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Cour Suprême du Canada

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JUDGES

OF THE

SUPREME COURT OF CANADA

The Honourable ROBERT TASCHEREAU, P.C., *Chief Justice of Canada.*

The Honourable JOHN ROBERT CARTWRIGHT.

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.

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The Honourable LUCIEN CARDIN, Q.C.

SOLICITORS GENERAL OF CANADA

The Honourable J. Watson MACNAUGHT, Q.C.

The Honourable L. T. PENNELL, Q.C.

JUGES

DE LA

COUR SUPRÊME DU CANADA

L'honorable ROBERT TASCHEREAU, C.P., *juge en chef du Canada.*

L'honorable JOHN ROBERT CARTWRIGHT.

L'honorable GÉRALD FAUTEUX.

L'honorable DOUGLAS CHARLES ABBOTT, C.P.

L'honorable RONALD MARTLAND.

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L'honorable L. T. PENNELL, C.R.

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ERRATA

in–dans le

volume 1965

Page 209, line 4 of French Caption. Read "Code criminel" instead of "Droit criminel".
Page 276, line 4 of French Caption. Read "Code criminel" instead of "Droit criminel".
Page 538, in marginal notes. Read "Taschereau C. J." instead of "Taschereau J.".
Page 576, line 2 of Caption. Read "le Commissaire" instead of "la Commissaire".
Page 624, line 4 of English Caption. Read "Reeve" instead of "Revee".

Page 209, ligne 4 de l'en-tête français. Lire «Code criminel» au lieu de «Droit criminel».
Page 276, ligne 4 de l'en-tête français. Lire «Code criminel» au lieu de «Droit criminel».
Page 538, notes marginales. Lire «Taschereau C. J.» au lieu de «Taschereau J.».
Page 576, ligne 2 de l'en-tête. Lire «le Commissaire» au lieu de «la Commissaire».
Page 624, ligne 4 de l'en-tête anglais. Lire «Reeve» au lieu de «Revee».

CORRIGENDA

Page 473, Part VII in marginal notes. Read "Cartwright J." instead of Fauteux J.

Page 488, Part VII in marginal notes. Read "Fauteux J." instead of Cartwright J.

ERRATA

Page 473, Partie VII, notes marginales: lire "Cartwright J." au lieu de Fauteux J.

Page 488, Partie VII, notes marginales: lire "Fauteux J." au lieu de Cartwright J.

UNREPORTED JUDGMENTS—JUGEMENTS NON RAPPORTÉS

The following judgments rendered during the year will not be reported

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

Abrams v. Robinson (Ont.), appeal dismissed with costs, June 16, 1965.

Bélanger v. Cité de Ste-Foy (Que.), [1964] Q.B. 272, appeal dismissed with costs, May 18, 1965.

Boland v. Par-Tex Foundation Co. Ltd. (Ont.), [1959] O.W.N. 206, appeal dismissed with costs, February 25, 1965.

C.A.P.A.C. Ltd. v. Baton Broadcasting Ltd. (Exch.), appeal dismissed with costs, March 29, 1965.

Cadillac Contracting and Developments (Toronto) Ltd. v. Minister of National Revenue (Exch.), [1962] Ex. C.R. 258, C.T.C. 275, 62 D.T.C. 1170, appeal dismissed with costs, February 25, 1965.

Carlton v. Jamb Sets Ltd. (Exch.), [1964] Ex. C.R. 377, appeal dismissed with costs, April 29, 1965.

Cipolla v. The Queen (Ont.), 46 C.R. 78, appeal dismissed, Cartwright J. dubitante, June 14, 1965.

Cook v. Limebeer et al. (Ont.), [1961] O.R. 228, 26 D.L.R. (2d) 690, appeal dismissed with costs, June 7, 1965.

Cull v. The Queen (Man.), appeal quashed, March 11, 1965.

Darby v. The Queen (B.C.), application for a writ of habeas corpus dismissed, April 9, 1965.

Dion v. The Queen (Que.), [1965] Q.B. 238, appeal dismissed, October 7, 1965.

Dlugos v. The Queen (Sask.), appeal dismissed, October 5, 1965.

Dubois v. Dubé (Que.), [1964] Q.B. 719, appeal dismissed with costs, March 11, 1965.

Dulude v. Marsh et al. (Que.), [1964] Q.B. 573, appeal dismissed with costs, October 29, 1965.

Employers' Liability Assurance Corpn. v. Jean (Que.), [1964] Q.B. 761, appeal dismissed with costs, May 19, 1965.

Fabi v. Minister of National Revenue (Exch.), [1964] Ex. C.R. 308, both appeals dismissed with costs, June 2, 1965.

Guay v. Paroisse de St-Blaise (Que.), [1964] Q.B. 709, appeal dismissed with costs, May 27, 1965.

Létourneau v. The Queen (Que.), appeal dismissed, October 6, 1965.

Lloyd v. Minister of National Revenue (Exch.), [1964] Ex. C.R. 506, appeal dismissed with costs, January 28, 1965.

Loughead et al. v. The Queen (Exch.), appeal dismissed with costs, March 26, 1965.

McKechnie v. Rideau Aluminum & Steel Co. et al. (Ont.), 43 D.L.R. (2d) 113, appeal dismissed with costs, February 9, 1965.

Marmeroglous v. City of Toronto (Ont.), appeal dismissed with costs, February 9, 1965.

Metropolitan Toronto v. Brentwood Construction Co. (Ont.), appeal dismissed with costs, November 29, 1965.

Morin v. The Queen (Que.), appeal dismissed, November 2, 1965.

Ottawa Aero Service Ltd. v. Frederick (Ont.), 44 D.L.R. (2d) 628, appeal dismissed with costs, March 24, 1965.

Pan American Petroleum Corpn. et al. v. Potapchuck et al. (Alta.), 46 W.W.R. 237, appeal dismissed with costs, May 11, 1965.

Perkins et al., Estate of, v. Treasurer of Ontario (Ont.), appeal dismissed with costs, April 28, 1965.

Picard v. Guay (Que.), [1964] Q.B. 348, appeal dismissed with costs, October 22, 1965.

Provost v. Pellerin et al. (Que.), [1964] Q.B. 823, appeal dismissed with costs; cross-appeal allowed with costs, May 28, 1965.

Queen, The v. White and Bob (B.C.), appeal dismissed with costs, November 10, 1965.

Read v. The Queen (Ont.), appeal as to count 1 dismissed; appeal as to count 3 allowed, April 6, 1965.

Salvail v. Perron (Que.), [1965] Q.B. 407, appeal dismissed with costs, October 22, 1965.

Seven-Up Co. v. Heavey (Exch.), [1964] Ex. C.R. 922, appeal dismissed with costs, June 9, 1965.

Ship "Extavia" v. British American Transportation Co. (Exch.—Ont. Admiralty), appeal dismissed with costs, November 30, 1965.

Smith v. The Queen (Ont.), appeal dismissed, November 17, 1965.

Standard Dredging Co. Ltd. v. Harbour Development Ltd., St. John Shipbuilding & Drydock Co. et al. (N.B.), appeal dismissed with costs, May 12, 1965.

Starko v. Minister of National Revenue (Exch.), appeal dismissed with costs, October 12, 1965.

Welsby v. Division Securities Ltd. (Ont.), appeal dismissed with costs, June 21, 1965.

Whalen v. The Queen (Ont.), appeal dismissed, June 15, 1965.

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.

Allard v. The Queen (Ont.), (1965), 45 C.R. 211, leave to appeal refused, April 5, 1965.

Ample Investment v. Township of North York et al. (Ont.), leave to appeal refused with costs, June 21, 1965.

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Anthony v. The Queen (Ont.), leave to appeal refused, April 5, 1965.

Bateman v. Bateman (Alta.), (1965), 51 W.W.R. 633, leave to appeal refused with costs, May 17, 1965.

Bell v. The Queen (Que.), [1965] Q.B. 219, leave to appeal refused, February 8, 1965.

Bousquet v. Houston (Man.), leave to appeal refused with costs, December 8, 1965.

Burnett Steamship et al. v. Canada Malting et al. (Ex. Admir.), motion to quash granted with costs, May 3, 1965.

Calgary Power Ltd. v. Saskatoon (Alta.), leave to appeal refused with costs, May 10, 1965.

Campbell v. The Queen (Ont.), application for issuance of writ of habeas corpus refused, March 22, 1965.

Chabot v. Paquin (Que.), [1965] Q.B. 425, leave to appeal refused with costs, May 18, 1965.

Chickloski et al. v. The Queen (Ont.), leave to appeal refused, May 17, 1965.

Colman et al v. Rous et al. (Que.), leave to appeal refused with costs, February 1, 1965.

Colucci v. The Queen (Ont.), leave to appeal refused, June 7, 1965.

Derome v. Montreal Bar Association (Que.), leave to appeal refused with costs, February 2, 1965.

Derome v. The Queen (Que.), motion to quash granted, February 2, 1965.

Ditlove et al. v. Norbury et al. (Man.), (1964), 49 D.L.R. (2d) 740, motion for consent judgment granted, June 21, 1965.

Druckman v. Stand Built (Que.), [1965] Q.B. 615, motion to quash granted as to costs only, March 22, 1965.

Dubiner v. Cherrio Toys (Ont.), motion to quash granted with costs, February 22, 1965.

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Farris v. The Queen (Ont.), (1965), 50 D.L.R. (2d) 689, leave to appeal refused, February 1, 1965.

Fidelity Real Estate Ltd. v. Wood (Ont.), motion to quash granted with costs, December 13, 1965.

Gagné v. Trépanier (Que.), [1964] Q.B. 755, leave to appeal refused with costs, January 26, 1965.

Gauthier v. The Queen (Ont.), leave to appeal refused, October 18, 1965.

General Tire v. Phillips Petroleum et al. (Ex.), motion to quash granted with costs, April 27, 1965.

Gin et al. v. Gibson et al. (Ont.), leave to appeal refused, November 29, 1965.

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Gordon Magazine v. The Queen (Ont.), leave to appeal refused, June 7, 1965.

Hamel v. The Queen (Ont.), leave to appeal refused, May 17, 1965.

Hamelin v. La Reine (Que.), motion to quash granted, November 9, 1965.

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Hooker v. The Queen (Ont.), leave to appeal refused, April 6, 1965.

Klegerman v. The Queen (Ont.), leave to appeal refused, October 18, 1965.

Korn & Son v. Premier Upholstering (Ont.), leave to appeal refused with costs, April 9, 1965.

Laiterie Perrette v. Cour des Sessions de la Paix et al. (Que.), [1965] Q.B. 646, leave to appeal refused with costs, October 5, 1965.

Lapointe v. The Queen, (B.C.), leave to appeal refused, April 5, 1965.

Mapa et al. v. Township of North York et al. (Ont.), leave to appeal refused with costs, June 21, 1965.

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Mont-Laurier v. Labelle et al. (Que.), motion to quash granted with costs, February 1, 1965.

Morrisson v. The Queen (Ont.), application for issuance of writ of habeas corpus refused, March 15, 1965.

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Murray Hill v. Batson et al. (Que.), leave to appeal refused with costs, May 18, 1965.

Mc Caud v. The Queen (Ont.), leave to appeal refused, May 20, 1965.

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Parent v. Bienvenu (Que.), [1965] Q.B. 388, leave to appeal refused, April 27, 1965.

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Phelan v. The Queen (Ont.), leave to appeal refused, April 5, 1965.

Pitt v. Turner (Alta.), leave to appeal refused with costs, October 5, 1965.

Queen, The v. Colabro, Stewart, Loucks and Tremblay (Que.), [1965] Q.B. 300, leave to appeal refused, March 29, 1965.

Queen, The v. O'Brien (N.B.), leave to appeal refused, October 25, 1965.

Radulak v. The Queen (Ont.), application for issuance of writ of habeas corpus refused, May 31, 1965.

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Raymond v. Constant (Que.), [1964] Q.B. 906, leave to appeal refused with costs, February 2, 1965.

Rose Press v. Premier Upholstering (Ont.), leave to appeal refused with costs, April 9, 1965.

Rosenberg v. Rosenberg (Man.), (1964), 50 W.W.R. 257, leave to appeal refused with costs, January 26, 1965.

Rowles v. The Queen (Sask.), leave to appeal refused, June 7, 1965.

Roy Limitée v. Cité de Sherbrooke (Que.), leave to appeal refused with costs, November 9, 1965.

Saguenay v. Larouche (Que.), leave to appeal refused with costs, January 26, 1965.

Schwartz v. Norbury et al. (Man.), (1964), 49 D.L.R. (2d) 740, motion for consent judgment granted, June 21, 1965.

Scott v. The Queen (B.C.), leave to appeal refused, October 5, 1965.

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Smith v. The Queen (B.C.), leave to appeal refused, November 1, 1965.

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Tidey (Donald) Construction Ltd. v. Pretu et al (Ont.), leave to appeal refused with costs, December 13, 1965.

Toronto, City of v. Miller Paving (Ont.), [1965] 1 O.R. 658, leave to appeal refused with costs, February 16, 1965.

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Voelkner v. Gameroff et al. (Que.), leave to appeal refused with costs, November 9, 1965.

Wilson v. The Queen (Ont.), leave to appeal refused, April 9, 1965.

Worrall v. Swan et al. (Ont.), (1965), 44 C.R. 151, leave to appeal refused, December 14, 1964.

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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

91525—1

INTERNATIONAL MINERALS AND CHEMICAL CORPORATION (*Defendant*) ..... APPELLANT;

1964
*June 15, 16
Oct. 6

AND

POTASH COMPANY OF AMERICA (*Defendant*) ..... RESPONDENT;

AND

DUVAL POTASH AND SULPHUR COMPANY (*Plaintiff*)

AND

THE COMMISSIONER OF PATENTS (*Defendant*)

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Practice and Procedure—Conflict between applicants for patent—Application by third party to be added as a defendant—Whether Exchequer Court had jurisdiction to add party—Patent Act, R.S.C. 1952, c. 203, s. 45(8)—Exchequer Court Rules, r. 42—R.S.C. (Eng.), Ord. 16, r. 11.

In an action concerning two pending applications for patents for a method of handling flotation middlings in ore concentration processes, one made by the plaintiff company D and the other by the defendant company I, D asked for a declaration that it was entitled to the issue of a patent containing the claims in conflict or, failing that relief, that there was no conflict. I, by its defence, asserted that the Commissioner of Patents was right in determining that the inventor named in its application was the prior inventor of the claims in conflict and asked for dismissal of the action. A third company P claimed prior knowledge and use of the process; P had negotiated with I in regard to making application for a patent and subsequently P and I jointly negotiated with D but without success. I later decided to negotiate with D on an entirely independent basis. P made application to the Exchequer Court to be added as a party defendant in the action brought by D against I and such order was made by the President of the Court. With leave, I appealed from that order and contended that there was no jurisdiction to make it.

Held: The appeal should be dismissed.

The Exchequer Court was a superior court of record and was properly seized of the action between D and I; its general jurisdiction over its own process was not restricted by the circumstance that the action was commenced pursuant to s. 45(8) of the *Patent Act.*

By virtue of r. 42 of the *Exchequer Court Rules* the practice as to adding parties was governed by r. 11 of order 16 of the Rules of the Supreme

*PRESENT: Taschereau C.J. and Cartwright, Abbott, Martland and Spence JJ.

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Court of Judicature in England. It was not necessary in this case to choose between the wider and the narrower view as to the scope of that rule, which was considered in *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357. D was asking that it be declared that it was entitled to the issue of a patent which, if granted, would confer upon it the exclusive right of using the flotation process which P had been using for years. The order would affect the legal right of P to continue to carry on its business. To allow the action to proceed to judgment without the intervention of P, leaving it to its rights under ss. 61 and 62 of the *Patent Act*, would be to countenance the multiplicity of proceedings which it was one of the objects of the rule to avoid.

The President had jurisdiction to make the order adding P as a defendant and he exercised his discretion correctly.

APPEAL from an order made by Thorson P., whereby the respondent was added as a party defendant in an action pending in the Exchequer Court of Canada. Appeal dismissed.

Christopher Robinson, Q.C., and *J. D. Kokonis*, for the defendant, appellant.

Hon. C. H. Locke, Q.C., and *Ross G. Gray, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to leave granted by my brother Abbott, from an order made by Thorson P., without recorded reasons, on December 12, 1963, whereby the respondent, Potash Company of America, hereinafter referred to as "PCA" was added as a party defendant in an action pending in the Exchequer Court of Canada.

The action was commenced on June 14, 1961, by Duval Sulphur and Potash Company, hereinafter referred to as "Duval", as plaintiff, against the appellant, International Minerals and Chemical Corporation, hereinafter referred to as "International", and the Commissioner of Patents as defendants.

In the amended statement of claim Duval alleges (i) that conflict exists, within the meaning of the *Patent Act*, R.S.C. 1952, c. 203, as amended, between two pending applications for patents for a method of handling flotation middlings in ore concentration processes, one made by Duval and the other by International; (ii) that D. J. Bourne and M. H. Harrison are the inventors of the subject-matter of the

patent claims and that Duval is the assignee of their invention; (iii) that International claims that one G. E. Atwood is the inventor and that it is the assignee of Atwood's rights; and (iv) that the Commissioner of Patents by decision dated March 17, 1961, has declared Atwood to be the prior inventor thus deciding the conflict in favour of International.

The statement of claim concludes by asking for judgment, with costs, determining the rights of the parties and declaring:

(a) That the plaintiff Duval is entitled to the issue of a patent containing the claims in conflict;

(b) In the alternative and only if the foregoing relief is not granted, that there is in fact no conflict between the alleged conflicting claims;

(c) Such further and other relief as plaintiff may be advised.

On October 20, 1961, International filed a brief statement of defence, admitting the existence of the conflict, denying that Bourne and Harrison are the inventors of the subject-matter of the conflicting claims, stating that the Commissioner of Patents was right in determining that Atwood is the prior inventor, and asking that the action be dismissed with costs.

The Commissioner of Patents is taking no part in the action.

Duval does not appeal against the order of Thorson P.

The application of PCA to be added as a defendant was supported by two affidavits, dated September 26, 1963 and November 15, 1963, made by its resident counsel, Roy H. Blackman an attorney at law; the contents of the first of these may be summarized as follows.

Since prior to World War II PCA has been engaged in the commercial production of potassium chloride from sylvinite (a soluble potash ore) at its mines and plant in New Mexico, U.S.A. and is currently engaged in the development of its potash ore deposit in Saskatchewan, Canada.

On August 26, 1958, United States Patent No. 2,849,113 issued to Duval as assignee of Bourne and Harrison. The said patent claimed an invention corresponding to the invention claimed in one or more of the conflicting claims referred to in the statement of claim. Shortly after the issuance of this patent Blackman had discussions with representatives of International concerning the validity of the said U.S. patent.

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At some time subsequent to the issue of the said U.S. patent and before May 25, 1959, Blackman became aware that Duval had pending in Canada an application for patent for the same invention as that covered by the said U.S. patent. In the early part of 1959 Blackman was approached by International and requested to help it in preparing a defensive position against the said U.S. patent and agreed to co-operate. In May 1959, Blackman conferred with Mr. Harold J. Birch, an attorney representing International who informed Blackman that International had filed an application in Canada for a patent for substantially the same invention as that covered by Duval's U.S. patent, that the said application was based upon 1949 disclosures of Atwood made when he was an employee of International, and that it was filed as a defensive measure to provoke a conflict with the pending Canadian patent application of Duval. Birch also stated that if the said U.S. patent claimed a patentable invention he considered it likely that a patent of similar scope would issue to International in Atwood's name and not to Bourne. Birch said that International's primary objective was invalidation of the said U.S. patent and prevention of issuance of a corresponding Bourne Canadian patent. Birch agreed that International and its counsel would make their best efforts to employ any disclosures made by PCA including disclosures of work done prior to the 1949 Atwood disclosures to that end, despite the effect any such efforts might have on the Atwood Canadian application filed by International. Blackman then agreed to disclose and did in fact disclose to Birch work done several years previously by PCA relating to the treatment of middling material in its potash flotation circuit which he considered to be relevant to any assessment of the validity of the claims of the U.S. patent and the corresponding Canadian application.

During the summer and early fall of 1959 PCA caused a Canadian patent application to be prepared based upon the previous work of PCA referred to above and a copy of the specification and claims of the said patent application was sent to Birch. As early as October 12, 1959, the attorneys for International requested Blackman not to file the proposed PCA Canadian patent application. Blackman expressed to them his concern that if PCA acceded to the request and if International prevailed in the anticipated

Canadian conflict with Duval and obtained a Canadian patent, International might seek to assert the patent against PCA. Blackman indicated that if PCA's position in this respect were protected PCA would refrain from filing its Canadian application. Following discussions International agreed that it would not assert its prospective Canadian patent against PCA and this was confirmed by letter dated January 13, 1960. Since the receipt of this letter and because of it PCA has made no attempt to file its Canadian patent application.

During the summer of 1961 PCA agreed with International that PCA would share with International and another interested company the Canadian counsel fees and out-of-pocket expenses in respect of International's defence to the present action. PCA and International further agreed that they would jointly negotiate with Duval with the objective of settling the dispute on a basis that would include provision for a royalty-free licence both to PCA and International under the said U.S. patent and under any corresponding Canadian patent that might issue to Duval. It was further agreed between International and PCA that if such negotiations were unsuccessful International's defence to the present action would be vigorously prosecuted. Thereafter International and PCA jointly negotiated with Duval but such negotiations were not successful.

Further discussions and correspondence continued until on September 3, 1963, one of the attorneys for International telephoned Blackman and told him that International had decided, as a matter of policy, to negotiate with Duval on an entirely independent basis. Blackman took the position that International was not free to do this because of its obligations to PCA but International by letter dated September 3, 1963, repeated its decision.

Paragraph 14 of Mr. Blackman's first affidavit is as follows:

> In view of International's announced intention to negotiate with Duval on an entirely independent basis, PCA fears that International may withdraw its defence to the present action, or consent to judgment therein in favour of Duval, with the possible result that Duval's said Canadian application would issue to patent, thereby reversing the Commissioner of Patents' decision awarding the claims in conflict to International, without the Exchequer Court having had an opportunity to consider in contested proceedings the merits of the issues presently defined by the pleadings, or the merits of further grounds that could be and should be pleaded by International for denying the issuance of a patent to Duval.

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Mr. Blackman's second affidavit describes in considerable detail the work done and the methods of handling flotation middlings used by PCA from 1944 on, and expresses the opinion that the facts stated show knowledge and use by PCA of what is claimed by Duval as an invention in its application for the Canadian patent which is in question in this action, for years prior to the date on which Duval claims the invention was made.

Paragraph 31 of the affidavit is as follows:

> It is the desire of PCA to operate in Saskatchewan a flotation process which would be within the scope of claim C 5, and other claims of the said Duval application, in the beneficiation of the potash ores from its deposits in Saskatchewan. The grant to Duval of an exclusive right to practise the invention claimed in the Duval application would adversely affect the interests of PCA.

Mr. Blackman was not cross-examined and the only challenge to any of the statements set out in his affidavits is contained in para. 2 of an affidavit made by Mr. Irons, an attorney for International, which is as follows:

> The allegations of paragraph 14 of the Blackman affidavit dated the 26th day of September, 1963, and filed in support of the Potash Company of America's motion to the effect that " . . . International may withdraw its defence to the present action or consent to judgment therein in favour of Duval . . . " is not well founded. I state on behalf of and with the knowledge and approval of LMC that IMC will neither 'withdraw its defence to the present action' nor 'consent to judgment therein in favour of Duval.' To the contrary, IMC will insist on an adjudication of the conflict controversy on its merits by the Exchequer Court.

While many of the matters of fact set out above may be in controversy at the trial, we should in dealing with this appeal proceed on the basis that the facts are as stated.

Counsel for the appellant attacks the order appealed from on the ground that there was no jurisdiction to make it. He disclaims any suggestion that we should review the discretion exercised by the learned President if he had jurisdiction to add PCA as a defendant.

The argument is based on two main grounds.

First, it is said that in an action commenced pursuant to s. 45(8) of the *Patent Act,* as was this action, the Exchequer Court has jurisdiction to deal with an objection to the grant of a patent only by way of review of a decision of the Commissioner and only at the instance of an applicant for patent whose application has been in unsuccessful conflict with another application. It is argued that to allow PCA to

intervene in the action between Duval and International in order to contend (as it does in para. 10 of its statement of defence) that neither of them is entitled to the issue of a patent including the claims in conflict would be contrary to the whole scheme of procedure in the *Patent Act* respecting applications for patent.

In my opinion, this argument is not entitled to succeed. One of the matters which the Exchequer Court is called upon to decide by s. 45(8)(*b*) of the *Patent Act,* is whether or not any of the applicants is entitled to the issue of a patent. Under s. 21(*a*) of the *Exchequer Court Act* that Court "has jurisdiction as well between subject and subject as otherwise,

> (*a*) in all cases of conflicting applications for any patent of invention . . .

The Exchequer Court is a superior court of record and is properly seized of the action between Duval and International; its general jurisdiction over its own process is not restricted by the circumstance that the action was commenced pursuant to s. 45(8) of the *Patent Act.*

The second argument of the appellant, is that the order under appeal is outside the jurisdiction to add parties conferred on the Exchequer Court by the applicable rules of practice. By virtue of r. 42 of the *Exchequer Court Rules* the practice as to adding parties is governed by r. 11 of order 16 of the Rules of the Supreme Court of Judicature in England, which reads as follows:

> No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special Order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice.

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INTERNATIONAL MINERALS AND CHEMICAL CORPN. v. POTASH CO. OF AMERICA et al.

Cartwright J.

In support of this argument the appellant relies chiefly on the judgment of Devlin J., as he then was, in *Amon v. Raphael Tuck & Sons Ltd.*[1], in which the construction and scope of order 16 r. 11 are fully considered.

After quoting the rule Devlin J. says that there are two views about its scope and that authority can be cited for both. One, the wider, is that the rule gives a wide power to the Court to join any party who has a claim which relates to the subject-matter of the action; the other, and narrower, is that the power given by the rule is hedged about with limitations which are to be found in the decided cases and which do not merely set out principles on which the Court's discretion should be exercised but place limits on its jurisdiction. At p. 363 of the report Devlin J. quotes, as an accurate statement of the narrower view of the application of the rule, the following portion of a note in the White Book (1955 ed., p. 232):

> "Generally in common law and Chancery matters a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone. He cannot be compelled to proceed against other persons whom he has no desire to sue . . . Generally speaking, intervention can only be insisted upon in the three classes of case, namely: (A) In a representative action where the intervener is one of a class whom plaintiff claims to represent", but who denies that the plaintiff does in fact represent him; "(B) Where the proprietary rights of the intervener are directly affected by the proceedings," and "(C) In actions claiming the specific performance of contracts where third persons have an interest in the question of the manner in which the contract should be performed."

After an elaborate review of the relevant authorities Devlin J. expresses the view that the narrower construction of the rule should be adopted. To decide whether a particular case falls within class (B) in the passage from the White Book, quoted above, Devlin J. proposes the following test:

> May the order for which the plaintiff is asking directly affect the intervener in the exercise of his legal rights?

On the material before him in the *Amon* case Devlin J. held that this question should be answered in the affirmative and accordingly allowed the intervention.

In order to decide the present appeal I do not find it necessary to choose between the wider and the narrower view as to the scope of the rule and I refrain from doing so.

[1] [1956] 1 Q.B. 357.

On the material before us I am satisfied that in this case the question formulated by Devlin J. should be answered in the affirmative. The order for which Duval is asking in the action is that it be declared that it is entitled to the issue of a patent which, if granted, will confer upon it the exclusive right of using the flotation process which PCA has been using for years and proposes to use in the development of its deposits of potash ores in Saskatchewan. The order sought would, in my opinion, affect the legal right of PCA to continue to carry on its business. It is true that if the intervention were not allowed the question of the validity of any patent to which Duval might be declared entitled would not as against PCA be *res judicata* and could be put in question under either s. 61 or s. 62 of the *Patent Act,* but until the patent was successfully impeached the right of PCA set out above would be affected. To allow the present action to proceed to judgment without the intervention of PCA, leaving it to its rights under the sections mentioned, would be to countenance the multiplicity of proceedings which it was one of the objects of the rule to avoid.

In my opinion the learned President had jurisdiction to make the order adding PCA as a defendant; I have already mentioned that it was not argued that we should review the discretion which he exercised if we came to the conclusion that the order was one within his jurisdiction, but I think it proper to say that, in my opinion, on the material before him his discretion was rightly exercised.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Smart & Biggar, Ottawa.

Solicitors for the defendant, respondent: Herridge, Tolmie, Gray, Coyne & Blair, Ottawa.

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*June 2, 3
Oct. 6

PHILIPPE GUAY .....APPELLANT;

AND

RENE LAFLEUR .....RESPONDENT.

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

Taxation—Income tax—Investigation—Inquiry by person authorized by Minister into the affairs of taxpayer—Whether taxpayer entitled to be present and represented by counsel at hearings—Injunction—Income Tax Act, R.S.C. 1952, c. 148, s. 126(4), (8)—Inquiries Act, R.S.C. 1952, c. 154, ss. 4, 5—Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2 (e) —Public Inquiries Act, R.S.O. 1960, c. 323, s. 5—Security Frauds Prevention Act, 1930 (B.C.), c. 64, ss. 10, 29.

The appellant, an officer of the Department of National Revenue, was authorized by the Deputy Minister, under s. 126(4) of the *Income Tax Act,* R.S.C. 1952, c. 148, to make an inquiry into the affairs of the respondent and thirteen other individuals, corporations and estates. A number of persons were summoned for the purpose of being questioned under oath regarding the affairs of the persons subject to the inquiry. But the respondent was not summoned to appear nor did he receive any official notice that this inquiry was being held. At the opening of the inquiry, attorneys appeared on behalf of the respondent and asked that the latter be allowed to be present and to be represented by counsel during the examination of all persons summoned by the investigator. This request was refused. Whereupon, the respondent applied to the Superior Court for an injunction asking that the sittings be suspended until the respondent had obtained from the investigator the authorization to be present and to be represented. The injunction was granted by the trial judge; and his judgment was affirmed by a majority judgment in the Court of Appeal. The investigator was granted leave to appeal to this Court.

Held (Hall J. *dissenting*): The appeal should be allowed and the injunction dismissed.

Per Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.: Section 2 (e) of the *Canadian Bill of Rights* had no application since no rights and obligations of the respondent were to be determined by the person conducting the investigation. The investigation was a purely administrative matter which could neither decide nor adjudicate upon anything. It was neither a judicial nor a quasi-judicial inquiry but a private investigation at which the respondent was not entitled to be present or represented by counsel. The power given to the Minister under s. 126 (4) is to enable him to obtain the facts which he considers necessary to enable him to discharge the duty imposed on him of assessing and collecting the taxes payable under the Act. The taxpayer's right is not affected until an assessment is made. Then all the appeal provisions mentioned in the Act are open to him. As a purely administrative matter where the person holding the inquiry neither decides nor adjudicates

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

upon anything, it was not for the Courts to specify how that inquiry was to be conducted except to the extent, if any, that the subject's rights are denied him. The fact that the investigator was given certain limited powers of compelling witnesses to attend before him and testify under oath did not change the nature of the inquiry.

Per Cartwright J.: Generally speaking, apart from some statutory provisions making it applicable, the maxim *"Audi alteram partem"* did not apply to an administrative officer whose function was simply to collect information and make a report, and who had no power either to impose a liability or to give a decision affecting the rights of the parties, as in the present case.

Per Spence J.: The investigation was a purely administrative matter which could neither decide nor adjudicate upon anything. To give effect to the respondent's demand even without the right to cross-examine the witnesses would be for the judiciary to attempt to impose its own methods on an administrative officer and the judiciary should not make such an attempt. *Saint John v. Fraser,* [1935] S.C.R. 441, referred to. The fact that the investigator was bound to act judicially in the sense of being fair and impartial did not require him to permit the respondent and his counsel to be present whether or not such counsel were to attempt to cross-examine witnesses.

Hall J. *dissenting*: The respondent's right to a fair and impartial investigation implied that he had the right to attend and to be represented by counsel. Although he was not acting in a judicial capacity or performing a judicial function, the investigator was clothed with all the outward attributes of a judicial body. The terms of his appointment authorized under s. 126 of the Act did not exclude the making of recommendations arising out of the inquiry. On the contrary it was implicit to the inquiry that some judgment on the facts and information obtained would be made by the investigator in his report to the Deputy Minister.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming the granting of an injunction by the trial judge. Appeal allowed, Hall J. dissenting.

Rodrigue Bédard, Q.C., and *Roger Tassé,* for the appellant.

Roch Pinard, Q.C., for the respondent.

The judgment of Taschereau C.J. and Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

ABBOTT J.:—The material facts in this case are not in dispute. The sole issue is whether the respondent is entitled to be present and represented by counsel at an enquiry conducted by appellant under the *Income Tax Act.*

[1] [1963] Que. Q.B. 623, [1963] C.T.C. 201, 63 D.T.C. 1098.

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The appellant is an officer of the Department of National Revenue. On December 28, 1960, he was authorized in writing by the Deputy Minister of National Revenue, acting for his Minister under the provisions of the Act, "to investigate the affairs" of the respondent and thirteen other individuals, corporations and estates.

The appellant commenced the investigation on January 10, 1961, after summoning a number of persons (of whom respondent was not one) to appear on that date at the office of the Department of National Revenue in Montreal, to be questioned under oath regarding the affairs of the persons subject to the enquiry. The persons summoned for examination were permitted to be represented by counsel if they so desired.

At the opening of the enquiry, attorneys appeared before appellant on behalf of respondent and asked that respondent be allowed to be present and to be represented by counsel during the examination of all persons summoned by the appellant. That request was refused.

The same day respondent applied to the Superior Court for an injunction asking for an order—

que lesdites séances de ladite commission soient suspendues jusqu'à ce que le demandeur ait obtenu du défendeur l'autorisation d'être présent et d'être représenté à toutes et chacune desdites séances par ses procureurs.

On January 12, 1961, the date fixed for the hearing on the application for an interlocutory injunction, the appellant agreed to suspend his investigation until judgment was rendered on the application, and therefore no interlocutory order was necessary.

On February 17, 1961, Mr. Justice Brossard in a considered judgment granted the injunction asked for in the following terms:

ACCUEILLE la requête en injonction du demandeur; ORDONNE que les séances du défendeur agissant en sa qualité d'enquêteur nommé par le sous-ministre du Revenu national en date du 28 décembre 1960 et en vertu des dispositions de l'article 126(4) de la Loi de l'impôt sur le revenu soient suspendues jusqu'à ce que le demandeur ait obtenu du défendeur l'autorisation d'y être présent et d'y être représenté par ses procureurs; le tout sans frais mais avec recommandation que les frais du demandeur soient payés par le mis-en-cause.

That judgment was affirmed by the Court of Queen's Bench[1], Hyde and Montgomery JJ. dissenting.

[1] [1963] Que. Q.B. 623, [1963] C.T.C. 201, 63 D.T.C. 1098.

As I have indicated, under the terms of his appointment, the appellant was authorized—

to make an inquiry, as authorized by Section 126, subsections 4 and 8 of the said Income Tax Act which sections give the person authorized to make the inquiry all the powers and authorities conferred on a commissioner by sections 4 and 5 of the Inquiries Act or which may be conferred on a commissioner under section 11 thereof, into the affairs of RENE LAFLEUR, MARIE-MARTHE LAFLEUR, FRANCOIS FOURNELLE, DAME HENRIETTE LAFLEUR-FOURNELLE, JEAN FAUVIER, JEAN CHAPOLARD, RAOUL DASSERRE, P. SUTTER, HENRI CLOUARD, LUC LEMAIRE-LAFLEUR LTEE, LES PLACEMENTS MONTCALM LIMITEE, EDIFICE LAFLEUR LTEE, SUCCESSION LEONARD LAFLEUR, and the ESTATE OF HERMAS FOURNELLE.

The relevant statutory provisions referred to in that authorization are:

Income Tax Act

126 (4) The Minister may, for any purpose related to the administration or enforcement of this Act, authorize any person, whether or not he is an officer of the Department of National Revenue, to make such inquiry as he may deem necessary with reference to anything relating to the administration or enforcement of this Act.

(8) For the purpose of an inquiry authorized under subsection (4), the person authorized to make the inquiry has all the powers and authorities conferred on a commissioner by sections 4 and 5 of the Inquiries Act or which may be conferred on a commissioner under section 11 thereof.

Inquiries Act

4. The Commissioners have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

5. The Commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

Section 11 of the *Inquiries Act* referred to in the authorization does not appear to be material to the present proceedings.

The rights claimed by the respondent are not to be found in the *Income Tax Act* or the *Inquiries Act,* and this was recognized by the learned trial judge. He appears to have based his judgment primarily upon the ground that, in refusing to permit the respondent to be present and represented by counsel, appellant had infringed the provisions of

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the *Canadian Bill of Rights* specifically s. 2(*e*) which seeks to ensure the right of all persons—

> to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

With respect to this section it is sufficient to say that it can have no application since no rights and obligations are determined by the person appointed to conduct the investigation.

There are no common reasons of the majority in the Court of Queen's Bench. Mr. Justice Bissonnette and Mr. Justice Rinfret held that the investigation was a quasi-judicial one and that consequently respondent had a right to be heard. Mr. Justice Rinfret also held that the enquiry infringed the *Canadian Bill of Rights.*

Mr. Justice Owen was of opinion that the enquiry is an administrative matter and that the *Canadian Bill of Rights* was not infringed. He held however that respondent was entitled to be present and represented by counsel for the following reasons:

> Lafleur's right to a fair and impartial investigation implies that he has the right to attend and to be represented by counsel at the sittings of the Inquiry.
>
> The proposed investigation into the affairs of Lafleur with Lafleur and his counsel excluded would, in my opinion, be a one-sided and prejudiced Inquiry.
>
> The presence of Lafleur and his counsel at the Inquiry would tend to discourage exaggerated or biased evidence by the witnesses called and to remind Guay and counsel for the Minister of their duty to act with fairness and impartiality.
>
> According to the fundamental principle of law which requires that the present investigation be fair and impartial Lafleur is entitled to attend the sittings of the Inquiry and to be represented by legal counsel at such sittings.

Hyde and Montgomery JJ. dissenting, held that the investigation conducted by appellant on behalf of the Minister, is a purely administrative matter which can neither decide nor adjudicate upon anything, that it is not a judicial or quasi-judicial enquiry but a private investigation at which the respondent is not entitled to be present or represented by counsel.

I am in respectful agreement with Hyde and Montgomery JJ. and there is very little I desire to add to what they have said in their reasons.

The power given to the Minister under s. 126(4) to authorize an enquiry to be made on his behalf, is only one

of a number of similar powers of enquiry granted to the Minister under the Act. These powers are granted to enable the Minister to obtain the facts which he considers necessary to enable him to discharge the duty imposed on him of assessing and collecting the taxes payable under the Act. The taxpayer's right is not affected until an assessment is made. Then all the appeal provisions mentioned in the Act are open to him.

The fact that a person authorized to make an investigation on behalf of the Minister is given certain limited powers of compelling witnesses to attend before him and testify under oath, does not, in my opinion, change the nature of the enquiry. That view was admirably expressed by Mr. Justice Hyde whose words I adopt:

> As a purely administrative matter where the person holding the inquiry neither decides nor adjudicates upon anything, it is not for the Courts to specify how that inquiry is to be conducted except to the extent, if any, that the subject's rights are denied him. The taking of sworn statements is a common everyday occurrence. The deponent is frequently examined in subsequent Court proceedings where the interests of another may be affected by the statements of that witness. I know of no requirement in law that any person likely to be affected in such a way is entitled to be present with counsel when such a sworn statement is originally made, and I see little distinction from the proceeding in issue.

I would allow the appeal and dismiss the application for the injunction, with costs throughout.

CARTWRIGHT J.:—The relevant facts and the questions raised on this appeal are set out in the reasons of my brother Abbott. I agree with the conclusion at which he has arrived and wish to add only a few observations.

The function of the appellant under the terms of his appointment is simply to gather information; his duties are administrative, they are neither judicial nor quasi-judicial.

There are, of course, many administrative bodies which are bound by the maxim *"audi alteram partem"* but the condition of their being so bound is that they have power to give a decision which affects the rights of, or imposes liabilities upon, others.

It was of a body having such power that Lord Loreburn L.C. said in *Board of Education v. Rice*[1]:

> I need not add that . . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything.

[1] [1911] A.C. 179 at 182, 80 L.J.K.B. 769.

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The appellant in the case at bar has no power to decide anything.

In *Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montreal*[1], Lord Macnaghten, delivering the judgment of the Judicial Committee, cited with approval the following passage from the judgment of Kelly C.B. in *Wood v. Wood*[2], which was adopted by Rinfret C.J. in *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board*[3]:

> They are bound in the exercise of their functions by the rule expressed in the maxim *'Audi alteram partem'* that no man should be condemned to consequence resulting from alleged misconduct unheard, and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

The appellant in the case at bar is not invested with authority to adjudicate upon any matter.

Generally speaking, apart from some statutory provision making it applicable, the maxim *"audi alteram partem"* does not apply to an administrative officer whose function is simply to collect information and make a report and who has no power either to impose a liability or to give a decision affecting the rights of parties.

In the case of *Re The Ontario Crime Commission, Ex Parte Feeley and McDermott*[4], the Court of Appeal for Ontario held that while the question, whether persons against whom grave allegations of criminal conduct were made should be permitted to be represented before the Commissioner conducting an inquiry to ascertain facts and without power to make any decision binding on anyone, was one committed to the discretion of the Commissioner, the Court of Appeal had authority to review his decision and substitute its discretion for his. Schroeder J.A. who gave the reasons of the majority made it clear that this result flowed from the terms of s. 5 of the *Public Inquiries Act* of Ontario, R.S.O. 1960, c. 323, a statutory provision which the learned Justice of Appeal aptly described as unique. Laidlaw J.A., dissenting, reached the opposite conclusion. I refrain from attempting to choose between these con-

[1] [1906] A.C. 535 at 540, 75 L.J.P.C. 73.
[2] (1874), L.R. 9 Ex. 192 at 196, 43 L.J. Ex. 153.
[3] [1953] 2 S.C.R. 140 at 152, 107 C.C.C. 183, 4 D.L.R. 161.
[4] [1962] O.R. 872, 133 C.C.C. 116, 34 D.L.R. (2d) 451.

flicting views; it is unnecessary to do so for the purpose of deciding the case before us as there is no similar statutory provision relating to the inquiry which the appellant is conducting.

The only statutory provision relied on by the respondent is clause (*e*) of s. 2 of the *Canadian Bill of Rights,* 1960 (Can.), c. 44, which reads as follows:

> 2. . . . no law of Canada shall be construed or applied so as to . . .
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

This does not assist the respondent, for the appellant has no power to determine any of the former's rights or obligations.

In conclusion I wish to express my general agreement with the reasons of my brother Abbott and with those of Hyde and Montgomery JJ. I would dispose of the appeal as proposed by my brother Abbott.

HALL J. (*dissenting*):—The relevant facts and the questions raised on this appeal are set out in the reasons of my brother Abbott. With deference, however, I cannot agree with the conclusion reached by him and by the other members of the Court. I see no alternative to the position taken by Owen J. in the Court of Queen's Bench[1] that "Lafleur's right to a fair and impartial investigation implies that he has the right to attend and to be represented by counsel at the sittings of the inquiry."

Although he was not acting in a judicial capacity or performing a judicial function, Guay was clothed with all the outward attributes of a judicial body, including the right to subpoena witnesses, to have them questioned under oath by counsel for the Crown and to compel them to give evidence as might any court of record in civil cases. Anyone entering the room in which the inquiry was begun would have thought himself in a judicial hearing or proceeding akin thereto. From this scene only one person is missing—the man whose affairs are under investigation. The door is barred to him. That, in my view, is a denial of a fair and impartial hearing to this man.

It is urged that the requirement of acting judicially is absent here because Guay as Commissioner was not required

[1] [1963] Que. Q.B. 623, [1963] C.T.C. 201, 63 D.T.C. 1098.

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to make a decision, that he was merely to conduct an inquiry and to make a report to the Deputy Minister who had authorized and named him to make the inquiry. I do not read the terms of Guay's appointment authorized by s. 126 of the *Income Tax Act* as excluding the making of recommendations arising out of the inquiry. I think it is implicit to the inquiry that some judgment on the facts and information obtained would be made by Guay in his report to the Deputy Minister. If the Deputy Minister (who is said to be the person who would make the decision) had himself conducted the inquiry, he would have been required to act judicially in the sense that he must act fairly and impartially. See *St. John v. Fraser*[1]. Surely when the powers are given to a subordinate, the requirement of acting judicially is even stronger. One cannot ignore the reality of the situation that in such cases the decision is made by the subordinate but put out in the name of the Deputy Minister.

I would, accordingly, dismiss the appeal with costs.

SPENCE J.:—I have had the opportunity of reading the reasons of my brother Abbott and I agree in the result.

It would appear, however, that it would be proper to examine the decision of this Court in *St. John v. Fraser*[1]. There, Fraser was appointed by the Attorney General of British Columbia under the provisions of s. 10 of the *Securities Fraud Prevention Act* of that province to carry on an investigation in reference to the affairs of Wayside Consolidated Gold Mines Limited. It appearing during the examination that the Vancouver Stock and Bond Company Limited had underwritten a large part of a new issue of stock to the former company, St. John, the Vancouver company's business manager, was examined by the investigator on four occasions. The solicitor for Mr. St. John and the Vancouver company was present on all of those occasions and their counsel on the last two. Both the solicitor and the counsel took part in the examinations of Mr. St. John and the counsel was afforded the fullest opportunity for argument on his clients' behalf. The investigator had in the meantime examined some other witnesses on matters connected with St. John and the Vancouver company's conduct without notice to them and with no opportunity for their counsel to cross-examine such witnesses.

[1] [1935] S.C.R. 441, 3 D.L.R. 465, 64 C.C.C. 90.

Their counsel requested a copy of the evidence given by two particular witnesses and the investigator informed such counsel that in view of the fact that St. John was about to be recalled to give further evidence he would furnish the counsel with the copies of the transcript of the evidence so requested after Mr. St. John had been further examined, and suggested that then counsel could recall St. John to give any further evidence or explanation that might be desired. It was admitted on behalf of the Attorney General that he had taken the position after counsel for Mr. St. John and the Vancouver company had intervened in the case, that such counsel was not entitled to cross-examine any witnesses who had been examined by the investigator in the course of the investigations and that he, the Attorney General, had so instructed the investigator. The solicitor for Mr. St. John and the Vancouver company then applied for an injunction restraining the investigator from proceeding with the investigation in so far as it related to the conduct or actions of either St. John or the Vancouver company and from making any finding or report to the Attorney General in connection therewith on the ground that he had not given notice to St. John or the Vancouver company of the examination of witnesses concerning their relations with the Wayside Consolidated Gold Mines Limited and that he had not afforded them an opportunity of cross-examining such witnesses. The court was unanimous in coming to the opinion that the investigation was an administrative procedure only. Davis J. said, at p. 452:

> Fundamentally, the investigator in this case was an administrative officer, and the machinery set up by the statute was administrative for the purpose of enquiring as to whether or not fraudulent practices had been or were being carried on in connection with the sale of the securities of the Wayside Company.

In the present case, I am in agreement with my brother Abbott in holding as did Hyde and Montgomery JJ. that this investigation is a purely administrative matter which can neither decide nor adjudicate upon anything.

On the basis of that finding in the *St. John v. Fraser* case, Crocket J., with whom Lamont J. agreed, held that s. 29 of the *Securities Fraud Prevention Act,* a prohibitory section, barred the action for an injunction. Davis J., however, although agreeing with that conclusion, proceeded at p. 451:

> Assuming then in favour of the appellants that the prohibitory section does not apply in this case, the real issue on the merits is whether or not

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the plaintiffs were entitled as of right to be afforded freedom of cross-examination of each and every witness called by the investigator.

And at p. 452:

The investigator was not a court of law nor was he a court in law, but to say that he was an administrative body, as distinct from a judicial tribunal, does not mean that persons appearing before him were not entitled to any rights. An administrative tribunal must act to a certain extent in a judicial manner, but that does not mean that it must act in every detail in its procedure the same as a court of law adjudicating upon a *lis inter partes*. It means that the tribunal, while exercising administrative functions, must act "judicially" in the sense that it must act fairly and impartially. In *O'Connor v. Waldron*, [1935] A.C. 76 at 82, Lord Atkin refers to cases where tribunals, such as a military court of enquiry or an investigation by an ecclesiastical commission, had attributes similar to those of a court of justice.

"On the other hand (he continues) the fact that a tribunal may be exercising merely administrative functions though in so doing it must act judicially, is well established, and appears clearly from the *Royal Aquarium* case."

In the *Royal Aquarium case* [1892] 1 Q.B. 431, "judicial" in relation to administrative bodies is used in the sense that they are bound to act fairly and impartially.

And at p. 453:

The only objection taken by the appellants, and it was very strenuously and earnestly pressed upon us in a very able argument by their counsel Mr. Farris, was that it was against natural justice that the plaintiffs should have been denied the right they claim of cross-examining every witness who was heard by the investigator. The right was asserted as a right to which every witness against whom a finding might possibly be made was entitled. I do not think that any such right exists at common law. The investigation was primarily an administrative function under the statute, and while the investigator was bound to act judicially in the sense of being fair and impartial, that, it seems to me, is something quite different from the right asserted by the appellants of freedom of cross-examination of all the witnesses. It is natural, as Lord Shaw said in the *Arlidge* case, [1915] A.C. 120 at 138, that lawyers should favour lawyer-like methods but it is not for the judiciary to impose its own methods on administrative or executive officers,

Although in the *St. John v. Fraser* case the complaint urged by counsel for the plaintiffs was the refusal to permit him to cross-examine all witnesses called, it is significant that the investigator took exactly the same course as the investigator had done in the present case, i.e., he proceeded in the absence of counsel for the plaintiffs and without notice to either the plaintiffs or their counsel to examine other witnesses. During the course of the argument, I attempted to ascertain from counsel for the respondent

whether, in fact, his present demand that he should be allowed to be present during the examination of all witnesses and therefore necessarily to have notice of such examinations, was not merely preliminary to a demand that counsel have leave to cross-examine such witnesses, and, in my opinion, the prejudice to the respondent suggested in the reasons for judgment of Owen J. could not be avoided without such right of cross-examination being exercised. However, even if the respondent were to confine his demand to a simple right to be present in person and with counsel during such examination, in my view, to give effect to that demand would be for the judiciary to attempt to impose its own methods on an administrative officer and, with respect, I am of the opinion that Davis J. rightly held that the judiciary should not make such an attempt. The fact that the investigator is bound to act judicially in the sense of being fair and impartial does not require the investigator to permit the respondent and his counsel to be present during every examination carried on by virtue of the authorization of the Deputy Minister whether or not such counsel were to attempt to cross-examine such witnesses.

For these reasons, I agree that the appeal should be allowed and the application for the injunction dismissed with costs throughout.

Appeal allowed with costs, HALL J. *dissenting.*

Attorney for the appellant: E. A. Driedger, Ottawa.

Attorneys for the respondent: Pinard, Pigeon, Paré & Cantin, Montreal.

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*June 15
Oct. 6

EMMA JANE KILBY, SAMUEL T. GRAHAM, FREDERICK NOBEL GRAHAM, ADRIAN DOBBIE and HYATT DOBBIE .....APPELLANTS;

AND

LOREEN MYERS, RONALD HARMER, DALE DVORACHEK, DONALD ALEXANDER CAMPBELL and CROWN TRUST COMPANY, Executors and Trustees under the Last Will and Testament of Lenna May Harmer, deceased .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Construction—Gift to testatrix's husband if he survives—Provision for alternative disposition and will to take effect as if husband had predeceased testatrix in event of their deaths being simultaneous—Whether expression of intention that in either of the two situations, contemporaneous death or death of testatrix following that of husband, disposition of property to be the same.

The testatrix was a spinster until 1947 when at the age of 64 she married a widower who was then 75. Her husband had living at that time one child and four grandchildren. On September 10, 1959, the testatrix and her husband made wills which were in the same terms *mutatis mutandis*. The testatrix's husband died on May 4, 1962, and the testatrix died on July 3, 1962. Paragraph III of the testatrix's will read in part: "If my husband and I should both die under circumstances rendering it uncertain which of us survived the other, I declare that my will shall take effect as if my husband had predeceased me and I GIVE, DEVISE AND BEQUEATH all my said property to my Trustees upon the following trusts, namely: x x x (3) To divide the residue of my estate into as many equal parts as there are grandchildren of mine then alive, and to pay to each grandchild one of such equal parts."

The legatees in accordance with para. III (3) claimed the whole balance of the estate and their claim was opposed by the heirs-at-law of the testatrix. A motion was made for construction of the will; the trial judge was of the opinion that there was an obvious omission in para. III and that the testatrix intended to provide not only for the contingency of simultaneous death but also for the contingency of her husband predeceasing her. He held that in the circumstances it was the right and the duty of the Court to supply the omission and proceeded to do so by giving an affirmative answer to the question: Having regard for the provisions of the will as a whole and the language of para. III, does para. III apply when the testatrix's husband clearly predeceases her? An appeal to the Court of Appeal was dismissed; the majority held that in the testatrix's will there was a clear and unequivocal expression of her intention that in either of the two situations, *i.e.*, contemporaneous death or by her death following that of her husband, the disposition of her property was

*PRESENT: Cartwright, Abbott, Judson, Ritchie and Spence JJ.

to be the same. A further appeal by the heirs-at-law was brought to this Court.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright, Abbott, Judson and Ritchie JJ.: This was not a case in which the Court was justified in supplying words in the will; it could not be said with certainty that anything had been omitted. In para. III the testatrix made a complete disposition of her property to take effect if her husband and she should die at the same time. By using the words "I declare that my will shall take effect as if my husband had predeceased me and . . ." she had expressed the intention that if her husband predeceased her her estate was to be disposed of as if he had died contemporaneously with her and what was to be done if the latter event should happen was fully set out in clauses (1), (2) and (3) of para. III.

Per Ritchie J.: The construction urged by the heirs-at-law was based on the assumption that the testatrix intended to die intestate in the event of her husband having predeceased her. The suggestion that she had such an intention failed. When an individual has purported to make final disposition of all his "property both real and personal of every nature and kind and wheresoever situate", he is not to be taken to have intended to leave all his property undisposed of on the happening of certain events, unless there are some very exceptional and compelling reasons for so holding. A construction resulting in an intestacy "is a dernier ressort in the construction of wills."

Per Spence J., *dissenting*: The declaration and dispositions made by para. III were in terms wholly conditioned upon an event which did not happen. Therefore, in order to attain the result which was reached in the Courts below, this Court must insert additional words in the testatrix's will. To read into this will the words necessary to provide for the unmentioned event the Court must be compelled to the conclusion that the will revealed so strong a probability of such an intention that a contrary intention could not be supposed. No compelling necessity to insert the words allegedly omitted could be found; neither the actual words of the will nor the circumstances of the testatrix and her late husband's death resulted in any compelling conviction that there was an accidental omission in the will as executed.

The words "I declare that my will shall take effect as if my husband had predeceased me . . ." could not be considered as mere surplusage but even if that were so, the existence of surplusage in a will was no ground for giving the rest of the clause a new and different meaning. These words did not indicate that the testatrix had made a clear and unequivocal expression that in either of the two situations, the disposition of her property was to be the same.

[*Maclean et al. v. Henning* (1903), 33 S.C.R. 305, distinguished]

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Fraser J. Appeal dismissed, Spence J. dissenting.

S. C. Biggs, Q.C., for the appellants.

[1] [1964] 1 O.R. 367, 42 D.L.R. (2d) 321, *sub nom. Re Harmer.*

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G. H. Davies, for the respondents: L. Myers, R. Harmer, D. Dvorachek and D. A. Campbell.

M. J. Tarrison, for the respondent: Crown Trust Company.

The judgment of Cartwright, Abbott and Judson JJ. was delivered by

CARTWRIGHT J.:—The relevant facts and the manner in which the case has been dealt with in the Courts below are set out in the reasons of my brother Spence.

In my opinion, this is not a case in which the Court is justified in supplying words in the will; I agree with my brother Spence that it cannot be said with certainty that anything has been omitted.

The decision of the appeal appears to me to turn on the construction of the opening words of para. III of the will reading as follows:

> III. If my husband and I should both die under circumstances rendering it uncertain which of us survived the other, I declare that my will shall take effect as if my husband had predeceased me and I GIVE, DEVISE AND BEQUEATH all my said property to my Trustees upon the following trusts, namely:

If this clause did not contain the words:

> I declare that my will shall take effect as if my husband had predeceased me, and

this case would be indistinguishable from that of *Maclean et al. v. Henning*[1]; but, in my opinion, the presence of the last-quoted words is of decisive importance.

As a matter of syntax all the words of para. III which follow the opening conditional clause:

> If my husband and I should both die under circumstances rendering it uncertain which of us survived the other

are dependent upon the prescribed condition and come into operation only if it be fulfilled, in the events that have happened it has not been fulfilled, and consequently, on a literal construction, para. III would be without effect and the estate of the testatrix would pass to those entitled on an

[1] (1903), 33 S.C.R. 305.

intestacy, as was held by Aylesworth J.A. The objection to this view is that it gives no effect to the words:

> I declare that my will shall take effect as if my husband had predeceased me and

It is argued that even if this literal construction be adopted the words last quoted are not pure surplusage as in the event of uncertainty whether he survived, they would cancel the gift to the husband and revoke his appointment as executor; but if the husband and wife had died in a common disaster the same result would have been reached although the words last quoted had been omitted. In my view, these words serve no purpose if the literal construction is adhered to, although they may have been inserted *ex abundanti cautela.*

Not without hesitation, I have reached the conclusion that the last-quoted words shew that it was the intention of the testatrix that if her husband should predecease her the disposition of her estate contained in clauses (I), (2) and (3) of para. III of her will should take effect.

In para. III the testatrix has made a complete disposition of her property to take effect if her husband and she should die at the same time. By using the last-quoted words she has said that the disposition made on that condition shall be the same as if her husband had predeceased her. If the disposition of her property to be made if her husband and she die contemporaneously is represented by the symbol "X", she has said that this shall be the same as the effect of her will if her husband predeceases her; if the last-mentioned effect is represented by the symbol "Y" the meaning of the opening words of para. III now under consideration may be represented by the equation "X equals Y"; from which it follows that "Y equals X".

If this reasoning be sound, as I think it is, it follows that the meaning of the words used by the testatrix is that if her husband predeceases her her estate shall be disposed of as if he had died contemporaneously with her and what is to be done if the latter event should happen is fully set out in clauses (I), (2) and (3) of para. III. In my opinion this is the intention which the testatrix has expressed by the words which she has used.

I agree with the reasons of Kelly J.A., who gave the judgment of the majority in the Court of Appeal, subject only

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to the reservation that, while I have reached a definite conclusion, I do not find the matter as clear as did the learned Justice of Appeal. In my opinion this case falls within the observations as to the disposition of costs made by Lord Birkenhead in *Boyce v. Wasbrough*[1], at p. 435, which were applied by the majority of this Court in *Niles v. Lake*[2]. The issue to be decided in the case at bar was difficult and debatable and there has been a difference of judicial opinion in the Court of Appeal and in this Court.

I would dismiss the appeal but would direct that the costs of all parties, other than Crown Trust Company, be paid as between party and party out of the estate of the testatrix. I would make no order as to the costs of Crown Trust Company.

RITCHIE J.:—The facts giving rise to this appeal are fully set forth in the reasons for judgment which have been filed by Mr. Justice Spence and it will accordingly be unnecessary for me to restate them.

I agree with Mr. Justice Cartwright, whose decision I have also had the benefit of reading, that, for the reasons stated by him, the words ". . . I declare that my will shall take effect as if my husband had predeceased me and . . ." as they occur in clause III of the will of the late Lenna May Harmer, are sufficient to distinguish this case from that of *Maclean et al. v. Henning*[3], and that it is not necessary to delete or supply any words in order to give effect to that clause as a valid disposition of the whole estate of the testatrix in the event of her husband having predeceased her.

I only wish to add that in my view this conclusion is strengthened by the fact that the alternative construction urged upon us on behalf of her heirs-at-law is based on the assumption that the testatrix intended to die intestate in the event of her husband having predeceased her.

The inclination of courts to lean against a construction which will result in intestacy is far from being a rule of universal application and is not to be followed if the circumstances of the case and the language of the will are such as to clearly indicate the testator's intention to leave his property or some part of it undisposed of upon the happening of certain events.

[1] [1922] 1 A.C. 425. [2] [1947] S.C.R. 291, 2 D.L.R. 248.
[3] (1903), 33 S.C.R. 305.

It appears to me, however, that when an individual has purported to make final disposition of all his "property both real and personal of every nature and kind and wheresoever situate", he is not to be taken to have intended to leave all that property undisposed of on the happening of certain events, unless there are some very exceptional and compelling reasons for so holding. As was said by Lord Shaw in *Lightfoot v. Maybery*[1], at p. 802, a construction resulting in an intestacy "is a dernier ressort in the construction of wills".

In the present case the husband and wife made mutual wills and the suggestion is that it was the intention of each of them that in the event of one having predeceased the other, the whole property of the survivor should remain undisposed of. One reason which is relied on in support of the existence of such an intention in the case of the testatrix is that it would be quite rational for her to leave the final disposition of her estate in the event of her surviving her husband to be decided after she had learned who was going to assist her during the balance of her life. It appears to me that the opening words of the will—"THIS IS THE *LAST* WILL AND TESTAMENT of me, Lenna May Harmer . . ." must of themselves be taken as mitigating strongly against any interpretation which is predicated on the assumption that the testatrix signed that document intending that in the event of her surviving her husband, she might make another will.

For the above reasons, as well as for those stated by Mr. Justice Cartwright, I would dismiss this appeal and direct that the costs should be paid in the manner proposed by him.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal of Ontario[2] made on January 3, 1964, in which that Court by a majority dismissed an appeal from the judgment of the Honourable Mr. Justice Fraser made on August 9, 1963.

The testatrix married Stephen Harmer, a widower, in 1947. She was a spinster and had no children and at the time of her marriage she was 64 years of age. Her husband, a widower, had living at that time one child and four grandchildren. On September 10, 1959, the testatrix and her hus-

[1] [1914] A.C. 782.
[2] [1964] 1 O.R. 367, 42 D.L.R. (2d) 321, *sub nom. Re Harmer.*

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band made wills which were in the same terms *mutatis mutandis*. The testatrix was at that time 76 years of age. On June 13, 1961, the testatrix's husband by a codicil revoked the provisions of para. III(3) of his last will which had been made on September 10, 1959, and provided that the whole of the remainder of his estate should go to his granddaughter Mrs. Loreen Myers. The testatrix's husband then died on May 4, 1962, and the testatrix died on July 3, 1962, without making any alteration of her will dated September 10, 1959. That will provided in part:

> II. I GIVE, DEVISE AND BEQUEATH all my property, both real and personal, of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment, to my husband, STEPHEN HARMER, for his own use absolutely, if he survives me, and I NOMINATE, CONSTITUTE AND APPOINT my husband and CROWN TRUST COMPANY to be the Executors of this my Will.
>
> III. If my husband and I should both die under circumstances rendering it uncertain which of us survived the other, I declare that my will shall take effect as if my husband had predeceased me and I GIVE, DEVISE and BEQUEATH all my said property to my Trustee upon the following trusts, namely:
>
> (1) To pay all my just debts, funeral and testamentary expenses as soon as possible after my decease.
>
> (2) To pay out of the capital of my general estate all estate taxes, inheritance and death taxes and any taxes that may be payable in this or in any other jurisdiction by reason of my decease in connection with any insurance or any gift or benefit given by me to any person hereinafter mentioned, either in my lifetime or by survivorship or by this my will or any codicil thereto, with full power to my Trustees in their sole discretion to settle, compromise, commute or postpone payment of the duty or any part thereof.
>
> (3) To divide the residue of my estate into as many equal parts as there are grandchildren of mine then alive, and to pay to each grandchild one of such equal parts.

The legatees in accordance with para. III(3) claimed the whole balance of the estate and their claim was opposed by the heirs-at-law of the testatrix.

The Crown Trust Company, as surviving executor, applied to the Supreme Court of Ontario for advice and directions on the following questions:

> 1. Having regard for the provisions of the Will as a whole and the language of paragraph numbered III, does paragraph numbered III apply when the Testatrix's husband clearly predeceases her?
>
> 2. If the answer to question 1 is affirmative, to whom do the benefits pass under subparagraph numbered (3) of paragraph numbered III if the testatrix had no children of the marriage and consequently no grandchildren

or in the alternative

To whom the words 'grandchildren of mine' and 'grandchild' refer in subparagraph numbered (3) of paragraph numbered III?

Fraser J. answered the first question in the affirmative and answered the second question by finding that the words "grandchildren of mine" and "grandchild" in para. III(3) referred to the grandchildren of the testatrix's deceased husband.

In the Court of Appeal and here, the appeal was argued solely with respect to the answer to the first question. Fraser J., in written reasons, was of the opinion that there was in the will of the testatrix an obvious omission, although he was unable to find the exact words which were, in his opinion, omitted or to say whether those words would have been, by an additional clause inserted before III or by additional words inserted into clause III. Fraser J. held that it was the right and the duty of the Court under the circumstances which existed to supply the omission and proceeded to do so by his answer to question 1.

Kelly J.A., giving judgment for the Court of Appeal, said:

> I am in agreement with the conclusions reached by Fraser J. for the reasons so ably set out by him, and would adopt his reasons save in one particular.

He continued:

> I take it as a governing principle that the very words used by the testatrix in framing her will should be interpreted so as to give effect in its ordinary meaning to every word and phrase employed by the testatrix, unless there are such inconsistencies as to make it impossible to accomplish this end.

and found that the testatrix had considered the possibility of three different sets of circumstances prevailing at the time of her death. First, that her death might occur prior to that of her husband, second, that her death might occur after her husband's death, and third, that due to some common disaster both deaths might occur under circumstances which would make it difficult or impossible to determine which death had occurred first. And then continued:

> Having made effective provision for the one to whom she felt the most responsibility should he continue to live and enjoy the benefit of her bequest, she then directed her attention to situations (b) and (c).
>
> There is a clear and unequivocal expression of her intention that in either of these two situations the disposition of her property was to be

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the same. Whether the death of her husband occurred before her death or at the same time, only one set of provisions for the disposition of her property was to be made.

Having made clear her intention that in either situation (b) or situation (c) the disposition of her property was to be the same, she proceeded to set out adequate provisions dealing with her property. Whether the distributive provisions, paragraph III, are grammatically related to situation (b) or to situation (c), if the words of distribution are applicable to either situation they must perforce be deemed equally applicable to the other.

I am unable to adopt the view of Kelly J.A. that in the testatrix's will there is a clear and unequivocal expression of her intention that in either of the two situations, *i.e.*, contemporaneous death or by her death following that of her husband, the disposition of her property was to be the same. I am, on the other hand, of the view that Aylesworth J.A., in his dissenting reasons, was exactly accurate when he said:

The declaration and dispositions made by paragraph III of the Will (supra) are in terms wholly conditioned upon an event which did not happen, namely, "if my husband and I should both die under circumstances rendering it uncertain which of us survived the other".

I am, therefore, of the view that in order to attain the result which was reached in both Courts below, this Court must insert in the last will of the testatrix additional words. Aylesworth J.A. suggested those words, if they should be inserted, might be inserted at the beginning of clause III(3) of the will and those words might be "in the event my husband predeceases me" or words to like effect.

The difficulty of such an insertion by order of the Court is that the Court must be able to say as a matter of necessary implication that there was an omission and what the omission was: *Crook v. Hill*[1], *per* Sir William James, L.J., at p. 315. The Court must not speculate but be able to say as a matter of compelling conviction the nature of the error which has occurred: *Re Smith, Veasey v. Smith et al.*[2]

Davis J. said in the Supreme Court of Canada in *Maclean et al. v. Henning*[3], at p. 307:

Much has been said as to the "intention" of the testator. It is our duty, however, to gather that intention from the language he has used. Speculation as to what he must have intended has been indulged in based upon the alleged vagueness of the language of the will and the relations of the testator toward his wife who predeceased him, the character of

[1] (1871), L.R. 6 Ch. App. 311. [2] [1947] 2 All E.R. 708 at 710.
[3] (1903), 33 S.C.R. 305.

the contingent dispositions he has made, and the circumstances surrounding his death. Able and ingenious as many of them are, however, they must not be permitted to alter the plain meaning of the language used.

I adopt the view cited by Aylesworth J.A. in the Court of Appeal:

> To read into this will the words necessary to provide for the unmentioned event the Court must be compelled to the conclusion that the will reveals so strong a probability of such an intention that a contrary intention cannot be supposed.

Now do either the actual words of the will or the circumstances of the testatrix and her late husband's death result in any compelling conviction that there was an accidental omission in this will as executed. Since the counsel for the respondent submits that the Court to determine the intention of the testatrix may not only look at the will but at surrounding circumstances, it is my intention to consider these two matters together. One would surely believe that neither the testatrix nor her husband at the date they both executed wills would have believed that they would ever have any children. The first interest of them both was that whichever one survived would have available for his or her support the whole of their joint estates. Both the testatrix and her husband saw to that by clause II of their respective wills. To reverse the order of the consideration by Kelly J.A., I turn next to the contemplated situation that both might die as a result of a common disaster under circumstances which would make it difficult or impossible to determine which death had occurred first. Again, both the testatrix and her late husband took care of that situation in the words of clause III and particularly the opening lines thereof, and did so, in my view, in a perfectly rational fashion, *i.e.,* that the whole of the estate would go to the grandchildren of the testatrix' husband, who he had determined would be the recipients of his bounty. When both died, to all intents and purposes contemporaneously, then neither one was in need of any fund to maintain them after such catastrophe and the testatrix might be perfectly ready under those circumstances to have her husband's grandchildren take the fund.

Lastly, one might survive the other, considering the situation from the point of view of the survivor. It is the position of counsel for the said grandchildren of the husband that

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it would be ridiculous that the two testators should contemplate intestacy. I am of the opinion that rather than it being ridiculous it was quite rational. There is nothing to conclude that either the testatrix or her husband believed that either of them would, when such one survived his or her spouse, be deprived of an opportunity to make further testamentary disposition. In fact, if the deaths did not occur as a result of a common disaster, each one would think that the survivor could then contemplate the future in the light of the situation which then maintained and make such testamentary disposition as was commensurate with the view. Either of them, due to their age on the death of the spouse might well contemplate that he or she would have to have some assistance and care in living out the balance of his or her life. It might be that that care would be provided, at any rate in the case of the testatrix, by either her late husband's grandchildren or by her own nieces or nephews. Therefore, it would be quite rational for the testatrix to leave the disposition of her estate, in the event she survived her husband, which is the event that occurred, to be decided after she had learned who was going to assist her in living out the balance of her life and therefore who would be entitled to her bounty. This is the view expressed by Aylesworth J.A. in the Court of Appeal when he said:

> she may have considered the contingency but have come to no conclusion upon it, reflecting that if she survived her husband her future was uncertain as to whom she would live with or where she would live and as to many circumstances which might arise creating claims upon her bounty . . .

The fact that the testatrix died only 88 days after her husband without having made such further testamentary disposition, in my view does not operate as any denial of the view which I have expressed, especially when it appears that she had been in hospital suffering from a broken hip from January 1962, some months before the death of her husband, until the date of her death. I, therefore, can find no compelling necessity to insert the words allegedly omitted.

Both at trial and in the majority judgment of the Court of Appeal, the view was expressed that to interpret the will of the testatrix in the manner suggested by her heirs-at-law was to find the words "I declare that my will shall take effect as if my husband had predeceased me and . . ." mere

surplusage. If those words are omitted the clause would read

> If my husband and I should both die under circumstances rendering it uncertain which of us survived the other, I give, devise and bequeath all my said property to my trustee upon the following terms:

There would still remain the whole of clause II so that it would have still resulted in the appointment of her late husband as an executor and it might have caused difficulties in administration despite the provisions of *The Survivorship Act,* R.S.O. 1960, c. 391. I am of the opinion such words cannot be considered as mere surplusage and even if that were so, the existence of surplusage in a will is no ground for giving the rest of the clause a new and different meaning: *In re Boden, Boden v. Boden*[1], *per* Fletcher Moulton L.J., at pp. 143 and 145.

Therefore, with every respect to the views of Kelly J.A., I have come to the conclusion that these words do not indicate that the testatrix had made a clear and unequivocal expression that in either of the two situations, the disposition of her property was to be the same.

I would allow the appeal and would answer the first question in the negative. The costs of the parties appearing on the appeal with the exception of the executor, should be paid out of the estate. There should be no costs to the executor.

Appeal dismissed, SPENCE J. *dissenting.*

Solicitors for the appellants: Payton, Biggs & Graham, Toronto.

Solicitors for the respondents, L. Myers, R. Harmer, D. Dvorachek and D. A. Campbell: Pearson, Flynn, Sturdy & Davies, Preston, Ont.

Solicitors for the respondent, Crown Trust Company: Littlejohn, Sutherland & Tarrison, Paris, Ont.

[1] [1907] 1 Ch. 132.

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*May 27, 28, 29 Oct. 6

NORCAN OILS LTD. and GRIDOIL FREEHOLD LEASES LTD. ..... APPELLANTS;

AND

HENRY FOGLER, a dissentient shareholder ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Companies—Amalgamation—Order approving amalgamation agreement—Amalgamation certificate issued by Registrar of Companies—Approval order set aside on appeal—Order on appeal of no effect—The Companies Act, R.S.A. 1955, c. 53, s. 140a (enacted 1959, c. 10).

Pursuant to the provisions of s. 140a of *The Companies Act,* R.S.A. 1955, c. 53, as amended, an order was granted approving the amalgamation of the appellant companies G and N. At the hearing of the application for approval of the amalgamation agreement, only one person appeared to oppose the application, this being the respondent F. The position which he took was that the ratio between the participation of G and N shareholders in the amalgamated company was unfair to the G shareholders. On appeal, the Appellate Division of the Supreme Court of Alberta allowed the appeal and set aside the approving order; two members of the Court held that the material submitted to the shareholders of G was insufficient to enable them to judge of the fairness and propriety of the scheme and a third member of the Court held that the material furnished by the companies was insufficient to enable either the shareholders or the Court to determine whether or not the transaction was provident. An appeal from the judgment of the Appellate Division was brought to this Court.

Held (Judson and Spence JJ. dissenting): The appeal should be allowed.

Per Martland, Ritchie and Hall JJ.: The vital elements in relation to this appeal were: 1. The Registrar of Companies, acting upon the strength of an order which the judge who made it had jurisdiction to make and which was, therefore, valid until set aside, issued, as he was required to do by the statute, a certificate that G and N had been amalgamated into one company. 2. Upon such certificate being issued, G and N then became one company, which company thereafter possessed all the property rights, privileges and franchises and became subject to all the liabilities, contracts and debts of each of the amalgamating companies. 3. Thereafter the amalgamated company had existed and done business on its own account.

Under s. 140a of *The Companies Act,* G and N, in the absence of any valid stay of proceedings, were required to file the amalgamation agreement and the approving order with the Registrar, who, in turn, was obliged to act upon it. The filing of a notice of appeal did not stay such proceedings, nor invalidate them. The result was that the whole purpose for which the order was made was fulfilled, a certificate of amalgamation was issued, and rights and interests had been

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

acquired by other persons against and in the amalgamated company, upon the strength of that certificate.

The Act contained no provision for the revocation of such a certificate. The Appellate Division had no power to revoke it, nor did it, by its order, purport to do so. The setting aside of the approving order did not have and could not have the effect of dissolving the amalgamated company, or of restoring the separate corporate existence of G and N. Accordingly, the order of the Appellate Division could have no effect and ought not to have been made.

Per Judson and Spence JJ., *dissenting*: The Appellate Division was correct in its view as to the effectiveness of the material put before the G shareholders; these shareholders had far less accurate information or explanation than they were entitled to in order to permit them to come to an intelligent judgment as to whether or not they should vote in favour of the proposed amalgamation and for that reason the judgment of the Appellate Division should be affirmed..

The allegation that F, because of his purchase of shares of the amalgamated company on the open market, had lost any right to appeal to the Appellate Division failed; he had simply invested in those shares for whatever they were worth and had not in any way elected to approve the transaction which he was now attacking.

An application for an order approving an amalgamation, pursuant to s. 140a of *The Companies Act,* was an application to the *court* exercising ordinary jurisdiction as such and was not an application to any person in the position of a *persona designata;* therefore the provisions of *The Extra-curial Orders Act,* R.S.A. 1955, c. 105, did not apply and an appeal lay as of right under the provisions of s. 26 of *The Judicature Act,* R.S.A. 1955, c. 164. *Esso Standard (Inter-America) Inc. v. J. W. Enterprises Inc.,* [1963] S.C.R. 144, followed.

Finally, the appellants had taken the position that when the respondent did not apply for any stay of proceedings and since the circumstances had so altered that the decision of the Appellate Division was vain, it was now impossible to return to the position prior to the argument of the appeal. However, to allow this appeal would involve the restoration of the order approving the amalgamation and that would be a gross injustice to minority shareholders who might well have proceedings in contemplation or even under way. Their rights should not be foreclosed or even in any way affected by any judgment of this Court allowing an appeal from the decision of the Appellate Division which was a correct decision.

The order approving the amalgamation agreement did not order the proponents of the scheme to do anything. They took the responsibility of filing the amalgamation agreement and order with the Registrar after their solicitor had been served with a notice of appeal and after that notice of appeal had been filed. There was a right of appeal to the Appellate Division. It was no answer to say when that appeal was successful that nothing could be done and that the dissenting shareholder must accept an accomplished fact even when he did not apply for a stay. Therefore, the appeal should be dismissed; the respondent would have to take such proceedings as he deemed fit to effect the remedy he desired, such proceedings to be in the Courts of Alberta.

Commissioner of Provincial Police v. R. ex rel. Dumont, [1941] S.C.R. 317; *R. ex rel. Tolfree v. Clark,* [1944] S.C.R. 69, distinguished.

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APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], allowing an appeal from a judgment of Cairns J. Appeal allowed, Judson and Spence JJ. dissenting.

A. S. Pattillo, Q.C., and *E. D. Arnold, Q.C.,* for the appellants.

H. Fogler, respondent, in person.

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

MARTLAND J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1], setting aside an order which had been made approving, pursuant to s. 140a of *The Companies Act,* R.S.A. 1955, c. 53, as amended, the amalgamation, as one company, of Gridoil Freehold Leases Ltd. (hereinafter referred to as "Gridoil") and Norcan Oils Ltd. (hereinafter referred to as "Norcan") under the name of Gridoil Freehold Leases Ltd. (hereinafter referred to as "the amalgamated company").

Gridoil was incorporated as a public company under the laws of the Province of Alberta on September 21, 1950, and was engaged in the business of the development and production of and exploration for oil and natural gas in Western Canada. Norcan was incorporated, under a different name, as a private company under the laws of the Province of Alberta on August 2, 1957. It was inactive until 1962. In April of that year it became a public company and shortly prior thereto had commenced operations, its business being the development, production of and exploration for oil and natural gas in Western Canada.

At the time the two companies entered into an amalgamation agreement Gridoil had authorized capital consisting of $270,000 divided into 3,000,000 shares, each with a par value of nine cents, of which 2,234,871 were issued and outstanding. At that time Norcan had an authorized capital of $3,000,000 divided into 3,000,000 shares, each with a par value of one dollar, of which 1,141,248 were issued and outstanding.

The boards of directors of both companies consisted of exactly the same persons and each company had the same

[1] (1964), 47 W.W.R. 257, 43 D.L.R. (2d) 508.

president and vice-president as the other. The four persons who constituted the two boards of directors controlled 58.6 per cent of the shares of Gridoil issued and outstanding and 61.6 per cent of the shares of Norcan issued and outstanding.

Excluding the shares controlled by the directors, over 90 per cent of the Gridoil shares were owned by residents of the United States and approximately 60 per cent of the Norcan shares were similarly owned. Gridoil shares were listed on the American Stock Exchange, but Norcan shares were not.

Both companies held reservations and crown and freehold leases in Western Canada and in the Northwest Territories. They shared the same office premises, the same management and the same staff. The directors of the two companies decided that an amalgamation was desirable and that the method which should be adopted to determine the relative participation in the shares of the amalgamated company of the respective shareholders of the two companies should be upon the basis of an independent valuation of the properties of the two companies. Such a valuation was made by an independent firm of geological and engineering consultants in Calgary. On the basis of the valuation it was proposed by the directors that the shareholders of Gridoil should receive one share of the amalgamated company for each share of Gridoil and that the shareholders of Norcan should receive nine shares of the amalgamated company for each share of Norcan.

An amalgamation agreement, dated December 3, 1962, was entered into between the two companies which, *inter alia,* provided for the share interests in the amalgamated company on that basis.

Authority for the amalgamation of two or more Alberta companies into one company is contained in s. 140a of *The Companies Act.* This section was first enacted in c. 10, Alberta Statutes 1959. The relevant portions of it are as follows:

140a. (1) Any two or more companies, including holding and subsidiary companies, may amalgamate and continue as one company.

(2) The companies proposing to amalgamate may enter into an amalgamation agreement, which shall prescribe the terms and conditions of the amalgamation and the mode of carrying the amalgamation into effect.

(3) The amalgamation agreement shall further set out

(*a*) the name of the amalgamated company,

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(*b*) the place within the Province at which the registered office of the amalgamated company is to be situated,

(*c*) the amount of the authorized capital of the amalgamated company and the division thereof into shares,

(*d*) the objects for which the amalgamated company is to be established,

(*e*) the names, occupations and places of residence of the first directors of the amalgamated company,

(*f*) the date when subsequent directors are to be elected,

(*g*) the manner of converting the authorized and issued capital of each of the companies into that of the amalgamated company, and

(*h*) such other details as may be necessary to perfect the amalgamation and to provide for the subsequent management and working of the amalgamated company.

(4) The amalgamation agreement shall be submitted to the shareholders of each of the amalgamating companies at general meetings thereof called for the purpose of considering the agreement, and if three-fourths of the votes cast at each meeting are in favour of the amalgamation agreement,

(*a*) the secretary of each of the amalgamating companies shall certify that fact under the corporate seal thereof, and

(*b*) the amalgamation agreement shall be deemed to have been adopted by each of the amalgamating companies.

(5) Where the amalgamation agreement is deemed to have been adopted the amalgamating companies may, if a copy of the agreement has been submitted to the Registrar and approved in writing by him, apply to the court for an order approving the amalgamation.

(6) Unless the court otherwise directs, each amalgamating company shall notify each of its dissentient shareholders, in such manner as the court may direct, of the time and place when the application for the approving order will be made.

(7) Unless the court otherwise directs, notice of the time and place of the application for the approving order shall be given to the creditors of an amalgamating company in such manner as the court may direct.

(8) Upon the application, the court shall hear and determine the matter and may approve the amalgamation agreement as presented or may approve it subject to compliance with such terms and conditions as it thinks fit, having regard to the rights and interests of all parties including the dissentient shareholders and creditors.

(9) The amalgamation agreement and the approving order shall be filed with the Registrar, together with proof of compliance with any terms and conditions that may have been imposed by the court in the approving order.

(10) On receipt of the amalgamation agreement, approving order and such other documents as may be required pursuant to subsection (9), the Registrar shall issue a certificate of amalgamation under his seal of office and certifying that the amalgamating companies have amalgamated.

(11) On and from the date of the certificate of amalgamation, the amalgamating companies are amalgamated and are continued as one company hereinafter called the "amalgamated company", under the name and having the authorized capital and objects specified in the amalgamation agreement.

(12) The amalgamated company thereafter possesses all the property, rights, privileges and franchises and is subject to all the liabilities, contracts and debts of each of the amalgamating companies, and all the provisions of the amalgamation agreement respecting the name of the amalgamated company, its registered office, capital and objects shall be deemed to constitute the memorandum of association of the amalgamated company.

* * *

(19) An amalgamated company shall, for the purposes of the other provisions of this Act, be deemed to be a company incorporated under this Act within the meaning of clause (g) of section 2, so far as the nature of an amalgamated company will permit.

Section 2(*g*), which is referred to in subs. (19) above, provides as follows:

(*g*) "company" includes any company incorporated under this Act and an existing company;

"Existing company" is defined in s. 2(*p*):

(*p*) "existing company" means a company lawfully incorporated or registered under any Act or Ordinance respecting companies at any time in force in the Province prior to the first day of October, 1929, and subject to the legislative authority of the Province;

The amalgamation agreement was submitted to the Registrar of Joint Stock Companies and received his approval on January 9, 1963.

The amalgamation agreement was submitted to the shareholders of each company at meetings held on January 15, 1963.

At the Gridoil meeting 96.3 per cent of the votes cast were in favour of the agreement. Of the shares voted, excluding those controlled by the four directors, 78.5 per cent were in favour of it.

At the Norcan meeting 99.8 per cent of the votes cast were in favour of the agreement. Of the shares voted, excluding those controlled by the four directors, 99.2 per cent were in favour of it.

Application was then made for approval of the agreement. Notice was given to the dissentient shareholders in the manner directed by the learned judge before whom the application was to be made. He dispensed with notice to creditors.

At the hearing on February 12, 1963, only one person appeared to oppose the application, this being the respondent Fogler. The position which he took was that the ratio between the participation of Gridoil and Norcan share-

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holders in the amalgamated company was unfair to the Gridoil shareholders.

The learned judge granted an order approving the amalgamation agreement, which was entered on February 13. No application was made for any stay of proceedings under the order, nor was any intimation given by the respondent of his intention to make such an application.

On February 15 the respondent filed a notice of appeal. Rule 610 of the Rules of Court of the Supreme Court of Alberta provides as follows:

> 610. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from except so far as the Court or judge or master appealed from, or any judge of the Supreme Court, may order; and no intermediate act or proceedings shall be invalidated except so far as the court appealed from may direct.

The solicitor representing Gridoil and Norcan, upon being served with the notice of appeal, notified the Registrar of Joint Stock Companies of this fact. Thereafter he proceeded to file with the Registrar the amalgamation agreement and the approving order pursuant to the requirements of subs. (9) of s. 140a. The Registrar issued a certificate of amalgamation, pursuant to subs. (10), on February 18, certifying that Gridoil and Norcan were that day amalgamated as one company under the name of Gridoil Freehold Leases Ltd.

The respondent's appeal came on for hearing on October 17, 1963, and judgment was delivered on February 24, 1964, allowing the appeal and setting aside the approving order.

The learned Chief Justice, whose reasons were concurred in by Johnson J.A., held that the material submitted to the shareholders of Gridoil was insufficient to enable them to judge of the fairness and propriety of the scheme because (1) it did not disclose the figure as to the revaluation of the oil and gas properties of that company and (2) it did not disclose that Gridoil had accumulated tax credits of $2,000,000, resulting from drilling and exploration expenses incurred by it in previous years, which might, under certain circumstances, be used by the amalgamated company against future taxable income.

The explanation given before us with respect to both of these items was that the material in question could not be furnished if Gridoil were to comply with the requirements

of the American Securities Exchange Commission and that, in view of the fact that of the issued shares of Gridoil not controlled by its directors over 90 per cent were owned in the United States and the fact that Gridoil shares were listed on the American Stock Exchange, such compliance was highly desirable.

Porter J.A., who delivered separate reasons for allowing the appeal, held that the material furnished by the companies was insufficient to enable either the shareholders or the Court to determine whether or not the transaction was provident.

In view of the conclusions which I have reached with respect to this appeal, I express no opinion as to the nature of the material which should be submitted to shareholders when they are summoned to a meeting to consider the approval of an amalgamation agreement. Section 140a itself contains no statutory requirement in this regard.

To me the vital elements in relation to this appeal are:

1. that the Registrar, acting upon the strength of an order which the learned judge who made it had jurisdiction to make and which was, therefore, valid until set aside, issued, as he was required to do by the statute, a certificate that Gridoil and Norcan had been amalgamated into one company;

2. that, upon such certificate being issued, Gridoil and Norcan then became one company, which company thereafter possessed all the property rights, privileges and franchises and became subject to all the liabilities, contracts and debts of each of the amalgamating companies;

3. that thereafter the amalgamated company has existed and done business on its own account, including:

(1) the acquisition, either alone or in participation with other companies, of 14,701 net acres of petroleum and natural gas rights in Alberta and Saskatchewan, at a total cost to the amalgamated company of over $500,000;

(2) the acquisition, by way of participation in farmout agreements and joint ventures with 56 other companies, of over 200,000 net acres of petroleum and natural gas rights in those two provinces and in the Arctic Islands at a cost to the amalgamated company of over $50,000;

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(3) the expenditure of over $1,500,000 for drilling and development of the petroleum and natural gas rights acquired since the amalgamation;

(4) the obtaining of a production loan from the bank, of which $775,000 remains outstanding;

(5) the incurring of trade obligations of which approximately $250,000 remains outstanding.

As I read s. 140a, Gridoil and Norcan, in the absence of any valid stay of proceedings, were required to file the amalgamation agreement and the approving order with the Registrar, who, in turn, was obliged to act upon it. The filing of a notice of appeal did not stay such proceedings, nor invalidate the same.

The result is that the whole purpose for which the order was made was fulfilled, a certificate of amalgamation was issued, and rights and interests have been acquired by other persons against and in the amalgamated company, upon the strength of that certificate.

That being so, it is necessary to consider what is the effect of the order on appeal setting aside the order which approved the amalgamation agreement.

The approving order was not one which affected only the position of the parties to the proceedings which led up to it. It was an order from which, when filed with the Registrar, by the terms of the statute, legal consequences must flow, which inevitably affected the rights of other persons. Under the specific provisions of s. 140a, upon receipt of the amalgamation agreement and the order approving it, the Registrar was not only empowered, but legally obligated, to issue a certificate of amalgamation, and, thereafter, the two companies were amalgamated into one amalgamated company, which was authorized to carry on business, including the making of contracts with other persons. Any such person was entitled to rely upon the certificate as sufficient basis for the capacity of the amalgamated company so to do.

The Companies Act contains no provision for the revocation of such a certificate. In my opinion the Appellate Division had no power to revoke it, nor did it, by its order, purport to do so. The setting aside of the approving order did not have and could not have the effect of dissolving the amalgamated company, or of restoring the separate corporate existence of Gridoil and Norcan. Accordingly, the

order of the Appellate Division could have no effect and ought not to have been made.

For these reasons, in my opinion, the appeal should be allowed. In the light of all the circumstances of this case I do not think that either party should be entitled to receive costs in this Court, or in the Court below.

The judgment of Judson and Spence JJ. was delivered by

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta[1] made on March 23, 1964. By that order the Court allowed an appeal from the judgment of Mr. Justice Cairns dated February 12, 1963, in which Mr. Justice Cairns approved the amalgamation agreement between the two appellant companies. I propose to deal with the merits of the appeal and then to discuss certain preliminary objections put forward by counsel for the appellants.

The order of Cairns J. was made without written reasons. I think the Court below assumed, and I am ready to assume, that the amalgamation agreement was approved upon the argument advanced to this Court. In the Court of Appeal reasons were delivered by the Chief Justice of Alberta and by Mr. Justice Porter. Mr. Justice Johnson concurred with the Chief Justice. All agreed in allowing the appeal and quashing the order approving the amalgamation agreement. Porter J.A., citing s. 140a of *The Companies Act* of Alberta, stated that under that section a shareholder who dissents from the views of only three-quarters of the members whose votes were cast at a meeting may be forced to exchange his shares for shares in the amalgamated company and continued:

> He may thus be coerced into taking the shares in the new company by a relatively small percentage of shares and shareholders of the old company. This is not, however, to be done without the approval of the court in terms as follows:

Porter J.A. then quoted s. 140a(8), and continued:

> It will be observed that the statute itself gives no guidance and imposes no limits as regards the grounds on which this judicial discretion is to be exercised. The approval of the transaction is left entirely to the discretion of the court: *Hayes v. Mayhood,* 18 D.L.R. (2d) at 505. Unlike the requirements of section 138, the requisite majority cannot by itself compel the amalgamation. It must have the approval of the court whereas under section 138 the compulsory purchase is complete unless the dissentient shareholder moves to the court to order otherwise.

[1] (1964), 47 W.W.R. 257, 43 D.L.R. (2d) 508.

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It is clear that section 140a(8) requires the judge to review the facts and circumstances and approve of the transaction if, in his opinion, it is fair and provident. *To exercise that discretion he must decide whether a prudent man properly informed would regard the transaction as provident.*

(The italicizing is my own.)

Porter J.A. cites *In re Bugle Press Ltd.*[1], at p. 276, for the proposition that business people are much better able to judge their own affairs than the Court is able to do and therefore the Court is accustomed to pay the greatest attention to what commercial people who are concerned with a transaction in fact decide, but pointed out that in the same case it was emphasized that those who proposed the amalgamation controlled 90 per cent of the holding and that under such circumstances their views could not serve as a guide to the propriety of the transaction as would the opinion of a majority of shareholders interested in only one of the amalgamated companies. That is the situation in the present case where those proposing the amalgamation hold 61 per cent of the capital stock of Norcan and 58.6 per cent in the capital stock of Gridoil.

Porter J.A. continued by showing that in the case of Norcan, and leaving aside the shares held by the promoters, only 18 per cent of the shareholders in fact voted for the amalgamation, and in the case of Gridoil, leaving aside the promoters' shares, only 12 per cent voted for the amalgamation, and then stated:

With so small a percentage of the disinterested shareholders voting the first inquiry for a court should be to determine whether the information which was given to the shareholders prior to the meeting was such as to enable them to form a judgment as to whether they should or should not attend the meeting. "Did the circular issued to the shareholders disclose sufficient information to enable them to judge of the fairness and propriety of the scheme?" (*Carruth v. Imperial Chemical Industries Ltd.*, [1937] 2 All E.R. 422.)

After a detailed analysis of the material, Porter J.A. concludes:

No court can determine whether this merging transaction is fair and no shareholder can make a decision without having knowledge of all the facts which a prudent man disposing of one stock and acquiring another would require to weigh and consider before coming to a decision. The necessary facts will vary with the characteristics of the companies involved but in companies of the kind being dealt with here they may well include, for example, the following: book value for historical purposes, demonstrated earnings capacity, liabilities current and long term,

[1] [1961] 1 Ch. 270.

cash flow, provisions for depreciation and depletion, market activities, the speculative potential of the acreage of an exploratory company, proper estimates of reserves, and their marketability, as well as the benefits that might accrue to the shareholders in the future operations of the merged company that would not be available if the companies were not merged.

In my view the material before the learned judge was so lacking in essential facts that it could not form the basis for the exercise of discretion.

Smith C.J.A. said in his reasons:

I have had the advantage of reading the reasons for judgment of Porter J.A. which sufficiently outline the facts, I am in agreement with the result which he has reached but I might base my decision upon somewhat narrower ground.

Having then examined the material and authorities upon the subject, he concludes:

My view is that the proxy statement sent to the shareholders of Gridoil was insufficient because of the omission (1) of the figure as to the revaluation of the oil and gas properties of that company, and (2) of a reference to the tax credits of $2,000,000.00 referred to by Porter J.A. Under these circumstances, my view is that the shareholders were not enabled to exercise an intelligent judgment upon the merits of the proposed amalgamation. I do not consider that the directors in the proxy statement were "honestly putting forward to the best of their skill and ability a fair picture of the Company's position" (*In re Imperial Chemical Industries Ltd.* [1936] 1 Ch. 587, Clauson J. at 618) or that the proxy statement "disclosed sufficient information to enable" the shareholders to "judge of the fairness and propriety of the scheme." (*Carruth v. Imperial Industries Ltd.* [1937] 2 All E.R. 422.)

Smith C.J.A. also quoted Masten J.A. in *Re Langley's Ltd.*[1], at p. 132:

. . . and that every shareholder affected by the proposed scheme receives such fair, candid and reasonable notice of the proposed arrangement as will afford him proper and adequate opportunity for its consideration prior to the meeting.

Despite the very able argument of learned counsel for the appellants, I have not been convinced that the Court of Appeal for Alberta was not exactly correct in its view as to the effectiveness of the material put before the Gridoil shareholders to permit them to make an intelligent appraisal of the proposed amalgamation. In the 1960 directors' report to the shareholders of Gridoil under date May 5, 1961, it was said in part:

During the past two years water flooding and other engineering operations were carried out in the Company's major producing field. In

[1] [1938] O.R. 123.

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1960 the Company's engineer was able to evaluate the results of these operations and he estimated the recoverable oil reserves to be 4,500,000 net barrels after royalties, an increase of 2,500,000 barrels over the previous estimate of 2,000,000 barrels. This major revision in the oil reserves was discussed with appropriate officials of the Securities and Exchange Commission in Washington and they approved the upward revision of oil reserves as calculated by the Company's engineer.

The 1961 directors' report to shareholders dated April 27, 1962, was in a similarly optimistic vein. Then the proxy statement upon the proposed amalgamation, after having recited that it was proposed that one share of the old Gridoil stock should be surrendered for one share of the new stock as against the proposal that one share of Norcan should be surrendered for nine shares of the new stock, continued:

The above ratio was determined on a basis of estimates of the value of the assets of the companies including estimates of value by independent geologists and engineers with respect to oil and gas properties of the companies and of Canadian Williston Minerals Ltd. owned 63.4% by Norcan. The net earnings of the companies were not given any weight in determining the basis of exchange. Such estimates of value of the oil and gas properties of the companies are not necessarily indicative of the fair market value thereof. On the basis of the present outstanding shares the ratio of value per share of Gridoil and Norcan was determined to be approximately 1 to 9 which became the basis for the exchange.

With the notice of special general meeting of shareholders and a proxy statement as to Gridoil there were forwarded to its shareholders under date December 21, 1962, two letters from S. C. Nickel as president. In one of those letters, it was said in part:

Although the Company's cash flow from operations for the nine months ended September 30, 1962 was $245,846, your management has found it necessary to restrict normal drilling and exploration activities because of insufficient working capital. Also sinking fund requirements in respect of the 5½% Notes beginning in 1964 are likely further to restrict the amount of funds available for future exploration. Norcan on the other hand has substantial working capital and holds $710,000 principal amount of 5½% Notes of the Company which would be acquired by the Company and cancelled prior to the effective date of the amalgamation, resulting in the sinking fund requirements being satisfied until 1968. The amalgamation of Gridoil and Norcan would result in a much greater and more diversified spread of oil and gas properties.

The second letter under the same date is very short and simply advises that the statement in the 1960 annual report that "this major revision in the oil reserves was discussed with appropriate officials of the Securities and Exchange Commission in Washington and they approved the upward revision of oil reserves as calculated by the company

engineer" was an incorrect statement. Also included amongst the material forwarded to shareholders in the proxy statement were statements of book value which purported to show that the shares in Gridoil Freehold Leases Ltd. were of a minus 15 cents book value. A shareholder seeing this dire picture might well have determined to take the 1 for 9 distribution proposed in the amalgamation without any further investigation and have refrained from attending the meeting or exercising his vote. Only a small percentage of shareholders did attend the meeting apart from the shares controlled by the promoters. I am in agreement with the Chief Justice of Alberta when he said:

> If the valuation of the oil and gas properties of Gridoil was accurate, that company had a surplus instead of a substantial deficit.

Porter J.A. remarks:

> Downgraded as Gridoil was by the contents of the circular, many shareholders may well have elected to stay away from the meeting and take their loss.

A further and in my opinion a very important consideration is the fact that in the Gridoil proxy statement there was no mention of a $2,000,000 allowance under the *Income Tax Act* which could be deducted from income before the imposition of tax. But, in the statement which went to the Norcan shareholders, this item is not overlooked but rather is emphasized in the following terms:

> Tax credits of some $2,000,000 resulting from drilling and exploration expenditure incurred by Gridoil in prior years may be used by the amalgamated company under certain circumstances against future taxable income as it is expected that no income tax would be payable by the amalgamated company for a number of years.

This omission from the Gridoil proxy statement was explained by William L. James in his affidavit sworn on April 17, 1964:

> 28. The above mentioned second sentence concerning the tax credit was not included in the President's letter to the shareholders of Gridoil for the following reasons:
>
> On the basis of their discussion with the S.E.C. officials Gridoil's representatives were satisfied that the S.E.C. would not permit the inclusion of the said sentence in the President's letter to the shareholders. Furthermore the unclaimed drilling and exploration expenditures were not considered to be a significant factor in the valuations, as it was anticipated that the amalgamated company in the normal course of its operations would create large tax deductions in its own right, and it was questionable whether the tax credits of Gridoil would ever have any value

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to the amalagamated company. In the result, these Gridoil tax credits have to date had no value to the amalgamated company. In its first fiscal period (February 19, 1963 to December 31, 1963), the amalgamated company incurred drilling and exploration expenditures of some $860,000 in excess of its taxable income without using any of Gridoil's unclaimed expenditures. The directors have approved a drilling and exploration budget of $1,700,000 for 1964 which is considerably more than the credits which can be used in that year. The prevailing general practice in dealing with the acquisition of this type of tax credits is to value them on the basis of 5 cents to 10 cents on the dollar provided that they will be required as a deduction from taxable income in the near future. Because the Gridoil tax credits may never be required by the amalgamated company their value is considerably less than five cents on the dollar. Therefore they were not considered a significant factor in valuing the assets of Gridoil.

I am not convinced by that explanation. It would seem to me that the tax credit was thought sufficiently attractive to emphasize in the proxy statement to the Norcan shareholders and it is rather a sad admission if Mr. James is now permitted to come along and swear that it really wasn't of any importance at all. Secondly, I share a view which I understand was expressed by Porter J.A. during the appeal that no S.E.C. requirements or regulation should prevent shareholders in Canada having proper notice of such an important matter when considering the proposed amalgamation.

It is not my intention to go through all of the material in great detail. I may summarize by saying that I am convinced that the shareholders of Gridoil had far less accurate information or explanation than they were entitled to in order to permit them to come to an intelligent judgment as to whether or not they should vote in favour of the proposed amalgamation and for that reason I am ready to affirm the judgment of the Court of Appeal of Alberta.

I turn now to three preliminary matters brought up by counsel for the appellants. Firstly, the appellant alleges that the respondent lost any right to prosecute his appeal to the Appellate Division of Alberta because he had in September of 1963 purchased 3,000 shares of stock in the amalgamated company. These shares were purchased on the market and were not the purchase of treasury shares from the amalgamated company. Counsel cites in support of that view, *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd.*[1]; *Honey Dew Ltd. v. Ryan et al.*[2], and *Banque*

[1] [1921] 2 K.B. 608. [2] [1935] O.R. 56.

des Marchands de Moscou (Koupetschesky) v. Kindersley et al.[1] and seeks to distinguish *Lissenden v. Bosch Ltd.*[2]. Having considered those cases and others, I am of the opinion that the present situation does not exhibit an example of a person who had an election between two different courses and who could therefore choose either but who could not choose both. When Fogler purchased shares of the amalgamated company on the open market, he was simply investing in those shares for whatever they were worth and wasn't in any way electing to approve the transaction which he now attacks.

The second matter urged by way of preliminary objection, is that the Appellate Division erred in allowing the appeal from the Honourable Mr. Justice Cairns on the basis that that order was made by the learned judge as a *persona designata* and that under the provisions of the Alberta *Extra-curial Orders Act,* R.S.A. 1955, c. 105, s. 7, no appeal lies from the judgment, order, or decision of a judge under s. 2 of the Act unless an appeal is expressly authorized by the Act giving the jurisdiction or special leave to appeal is granted by the said judge or judge of the Supreme Court. Section 140a of the Alberta *Companies Act* gives no such right of appeal and no leave was obtained from a judge of the Supreme Court of Alberta.

Section 140a(5) of the Alberta *Companies Act* provides:

> Where the amalgamation agreement is deemed to have been adopted the amalgamating companies may, if a copy of the agreement has been submitted to the Registrar and approved in writing by him, apply to *the court* for an order approving the amalgamation. (The italicizing is my own.)

Subsections (6), (7) and (8) continue to deal with the jurisdiction of the *court.*

The *Judicature Act,* R.S.A. 1955, c. 164, in s. 26(*b*)(iv) provides that the Appellate Division has jurisdiction and power subject to the provisions of the rules of the court to hear and determine

> (iv) all appeals or motions in the nature of appeals respecting a judgment, order, or decision of
> (A) a judge of the Supreme Court.

I accept the judgment of the Court of Appeal of Ontario in *Re Hynes and Schwartz*[3], that when a judge is given juris-

[1] [1951] Ch. 112. [2] [1940] A.C. 412.
[3] [1937] O.R. 924.

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diction to make a decision, in that case on an appeal from the architects' board, and no right of appeal is given in the statute then the only appeal therefrom to the Court of Appeal may be by virtue of *The Judges' Orders Enforcement Act* (the counterpart in Ontario of *The Extra-curial Orders Act* of Alberta), and *Cook v. Westgate*[1], that it is elementary law that there no right of appeal exists unless it is given by statute. I am, however, of the opinion that the matter was settled by the decision of this Court in *Esso Standard (Inter-America) Inc. v. J. W. Enterprises Inc.*[2], where the Court by dismissing the appeal from a judgment of the Court of Appeal of Ontario, reported as *Re International Petroleum Ltd.*[3], approved the jurisdiction of that Court. There, the Court was considering the provisions of s. 128 of the *Companies Act* of Canada, R.S.C. 1952, c. 23. That section in subs. (1) provided for giving notice "in such manner as may be prescribed *by the Court* in the province in which the head office of the transferor company is situate . . ." and further provided for the jurisdiction of *the Court*. Nothing in the section gave a right of appeal to the Court of Appeal from the decision in first instance. Laidlaw J.A., giving judgment for the majority, said at p. 711:

> Mr. Robinette submitted "that where jurisdiction is conferred by a Dominion statute on the Supreme Court of Ontario the effect is to confer jurisdiction on both branches of the Supreme Court of Ontario with the result that the Court of Appeal has the jurisdiction conferred upon it for this purpose by the *Judicature Act,* and that Act in s. 26(2) provides that the Court of Appeal has jurisdiction as provided by any Act of the Parliament of Canada or of the Legislature". I accept that submission. *I think that the words "the Court" as used in s. 128 of the Companies Act confers jurisdiction on the High Court of Justice as one branch of the Supreme Court of Ontario and also on the Court of Appeal as the other branch of that Court, and that by virtue of s. 26 of the Judicature Act an appeal lies to this Court from the orders made in Court by Wells J., a Judge of the High Court of Justice.* (The italicizing is my own.)

I am therefore of the opinion that the application to the Court provided in s. 140a of *The Companies Act* of Alberta is an application to the *court* exercising ordinary jurisdiction as such and is not an application to any person in the position of a *persona designata,* that therefore the provisions of *The Extra-curial Orders Act* of the Province of Alberta do not apply and that an appeal lay as of right under the provisions of s. 26 of *The Judicature Act,* R.S.A. 1955, c. 164.

[1] [1944] 3 W.W.R. 145 at 153. [2] [1963] S.C.R. 144.
[3] [1962] O.R. 705.

The third preliminary objection is one which presents some considerable difficulty. By r. 610 of the Alberta Rules of Court, an appeal does not operate as a stay of execution, or of proceedings under decisions appealed from, except so far as the court or judge, or master appealed from, or any judge of the Supreme Court may order, and further, no intermediate act or proceeding shall be invalidated except in so far as the court appealed from may direct. In the present case, no application was made by the appellant in the Appellate Division, here the respondent, Fogler for stay of execution. *The Companies Act* of Alberta in s. 140a(9) provides that the amalgamation agreement and the approving order shall be filed with the Registrar together with proof of compliance with any terms and conditions that may have been imposed by the court in approving the order. The Court did not impose any conditions. The order of Cairns J. approving the application for amalgamation was dated February 12, 1963, and was entered on February 13, 1963. The order was filed with the Registrar under the provisions of the said s. 140a(9) and the Registrar thereupon in pursuance of the said s. 140a issued a certificate dated February 18, 1963, under his seal of office certifying that Gridoil and Norcan were that day amalgamated as one company under the name Gridoil Freehold Leases Ltd. Subsection (11) of s. 140a of *The Companies Act* provides:

> (11) On and from the date of the certificate of amalgamation the amalgamating companies are amalgamated and are continued as one company hereinafter called the amalgamated company under the name and having the authorized capital and objects specified in the amalgamation agreement.

Subsection (19) of the said section provides:

> (19) An amalgamated company shall for the purpose of the other provisions of this Act be deemed to have been a company incorporated under this Act within the meaning of clause (g) of s. 2 so far as the nature of an amalgamated company will permit.

In pursuance of the said certificate of amalgamation, the amalgamation was immediately carried in full force and effect. Neither Gridoil nor Norcan has since the date of the said certificate operated as a continuing corporation. The amalgamated company has been in full operation. By April 1, 1964, all shares of Norcan had been exchanged for

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the shares of the amalgamated company except 49,964 shares registered in the name of 322 shareholders. Since the amalgamation on February 18, 1963, many shares of stock of the amalgamated company have changed hands on the stock exchange and otherwise. Since that date, the amalgamated company acting in the normal course of business has acquired either alone or in participation with other companies 14,701 net acres of petroleum and natural gas rights in the provinces of Alberta and Saskatchewan at a total cost to the amalgamated company of $503,674; has acquired 201,721 net acres of petroleum and natural gas rights in the said provinces and in the Arctic Islands by way of farm-out agreements at a cost of $54,134 and have expended the sum of $1,556,535 for drilling and development of petroleum and natural gas rights. The amalgamated companies have obtained a production loan of $800,000 from the Bank of Montreal in December 1963 of which amount the sum of $775,000 remained outstanding. It has cancelled $710,000 of Gridoil's 5½ per cent convertible sinking fund redeemable notes formerly owned by Norcan, has incurred trade obligations and liabilities in the normal course of business and the sum of $250,000 presently remains outstanding and unpaid in respect of such trade obligations and liabilities. 1,309,435 shares of Gridoil which were owned by Norcan have been cancelled in accordance with the terms of the amalgamation agreement. In view of these circumstances and under the provisions of the Alberta *Companies Act* hereinbefore recited, counsel for the appellant takes the position that when the respondent did not apply for any stay of proceedings and since the circumstances have so altered that the decision of the Appellate Division is vain, it is now impossible to return to the position prior to the argument of the appeal. Counsel points out that the Appellate Division did not set aside the certificate of amalgamation granted by the Registrar. It is true that Mr. Justice Porter's reasons for judgment conclude with the sentence "the order approving the merger should therefore be set aside".

The formal order of the Appellate Division simply provided:

> It is adjudged that the appeal from the said order of the Honourable Mr. Justice J. M. Cairns be allowed and the said order be set aside.

Of course the question arises whether this Court should be concerned with this problem. Rule 601 of the Rules of Court of Alberta provides in part:

> The Court shall have power to draw inferences of fact and give any judgment and make any order which ought to have been made and to make such further order or other order as the case may require.

Counsel for the appellant in urging this objection relied, *inter alia,* upon *Commissioner of Provincial Police v. The King ex rel. Dumont*[1], where Duff C.J. said at p. 320:

> After the judgment of the Court of Appeal allowing the appeal the Commissioner of Police very properly complied with the order and delivered up the licences and number plates. The argument on behalf of the appellant in support of the Commissioner's authority being as I have said quite without substance I think a reasonable interpretation of what occurred is that the Commissioner acquiesced in the judgment of the Court that the suspension was invalid and that he was not entitled to retain the licence and number plates. From that point of view, the appeal has no practical object. Even if the appellant's technical objection to the proceedings by way of *mandamus* had been well founded, the licences and number plates would still remain in the hands of the respondent; the purported suspension would still remain a void act and the only question for discussion on appeal would be the academic technical question with regard to the propriety of proceedings by *mandamus* and the question of costs.

I am of the opinion that this decision is not in *pari materia.* At the time the Appellate Division heard the appeal of the present respondent, the amalgamation order was in effect and was being complied with. The appeal was therefore not academic and the Appellate Division, in my view, had the right to make the order which it did make.

In *The King ex rel. Tolfree v. Clark*[2], this Court refused leave to appeal from the judgment of the Court of Appeal of Ontario affirming the dismissal by Hope J. of an application in the nature of *quo warranto* for an order that the respondents show cause why they did unlawfully exercise or usurp the office and liberties of a member of the legislature of Ontario. After the judgment of the Court of Appeal, the then present legislative assembly had been dissolved. Duff C.J. said at p. 72:

> Admittedly the application by way of *quo warranto* was for the purpose of obtaining a judicial pronouncement upon the validity of the statute of 1942 extending the life of the Legislative Assembly, as well as section 3 of the *Legislative Assembly Act.* Nevertheless, the direct and immediate object of the proceeding was to obtain a judgment fore-

[1] [1941] S.C.R. 317. [2] [1944] S.C.R. 69.

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judging and excluding the respondents from sitting and exercising the functions of members of the "then present" Legislative Assembly; and obviously, the Legislative Assembly having been dissolved since the delivery of the judgment of the Court of Appeal, such a judgment could not now be executed and could have no direct and immediate practical effect as between the parties except as to costs. It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared.

Again, the situation in that case was not as in the present case; the amalgamation was approved by Cairns J. and at the time of the decision in the Appellate Division and now is in full effect. In *Coca-Cola Company of Canada v. Mathews*[1], this Court refused to entertain an appeal where the amount of the judgment was $350 plus costs of the trial, and the parties had agreed that the appellant would pay to the respondent the amount of the judgment and costs in any event of the result of the appeal to this Court.

In my view, there is no reason for allowing the appeal and affirming the order of Cairns J. All that is involved in this appeal is the question of whether that order was properly made. I agree with the Appellate Division that it was not so made. What the consequences of this may be is a matter which perhaps should be determined by the Supreme Court of Alberta and that Court would appear to have such power under r. 601 *supra*. For this Court to allow the appeal would involve the restoration of the order of Cairns J. and that would be a gross injustice to minority shareholders who might well have proceedings in contemplation or even under way. Their rights should not be foreclosed or even in any way affected by any judgment of this Court allowing an appeal from the decision of the Appellate Division which I believe was a correct decision.

The order of Cairns J. approving the amalgamation agreement did not order the proponents of the scheme to do anything. They took the responsibility of filing the amalgamation agreement and order with the Registrar after their solicitor had been served with a notice of appeal and after that notice of appeal had been filed. There was a right of appeal to the Appellate Division. It is no answer to say when that appeal was successful that nothing could be done and that the dissenting shareholder must accept an accomplished fact even when he did not apply for a stay.

[1] [1944] S.C.R. 385.

I therefore am of the opinion that this Court should dismiss the appeal and then the respondent will have to take such proceedings as he deems fit to effect the remedy he desires, such proceedings being in the Courts of Alberta.

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

Appeal allowed, no order as to costs, JUDSON *and* SPENCE JJ. *dissenting.*

Solicitors for the appellants: Arnold & Crawford, Calgary.

Solicitors for the respondent: Prothroe, Gibbs, McCruden & Hilland, Calgary.

RAYMOND JOSEPH KIPP .....APPELLANT;

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*June 17, 18, 19
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AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Indictment—Duplicity—Charge of selling as food "dead animals" contrary to s. 25(b) of Food and Drugs Act, 1952-53 (Can.), c. 38 and regulations—"Dead animals" defined by regulations as either improperly killed or affected with disease—Whether indictment void for duplicity—Whether two different modes of committing single offence—Criminal Code, 1953-54 (Can.), c. 51, s. 703.

Criminal law—Mandamus—County Court judge erroneously quashing indictment for duplicity on preliminary objection—Whether order lies to compel judge to proceed with indictment.

The appellant was charged with having sold as food "dead animals" in violation of s. B.14.010 of the Food and Drug Regulations, thereby committing an indictable offence contrary to s. 25(*b*) of the *Food and Drugs Act,* 1952-53 (Can.), c. 38. At the trial after the indictment was read and before a plea was entered, the appellant moved to have the indictment quashed for duplicity. The County Court judge quashed the indictment on that ground. The basis for his judgment being that by the definition in s. 14.012 of the regulations, "dead animals" could mean either animals not properly killed or diseased animals. The Crown then moved for an order of mandamus directing the County Court judge or some other judge of the County Court to proceed with the trial on the indictment as framed. The order was granted and this judgment was affirmed by the Court of Appeal. The appellant was granted leave to appeal to this Court, and argued that mandamus did

*PRESENT: Taschereau C.J. and Cartwright, Judson, Ritchie and Spence JJ.

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not lie in this case, and secondly, that the indictment was void for duplicity.

Held (Cartwright and Spence JJ. dissenting): The appeal should be dismissed.

Per Taschereau C.J. and Judson and Ritchie JJ.: There was no duplicity on the face of the indictment. It charged only the one offence of selling dead animals, and regulation B.14.012 did no more than define two different modes of committing the same offence. The phrase "dead animals" was not a synonym for meat. A butcher sells meat, not "dead animals".

Mandamus was available to the Crown in this case. The cases of *Re McLeod v. Amiro,* 27 O.L.R. 232, *R. v. Justices of Middlesex* (1877), 2 Q.B.D. 516 and *R. v. Hannah and MacLean,* 77 C.C.C. 32, did not touch the problem in the present case where the indictment was quashed before plea and no trial was held. The trial judge can be compelled to give a decision on the merits and it was no answer to such an application to say that he had exercised his jurisdiction in quashing the indictment and that such a decision could not be reviewed. The trial judge had the power to deal with the form of the indictment and he was acting within his jurisdiction when he erroneously quashed the indictment. He was there to try the charge. It was proper, in the circumstances, to issue the writ of mandamus.

Per Cartwright J., *dissenting:* The phrase "dead animal" is, for the purpose of the regulations, given two special meanings to the exclusion of all other meanings. The indictment must be read as if the extended meanings of that phrase were set out in it. Regulation B.14.010, read, as it must be to render it intelligible, with the definition of "dead animal", creates two distinct offences and not one offence which could be committed in two modes. The indictment was therefore void for duplicity.

On the assumption that the trial judge's decision that the indictment was void for duplicity was wrong in law, mandamus did not lie.

Per Spence J., dissenting: There is no doubt that mandamus is an extraordinary remedy by which a superior Court may direct any inferior tribunal to do some particular thing which appertains to its duty and which it has declined to do, and where, as in the present case, there is no other remedy available. But the argument of the Crown that mandamus will lie to compel the trial judge to hear this case on the merits, could not be supported. The trial judge did not decline jurisdiction but accepted it and, as part of the legal merits of the case, found that the indictment was void for duplicity. His decision was a decision upon the legal merits. Consequently, mandamus to compel him to do his duty did not lie despite the fact that the lower Courts were of the opinion that he was in error in the performance of his duty.

The indictment, furthermore, was void for duplicity.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the granting of an order of mandamus by Grant J. Appeal dismissed, Cartwright and Spence JJ. dissenting.

J. R. Maurice Gautreau, for the appellant.

T. D. MacDonald, Q.C., and *Arthur C. Whealy,* for the respondent.

The judgment of the Chief Justice and Judson and Ritchie JJ. was delivered by

JUDSON J.:—The appellant Raymond Joseph Kipp was charged with the offence of selling as food, dead animals or parts thereof in violation of the provisions of the *Food and Drugs Act*. He was committed for trial after a preliminary hearing and he elected to be tried under Part XVI of the *Criminal Code* by a judge without a jury.

At the trial after the indictment was read and before a plea was entered by the appellant, his counsel objected to the form of the indictment. The County Court Judge quashed the indictment on the sole ground that it was void for duplicity. The Crown then moved for an order of mandamus directing the County Court Judge or some other Judge of the County Court Judges' Criminal Court for the County of Carleton to proceed with the trial of the accused on the indictment as framed. Grant J. made this order and also set aside the quashing of the indictment[1]. The Court of Appeal affirmed the order of Grant J. Kipp now appeals with leave of this Court.

I agree with Grant J. that this indictment is not void for duplicity. It reads as follows:

> That he, the said Raymond Joseph Kipp, between the 9th day of August, A.D. 1961, and the 20th day of October, A.D. 1961, at the then Town of Eastview in the Province of Ontario, did unlawfully sell as food dead animals or parts thereof in violation of Section B.14.010 of the Food and Drug Regulations made by Order-in-Council P.C. 1954-1915 of the 8th December, 1954, as amended by Order-in-Council P.C. 1961-1097 of the 31st July, 1961, thereby committing an indictable offence contrary to paragraph (*b*) of Section 25 of the Food and Drugs Act, Statutes of Canada 1952-53, Chapter 38.

Regulation 14.010 simply provides that "No person shall sell as food a dead animal or any part thereof."

"Dead animal" is defined in Regulation B.14.012 as follows:

> B.14.012 For the purpose of Section B.14.010 and B.14.011, "dead animal" means a dead animal that

[1] [1963] 3 C.C.C. 72, 40 C.R. 366.

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(*a*) was not killed for the purpose of food in accordance with commonly accepted practise of killing animals for the purpose of food, which shall include exsanguination, or

(*b*) was affected with disease at the time it was killed.

To me it is plain that there is no duplicity on the face of this indictment. It charges only the one offence of selling dead animals or parts thereof, and Regulation B.14.012 does no more than define two different modes of committing the same offence. I cannot accept the phrase "dead animals" as a synonym for meat. A butcher sells meat, not "dead animals".

It is common ground that the Crown has no right of appeal from this erroneous quashing of the indictment. The only remaining question is whether an order of mandamus should issue directing the County Court Judge to proceed with the trial. Again, for the reasons given by Grant J., I am of the opinion that it should.

The appellant relies on *Re McLeod v. Amiro*[1]; *The Queen v. Justices of Middlesex*[2]; and *Rex v. Hanna & McLean*[3]. These are cases involving appeals from summary convictions which in the opinion of the reviewing court were finally but erroneously decided on the merits. The cases merely hold that such decisions are not reviewable by way of mandamus. They do not touch the problem in the present case where an indictment is quashed before plea and no trial is held. All that the Crown is seeking is an order directing the County Court Judge to proceed with the trial. If he proceeds with the trial and gives a decision, that decision is open to appeal and is not reviewable on mandamus. But he can be compelled to give a decision on the merits and it is no answer to such an application to say that he has exercised his jurisdiction in quashing the indictment and that such a decision cannot be reviewed.

The use of the word "jurisdiction" in this context does not help one towards a solution. There is no dispute that the judge had the power to deal with the form of the indictment and that he was acting within his jurisdiction when he quashed the indictment. But he made an error in quash-

[1] (1912), 27 O.L.R. 232, 25 C.C.C. 230, 8 D.L.R. 726.
[2] (1877), 2 Q.B.D. 516.
[3] (1941), 57 B.C.R. 52, 77 C.C.C. 32, 3 W.W.R. 753, 4 D.L.R. 584.

ing this indictment. He was there to try the charge. As the matter stands now, unless the order of mandamus issues, the case as framed cannot be tried and it should be so tried. It is proper, in the circumstances, to issue the writ of mandamus. I approve of the reasons of Grant J. on this point in their entirety[1].

I would dismiss the appeal. This being an indictable offence, there can be no order as to costs either here or in the Court of Appeal.

CARTWRIGHT J. (*dissenting*):—The proceedings in the courts below out of which this appeal arises are set out in the reasons of my brother Spence.

Two questions were fully argued before us, (i) whether in the circumstances mandamus lies, and (ii) whether the learned County Court Judge erred in holding that the indictment was void for duplicity.

On the first of these questions I agree with the reasons and conclusion of my brother Spence. As he points out, the decision that mandamus does not lie renders it unnecessary, for the disposition of this appeal, to deal with the second question; I think, however, that it is desirable to express an opinion upon it because if this appeal be allowed the respondent will be free to prefer a new indictment in the same words as that which was quashed by Gibson C.C.J. and the Judge before whom it comes for trial, in the absence of any expression by this Court, would, no doubt, follow the judgment of Grant J., affirmed by the Court of Appeal, holding that the indictment as framed was not void for duplicity.

The wording of the indictment is set out in full in the reasons of my brother Spence. The important words are:

> . . . did unlawfully sell as food dead animals or parts thereof in violation of section B.14.010 of the Food and Drug Regulations . . .

Regulation B.14.010 of the Food and Drug Regulations reads as follows:

> B.14.010—No person shall sell as food a dead animal or any part thereof.

[1] [1963] 3 C.C.C. 72, 40 C.R. 366.

The phrase "dead animal" is defined in Regulation B.14.012 which reads as follows:

> B.14.012 For the purpose of sections B.14.010 and B.14.011, "dead animal" means a dead animal that
>
> (*a*) was not killed for the purpose of food in accordance with commonly accepted practice of killing animals for the purpose of food, which shall include exsanguination, or
>
> (*b*) was affected with disease at the time it was killed.

It is obvious that the words of Regulation B.14.010, standing alone, cannot have been intended to be given their plain and ordinary meaning. The words are clear and simple English words; they are unambiguous and if applied literally would bring about the result that every retail dealer in the country commits an indictable offence whenever he makes a sale of meat to a customer. Butchers do not sell parts of live animals.

The definition section, quoted above, makes this plain. The phrase "dead animal" is, for the purpose of the regulation, given two special meanings to the exclusion of all other meanings. I agree with Gibson C.C.J. that the indictment must be read as if the extended meanings of the phrase "dead animal" were set out in it. So read, the words of the charge to which the appellant was called upon to plead were as follows:

> . . . did unlawfully sell as food dead animals or parts thereof which were not killed for the purpose of food in accordance with commonly accepted practice of killing animals for the purpose of food, which shall include exsanguination, or which were affected with disease at the time they were killed.

The question is whether these words describe but one offence which may be committed in two modes or describe two different offences.

Counsel for the respondent relies on ss. 492 and 500 of the *Criminal Code,* which, so far as relevant read as follows:

> 492 (1) Each count in an indictment shall in general apply to a single transaction and shall contain and is sufficient if it contains in substance a statement that the accused committed an indictable offence therein specified.
>
> (2) The statement referred to in subsection (1) may be . . .
>
> (*b*) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence, . . .

(6) Nothing in this Part relating to matters that do not render a count insufficient shall be deemed to restrict or limit the application of this section.

* * *

500. (1) A count is not objectionable by reason only that

(a) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an indictable offence the matters, acts or omissions charged in the count . . .

The effect of the corresponding sections dealing with offences punishable on summary conviction was fully considered in the reasons of this Court in *Archer v. The Queen*[1] and the effect of the sections quoted above was dealt with as follows in the unanimous judgment of this Court in *Cox* and *Paton v. The Queen*[2]. After quoting the relevant portions of ss. 492 and 500 the reasons continue:

It is clear since the judgment of this Court in *Archer v. The Queen* that these provisions do not render a count good if the words of the enactment which are adopted in framing the count describe more than one offence.

There is no difficulty in stating the applicable principle of law; if the indictment in one count charges more than one offence it is bad for duplicity. The question as to which there is room for differences of judicial opinion is whether in a particular case the words of a count describe one offence which may be committed in different modes or describe more than one offence.

In the case at bar, in order to support the submission that only one offence is charged, it is necessary to define the single offence which is committed (a) when a butcher sells parts of a perfectly healthy animal killed, for example, by being run into by a motor vehicle and therefore not "in accordance with commonly accepted practice" and, (b) when a butcher sells parts of a diseased animal.

Grant J. deals with this point as follows:

Here, as in *Gatto v. The King* (1938) S.C.R. 423, there is only one offence charged, namely, that of selling.

The difficulty I have in accepting this is that selling meat, *simpliciter,* is not an offence at all.

[1] [1955] S.C.R. 33, 20 C.R. 181, 110 C.C.C. 321, 2 D.L.R. 621.
[2] [1963] S.C.R. 500 at 517, 40 C.R. 52, 2 C.C.C. 148.

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To suggest that there is only one offence, "selling meat for food in contravention of the regulations", would be to beg the question which is whether the prohibitions as to the sale of meat for food contained in the regulations create more than one offence.

The one offence cannot be "selling meat for food which is unfit for human consumption" because as in case (a) suggested above, the flesh of an animal might be perfectly fit for human consumption but its sale nonetheless forbidden because of the manner in which it was killed.

In my opinion, Regulation B.14.010, read, as it must be to render it intelligible, with the definition of "dead animal", creates two distinct offences and I agree with Gibson C.C.J. that the indictment was void for duplicity. It follows that I would allow the appeal.

I base my judgment on the two grounds, (i) that Gibson C.C.J. was right in law in holding that the indictment was void for duplicity and (ii) that, even on the assumption that his decision was wrong in law, mandamus does not lie.

I would allow the appeal, set aside the orders of the Court of Appeal and of Grant J. and direct that the application for an order of mandamus stand dismissed. I would make no order as to costs in any Court.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Ontario made on October 18, 1963, dismissing an appeal from the order of Grant J. made on May 27, 1963. By the latter order, Grant J. had issued a mandamus requiring Gibson C.C.J. to hear and determine a charge against the appellant.

The appellant had been charged before Gibson C.C.J. on an indictment which read as follows:

> that he did, between the 9th day of August, A.D. 1961, and the 20th day of October, A.D. 1961, at the then Town of Eastview in the Province of Ontario, unlawfully sell as food dead animals or parts thereof in violation of section B.14.010 of the Food and Drug Regulations made by Order in Council P.C. 1954-1915 of the 8th December, 1954, as amended by Order in Council P.C. 1961-1097 of the 31st July, 1961, thereby committing an indictable offence contrary to paragraph (*b*) of section 25 of the Food and Drugs Act, Statutes of Canada 1952-53, Chapter 38,

On the commencement of the trial before Gibson C.C.J. counsel for the appellant raised two points of law:

(1) whether the indictment is void for duplicity, and

(2) whether the pertinent regulations were in force during the time covered by the alleged offence or offences.

Counsel later withdrew the second objection but after argument Gibson C.C.J., in written reasons, allowed the first objection and concluded his judgment with the words "the bill of indictment is, therefore, quashed".

Counsel for the appellant in this Court based his appeal upon two propositions: firstly, that mandamus does not lie when the trial judge quashes an indictment on the preliminary objection that the charge is void for duplicity, and secondly, that the charge being void for duplicity, even had Grant J. jurisdiction, he should not have allowed the mandamus.

It is my purpose in these reasons to deal only with the first ground as I am of the opinion that is sufficient to dispose of the appeal to this Court.

Counsel for the Attorney General of Ontario submits in reply to the first ground the following propositions: firstly, that mandamus, generally speaking, lies to compel the execution of a public duty where no other specific remedy for enforcing the performance of that duty exists. Secondly, that in the present case there is no other remedy available. Thirdly, that mandamus will lie to compel the trial judge to hear a case on the merits where he has wrongly declined jurisdiction on a preliminary point of law, notwithstanding that his decision therein can be judicial in character.

There can be no doubt that mandamus is an extraordinary remedy by which the superior Court may direct any inferior tribunal to do some particular thing which appertains to its duty and which it has declined to do: *The Queen et al. v. Leong Ba Chai*[1]; Halsbury, 3rd ed., vol. 2, pp. 84-5.

The writ will not issue when there is other specific remedy available: *The Queen v. Commissioners of Inland Revenue*[2], (in Re Nathan 1884). It would appear that in the present case there is no other remedy available for the reconsideration of the judgment of Gibson C.C.J. As I have said, he concluded his judgment by quashing the bill of indictment. The sole right of appeal by the Attorney-General is found in s. 584(1)(*a*) of the Code and it is

[1] [1954] S.C.R. 10, 1 D.L.R. 401. [2] (1884), 12 Q.B.D. 461.

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"against a judgment or verdict of acquittal of a trial court . . ."

In *Regina v. Leveille*[1], the accused, a married woman, although only 16 years of age, was charged with having stolen goods in her possession. When she came before the municipal court her counsel moved that she should be tried in the Social Welfare Court due to her age despite her marital status. The judge upheld the motion and declined jurisdiction. Rinfret J. at p. 99, said:

(I quote the translation from page 100):

> It is clear from the judgment of the Municipal Court judge, at p. 10 of the record, that this was not a judgment of acquittal.
>
> The consequence is unavoidable: in the circumstances the Crown has no right of appeal.

In *Rex v. Hansher and Burgess*[2], a County Court judge in general sessions quashed the indictment. The Crown appealed to the Court of Appeal. Masten J.A., at p. 74, said:

> The nature and effect of the order in question appears to be procedural merely and does not acquit the accused of the charge which stands against him and the Crown is at liberty forthwith to lay a new indictment: *R. v. Bainbridge* (1918) 30 C.C.C. 214 at 231.

The Attorney-General's difficulty is in the support of his third proposition. In *Re McLeod v. Amiro*[3], Riddell J. considered an application by way of mandamus to compel a division court judge to reopen an appeal from a police magistrate's conviction and to hear and adjudicate upon the same. When the appeal before the division court judge commenced, counsel for the appellant took objection to the information as insufficient in form and substance. No evidence was taken and the division court judge acceded to the argument of counsel for the appellant and allowed the appeal on the sole ground that the information was insufficient. At p. 234, Riddell J. said:

> It is, of course, contended in the present case that if the Court below decides on a preliminary point without going into the merits, there is no real decision on the case, and mandamus will lie.
>
> No doubt—but we must be sure that the point upon which the decision rested was preliminary in reality and not on the merits.
>
> It is in the view that what the learned judge decided was preliminary, that both the applicant and his solicitor swear that "there was no argu-

[1] (1960), 32 C.R. 98.
[2] [1940] O.R. 247, 74 C.C.C. 73, 3 D.L.R. 478.
[3] (1912), 27 O.L.R. 232, 25 C.C.C. 230, 8 D.L.R. 726.

ment before the said judge of the legal merits of the case—the only question being argued was the question of the insufficiency of the information and complaint". And it is pointed out that the Code (sec. 753) expressly provides that no judgment shall be given in favour of the applicant upon an objection to the information and complaint which objection was not taken before the magistrate. The learned Judge was, in my opinion, wrong in the view he took of the appeal (I am of course speaking only upon the material before me, and the facts may be quite different); but he has the same power to go wrong that any other Judge has.

That such a decision is not on a matter preliminary, but on the merits, is, to my mind, quite clear.

In coming to that conclusion, Riddell J. relied upon the well-known and oft-quoted case of *The Queen v. Justices of Middlesex*[1]. There, the appellant had been convicted before a metropolitan police magistrate under a charge of breach of a statute which made punishable as a rogue and vagabond "every person . . . using any subtle craft or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects". The conviction described the offence omitting the words "by palmistry or otherwise". On appeal to the Middlesex Sessions, counsel for the appellant commenced with an objection that the omission of the above words made the conviction bad. The justices after hearing the point argued retired and on their return the assistant judge gave, it was alleged contrary to the view of the majority, a decision quashing the conviction on the objection taken against it. An application was made for a mandamus but the court composed of Mellor J. and Lush J. dismissed the application. Mellor J., at p. 520, having discussed the remedy of mandamus, said:

However, they declined to adopt either course and I think they are not amenable to our control, for they have exercised their jurisdiction, and it is a cardinal rule when jurisdiction is vested in magistrates or any body of men, which they may exercise so long as they act within their authority, that however erroneously they decide, we cannot supervise their decision.

Lush J. said at p. 521:

They returned, and they found the conviction bad on the face of it. That is a decision upon the legal merits of the case. If they decided upon the merits of the appeal, the legal merits, or the merits of the matters of fact, we cannot order them to rescind that decision. We are not a Court of Appeal from decisions of the magistrates, and, however erroneously they may have decided, we have no power to interfere.

[1] (1877), 2 Q.B.D. 516.

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Those two judgments have been followed in a series of cases in the Courts throughout Canada. The judgment in *McLeod v. Amiro* has been criticized and counsel for the Attorney-General in this Court sought to distinguish it on the ground that it was an appeal while the decision of the learned county court judge in this case was at trial, but I can see no valid distinction here as despite the fact that it was an appeal the appeal took the form of a trial de novo in the *McLeod* case. Again, it is submitted, the *McLeod* case was the decision of a single judge and against the weight of authority; it was, however, the decision of Riddell J., a very great judge, and has been quoted and adopted by many courts of appeal and by this Court: *Re Ault*[1]; *Re Sigurdson*[2]; *Re R. v. Spiers*[3]; *R. v. Stacpoole*[4]; *R. v. Lebrecque et al.*[5].

Although it was decided upon consent and without argument on behalf of the accused, at p. 234 Riddell J. said: "Amiro, through his counsel, consents: and a consent is also filed signed by the learned Judge," in my view, that certainly does not lessen the authority of the decision. Counsel who applied for the grant of the mandamus was present and evidently argued it extensively. Finally, it is said that the decision was overruled by *Regina ex rel. Hickman v. Marshall*[6].

In the latter case, the accused was charged before the magistrate with a breach of s. 400 of the Air Regulations. On the opening of the accused's trial, his counsel made an objection that the charge was barred by s. 693 (2) of the Code as it had been laid more than 6 months after the time when the subject-matter of the proceedings arose. Counsel for the informant submitted that the *Aeronautics Act*, R.S.C. 1952, c. 23, providing for a 12-months' limitation was the effective provision. After hearing argument the magistrate reserved his decision, accused pleaded not guilty, and evidence was taken. The magistrate later delivered reasons that because of the Code, s. 693(2), he lacked jurisdiction to

[1] (1956), 18 W.W.R. 428, 24 C.R. 260, 115 C.C.C. 132.

[2] (1915), 25 Man. L.R. 832, 33 W.L.R. 325, 25 C.C.C. 291, 9 W.W.R. 940, 28 D.L.R. 375.

[3] (1924), 55 O.L.R. 290.

[4] (1933), 41 Man. R. 670.

[5] [1941], O.R. 10, 75 C.C.C. 117.

[6] (1960), 127 C.C.C. 76.

try the accused and he endorsed the information "no jurisdiction". The informant appealed to the county court of the County of York and his appeal was dismissed on the ground that no appeal lay. The Attorney-General for Ontario obtained leave to appeal to the Court of Appeal of Ontario and on that appeal Morden J. said at p. 79:

> The right of appeal from summary convictions is one created by statute and is of strict law, and unless such a right is clearly given, it does not exist.

And at p. 80, speaking of the judgment of Cartwright J. in this Court in *R. v. Karpinski*[1]:

> In any event in that case the magistrate did not decline jurisdiction as was done here and I am unable to equate a denial of jurisdiction with an acquittal.
>
> In view of my opinion that no appeal lay to the County Court from the Magistrate's ruling, it is unnecessary, in fact it would be improper, to decide the second question upon which leave was granted to appeal to this Court.

And at p. 81:

> If the Magistrate persists in his opinion that he has no jurisdiction, then mandamus would be the proper remedy . . .

The learned justice in appeal cited a number of cases, *inter alia, McLeod v. Amiro,* but did not indicate whether he disagreed or agreed with those decisions.

In my view, the distinction between the present case on one hand and *Regina ex rel. Hickman v. Marshall* and the many other cases cited by counsel for the Ontario Attorney-General is that in each of the latter the court declined jurisdiction and did so usually in express words. In the present case, the court accepted jurisdiction. It was an ordinary case of a trial of an indictable offence where there had been a proper commitment for trial on preliminary hearing. The trial judge, Gibson C.C.J., commenced the trial and as part of the legal merits of the case found that the indictment was void for duplicity. Therefore, the decision in *The Queen v. Justices of Middlesex* was applicable. There the justices allowed the appeal because the conviction was bad on the fact of it; as Lush J. said, "That is a decision upon the legal merits of the case". I am of the opinion that those words are

[1] [1957] S.C.R. 343, 25 C.R. 365, 117 C.C.C. 241.

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exactly applicable to the actions of Gibson C.C.J. in this case. His decision was a decision upon the legal merits. Therefore, the learned county court judge having accepted jurisdiction and acted on it, mandamus to compel him to do his duty does not lie despite the fact that Grant J. and the Court of Appeal for Ontario were of the opinion that he was in error in the performance of his duty.

As Riddell J. said in *McLeod v. Amiro* at p. 236:

> It makes no difference if the learned Judge misconstrued sec. 753 of the Code—he has the power, untrammelled by me, to make mistakes: and I can find no reason why a misconception of the meaning of a statute is any worse than a misconception of a common law principle or equitable rule.

McDonald J.A. in the British Columbia Court of Appeal said in *Rex v. Hanna & McLean*[1]:

> When a Court has entered upon a case and has given a decision, however outrageous, it seems to me impossible to say it has refused jurisdiction. To take that course is simply to sit in appeal on a tribunal and to make mandamus another form of appeal. Although, as stated above, Courts have often taken that course, I think that on the weight of authority it cannot be justified. In order to justify awarding a mandamus to a County Court Judge who has given a judgment, however absurd, the Court must say that his judgment is no judgment, but a complete nullity . . . In my opinion the County Court Judge has jurisdiction to enter upon the hearing of this appeal; he did enter upon it; he was entirely wrong I think, in the course he took, for the plain intention of the *Criminal Code* is that he ought to have tried the case on the merits. Nevertheless, I have concluded that Robertson J., for the reasons given in his judgment and on the authorities above mentioned, was right in holding that he was powerless to compel the Judge in those proceedings to do otherwise than he has done.

In that case, the respondent had been convicted by a police magistrate on the charge of dangerous driving. He appealed to the County Court judge pursuant to the provisions of the Code and when the appeal came on he moved to quash on the ground that the evidence as disclosed by the magistrate's notes did not justify the conviction. The County Court judge looked at the depositions, refused Crown's counsel the right to call witnesses and quashed the conviction on that ground.

In *Dressler v. Tallman Gravel & Sand Supply Ltd.*[2], the appellant laid an information against his employer under *The Employment Standards Act,* 1957 (Man.), c. 20, charg-

[1] (1941), 77 C.C.C. 32 at 48, 57 B.C.R. 52, 3 W.W.R. 753, 4 D.L.R. 584.
[2] [1962] S.C.R. 564, 38 C.R. 48, 39 W.W.R. 39, 34 D.L.R. (2d) 399.

ing that the respondent had unlawfully failed to pay him overtime rates. Upon the matter coming on before the magistrate for trial, he, without hearing any evidence, ordered the charges dismissed on the ground that the information was in reference to an offence which took place more than six months before the institution of proceedings and also that the information was void for duplicity. The employee appealed by way of stated case and the respondent moved in the Court of Appeal, before any hearing on the merits, to dismiss the appeal on the ground, *inter alia,* that no appeal lay and that the appellant's proper procedure was to move for mandamus. By majority decision in the Court of Appeal of Manitoba the respondent's motion was granted and the stated case quashed. On appeal to this Court, the court adopted the dissenting judgment of Tritschler J.A. in the Court of Appeal of Manitoba. Locke J. giving the judgment of the Court quoted from the judgment of the learned justice in appeal and said at p. 569:

> As to the objection that the proper procedure was not by way of stated case but by *mandamus* to compel the magistrate to exercise his jurisdiction, he pointed out that this was not the case of a magistrate declining to enter upon a hearing because he was of the opinion that he had no jurisdiction, but one in which, exercising his jurisdiction, he had dismissed the information on grounds of law which appeared to him sufficient.
>
> With these conclusions, I agree and, with the greatest respect for the contrary opinion of the learned Chief Justice of Manitoba, I consider that the motion of the respondent to dismiss or quash the stated case, as it was expressed, should have been dismissed and the questions of law, which appear to me to be clearly raised, determined.

In the present case, I am of the opinion that the learned County Court judge did not decline his jurisdiction but accepted it and that therefore no mandamus lies. To the objection that this will result in there being no way of reviewing the allegedly erroneous decision of the County Court judge, it must be pointed out that such result need not be fatal. As was said by Masten J.A. at p. 174, in *Rex v. Hansher & Burgess, supra,* the Crown is at liberty forthwith to lay a new indictment. Boyd J. in *Re Ratcliffe v. Crescent Mills & Timber Company*[1] said at p. 333:

> That the plaintiff has no right of appeal in this case under the Division Courts Act may be a defect of legislation but it does not enlarge the remedy by mandamus.

[1] (1901), 1 O.L.R. 331.

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And in High, on Extra-Ordinary Remedies, 3rd ed., at p. 186, the learned author states:

> So when a court of appellate jurisdiction has dismissed an appeal, upon the ground that the act allowing appeals in such cases was unconstitutional and void, the writ will not go to compel the court to revise its actions and to reinstate the appeal. And this is true, even though the party aggrieved may have no other remedy to review the action of the court, since the absence of another adequate or specific remedy is not of itself ground for relief by mandamus. (The underlining is my own.)

For these reasons, I would allow the appeal.

Since drafting these reasons I have had the opportunity of perusing the reasons of my brother Cartwright. I agree with his conclusion that the indictment was void for duplicity and I concur in the disposition of the appeal which he proposes.

Appeal dismissed, CARTWRIGHT *and* SPENCE JJ. *dissenting.*

Solicitors for the appellant: McMichael, Wentzell & Gautreau, Ottawa.

Solicitor for the respondent: Arthur Whealy, Ottawa.

ARMAND GAGNON .....APPELANT;

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ET

LA COMMISSION DES VALEURS MOBILIÈRES DU QUÉBEC *et al.* } INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Témoin—Interrogatoire—Faillite—Privilège de la Couronne—Intérêt public—Attestation du procureur général—Formule trop générale—La Cour peut-elle aller au-delà de cette attestation—Code de procédure civile, art. 332.

Au cours de l'interrogatoire du secrétaire de la Commission intimée devant la Cour Supérieure, Division de faillite, l'appelant, en sa qualité de syndic à la faillite de la compagnie M, tenta d'obtenir la production d'une lettre qui aurait été adressée à la Commission par une tierce personne lors d'une enquête par la Commission sur les affaires de la compagnie M. Le secrétaire refusa de déclarer si la Commission avait ou non la lettre en question, réclama le privilège de l'art. 332 du *Code de procédure civile* et à cette fin produisit une lettre du procureur général se lisant ainsi: «Il est d'intérêt public que les faits et documents recueillis au cours des enquêtes faites par la Commission ne soient pas divulgués». Le juge de première instance rejeta l'objection de la Commission, considéra qu'il appartenait au juge et non au procureur général de déterminer si l'ordre public était en jeu, et qu'à son avis tel n'était pas le cas en l'espèce. Ce jugement fut infirmé par une décision majoritaire de la Cour d'appel. L'appelant obtint permission d'appeler à cette Cour.

Arrêt: L'appel doit être maintenu, le Juge Abbott étant dissident.

Le Juge en chef Taschereau et les Juges Fauteux, Martland, Judson, Ritchie et Hall: L'article 332 relève le fonctionnaire de l'obligation imposée aux témoins de répondre et de produire des pièces ou autres choses lorsque l'ordre public est concerné. Ce privilège n'est pourtant pas absolu. Il n'est étendu aux personnes mentionnées dans l'article que si et «lorsque le procureur général atteste par un écrit en la possession du témoin, qui doit le produire, que l'ordre public est concerné dans les faits sur lesquels on désire l'interroger». L'attestation dans le cas présent ne répond pas entièrement et adéquatement aux exigences de ces prescriptions. Les questions précises auxquelles le juge de première instance a ordonné au secrétaire de répondre n'indiquent pas par elles-mêmes que l'ordre public est en jeu. De plus, dans ses termes, l'attestation n'est pas reliée aux faits sur lesquels on désire interroger le témoin, mais constitue une formule générale apte à valoir dans toutes les causes, sans égard aux faits sur lesquels on désire interroger.

Le Juge Abbott, *dissident:* L'intitulé de la lettre mentionne spécialement les procédures dans lesquelles on tenta de la faire produire. Cette lettre autorise la Commission de se prévaloir du privilège et son langage était suffisant pour désigner la «class of communications» pour laquelle

*CORAM: Le Juge en chef Taschereau et les Juges Fauteux, Abbott, Martland, Judson, Ritchie et Hall.

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le privilège peut être invoqué, selon l'expression employée dans *Duncan v. Cammell, Laird and Co.*, [1942] A.C. 624. Le secrétaire de la Commission avait donc le droit de se prévaloir du privilège de refuser de témoigner pour des raisons d'ordre public.

La jurisprudence des Cours du Québec établie depuis plus d'un siècle supporte la proposition que c'est seulement le chef du département qui est en position et qui a le droit de décider si la divulgation sera contre l'intérêt public, et qu'aucune Cour n'a le droit d'aller au-delà de cette décision. Il faudrait une raison bien grave pour justifier une interférence avec cette jurisprudence. Il n'est pas possible de trouver cette raison dans le récent jugement de la Cour d'appel en Angleterre dans *In Re Grosvenor Hotel (N° 2)*, [1964] 3 All E.R. 354.

Witness—Examination—Bankruptcy—Crown privilege—Public policy—Attorney General's certificate—No reference to specific facts—Whether invalid for vagueness—Whether Court can go behind certificate—Code of Civil Procedure, art. 332.

During the course of an examination of the secretary of the Quebec Securities Commission before the Superior Court sitting in bankruptcy, the appellant, as liquidator of company M, sought the production of a letter alleged to have been written to the Commission by A at a time when the affairs of company M were being investigated by the Commission. The secretary refused to state whether or not the Commission had such a letter, claimed the privilege provided by art. 332 of the *Code of Civil Procedure* and in support of that claim produced a letter from the Attorney General of Quebec reading: "It is of public interest that the facts and documents assembled in the course of inquiries by the Commission should not be disclosed". The trial judge rejected the objection of the Commission and held that it was for the Court and not for the Attorney General to decide if public order was concerned, and that in this case it was not. This decision was reversed by a majority judgment in the Court of Appeal. The appellant was granted leave to appeal to this Court.

Held (Abbott J. dissenting): The appeal should be allowed.

Per Taschereau C.J. and Fauteux, Martland, Judson, Ritchie and Hall JJ.: Article 332 of the *Code of Civil Procedure* exempts public officials from the duty to testify and produce documents where public order is involved, provided that the Attorney General's certificate states that this is so in relation to the particular facts in issue. The certificate in this case did not satisfy that requirement. The precise questions which the witness was ordered to answer did not indicate by themselves that public order was concerned. Furthermore, the certificate was not related to the particular facts on which the appellant wished to examine the secretary, but constituted a general formula capable of serving in all cases, regardless of the facts.

Per Abbott J., *dissenting:* The heading of the letter specified the legal proceedings in which the production of documents was being sought. The letter authorized the Commission to invoke the privilege and its language was sufficient to designate a "class of communications" for which the privilege could be claimed, as that term was used in *Duncan v. Cammell, Laird and Co.*, [1942] A.C. 624. The secretary of the Commission was therefore entitled to claim the privilege of refusing to testify on grounds of public policy.

The jurisprudence of the Quebec Courts established now for more than a century supports the contention that it is only the head of a Department of State who is in a position and who has the right to decide whether the disclosure will be against the public interest, and that no Court has the right to go behind that decision. It would require a very compelling reason to warrant any interference with that jurisprudence. It is not possible to find that reason in the recent decision of the Court of Appeal in England in *In Re Grosvenor Hotel (No. 2)*, [1964] 3 All E.R. 354.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec, infirmant un jugement du Juge Hannen. Appel maintenu, le Juge Abbott étant dissident.

Claude Beauchemin, pour l'appelant.

C. A. Geoffrion, C.R., pour l'intimée.

Le jugement du Juge en chef Taschereau et des Juges Fauteux, Martland, Judson, Ritchie et Hall fut rendu par

LE JUGE FAUTEUX:—L'appelant, ès-qualité de syndic à la faillite de Mercédès Exploration Co. Ltd., ci-après appelée la Compagnie, a produit entre les mains de H. B. Savage, syndic à la faillite de la succession de feu J.-Antoine Mercier, ci-devant vice-président de la Compagnie, une réclamation relative à une somme d'environ $45,000 en espèces contenues dans un coffret de sûreté à la Mercantile Bank of Canada. Savage décida de rejeter cette réclamation et Gagnon s'adressa à la Cour supérieure, Division de Faillite, pour faire reviser cette décision.

Aux fins d'établir le bien-fondé de sa demande, Gagnon requit et obtint de la Cour une ordonnance autorisant l'interrogatoire du secrétaire de la Commission intimée et lui enjoignant de produire certains documents en la possession de la Commission qui avait fait enquête sur les affaires de la Compagnie et arrêté la libre disposition de ces argents. Celui-ci, obtempérant à cette ordonnance, fut entendu comme témoin et produisit certains documents. Au cours de son interrogatoire, il refusa cependant de répondre lorsqu'on lui demanda si la Commission avait en sa possession l'original ou un photostat d'une lettre, datée le ou vers le 25 février 1958, à elle adressée et signée par Gilbert Ayers, président de la Compagnie. Dans cette lettre, Ayers aurait déclaré qu'il opérait les fonds contenus dans ce coffret comme fonds corporatifs de la Compagnie et aurait demandé à la Commission la libération de ces argents. Devant ce

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refus, Gagnon fit une requête formelle pour obtenir de la Cour une ordonnance enjoignant au secrétaire de la Commission de répondre à la question ci-dessus et, dans l'éventualité d'une réponse affirmative, de produire la lettre et relater les circonstances en entourant la remise à la Commission. La Commission fit objection à cette demande et, à ces fins, son secrétaire produisit une lettre du Procureur Général, adressée au Président de la Commission des Valeurs Mobilières du Québec, et ainsi libellée:

Ministère du Procureur Général
Province de Québec

Dossier n° 5388-62

Montréal, P.Q.
le 12 février 1963

Me Maurice Désy, c.r.,
Président,
Commission des Valeurs Mobilières du Québec,
625 ouest, Boul. Dorchester,
Montréal 2.

RE: C.S., district de Montréal, n° 2213/1962
(en faillite)

La Succession de feu J. Antoine Mercier,
Failli

—et—

H. B. Savage, Syndic

—et—

Armand Gagnon, ès qualité, liquidateur de
Mercédès Exploration Co. Ltd., réclamant-
requérant

—et—

La Commission des Valeurs Mobilières du
Québec, intimée

—et—

William J. Wall et al., mis en cause

Cher monsieur,

Il est d'intérêt public que les faits et documents recueillis au cours des enquêtes faites par la Commission des Valeurs Mobilières du Québec ne soient pas divulgués.

Vous êtes en conséquence autorisé à vous prévaloir des dispositions de l'article 332 du Code de Procédure Civile de la Province de Québec, amendé par 6-7 Elisabeth II, chapitre 43, article 2.

Veuillez me croire
Votre tout dévoué,
Le Procureur Général
Georges Emile Lapalme.

L'article 332 du *Code de procédure civile,* tel qu'amendé par l'addition du second paragraphe pour assurer aux personnes y indiquées, et ce aux conditions y prescrites, le bénéfice

d'une exception à l'obligation généralement imposée aux témoins, se lit comme suit:

> 332. Il ne peut être contraint de déclarer ce qui lui a été révélé confidentiellement à raison de son caractère professionnel comme aviseur religieux ou légal, ou comme fonctionnaire de l'Etat lorsque l'ordre public y est concerné.
>
> Il en est de même à l'égard d'un membre, officier ou employé d'une commission, d'un office ou d'un autre organisme dont les membres sont nommés par le lieutenant-gouverneur en conseil, lorsque le procureur général ou le solliciteur général de la province atteste, par un écrit en la possession du témoin, qui doit le produire, que l'ordre public est concerné dans les faits sur lesquels on désire l'interroger.

La requête de Gagnon fut prise en délibéré pour être éventuellement accordée le 11 mars 1963. En substance, le Juge de première instance considéra que bien que l'art. 332 C.P.C. s'appliquait aux procédures faites sous l'empire de la *Loi de Faillite,* il appartenait au Juge et non au Procureur Général de déterminer, en dernière analyse, si l'ordre public était en jeu et qu'à son avis, tel n'était pas le cas en l'espèce.

Porté en appel, ce jugement fut infirmé par une décision majoritaire rendue le 16 décembre 1963. MM. les Juges Taschereau et Badeaux, de la majorité, exprimèrent l'avis, à l'instar du Juge de première instance, que l'art. 332 C.P.C. s'appliquait aux procédures en matière de faillite. Ils jugèrent, cependant, qu'au regard des dispositions de l'article, des principes énoncés dans *Duncan et al v. Cammell, Laird & Co. Ltd.*[1],—qu'ils distinguèrent de *Regina v. Snider*[2],—et de la lettre ci-dessus du Procureur Général, l'objection de la Commission aurait dû être accueillie. Dissident, M. le Juge Hyde exprima l'avis que la formule utilisée par le Procureur Général pour soumettre l'objection à la preuve est trop générale, ne répond pas aux exigences de l'art. 332 C.P.C. et, partant, ineffective pour valider l'objection.

L'appelant a demandé et obtenu la permission d'appeler à cette Cour de cette décision majoritaire de la Cour du banc de la reine.

La question qui nous est soumise met en regard, en matière de preuve, un principe et l'une des exceptions à ce principe. L'article 330 C.P.C. prescrit que le témoin qui, sans raison valable, refuse de répondre ou de produire des pièces ou autres choses en sa possession concernant le litige

[1] [1942] A.C. 624.

[2] [1954] R.C.S. 479, 54 D.T.C. 1129, [1954] C.T.C. 255, 109 C.C.C. 193.

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peut y être contraint par corps. Ces dispositions confirment et sanctionnent avec une sévérité adéquate et nécessaire une règle d'application générale dont l'observance est essentielle à l'administration de la justice. Apportant des exceptions à cette règle, le premier alinéa de l'art. 332 C.P.C. relève particulièrement de l'obligation imposée au témoin le fonctionnaire de l'État, lorsque l'ordre public est concerné. On reconnaît, par cette exception, la primauté de l'intérêt de l'État lorsque cet intérêt et celui du justiciable sont en conflit. Le second alinéa de cet art. 332 étend le bénéfice de ce privilège, communément désigné «Crown privilege», aux personnes y mentionnées et aux conditions y prescrites.

Ce privilège de la Couronne n'est pourtant pas absolu, en ce sens que le droit et la façon de l'invoquer, aussi bien que la validité de son exercice, demeurent sujets à des prescriptions que précise la jurisprudence. Dans *Duncan et al. v. Cammell, Laird & Co. Ltd., supra,* la Chambre des Lords, après avoir noté que l'ordre public pouvait être concerné en raison du contenu du document ou de la catégorie dont il fait partie, a jugé qu'il était essentiel que la décision ministérielle de faire objection à la production soit prise par le Ministre, chef politique du Ministère concerné, après qu'il ait lui-même vu et considéré le document et formé personnellement l'opinion que sa production serait, pour un motif apparaissant suffisamment à l'objection, nuisible à l'ordre public. Par ailleurs et dans la même cause, on a déclaré qu'une objection ministérielle validement formulée n'était pas sujette à revision par le pouvoir judiciaire; toutefois, cette déclaration, subséquemment considérée comme *obiter dictum* a été rejetée comme mal fondée dans une décision récente de la Cour d'Appel en Angleterre, soit dans *In re Grosvenor Hotel, (No. 2)*[1]. La décision de première instance en cette cause est rapportée à (No. 2) [1964] 2 All E.R. 674 et celle de la Cour d'Appel[2] dans le Times du vendredi, 31 juillet 1964, p. 7. Ajoutons que, bien que les parties au litige se soient jointes dans une demande de permission d'appeler à la Chambre des Lords, cette permission fut refusée. En substance, le Maître du Rôle, avec le concours de ses collègues, a rappelé que ce sont les juges qui sont les gardiens de la justice et, a-t-il ajouté, si la confiance qu'on met en eux a un sens et doit avoir une portée, ils doivent pouvoir raisonnablement s'assurer que l'intérêt de l'État l'emporte

[1] [1964] 2 All E.R. 674. [2] [1964] 3 All E.R. 354.

sur celui du justiciable, ou à tout le moins que l'objection ministérielle n'est pas déraisonnable comme c'est le cas, évidemment, lorsqu'il s'agit, par exemple, de documents concernant des secrets militaires, échanges diplomatiques, «cabinet papers» ou décisions politiques prises en haut lieu. Sans doute, les juges useront-ils d'une grande prudence et hésiteront-ils avant d'exercer ce pouvoir résiduaire de revision: mais le fait que celui-ci leur est attribué implique nécessairement que, si rares qu'ils soient, il se présentera des cas où naîtra le devoir de l'exercer. Et il va de soi que, dans chaque cas, varieront les faits invoqués pour le justifier; chacun devant être jugé à son mérite.

Dans le cas qui nous occupe, il faut retenir avec ces principes généraux concernant le privilège de la Couronne, que les dispositions particulières du deuxième alinéa de l'art. 332 n'étendent ce privilège aux personnes y mentionnées que si et «lorsque le Procureur Général ou le Solliciteur Général de la province atteste par un écrit en la possession du témoin, qui doit le produire, que l'ordre public est concerné *dans les faits sur lesquels on désire l'interroger*». A mon avis—et ceci me dispense de considérer toute autre question—l'attestation écrite donnée par le Procureur Général qui invoque l'exception à la règle ne répond pas entièrement et adéquatement aux exigences des prescriptions ci-dessus. Partageant l'opinion de M. le Juge Hyde, je dirais que les questions précises auxquelles le Juge de première instance a ordonné au Secrétaire de la Commission de répondre, n'indiquent pas par elles-mêmes que l'ordre public soit en jeu et, comme le savant Juge, je suis d'avis que, dans ses termes, l'attestation du Procureur Général n'est pas reliée, comme elle doit l'être pour satisfaire à la condition donnant droit au privilège, aux faits sur lesquels on désire interroger le témoin, mais constitue une formule générale apte à valoir dans toutes causes, sans égard aux faits sur lesquels on désire interroger le témoin.

Je maintiendrais l'appel, infirmerais le jugement de la Cour du banc de la reine, rétablirais le dispositif du jugement de première instance; avec dépens en cette Cour et en Cour du banc de la reine.

ABBOTT J. (*dissenting*):—The material facts in this appeal, which are not in dispute, are fully set out in the reasons of my brother Fauteux which I have had the advantage of considering.

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During the course of an examination of the Secretary of the Quebec Securities Commission before the Superior Court sitting in bankruptcy, the appellant, as liquidator of a mining company Mercedes Exploration Co. Ltd., sought the production of a letter alleged to have been written to the Commission on February 25, 1958, by one Gilbert Ayers, when the affairs of the said mining company were being investigated by the Commission.

The Secretary of the Commission refused to state whether or not the Commission had such a letter in its possession, claimed the privilege provided for under art. 332 of the *Code of Civil Procedure,* and in support of that claim produced and filed a letter dated February 12, 1963, signed by the Attorney General of Quebec. That letter read as follows:

Ministère du Procureur Général
Province de Québec

Dossier n° 5388-62

Montréal, P.Q.
le 12 février 1963.

M° Maurice Désy, c.r.,
Président,
Commission des Valeurs Mobilières du Québec
625 ouest, Boul. Dorchester
Montréal 2.

RE: C.S., district de Montréal, n° 2213/1962
(en faillite)
La Succession de feu J. Antoine Mercier,
Failli

—et—

H. B. Savage, Syndic

—et—

Armand Gagnon, ès qualité, liquidateur de
Mercédès Exploration Co. Ltd., réclamant-
requérant

—et—

La Commission des Valeurs Mobilières du
Québec, intimée

—et—

William J. Wall et al., mis en cause

Cher monsieur,

Il est d'intérêt public que les faits et documents recueillis au cours des enquêtes faites par la Commission des Valeurs Mobilières du Québec ne soient pas divulgués.

Vous êtes en conséquence autorisé à vous prévaloir des dispositions de l'article 332 du Code de Procédure Civile de la Province de Québec, amendé par 6-7 Elisabeth II, chapitre 43, article 2.

Veuillez me croire,
Votre tout dévoué,
Le Procureur Général,
Georges-Émile Lapalme.

The learned trial judge sitting in bankruptcy, held that in the circumstances the Commission was not entitled to invoke the privilege which it had claimed. That judgment was reversed by the Court of Queen's Bench, Mr. Justice Hyde dissenting. The present appeal, by leave, is from that judgment. It raises two questions both relating to the interpretation and effect of art. 332 C.C.P. which reads:

> 332. He cannot be compelled to declare what has been revealed to him confidentially in his professional character as religious or legal adviser, or as an officer of state where public policy is concerned.
>
> The same shall apply to any member, officer or employee of a commission, board or other body the members of which are appointed by the Lieutenant-Governor in Council, whenever the Attorney General or Solicitor-General of the Province certifies, by a writing in the possession of the witness, who must produce the same, that public order is involved in the facts concerning which it is desired to examine him.

The second paragraph of this article was added in 1958 by the statue 6-7 Eliz. II, c. 43. It extends to certain Crown agencies the privilege, which may be claimed by an "officer of state", of refusing to give evidence or produce documents on grounds of public policy. It also prescribes the authorization which the member or officer of such Crown agency must possess in order to claim the privilege.

Article 332 C.C.P. (then art. 275) was contained in the *Code of Civil Procedure* of 1867. It was retained in the revision of 1897 as art. 332. As I have said the second paragraph was added in 1958 but it does not appear to have introduced any new principle.

The two questions, to which I have referred, are these:

1. Was the Secretary of the Commission, in virtue of the letter signed by the Attorney General, entitled to claim the privilege, provided for under art. 332 C.C.P., of refusing to testify on grounds of public policy?
2. If his objection was validly taken, should the judge have treated it as conclusive?

As to the first of these questions, the letter of February 12, 1963, is signed by one of the ministers specified in art. 332. It is addressed to the President of the Quebec Securities Commission which is a Crown agency coming under the provisions of this article. The heading of the letter specifies the legal proceedings in which the production of documents was being sought and its authorizes the Commission to invoke the privilege provided for in the said article.

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The basis upon which the privilege was claimed is contained in the first paragraphs of the letter which reads:

> Il est d'intérêt public que les faits et documents recueillis au cours des enquêtes faites par la Commission des Valeurs Mobilières du Québec ne soient pas divulgués.

Hyde J. in the Court below considered this letter insufficient as being too general in its terms and said: "I consider that if the witness is to be excused from compliance with the order the certificate must state categorically 'that public order is involved in the facts concerning which it is desired to examine him'." His dissenting opinion was based upon this ground.

The letter of the Attorney General claimed the privilege with respect to "documents recueillis au cours des enquêtes faites par la Commission des Valeurs Mobilières du Québec". It seems to me that this language is sufficient to designate a "class of communications" for which privilege can be claimed, as that term was used by Viscount Simon in the *Cammell Laird* case[1]. The letter the production of which was sought falls within that class. On the whole, therefore, and with deference to those who hold the opposite view I am of opinion that the letter of the Attorney General entitled the Secretary of the Commission to claim the privilege of refusing to testify on grounds of public policy.

As to the second question, the principle enunciated in art. 332 C.C.P. appears to have been first considered by the Court of Queen's Bench of Lower Canada in *Gugy v. Maguire*[2]. In the opening paragraphs of his notes Meredith J., as he then was, says at p. 51:

> The Judges of this Court are all, I believe, agreed in the opinion, that the Head of a Department of state cannot be compelled, at the instance of a private suitor, to produce an official document in his custody, when the production of the document would, on grounds of public policy, be inexpedient.
>
> The question then arises: with whom does it rest to determine whether the production of a particular document is, on such general grounds, inexpedient?—The majority of the Court hold that the Head of the Department having official custody of the paper is necessarily the proper person to determine the question, while one of the members of the Court (M. Justice Mondelet) maintains that it must be determined by the judge.
>
> The general principles of law as well as the decisions of the Courts, both in England and the United States appears to me to be entirely in favour of the opinion of the majority of the Court.

[1] [1942] A.C. 624 at 635-6. [2] (1863), 13 L.C.R. 33.

He then proceeded to review the cases bearing on the question which had been decided in England and the United States, including *Beatson v. Skene*[1], which is referred to by Viscount Simon in the *Cammell Laird* case, and which had been decided in 1860 some three years before. In his work "De la Preuve" Judge Langelier, relying upon the authority of the *Gugy* case, says at p. 351:

> 840. Mais à qui appartient-il de décider si la déclaration qu'on voudrait obtenir d'un fonctionnaire est contre l'intérêt public? C'est au fonctionnaire lui-même et non au juge.

Article 332 C.C.P. was next considered by the Court of Queen's Bench in *Minister of National Revenue et al v. Die-Plast Co. Ltd. et al.*[2] Casey J. delivered the principal reasons for judgment in which the other members of the Court concurred. After quoting the statement of Meredith J. in the *Gugy* case to which I have referred, Casey J. says at p. 349:

> Since the decision in the *Gugy* case there have been others in the same sense. *Alain v. Belleau* (1897) 1 P.R. 98; *Hébert v. Latour* (1914), 15 P.R. 5; *Rheault v. Landry* (1919), 55 S.C. 1, 20 P.R. 187, and *Boyer v. Boyer* (1946) P.R. 174.
>
> It appears to me that these decisions constitute a jurisprudence which supports the contention that it is only the head of a Department of State who is in a position and who has the right to decide whether the disclosure will be against the public interest, and the further proposition that no Court has the right to go behind the decision—in this case—of the Minister of National Revenue. It would require a very compelling reason to warrant any interference with this jurisprudence and to justify an opinion contrary to that expressed in these decisions. Neither in the judgment *a quo* nor elsewhere have I been able to find such a reason.

These decisions were not questioned in the Court below, Hyde J. basing his dissent solely upon the ground that objection had not been taken in the proper form.

Article 332 C.C.P. does not appear to have been considered previously by this Court. I agree with Casey J. however, that it would require a very compelling reason to warrant any interference with this jurisprudence of the Quebec courts established now for more than a century. With respect I cannot find that reason in the recent decision of the Court of Appeal in England in *In re Grosvenor Hotel* (No. 2)[3] which is referred to by my brother Fauteux in his reasons.

[1] (1860), 5 H. & N. 838, 29 L.J. Ex. 430, 2 L.T. 378, 157 E.R. 1415.
[2] [1952] Que. Q.B. 342, 32 C.B.R. 241, [1952] C.T.C. 175, 2 D.L.R. 808.
[3] [1964] 2 All E.R. 674; [1964] 3 All E.R. 354.

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This view of the effect of the art. 332 C.C.P. certainly gives to a Minister of the Crown far-reaching power. It may well be that this is out of line with modern day conditions, as to which of course I express no opinion. If that be so, I think the remedy must be sought elsewhere than in the Courts.

I would dismiss the appeal with costs.

Appel maintenu avec dépens, LE JUGE ABBOTT *étant dissident.*

Procureur de l'appelant: C. Beauchemin, Montréal.

Procureurs de l'intimée: Geoffrion & Prud'Homme, Montréal.

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*Oct. 19
Nov. 9

THE DEPUTY ATTORNEY GENERAL OF CANADA ..... APPLICANT;

AND

ERIC BROWN ..... RESPONDENT.

MOTIONS FOR LEAVE TO APPEAL

Appeals—Jurisdiction—Taxation—Income tax—Seizure of solicitor's trust accounts books and records—Whether subject to solicitor-client privilege—Motion for leave to appeal—Supreme Court Act, R.S.C. 1952, c. 259, s. 41—Income Tax Act, R.S.C. 1952, c. 148, s. 126A.

In August 1962, in the course of making a "spot check" of lawyers' records, the Minister asked for permission to examine the respondent's trust account books and records. The apparent purpose of such examination related to the respondent's own return of income and not to the returns of any of his clients, and it was not inspired by any suggestion of improper conduct on his part. The permission was refused on the ground that a solicitor and client privilege existed. There was no waiver by any of the clients of their privilege. The procedure laid down in s. 126A of the *Income Tax Act,* R.S.C. 1952, c. 148, was followed, and the books and records were seized, sealed and placed in the custody of the sheriff. The respondent then applied to the Supreme Court of British Columbia for the determination of the question whether his clients had a solicitor-client privilege in respect of those books and records. The Court ruled that such a privilege did exist in respect of all the documents and they were ordered returned to the respondent. An appeal from this decision was quashed by the Court of Appeal for lack of jurisdiction. The Deputy Attorney General then applied to this Court for leave to appeal from the trial judge's order and, alternatively, for leave to appeal the decision of the Court of Appeal.

*PRESENT: Cartwright, Martland and Ritchie JJ.

Held: Both applications should be dismissed.

Section 126A of the *Income Tax Act* was a complete code in itself for deciding the question of solicitor-client privilege relative to documents of a client in the possession of a solicitor. The section, which contains no provision for an appeal, contemplates a speedy determination of the issue of the claim of privilege and thereafter a prompt delivery of possession of the document involved, either to the solicitor or to the officer of the Department. Once that has been done the whole matter has not only been determined, but completed and any order which could be made on an appeal, assuming that an appeal lies, could not have a direct and immediate practical effect, as the document would no longer be in the hands of the custodian. If the order directed delivery to the officer, he would, by the time the appeal was heard, have had the opportunity to inspect it. If delivery was ordered to be made to the solicitor, the Act contains no provision requiring him to surrender it again to the officer or to the custodian.

APPLICATIONS by the Crown for leave to appeal from a judgment of Sullivan J. of the Supreme Court of British Columbia,[1] and from a judgment of the Court of Appeal for British Columbia.[2] Applications dismissed.

D. S. Maxwell, Q.C., for the applicant.

C. C. Locke, Q.C. for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—Two applications have been made by the Deputy Attorney General of Canada (hereinafter referred to as "the applicant") for leave to appeal to this Court, pursuant to s. 41 of the *Supreme Court Act*.

The respondent, Eric Brown, is a barrister and solicitor, practising his profession in the City of Vancouver. On August 24, 1962, an officer of the Department of National Revenue attended at his office and asked him for permission to examine his trust account books and records kept by him. The apparent purpose of such examination related to the respondent's own return of income and not to the returns of any of his clients.

It should be stated at the outset that it is clear that the respondent is a barrister and solicitor in good standing and of high repute and that the proposed examination was not inspired by any suggestion of improper conduct on his part, but was to be made in the course of what both counsel described as a "spot check" of lawyers' records.

After considering the request, the respondent refused permission, on the ground that his clients had a solicitor

[1] [1963] C.T.C. 1, 62 D.T.C. 1331. [2] (1964), 64 D.T.C. 5107.

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and client privilege in respect of those books and records. The officer thereupon seized the documents in question, placed them in a sealed package, which was marked for identification, and then delivered them into the custody of the sheriff of the County of Vancouver.

On September 5, 1962, the respondent applied, pursuant to the provisions of s. 126A of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended, for the determination of the question whether the clients had a solicitor and client privilege in respect of the documents which had been seized. He also communicated to the Minister of National Revenue, as he was required to do by subs. (14) of that section, the names and addresses of the clients last known to him in respect of whom the privilege had been claimed. This list contained the names and addresses of all the respondent's clients for whom he held funds in trust.

The Minister did not communicate with any of the persons whose names were contained in the list to advise that a claim of privilege had been made on his behalf and to afford an opportunity of waiving the privilege as contemplated by subs. (14). The reason was the highly laudable one that such a communication, addressed to each of the respondent's clients for whom he held trust funds, would, in all likelihood, have had a serious effect upon the respondent's standing with his clients. In the result, however, none of the respondent's clients was aware of a claim of privilege having been made on his behalf, unless the respondent communicated with them, as to which there is no evidence before us.

The matter came on for hearing before Sullivan J., who held that a solicitor and client privilege did exist in respect of all the documents in question and who ordered, pursuant to subs. (5)(*b*)(i) of s. 126A, that the sealed package be delivered by the sheriff to the respondent forthwith. The learned judge found that the privilege existed with respect to all of the contents of the respondent's trust account books and records and he did not deem it necessary, in the light of the evidence adduced at the hearing, to inspect them.

Application for leave to appeal from the order[1] of Sullivan J., which was made on September 24, 1962, was made to this Court by notice filed on December 6, 1962.

[1] [1963] C.T.C. 1, 62 D.T.C. 1331.

Upon it appearing that an appeal had been taken from the order to the Court of Appeal of British Columbia, that application was adjourned. Thereafter the Court of Appeal[1], upon a motion to quash the appeal launched by the respondent, quashed the appeal, on the ground that the Court did not have jurisdiction to entertain the appeal, it being the view of the majority that in hearing the application Sullivan J. was acting as *persona designata* and there was no statutory provision for any appeal from his decision.

The applicant has now renewed its application for leave to appeal from the decision of Sullivan J., as being a decision of the "highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed", within the wording of s. 41 of the *Supreme Court Act*. Alternatively, the applicant now seeks leave to appeal from the decision of the Court of Appeal of British Columbia that it did not have jurisdiction to hear an appeal from the order of Sullivan J.

In so far as the latter application is concerned, despite the fact that the application for leave has been made, counsel for both parties submitted that no appeal did lie to the Court of Appeal of British Columbia because, this being a statute enacted by the Federal Parliament, a right of appeal to the Court of Appeal of British Columbia could only have been given by the terms of a Federal statute and no such right had been provided. Whether or not that submission is sound was not determined in the Court of Appeal of British Columbia, which reached its decision for different reasons, and, for the reasons hereinafter given, I do not think it is necessary to decide it here.

Section 125 of the *Income Tax Act* requires every person carrying on a business and every taxpayer to keep proper books and records of account. Section 126 enables a person, authorized by the Minister of National Revenue, to examine the books and records and any account, voucher, letter, telegram or other document which relates, or may relate, to information that is, or should be, in the books or records, or the amount of tax payable under the Act.

Section 126A was enacted in 1956, by c. 39 of the Statutes of Canada of that year, and it deals with documents which are in the possession of a solicitor for which he claims a solicitor and client privilege. The extent of that privilege

[1] (1964), 64 D.T.C. 5107.

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depends upon the law of the province in which the document is situated. The section provides for the placing of the documents, in a sealed package, in the possession of a custodian and for a speedy reference of the issue, as to the existence of the privilege claimed, to a judge of a superior court having jurisdiction in the province where the matter arises, or to a judge of the Exchequer Court of Canada.

The judge who hears the application must hear it in camera and he is required to deal with it summarily. He is further required to order either that the document in question be delivered by the custodian to the solicitor, if he holds that a privilege exists, or be delivered to an officer, or a person designated by the Deputy Minister of National Revenue for Taxation, if he holds that a privilege does not exist.

The section contemplates, not only a decision as to the existence of a solicitor and client privilege, but also a disposition of the custody of the document involved, in accordance with that decision.

The section contains no provision for an appeal.

The relevant provisions of s. 126A are as follows:

126A. (1) In this section

* * *

(*b*) "custodian" means a person in whose custody a package is placed pursuant to subsection (3);

* * *

(*e*) "solicitor-client privilege" means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between him and his lawyer in professional confidence.

* * *

(3) Where an officer is about to examine or seize a document in the possession of a lawyer and the lawyer claims that a named client of his has a solicitor-client privilege in respect of that document, the officer shall, without examining or making copies of the document,

(*a*) seize the document and place it, together with any other document in respect of which the lawyer at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package; and

(*b*) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if the officer and the lawyer agree in writing upon a person to act as custodian, in the custody of such person.

(4) Where a document has been seized and placed in custody under subsection (3), the client, or the lawyer on behalf of the client, may

(*a*) within 14 days from the day the document was so placed in custody, apply, upon 3 days' notice of motion to the Deputy Attorney General of Canada, to a judge for an order

(i) fixing a day (not later than 21 days after the date of the order) and place for the determination of the question whether the client has a solicitor-client privilege in respect of the document, and

(ii) requiring the custodian to produce the document to the judge at that time and place;

(*b*) serve a copy of the order on the Deputy Attorney General of Canada and the custodian within 6 days of the day on which it was made, and, within the same time, pay to the custodian the estimated expenses of transporting the document to and from the place of hearing and of safeguarding it; and

(*c*) if he has proceeded as authorized by paragraph (*b*), apply, at the appointed time and place, for an order determining the question.

(5) An application under paragraph (*c*) of subsection (4) shall be heard *in camera,* and on the application

(*a*) the judge may, if he considers it necessary to determine the question, inspect the document and, if he does so, he shall ensure that it is repackaged and resealed; and

(*b*) the judge shall decide the matter summarily and,

(i) if he is of opinion that the client has a solicitor-client privilege in respect of the document, shall order the custodian to deliver the document to the lawyer, and

(ii) if he is of opinion that the client does not have a solicitor-client privilege in respect of the document, shall order the custodian to deliver the document to the officer or some other person designated by the Deputy Minister of National Revenue for Taxation,

and he shall, at the same time, deliver concise reasons in which he shall describe the nature of the document without divulging the details thereof.

* * *

(7) The custodian shall

(*a*) deliver the document to the lawyer

(i) in accordance with a consent executed by the officer or by or on behalf of the Deputy Attorney General of Canada or the Deputy Minister of National Revenue for Taxation, or

(ii) in accordance with an order of a judge under this section; or

(*b*) deliver the document to the officer or some other person designated by the Deputy Minister of National Revenue for Taxation

(i) in accordance with a consent executed by the lawyer or the client, or

(ii) in accordance with an order of a judge under this section.

* * *

(11) The custodian shall not deliver a document to any person except in accordance with an order of a judge or a consent under this section or except to any officer or servant of the custodian for the purposes of safeguarding the document.

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(14) Where a lawyer has, for the purpose of subsection (2) or (3), made a claim that a named client of his has a solicitor-client privilege in respect of information or a document, he shall at the same time communicate to the Minister or some person duly authorized to act for the Minister the address of the client last known to him so that the Minister may endeavour to advise the client of the claim of privilege that has been made on his behalf and may thereby afford him an opportunity, if it is practicable within the time limited by this section, of waiving the claim of privilege before the matter comes on to be decided by a judge or other tribunal.

I agree with the view expressed by Lord J.A., in the Court of Appeal, that, in cases to which the section is applicable,

> Section 126A is a complete code in itself for deciding the question of solicitor-client privilege relative to documents of a client in the possession of a solicitor.

It is, of course, clear that the privilege involved is that of the client and not the solicitor and the application to a judge for which the section provides may be made by the client, or by the lawyer on his behalf.

The section contemplates a speedy determination of the issue of the claim of privilege and thereafter a prompt delivery of possession of the document involved, either to the solicitor or to the officer of the Department. It seems to me that once that has been done the whole matter has been not only determined, but completed, and that any order which could be made on an appeal (assuming that an appeal lies) could not have a "direct and immediate practical effect", to use the words of Chief Justice Duff in *The King on the Relation of Tolfree v. Clark*[1]. The document in question would no longer be in the hands of the custodian. If the order appealed from directed delivery to the departmental officer, he would, by the time the appeal was heard, have had his opportunity to inspect the document. If the order appealed from directed delivery to the solicitor, the Act contains no provision which would require him, after the document has been restored to him, to surrender it again to the departmental officer or to the custodian.

We were advised that in the present case, following the delivery of the documents to the solicitor, pursuant to the order of Sullivan J., they were voluntarily returned to the

[1] [1944] S.C.R. 69 at 72, 1 D.L.R. 495.

custody of the sheriff, pending an appeal, but I do not see how such a voluntary delivery can clothe the Appellate Court with power to make a new direction regarding their disposition. They are no longer in the hands of the custodian, pursuant to subs. (3). Furthermore, the custodian, under subs. (7), is obligated to deliver the document only upon a consent, or in accordance with the order of a judge under the section.

In the light of the foregoing, and assuming, without deciding, that this is a case in which an appeal could be brought to this Court, I do not think that it is one in which leave should be granted.

Assuming that the appeal were to be heard, the only issue which could be determined would be as to whether the learned judge was right in holding that the respondent was properly entitled to claim, on behalf of his clients generally, a solicitor and client privilege in respect of all his trust account records. Assuming that this Court did not agree that all such records, per se, were necessarily privileged from production, this would not finally determine the matter. It is each individual client who possesses a privilege, if one exists. Circumstances may vary and the position of each client who desired to claim privilege would still require to be considered. The order which this Court would have to make in such event would be that the position of each client of the respondent, who did not waive a claim to privilege, be examined separately and so the matter would be back practically where it started, more than two years after it began.

In so far as granting leave to appeal from the Court of Appeal of British Columbia is concerned, as previously mentioned, neither counsel contended that an appeal did lie to that Court. If leave were to be granted to appeal from the decision of the Court of Appeal, even if we were to reach the conclusion, on the appeal, that an appeal did lie to the Court of Appeal, the matter would then have to be referred back to that Court to hear the appeal upon the merits. Even if that appeal were to succeed, the Court of Appeal would be faced with the same problems in formulating an order as those which I have already outlined.

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For these reasons, in my opinion, this is not a proper case for the granting of leave to appeal to this Court and I would dismiss both applications with costs.

Applications dismissed with costs.

Solicitor for the applicant: E. A. Driedger, Ottawa.

Solicitors for the respondent: Ladner, Downs, Ladner, Locke, Clark & Lenox, Vancouver.

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*May 14, 15
19
Oct. 6

CANADIAN SUPERIOR OIL OF CALIFORNIA, LTD. (*Plaintiff*) .. } APPELLANT;

AND

EDWARD KANSTRUP AND SCURRY-RAINBOW OIL LTD. (*Defendants*) } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Mines and minerals—Petroleum and natural gas lease—Ten year term and as long thereafter as oil or gas produced from leased land—Where gas from gas well not sold or used royalty payment to extend lease as if gas being produced—Subsequent amendment of lease providing for pooling to establish spacing unit—Well drilled on pooled lands capped because of lack of market—Royalty paid after expiry of ten year term—Whether lease continued beyond expiration of primary term.

By a petroleum and natural gas lease, dated July 2, 1948, the respondent K leased the north west quarter of a certain section of land to the appellant. It was provided by cl. 2 that the lease was to be for a term of 10 years and "as long thereafter as oil, gas or other mineral is produced from said land hereunder . . ." It was further provided by cl. 3(b) that where gas from a well producing gas only was not sold or used, the appellant might pay as royalty $100 per well per year and, if it did so, it would be considered that gas was being produced within the meaning of cl. 2. The appellant filed a caveat against the land covered by the lease on July 6, 1948. In 1952 the lessor entered into a royalty trust agreement with Prudential Trust Co. as trustee, under which he assigned to the trustee a percentage of the gross royalty or share of production from any well or wells that might be drilled upon any part of the north west quarter, to be held and distributed by the trustee pursuant to the terms of the agreement.

At all times material since July 2, 1952, the relevant orders and regulations prescribed a spacing unit for a gas well as 640 acres, with power to the Oil and Gas Conservation Board, in a case in which, in its

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

opinion, it was proper to do so, to prescribe a spacing unit of any size or shape or within any boundaries. On July 1, 1954, an area within which the north west quarter was situate was designated by the Board as a gas field. In that field during the months April to June, 1958, the policy of the Board was not to grant a licence for the drilling of a well unless the applicant had the right to produce from an entire spacing unit. In January 1957 the appellant entered into a contract with Trans Canada Pipe Lines Ltd., whereby it dedicated all its gas in this field obtained from the Devonian formation for sale to that company; Trans Canada, however, was not obligated to take any gas until the latter part of 1959.

On November 8, 1957, the lease was amended by the addition to it of cl. 14(A). Under this clause the lessee was given the right to pool or combine the land covered by the lease with other adjoining lands to form a drilling unit, when such pooling or combining was necessary in order to conform with governmental regulations. The clause also provided that drilling operations on, or production of leased substances from any land in the unit should have the same effect in continuing the lease in force and effect as if such operation or production were upon or from the leased land.

In addition to its lease of the north west quarter, the appellant held a petroleum and natural gas lease in respect of the south half of the section from one P, who agreed to the addition of his lease of a clause similar to cl. 14(A). A company controlling the petroleum and natural gas rights in respect of the north east quarter of the same section entered into a pooling and joint operating agreement with the appellant. The latter, on May 1, 1958, obtained a licence to drill a well on legal subdivision 7 of the section, which was not a part of the north west quarter. A well was drilled and completed early in June 1958 as a gas well. There being no market for the gas, the appellant applied to the Board for permission to cap the well and such permission was granted on June 13.

On April 28, 1958, the respondent K had granted to the respondent company an option to acquire a petroleum and natural gas lease in respect of the north west quarter, and on July 7, 1958, the company filed a caveat in respect of its interest under this option. On July 9, 1958, the appellant forwarded to Prudential a cheque for $100, as representing a royalty payment then due on the capped well, pursuant to cl. 3(b) of the lease, for the period June 5, 1958, to June 5, 1959; these moneys were distributed by the trust company on December 20, 1958.

K wrote to the appellant on July 15, 1958, stating that the lease had expired and asking that the caveat filed by the appellant be removed. In November 1958 the respondent company caused notice to be served upon the appellant, pursuant to s. 144 of *The Land Titles Act*, R.S.A. 1955, c. 170, requiring it to remove its caveat or else to commence proceedings in respect of the same. An action was commenced following the receipt by the appellant of that notice. The appellant forwarded a further $100 cheque to Prudential in May 1959 and these funds were distributed by it in November 1960.

The trial judge held that the lease of July 2, 1948, had expired and was of no force and effect; this decision was affirmed on appeal by a unanimous judgment of the Appellate Division. A further appeal was brought to this Court.

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Held: The appeal should be dismissed.

Clause 14(A) did not have the effect of enabling the appellant to treat a capped gas well anywhere on the unit as being equivalent to one located on the north west quarter, but, even if it did, payment of the $100 royalty after the primary term had expired was not effective to continue the term of the lease thereafter. At the time the primary term came to an end, no oil, gas or any other mineral was being produced from any part of the unit, nor was there any gas which could be considered as being produced as a result of the operation of cl. 3(b). That clause did not impose upon the appellant any obligation to pay a $100 royalty in respect of a non-producing gas well. The appellant had a choice to pay or not to pay and the clause only became operative "if such payment is made". If the appellant sought to continue the lease in operation after the primary term, by the combined operation of cl. 3(b) and cl. 2, then it was essential that it should have paid the royalty before the primary term expired.

The appellant's argument, based on cl. 14, that compliance with statutory provisions requiring it to cap the well should not constitute a cause for termination of the lease failed. The failure of the appellant to produce gas within the primary term, so as to extend that term, was not caused because of the need to comply with any statute or regulation, but was caused solely by the fact that there was no market or use for it.

The argument based upon cl. 18 also failed because, while the clause postponed certain obligations on the part of the appellant, in certain events, it did not purport to modify the provisions of the *habendum* clause. That clause imposed no obligation upon the appellant to produce oil, gas or other mineral from the leased land. It only provided that the primary term could be extended if oil, gas or other mineral was produced. If none of those substances were produced within the primary term, the lease terminated at the expiration of that term.

Similarly, the appellant could not derive any assistance from cl. 15, which provided that breach by the appellant of any obligation under the lease "shall not work a forfeiture or termination of this lease nor because for cancellation or reversion hereof . . . save as herein expressly provided". There was no question of any breach by the appellant of any obligation under the lease.

The position of the respondent K was not affected by his acceptance of a portion of the two royalty payments made by the appellant after the primary term had expired. No question arose as to election or waiver of forfeiture. The lease contained within itself a provision which operated automatically to terminate it upon the expiration of the primary term.

Shell Oil Co. of Canada v. Gibbard, [1961] S.C.R. 725; *Shell Oil Co. v. Gunderson,* [1960] S.C.R. 424, distinguished; *East Crest Oil Co. v. Strohschein* (1951-52), 4 W.W.R. (N.S.) 553, referred to.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], affirming a judgment of Kirby J. Appeal dismissed.

[1] (1964), 47 W.W.R. 129, 43 D.L.R. (2d) 261.

G. H. Steer, Q.C., and *T. Mayson,* for the plaintiff, appellant.

J. H. Laycraft, Q.C., and *D. O. Sabey,* for the defendant, respondent, Scurry-Rainbow Oil Ltd.

W. B. Gill, for the defendant, respondent, Kanstrup.

The judgment of the Court was delivered by

MARTLAND J.:—By a petroleum and natural gas lease, dated July 2, 1948, the respondent Kanstrup leased to the appellant (whose name at that time was Rio Bravo Oil Company, Limited) the North West Quarter of Section 9, Township 39, Range 22, West of the Fourth Meridian, in the Province of Alberta, hereinafter referred to as "the North West Quarter".

The relevant provisions of that lease are as follows:

1. Lessor in consideration of Two Hundred Forty dollars ($240.00) of lawful money of Canada, the receipt of which is acknowledged by Lessor and the convenants and agreements hereinafter contained, has granted, demised, leased and let and by these presents does grant, demise, lease and let exclusively unto Lessee for the purpose and with the exclusive right of drilling wells, operating for and producing therefrom oil, gas, casinghead gas, casinghead gasoline and related hydrocarbons including the right to pull any and all casing with rights of way and easements for passage over and upon and across said land, and for laying pipe lines, telephone, telegraph and power lines, tanks, powerhouses, stations, gasoline plants, ponds, roadways and fixtures and structures for producing, saving, treating and caring for such products and housing and boarding employees and any and all other rights and privileges necessary, incident to or convenient for the economical operation on said land for the production of oil, gas, casinghead gas, casinghead gasoline and related hydrocarbons and erection of structures thereon to produce, save, treat and take care of said products, all that certain tract of land described as:

The North West Quarter of Section Nine (9) Township Thirty Nine (39) Range Twenty Two (22) West of the Fourth Meridian

as described in Certificate of Title Number 177 H 121 and subject to the reservations, exceptions and conditions contained in the existing Certificate of Title. For the purpose of determining the amount of any money payment hereunder, said land shall be considered to comprise 160 acres even though it actually comprises more or less.

2. Subject to the other provisions herein contained, this lease shall be for a term of 10 Years from this date (called "primary term") and as long thereafter as oil, gas or other mineral is produced from said land hereunder, or as long thereafter as Lessee shall conduct drilling, mining or re-working operations thereon as hereinafter provided and during the production of oil, gas or other mineral resulting therefrom.

3. The royalties reserved by Lessor are:

* * *

(*b*) On gas, including casinghead gas or other gaseous substance, produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market

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value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale; where gas from a well producing gas only is not sold or used, Lessee may pay as royalty $100.00 per well per year, and if such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof;

* * *

6. If operations for drilling are not commenced on said land on or before one year from the date hereof, the lease shall then terminate as to both parties, unless on or before such anniversary date Lessee shall pay or tender to Lessor or for deposit to Lessor's credit in the Royal Bank of Canada at Alix, Alberta which bank and its successors are Lessor's agents and authorized to deduct its service charge, if any, from deposits hereunder and shall continue as such agents and depository for any and all sums payable under the lease regardless of changes in ownership of said land, of the oil and gas thereunder, or of rentals to accrue hereunder, the sum of $160.00 Dollars ($160.00) which shall be known and operate as delay rental and shall cover the privilege of deferring the commencement of drilling operations for a period of one (1) year. In like manner and upon like payments or tenders annually, the commencement of drilling operations may be further deferred for successive periods of one (1) year each during the primary term. . . .

* * *

14. Compliance with any now or hereafter existing law enacted by the Parliament of Canada or Legislature of the Province of Alberta or any other lawmaking body, or with orders, judgments, decrees, rules, regulations made or promulgated by the Parliament of Canada or Legislature of the Province of Alberta, or any other law-making body, boards, commissions or committees purporting to be made under the authority of any such law, shall not constitute a violation of any of the terms of this lease or be considered a breach of any clause, obligation, covenant, undertaking, condition or stipulation contained herein, nor shall it be or constitute a cause for the termination, forfeiture, revision or revesting of any estate or interest herein and hereby created and set out, nor shall any such compliance confer any right of entry or become the basis of any action for damages or suit for the forfeiture or cancellation hereof; and while any such purport to be in force and effect they shall, when complied with by Lessee or its assigns, to the extent of such compliance operate as modifications of the terms and conditions of this lease where inconsistent therewith.

15. The breach by Lessee of any obligation hereunder shall not work a forfeiture or termination of this lease nor be cause for cancellation or reversion hereof in whole or in part save as herein expressly provided. If the obligation should require the drilling of a well or wells, Lessee shall have sixty (60) days after the receipt of written notice by Lessee from Lessor specifically stating the breach alleged by Lessor within which to begin operations for the drilling of any such well or wells; and the only penalty for failure so to do shall be the termination of this lease save as to forty (40) acres for each well being worked on or producing oil or gas to be selected by Lessee so that each forty (40) acre tract will embrace one such well.

* * *

18. All obligations under this lease requiring Lessee to commence or continue drilling or to operate on or produce oil or gas from the demised

premises shall be suspended while, but only so long as, Lessee is prevented from complying with such obligations, in part or in whole by strikes, lockouts, acts of God, federal, provincial or municipal laws or agencies, unavoidable accidents, delays in transportation, inability to obtain necessary materials in open market, inadequate facilities for the transportation of materials or for the disposition of production, or other matters beyond the reasonable control of Lessee whether similar to the matters herein specifically enumerated or not, or while legal action contesting Lessor's title to said land or Lessee's right in said premises by virtue hereof shall be pending final adjudication in a court assuming jurisdiction thereof, or while oil produced in or adjacent to said area is seventy-five cents per barrel or less at the well, or when there is no available market for the same at the well, notwithstanding anything herein to the contrary. Time consumed in cleaning, repairing, deepening, or improving any producing well or its necessary appurtenances shall not be deemed or considered as an interruption of the covenant requiring continuous operation. Lessee need not perform any requirement hereunder the performance of which would violate any reasonable conservation and/or curtailment program or plan of orderly development to which Lessee may voluntarily or by order of any governmental agency subscribe or observe. This agreement contains the entire understanding of the parties and no implied covenants of any nature (except covenants of title and quiet enjoyment ordiarily implied in a grant), shall be read into this lease.

A caveat in respect of the lease was registered by the appellant against the title of the respondent Kanstrup to the North West Quarter on July 6, 1948.

On March 19, 1952, the respondent Kanstrup entered into a royalty trust agreement with Prudential Trust Company Limited as trustee, under which he assigned to the trustee the 12½ per cent gross royalty or share of production from any well or wells that might be drilled upon any part of the North West Quarter, to be held and distributed by the trustee pursuant to the terms of the agreement.

At all times material since July 2, 1952, the relevant orders and regulations have prescribed a spacing unit for a gas well as 640 acres, with power to the Oil and Gas Conservation Board, in a case in which, in its opinion, it was proper so to do, to prescribe a spacing unit of any size or shape or within any boundaries.

On July 1, 1954, an area in the province within which the North West Quarter was situate was designated by the Board as "the Nevis Field", which was recognized in the oil and gas industry as being a gas field. In that field, during the months April to June, 1958, the policy of the Board was not to grant a licence for the drilling of a well unless the applicant had the right to produce from an entire spacing unit.

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On January 18, 1957, the appellant entered into a contract with Trans Canada Pipe Lines Limited, whereby it dedicated all its gas in the Nevis Field obtained from the Devonian formation for sale to that company. Trans Canada Pipe Lines Limited was not obligated to commence taking delivery of gas from that field from the appellant until the latter part of the year 1959.

On November 8, 1957, the lease was amended by the addition to it of cl. 14(A). The amendment was effected by a letter from the appellant to the respondent Kanstrup, which read as follows:

On the 2nd day of July, A.D. 1948, you, as Lessor, entered into a Petroleum & Natural Gas Lease with Rio Bravo Oil Company, Limited (now Canadian Superior Oil of California, Ltd), as Lessee, covering the North West Quarter (NW/4) of Section Nine (9), Township Thirty-nine (39), Range Twenty-two (22), West of the Fourth (4th) Meridian, reserving unto the Canadian Pacific Railway Company all coal, and containing One Hundred and Sixty (160) acres more or less.

As this land is included in the Nevis gas area we would like to amend the subject Petroleum & Natural Gas Lease by the addition thereto of a new clause, which will be clause 14(A) and will be entitled, "POOLING DUE TO REGULATION". The subject clause reads as follows:

14(A). *POOLING DUE TO REGULATION*

The Lessee is hereby given the right and power at any time and from time to time to pool or combine the said lands, or any portion thereof, with other lands adjoining the said lands, but so that any one such pool or unit (herein referred to as a "Unit") shall not exceed one drilling unit as hereinbefore defined, when such pooling or combining is necessary in order to conform with any regulations or orders of the Government of the Province of Alberta, or any other authoritative body, which are now or may hereafter be in force in relation thereto. In the event of such pooling or combining, the Lessor shall, in lieu of the royalties elsewhere herein specified, receive on production of leased substances from the said unit, only such portion of the royalties stipulated herein as the area of the said lands placed in the unit bears to the total area of lands in such unit. Drilling operations on, or production of leased substances from any land included in such unit shall have the same effect in continuing this Lease in force and effect during the term hereby granted, or any extension thereof, as to all the said lands, as if such operation or production were upon or from the said lands, or some portion thereof.

The purpose of this clause is to provide, as the clause indicates, for pooling due to regulation and such is necessary in this particular area because of the fact that the spacing unit for a gas well is Six Hundred and Forty (640) acres and the Nevis area appears to be purely a gas area with very little possibility of oil being found. We desire to pool this quarter section with the remainder of the lands in Section Nine (9) for the purpose of forming a Six Hundred and Forty (640) acre spacing unit with the object of drilling a well in the section. Our geological information indicates that Legal Subdivision Seven (7) of the said Section

Nine (9) is the best possible location on the said Section, and in consideration of you agreeing to the within amendment we will pay you the sum of One Hundred ($100.00) Dollars.

We would greatly appreciate your kind consideration of this matter and if the amendment to the subject Lease is agreeable to you, would you be kind enough to signify your agreement by signing this letter at the place indicated at the lower left-hand corner of this page, retaining one copy for your records and returning the remaining copies to us and the Lease will be deemed to be amended accordingly.

The respondent Kanstrup signed this letter, acknowledging and agreeing to the amendment of the lease.

In addition to its lease of the North West Quarter, the appellant held a petroleum and natural gas lease in respect of the South Half of Section 9, Township 39, Range 22, West of the Fourth Meridian, from one Peterson, who agreed to the addition to his lease of a clause similar to cl. 14(A), which has been cited above. The petroleum and natural gas rights in respect of the North East Quarter of the same section were controlled by Trans Empire Oils Ltd., which company, on March 7, 1958, entered into a pooling and joint operating agreement with the appellant.

On May 1, 1958, the appellant obtained a licence to drill a well on Legal Subdivision Seven of Section 9, which is not a part of the North West Quarter. A well was drilled on that legal subdivision and completed early in June, 1958, as a gas well. Almost immediately thereafter, on June 9, the appellant applied to the Board for permission to cap the well because of there being no market for the gas. Approval was granted by the Board on June 13.

On April 28, 1958, the respondent Kanstrup had granted to the respondent Scurry-Rainbow Oil Limited an option to acquire a petroleum and natural gas lease in respect of the North West Quarter, this lease being what is described in the industry as a "top lease". This option was open for acceptance within a period of one-half year from its date, or on or before, but not after, a date 30 days from the date of receipt of notice by the optionee from the optionor of the termination, cancellation or expiration of the existing petroleum and natural gas lease affecting the North West Quarter. Under its terms the respondent company could acquire a petroleum and natural gas lease in respect of the North West Quarter for a term of 10 years.

On July 7, 1958, the respondent company filed a caveat against the title of the respondent Kanstrup to the North West Quarter in respect of its interest under this option.

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On July 9, 1958, the appellant forwarded to Prudential Trust Company Limited a letter with a cheque for $100, as representing a royalty payment then due on the capped well on Legal Subdivision Seven, pursuant to cl. 3(*b*) of the lease, for the period June 5, 1958, to June 5, 1959. These moneys were distributed by the trust company on December 20, 1958.

On July 15, 1958, the respondent Kanstrup wrote to the appellant, stating that the lease had expired and asking that the caveat filed by the appellant be removed.

On or about November 28, 1958, the respondent company caused notice to be served upon the appellant, pursuant to s. 144 of *The Land Titles Act,* R.S.A. 1955, c. 170, requiring it to remove its caveat or else to commence proceedings in respect of the same. The present action was commenced following the receipt by the appellant of that notice.

On or about May 26, 1959, the appellant forwarded a further $100 cheque to the Prudential Trust Company Limited. These funds were distributed by it on November 20, 1960, after this action had been commenced.

The question in issue is as to whether the lease of the North West Quarter, by the respondent Kanstrup to the appellant, expired at the expiration of the primary term of 10 years provided for in cl. 2 of the lease, or whether it continued beyond that period either as a result of the operation of other clauses in the lease or as a result of the election by the respondent Kanstrup to waive the operation of cl. 2.

The appellant's first contention is that the lease was continued in force by the combined operation of cls. 14(A), 3(*b*) and 2 of the lease. The argument is that the well drilled by the appellant on Legal Subdivision Seven, by virtue of cl. 14(A), was a well within the meaning of the latter portion of cl. 3(*b*), which reads:

> where gas from a well producing gas only is not sold or used, Lessee may pay as royalty $100.00 per well per year, and if such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof;

The appellant then submits that the payment of a royalty of $100 per year in respect of the capped well on Legal Subdivision Seven would place the appellant in the same position as if gas were being produced within the meaning of cl. 2 of the lease, and so continue it in operation beyond the primary term.

The respondents contend that cl. 14(A) never became applicable in the circumstances of this case, because pooling never became necessary in order to comply with any governmental order or regulation, and in support of this submission they rely upon the decision of this Court in *Shell Oil Co. of Canada v. Gibbard*[1].

In considering the appellant's first contention, I am prepared to agree with the view expressed in the Appellate Division[2] that that case is distinguishable in that in the present case the letter from the appellant to the respondent Kanstrup, containing the terms of cl. 14(A), showed that the appellant intended the clause to be construed as providing for pooling, to enable the appellant to establish a 640 acre spacing unit, to enable it to obtain a licence from the Board to drill a well on the section of which the North West Quarter was a part.

It should be noted, however, that, whereas in *Shell Oil Co. of Canada v. Gibbard, supra,* and also in the case of *Shell Oil Co. v. Gunderson*[3], cl. 9 of the leases in question in those cases was a part of the lease when the lease was executed, in the present case cl. 14(A) (which is identical in its wording with cl. 9 of the leases under consideration in those two cases) was subsequently added to the lease at the appellant's request. That being so, I think it is necessary first to consider the effect of the lease as it stood before it was amended and then to consider how far its provisions were altered by the addition of the new clause.

Prior to the addition of cl. 14(A), the respondent Kanstrup had obligated himself, under cl. 2 of the lease, to a term of 10 years and as long thereafter as oil, gas or other mineral was produced from "the said land hereunder"; *i.e.,* from the North West Quarter. Clause 3(*b*) further provided that, where gas from a well producing gas only was not sold or used, the appellant might pay as royalty $100 per well per year and, if he did so, it would be considered that gas was being produced within the meaning of cl. 2. It is obvious that the only kind of well to which cl. 3(*b*) could apply was a non-producing gas well on the North West Quarter.

The object of cl. 14(A) was, as the appellant's letter stated, "for the purpose of forming a Six Hundred and Forty

[1] [1961] S.C.R. 725. [2] (1964), 47 W.W.R. 129, 43 D.L.R. (2d) 261.
[3] [1960] S.C.R. 424.

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(640) acre spacing unit with the object of drilling a well in the section."

Clause 14(A) stipulated that the pool or unit should not exceed one *drilling* unit (a term which was not defined in the lease) and gave the right and power to pool in order to conform with governmental regulations or orders. The appellant acquired, by this clause, the power to pool the North West Quarter with the balance of the section, so as to be able to establish to the Board the existence of a proper spacing unit, in order that it might obtain the necessary licence to drill a gas well on the section. The appellant did obtain the necessary drilling licence on the basis of its control of the section and the clause, therefore, fulfilled its purpose.

The effect of pooling is defined in the clause and it is twofold:

1. The royalty payable "on production of leased substances" is varied so as to give to the lessor only a fraction of the royalty which he would have been entitled to receive had there been a producing well drilled on his own land and no pooling. The numerator of that fraction was the number of acres in the North West Quarter and the denominator was the total area of the drilling unit.

2. "Drilling operations on, or production of leased substances from" any land in the unit is to have the same effect in continuing the lease in force and effect as if such operation or production were upon or from the North West Quarter.

It is the second of these consequences which is of interest here. In so far as drilling operations are concerned, they were completed within the primary term. They had the effect of fulfilling the drilling obligation of the appellant contained in cl. 6 of the lease. There was, however, no production of any of the leased substances, within the primary term, from any part of the 640 acre drilling unit. It is only drilling operations on or production of leased substances from any land other than the North West Quarter which, under the terms of cl. 14(A), would be effective to continue the lease on the North West Quarter in force. The wording of that clause does not extend beyond the effect which it gives to operations of that kind. It does not say that a non-producing gas well, not on the North West Quarter, is to be equivalent to a non-producing gas well on the North West

Quarter, so as to entitle the appellant to rely upon the latter portion of cl. 3(*b*), nor can any such provision be implied in a clause which limits the right to pool to a situation in which pooling is necessary in order to comply with governmental orders and regulations.

However, even if cl. 14(A) did have the effect of enabling the appellant to treat a capped gas well anywhere on the unit as being equivalent to one located on the North West Quarter, I agree with the learned trial judge that payment of the $100 royalty after the primary term had expired was not effective to continue the term of the lease thereafter. At the time the primary term came to an end, no oil, gas or any other mineral was being produced from any part of the unit, nor was there any gas which could be considered as being produced as a result of the operation of cl. 3(*b*). That clause did not impose upon the appellant any obligation to pay a $100 royalty in respect of a non-producing gas well. The appellant had a choice to pay or not to pay and the clause only became operative "if such payment is made." If the appellant sought to continue the lease in operation after the primary term, by the combined operation of cl. 3(*b*) and cl. 2, then it was essential that it should have paid the royalty before the primary term expired. The appellant was aware that gas would not be produced within the primary term some time before the primary term expired. The well on Legal Subdivision Seven had been capped by it in the early part of June 1958, and it was the appellant which sought for and obtained a Board order for the closing of that well.

The next argument raised by the appellant is based upon cl. 14 of the lease. It is contended that, as the appellant was precluded by law from blowing gas from its well into the air, and as it was bound by a Board order to keep the well capped, compliance with these legal requirements should not, under this clause, constitute a cause for the termination of the lease.

In my opinion, the error in this argument is that the cause for the termination of the lease was the failure by the appellant to produce gas from the well within the primary term, and not the need to comply with any laws, orders or regulations. Production of gas was not taken from the well because of the economic fact that the appellant had no market for it at the time the primary term expired.

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When cl. 2 of the lease refers to oil, gas or other mineral "produced" from the said land, read in the context of the whole of the lease, this means produced for sale or use, and not produced to be blown into the air. The order for the capping of the well was made by the Board at the appellant's own request and that request was made because of the absence of a market for gas produced from the well.

The position was, therefore, that the failure of the appellant to produce gas within the primary term, so as to extend that term, was not caused because of the need to comply with any statute or regulation, but was caused solely by the fact that there was no market or use for it.

The appellant also relies upon cl. 18, the *force majeure* provision, which states, *inter alia,* that all obligations under the lease requiring it to commence or continue drilling or to operate on or produce oil or gas from the demised premises should be suspended "when there is no available market for the same at the well." I will assume, for the purposes of this argument, that "the same" relates back to the words "oil or gas" at the beginning of the clause, and is not limited by the reference to "oil" which immediately precedes the words above quoted. The answer to this argument is that, while the clause postpones obligations, in certain events, it does not purport to modify the provisions of the *habendum* clause. That clause imposed no obligation upon the appellant to produce oil, gas or other mineral from the North West Quarter. It only provided that the primary term could be extended if oil, gas or other mineral was produced. If none of those substances were produced within the primary term, the lease terminated at the expiration of that term.

For the same reasons I do not think that the appellant derives any assistance from cl. 15, which provides that breach by the appellant of any obligation under the lease shall not work a forfeiture or termination of the lease or be cause for cancellation or reversion thereof, save as expressly provided. There is here no question of any breach by the appellant of any obligation under the lease. The lease provided for a specified primary term and for its continuance thereafter in certain events. The fact that those events did not occur does not constitute any breach on the part of the appellant of any of its obligations under the lease.

Finally there is the question as to whether the receipt by the respondent Kanstrup of a portion of the two $100 payments made by the appellant after the primary term had expired affects his legal position. The appellant contends that Kanstrup elected to continue the lease by accepting these payments, which he received from Prudential Trust Company Limited, and that he cannot contend that the lease terminated because the payment was not made prior to the expiration of the primary term.

As already noted, the distribution by the trust company of the first payment was not made until December 20, 1958. Prior to that Kanstrup had already written to the appellant on July 15 contending that the lease had expired and asking for the removal of the appellant's caveat.

In my opinion no question arises in this case as to election or waiver of forfeiture by the respondent Kanstrup. This lease contained within itself a provision which operated automatically to terminate it upon the expiration of the primary term. Thereafter there were no steps required to be taken by Kanstrup in order to bring it to an end. There was no election for him to make. There was no obligation on the part of the appellant to make any royalty payment in respect of the capped well, even assuming that cl. 3(*b*) was applicable to it. There was no default on the part of the appellant in not paying that money before the primary term had expired. There was, therefore, no forfeiture to relieve against.

In connection with this aspect of the case, I agree with the views expressed by Frank Ford J.A. in *East Crest Oil Co. Ltd. v. Strohschein*[1].

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Milner, Steer, Dyde, Massie, Layton, Cregan & Macdonnell, Edmonton.

Solicitors for the defendant, respondent, Scurry-Rainbow Oil Ltd.: Chambers, Saucier, Jones, Peacock, Gain & Stratton, Calgary.

Solicitor for the defendant, respondent, Kanstrup: W. B. Gill, Calgary.

[1](1951-52), 4 W.W.R. (N.S.) 553 at 558.

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Nov. 19

CO-OPERATORS INSURANCE ASSOCIATION (*Defendant*) ..... APPELLANT;

AND

ROBERT HENRY (BERT) KEARNEY (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Negligence—Car owned by insurance company in collision with train—Passenger and driver fellow servants of company and acting in course of their employment as such servants—Driver negligent—Liability of company for injuries to passenger—Driver immune from liability—The Highway Traffic Act, R.S.O. 1950, c. 167, s. 50(2) [now R.S.O. 1960, c. 172, s. 105(2)]—The Workmen's Compensation Act, R.S.O. 1960, c. 437, ss. 123-125.

The plaintiff, who conducted a real estate and insurance business, was an agent of the defendant company in soliciting insurance and servicing policyholders. In the event of a claim being made by any policyholder to whom the plaintiff had sold a policy, it was the general practice of the company to send its own adjuster into the area and it was recognized to be part of the plaintiff's duty to introduce this adjuster to the policyholder and assist on the adjustment. On such an occasion, while returning to his office, the plaintiff suffered serious injuries when the automobile in which he was riding collided with a train. The automobile was owned by the company and was being driven with its consent by its adjuster, one L. The collision was caused solely by the negligent driving of L. The trial judge gave judgment against the company and L; on appeal, the Court of Appeal affirmed the judgment against the company but dismissed the action against L. Both Courts proceeded on the view that at the moment of the collision the plaintiff and L were fellow servants of the company and acting in the course of their employment as such servants. A further appeal by the company was brought to this Court.

Held: (Cartwright and Ritchie JJ. dissenting): The appeal should be dismissed.

Per curiam: Part II of *The Workmen's Compensation Act,* R.S.O. 1960, c. 437, did away with the defence of common employment in this case.

Per Taschereau C.J. and Spence J.: The relationship between the plaintiff and the defendant at the time of the accident was, for the limited purpose of the adjustment and on the limited occasion, not solely that of insurance agent and insurance company but was that of master and servant. The defendant owed a duty by implied term of contract to the plaintiff to take reasonable care to provide for his safety when he was engaged in the course of his employment, and there was by the negligence of L a breach of that duty, a breach for which the defendant as the employer of L was responsible in law.

Also, s. 124 of *The Workmen's Compensation Act* gave the plaintiff a statutory right of action for damages which occurred "by reason of

*PRESENT: Taschereau C.J., Cartwright, Judson, Ritchie and Spence JJ.

the negligence of any person in the service of his employer (*i.e.*, L) acting within the scope of his employment". There was no doubt that L at the time was certainly acting within the scope of his employment.

The plaintiff, therefore, was entitled to succeed either on the basis of the common law liability of his employer or on the basis of the statutory liability created by s. 124 of *The Workmen's Compensation Act.*

The argument that s. 50(2) of *The Highway Traffic Act,* R.S.O. 1950, c. 167 (now R.S.O. 1960, c. 172, s. 105(2)) barred the right of the plaintiff to recover was rejected. If the plaintiff had a cause of action against his master by reason of the negligence of the master's servant, subs. (2) did not take it away, even though at the time it arose the plaintiff was being carried in his employer's motor vehicle. *Harrison v. Toronto Motor Car Ltd. and Krug,* [1945] O.R. 1, approved. All that s. 50(2) of the Act did was to bar recovery against an owner or driver. The action upon the tort was not barred against the employer.

Per Judson J.: The appeal should be dismissed in view of the decision in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* which could not be distinguished from the present case and unless the Court was ready to overrule that case, it must govern.

Per Cartwright J., *dissenting*: If, as argued by the plaintiff, it was decided in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* that although the liability for the injury caused directly and solely by L's negligence was taken away as against him the result was that, while L could not be sued, the liability remained and could be enforced against the defendant, then that decision was wrong and ought not to be followed.

The effect of s. 50(2) of *The Ontario Highway Traffic Act,* R.S.O. 1950, c. 167 (now R.S.O. 1960, c. 172, s. 105(2)), was not merely to afford a personal or procedural defence to the driver but to take away the passenger's right of action founded upon the driver's negligence.

Where the only breach of the duty to take care for the safety of the passenger, whether owed by the driver or the employer of the driver or the employer of the passenger, consists of negligent driving on the part of the driver and liability to the passenger for that negligence is negatived (not because of some personal immunity from suit possessed by the driver because of a particular relationship such as that of husband and wife existing between the passenger and the driver but by an express statutory provision applying to the case of every passenger who is being carried gratuitiously) the passenger's right of action is gone because the negligent act, liability for which is negatived, is as much an essential part of the passenger's cause of action against his own employer and of his cause of action against the employer of the driver as it is of his cause of action against the driver.

Per Ritchie J., *dissenting*: By reason of the provisions of s. 105 (2) of *The Highway Traffic Act,* R.S.O. 1960, c. 172, the driver's act which occasioned the injury did not constitute a breach of duty giving rise to liability against him and accordingly the defendant could not be held vicariously liable for this act under the rule of *respondeat superior* because, as was said in *Staveley Iron & Chemical Co. Ltd. v. Jones,* [1956] A.C. 627, "Where the liability of the employer is not personal but vicarious . . . if the servant is immune so is the employer".

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The plaintiff was not in the car when the accident occurred pursuant to any obligation which was binding on him in the matter of his employment; therefore there was no direct personal duty resting on the defendant with respect to the safe carriage of the plaintiff.

The effect of s. 124 of *The Workmen's Compensation Act* was to make an employer responsible to an injured employee for the negligent acts of a fellow servant done in the course of his employment which caused such injury in the same way that the employer was responsible to the rest of the world for such negligent acts. That section did not have the effect of creating a personal liability in the employer if the injured employee was not acting in the course of his employment at the time when he sustained the injury.

[*Hughes v. J. H. Watkins & Co.* (1928), 61 O.L.R. 587; *Dufferin Paving and Crushed Stone Ltd. v. Anger et al.*, [1940] S.C.R. 174, distinguished; *Lewis v. Nisbet & Auld Ltd.*, [1934] S.C.R. 333; *Jarvis v. Oshawa Hospital*, [1931] O.R. 482; *Humphreys v. City of London*, [1935] O.R. 295; *Wiznoski v. Peteroff*, [1938] 2 D.L.R. 205, applied; *Smith v. Moss et al.*, [1940] 1 K.B. 424; *Falsetto v. Brown et al.*, [1933] O.R. 645; *Wilsons & Clyde Coal Co. v. English*, [1938] A.C. 57; *Jurasits v. Nemes*, [1957] O.W.N. 166; *Priestly v. Fowler*, 150 E.R. 1030; *Radcliffe v. Ribble Motor Services Ltd.*, [1939] A.C. 215; *Broom v. Morgan*, [1953] 1 Q.B. 597; *Staveley Iron & Chemical Co. v. Jones*, [1956] A.C. 627; *Harvey v. R. G. O'Dell Ltd. et al.*, [1958] 1 All E.R. 657; *The King v. Anthony*, [1946] S.C.R. 659; *St. Helen's Colliery Co. v. Hewitson*, [1924] A.C. 59; *Dallas v. Home Oil Distributors Ltd.*, [1938] S.C.R. 244, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Haines J. Appeal dismissed, Cartwright and Ritchie JJ. dissenting.

B. O'Brien, Q.C., and *E. Sabol*, for the defendant, appellant.

J. D. Arnup, Q.C., and *J. J. Carthy*, for the plaintiff, respondent.

The judgment of Taschereau C.J. and Spence J. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] given on September 11, 1963, which dismissed the appeal from the judgment of Haines J. given on February 25, 1963, whereby he awarded damages of $16,800 in favour of the plaintiff.

The following questions arose and must be answered for the determination of the judgment herein:

1. Was the finding of the learned trial judge that at the time of the accident the plaintiff Kearney was in a position

[1] [1964] 1 O.R. 101, 41 D.L.R. (2d) 196.

where the defendant and its servants, including Livesey, owed to him a duty to carry him with due care correct? Haines J., at trial, found the plaintiff was in such a position, and continued:

> If, however, it is necessary to put a label on the relationship, I find that for the limited purpose of adjusting the loss there was a master and servant relationship.

2. Alternatively, was there a liability upon the appellant on the basis that Livesey was the appellant's servant no matter whether the plaintiff was or was not such servant or was s. 50(2) of *The Highway Traffic Act,* R.S.O. 1950, c. 167, intended to take away the action of a gratuitous passenger against the master for the negligence of the servant? This alternative need only be considered if it is determined that the plaintiff was not in a position where he could require that he be carried with reasonable care, *i.e.,* if proposition number 1 were decided against the plaintiff.

3. Has the plaintiff an independent cause of action under s. 124 of *The Workmen's Compensation Act,* which independent cause of action was not barred by the provisions of *The Highway Traffic Act, supra?*

Proposition one entails a finding that Kearney was a servant of the appellant and that *Harrison v. Toronto Motor Car Ltd. and Krug*[1] was correctly decided. I am of the opinion that the finding that Kearney was a servant is very largely a finding of fact and a finding of fact which the trial judge expressly made upon what he described as conflicting evidence. That finding has been expressly approved by Aylesworth J.A. in his reasons in the Court of Appeal. Counsel for the appellant in this Court sought to avoid the effect of concurrent findings of fact below by purporting to put his case only on the evidence given by the plaintiff Kearney and by those witnesses called on his behalf. This still does not lessen the invulnerability of the finding of fact, which may be determined by a trial judge's scrutiny of a witness's testimony and particularly his testimony on cross-examination, so that the trial judge considering evidence as a whole comes to his opinion as to the facts and inferences which should be drawn from that testimony. In so far as the proposition entailed the finding of law, I am in agreement that the test of whether a master and servant relationship

[1] [1945] O.R. 1.

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existed has been rightly put in many cases, and may be taken from Halsbury, 3rd ed., vol. 25, p. 452:

> In general, the distinction between a contract of service and a contract for work and labour or for service is similar to that which exists between a contract of service and a contract of agency, namely, that in the case of a contract of service the master not only directs what work is to be done but also controls the manner of doing it whereas in the case of a contract for work and labour or a contract for service, the employer is entitled to direct what work is to be done but not to control the manner of doing it.

The evidence established that Kearney was an insurance agent employed by the appellant under a contract which contract was filed as exhibit 2. Paragraph 6 of that contract provided that the agents agreed "to service policyholders satisfactorily and to report to home office promptly any new information affecting the desirability of a risk". The evidence established that, probably under the direction and insistence of the former district manager Lang, the plaintiff and others under contract as agents with the appellant company were constantly required to attend policyholders, discuss with them the settlement of claims, and as to certain types of claims actually adjusting the losses themselves. It is true that the plaintiff and other agents of the appellant company were insurance agents holding licence under *The Insurance Act,* R.S.O. 1950, c. 183, and that various sections of that Act entitled persons so licensed to "carry on business in good faith as an insurance agent" but I am of the opinion that a person holding such licence may nonetheless at any rate on a specific occasion and for a specific purpose become the servant of the insurance company. It is also true that Aylesworth J.A. in *Baldwin et al v. Lyons et al.*[1], at p. 691, said:

> It is quite clear, I think, and indeed no one has made any submission to the contrary, that so far as this agreement is concerned, the position of Lyons was that of an independent contractor. In my view, therefore, it would require cogent and unequivocal evidence to demonstrate that the parties in fact changed that relationship into one of master and servant.

It must be remembered that the plaintiff, when Livesey, the acting district manager of the appellant company, attended his office in Meaford and requested the plaintiff to accompany him to interview the policyholders, demurred pointing out that he was expecting to be engaged in some transactions in reference to his business as real estate agent.

[1] [1961] O.R. 687.

Livesey insisted, however, and the plaintiff not only accompanied Livesey to the policyholder's place of work but then accompanied Livesey and the said policyholder to the garage where the automotive vehicle, the subject of the claim, had been taken, there remained present during the interview between Livesey and the garage keeper, then returned with Livesey and the policyholder to the latter's place of work and there obtained from the policyholder his proof of loss.

Before the Court of Appeal, it was evidently argued that upon the latter duty having been completed, the service, if any, ceased and that therefore the plaintiff was not in the course of employment when he was injured as he was driven back to his own place of business. Aylesworth J.A., in his reasons, said:

> . . . he had been transported to the place where the work of adjustment occurred in the car of the defendant Livesey and for the very purpose of engaging in that endeavour; he was entitled as part of their joint work as employees of the other defendant, to be returned in the same vehicle to the place whence he came; his employment in that endeavour continued, in our view, until that had been done.

I agree with that statement.

In this Court, it was argued that the plaintiff was not a servant because he could have performed his task of servicing the policyholder in reference to the adjustment by driving his own automobile. I am of the opinion that the evidence refutes that suggestion. The district manager Livesey did not know where the policyholder's place of work was situated and had not met the policyholder. For the plaintiff to use his own automobile would have entailed the silly performance of two cars being driven down the odd few blocks to that place of work, one containing the district manager and the other containing the plaintiff who was to introduce the policyholder to the district manager. Similarly, as the same two men left that factory and proceeded to the garage, with whom was the policyholder to ride, the district manager whom he did not know, or the plaintiff whom he did know? I am of the opinion that the procedure of riding in the automobile driven by the district manager was the efficient way by which the plaintiff could carry out the duties which the district manager then and there directed him to carry out and that it was intended by the district manager that the said duties should be so carried out.

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Fleming in his valuable text on the law of Torts, 2nd ed., at p. 328, states:

> Under the pressure of novel situations, the courts have become increasingly aware of the strain on the traditional formulation [of the control test], and most recent cases display a discernible tendency to replace it by something like an 'organization' test. Was the alleged servant part of his employer's organization? Was his work subject to co-ordinational control as to 'where' and 'when' rather than 'how', [citing Lord Denning in *Stevenson, Jordon & Harrison Ltd. v. Macdonald,* [1952] 1 T.L.R. 101 at 111.]

Applying such an organizational test to the present case, it is noted that Haines J. in his reasons for judgment said:

> Exhibit 8 is a selection of correspondence collected recently by the plaintiff. While it is written after the accident it indicates that in dealing with policyholders, the company referred to the plaintiff from time to time as "our Meaford area representative, Bert Kearney" and "your C.I.A. representative", or "your C.I.A. field underwriter Bert Kearney". No significance can be attached to the fact that these letters were written concerning claims several years after the accident. Prior to the accident the plaintiff did not have a stenographer and the company files which would contain similar correspondence have been closed long since. The plaintiff says that he has always been held out by the company in this manner and I accept his evidence.

In short, the respondent was part of the appellant's organization; his work was subject to co-ordination control as to "where" and "when" and in the case of the present action, as to "how".

For these reasons, I do not believe that the finding of fact made by the learned trial judge and affirmed in the Court of Appeal, that at the time of the accident the plaintiff-respondent was, for the limited purpose and on the limited occasion, the servant of the appellant insurance company, should be disturbed. The fact that the respondent was a servant of the appellant, in my view, on the particular occasion while in other circumstances he may well have been an independent contractor is not fatal to his claim. Fleming, *op. cit.* says at p. 328:

> The employment of a servant may be limited to a particular occasion or extend over a long period; it may even be gratuitous.

See *Smith v. Moss et al.*[1] to which further reference will be made hereafter.

The respondent certainly was injured by the negligence of his fellow servant Livesey, both being in the course of their employment at the time.

[1] [1940] 1 K.B. 424.

Section 50 of *The Highway Traffic Act,* R.S.O. 1950, c. 167, provided:

> 50.—(1) The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as the owner.
>
> (2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle.

It was argued at trial, in the Court of Appeal, and in this Court, that s. 50(2) barred the right of the plaintiff-respondent to recover. Certainly, the vehicle was not "operated in the business of carrying passengers for compensation". Then under the words of the section, it would appear that neither the owner nor the driver of the motor vehicle was liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in or upon or getting on to or alighting from the motor vehicle. However, in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* the Court of Appeal for Ontario considered a claim by a servant, Harrison, for damages caused to her when injured in the course of her employment riding with her employer Krug in an automobile driven by his employee McKenzie, due to the negligence of the said McKenzie. The same statutory provision, then s. 47(2), R.S.O. 1937, c. 288, was urged in defence. Gillanders J.A., giving the judgment of the Court, said at p. 10:

> The contention that, in any event, the subsection is only intended to relieve the owner *qua* owner, from the statutory liability imposed by subs. 1, is a much more substantial contention.

And at p. 13, after examining the defence carefully, said:

> The provisions now being considered, being directed to the liability of the owner and driver, should be restricted to their liability *qua* owner and *qua* driver, and I think may not bar a right of action due to some other relationship. If the appellant has a cause of action against her master by reason of the negligence of his servant, subs. 2 does not take it away, even though at the time it arose she was being carried in her employer's motor vehicle.

The decision awarding Miss Harrison damages against her employer has been followed in the Courts of Ontario since that date. In the meantime, the section was re-enacted

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in 1950 as s. 50 and in 1960 as s. 105. It is true that *The Interpretation Act,* R.S.O. 1950, c. 184, s. 19, provided:

> The Legislature shall not, by re-enacting an Act, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise, been placed upon the language used in such Act or upon similiar language.

But in *Studer et al. v. Cowper et al.*[1], where a like provision of the Saskatchewan *Intepretation Act* was considered, it was held that it merely removed the presumption that existed at common law and that in a proper case it will be held that the legislature did have in mind the construction that had been placed upon a certain enactment when re-enacting it. It cannot be doubted that the effect of the decision in *Harrison v. Toronto Motor Car Ltd. and Krug* was known to every lawyer and to every judge in the Province of Ontario from the date of its decision on and it is difficult to understand how the frequent statutory amendments to *The Highway Traffic Act* between 1945 and the present date and the re-enactment of the very section in identical words in both the Revisions of 1950 and 1960 would have occurred if the decision in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* has not represented the intention of the legislature. The case has been cited and either adopted or distinguished in many judgments at trial and in the Court of Appeal. I am, therefore, of the opinion that this Court is entitled to consider the fact that the decision has remained unchallenged for 19 years and that the legislative provision upon which it depends has been twice re-enacted in considering whether the decision is incorrect.

Counsel for the appellant argued that the decision is contrary to that of the Court of Appeal itself in *Hughes v. J. H. Watkins & Co.*[2] and the decision of this Court in *Dufferin Paving and Crushed Stone Ltd. v. Anger et al.*[3] Gillanders J.A. considered that exact argument. Both of those decisions were decisions holding that the limitation section in *The Highway Traffic Act* applied generally and would bar an action in the case of *Hughes v. J. H. Watkins & Co.* by a pedestrian brought after the limitation period, and in the case of *Dufferin Paving and Crushed Stone Ltd. v. Anger* by a land owner whose property had been damaged by the vibration caused by the driving of trucks. Both of those

[1] [1951] S.C.R. 450.

[2] 61 O.L.R. 587, [1928] 2 D.L.R. 176. [3] [1940] S.C.R. 174, 1 D.L.R. 1.

decisions turned on the words of the limitation section, and are not decisions which require a general and all-inclusive effect to be given to the provisions of s. 50(2) of *The Highway Traffic Act* as it existed in 1957 and it still exists. I agree with the view of Gillanders J.A. in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* where he said at p. 13:

> I incline to the view that the essential difference between the limitation sections considered in the *Watkins* and *Dufferin Paving* cases and the section with which we are here concerned is that the limitation sections in the cases mentioned were of general application, affecting all actions "for the recovery of damages occasioned by a motor vehicle", while the subsection now under consideration only affects the liability of the owner or driver to a *certain type of action.* (The italicizing is my own.)

In my view, the history of the enactment of what is now s. 105 of *The Highway Traffic Act* and which was at the time of the accident in question in this action, s. 50(2) is significant. There was not, of course, at common law, any liability upon the owner of a motor vehicle for damages caused by the negligent driving of that vehicle when the driving was not that of the owner or of his servant. That liability was imposed in the Province of Ontario in the year 1930, by the Statutes of Ontario 1930, c. 48, which added s. 41(*a*) substantially in the same terms as s. 50(1) of the statute as it existed in the 1950 Revised Statutes of Ontario. In 1935 by the Statutes of that year, c. 26, s. 11, a second subsection was added to the then s. 41 which is in substantially the same terms as s. 50(2) of the Revised Statutes of Ontario 1950. During the intervening five years, *Falsetto v. Brown et al.*[1] came before the Courts. There, an accident had occurred on August 17, 1932, in a collision between a vehicle owned by one Brown and being driven by McMaster with the consent of the owner. In the vehicle were two passengers, Miss Falsetto and Hernden, both gratuitous passengers. Miss Falsetto, by her next friend, commenced an action against Brown and McMaster, the owner and driver of the automobile in which she had been a gratuitous passenger and against the owner of the truck with which that vehicle had come in collision, and at trial she was awarded judgment against all defendants. The owner of the truck alone appealed, and the majority judgment in the Court of Appeal held that the negligence of the driver of the automobile had been the sole cause of the collision so

[1] [1933] O.R. 645, 3 D.L.R. 545.

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the appeal of the owner of the truck was allowed. The liability of the owner of the automobile to the gratuitous passenger founded upon s. 41(*a*) of the 1930 Statutes of Ontario, c. 48, and which had not been the subject of appeal was the situation which the amendment of 1935 was intended to cure. Gillanders J.A. in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* was of the opinion that it was the only situation which the amendment was intended to cure. I have come to the conclusion that he was correct when he said, at p. 13:

> If the appellant has a cause of action against her master by reason of the negligence of his servant, subs. 2 does not take it away, even though at the time it arose she was being carried in her employer's motor vehicle.

The question arises then, did Kearney in this case have a right of action against his employer by reason of the negligence of the employer's servant Livesey? It is my intention to consider the matter, firstly, apart from the doctrine of common employment and the provisions of *The Workmen's Compensation Act.* Clerk and Lindsell on Torts, 12th ed., at p. 783, said:

> At common law a master owes a duty to his servant to take reasonable care for his servant's safety . . . This duty was described by Lord Herschell as "the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and . . . so to carry on his operations as not to subject those employed by him to unnecessary risk." The classic statement of the duty is to be found in the speeches of Lord Wright and Lord Maugham in *Wilsons & Clyde Coal Co., Ltd. v. English,* [1938] A.C. 57 at 78 and 86.

At p. 86 of that case, Lord Maugham said:

> The first proposition is that, subject as next mentioned, the employer is responsible to an employee for an accident caused by the negligence of any other employee acting within the scope of his authority. The maxim respondeat superior applies: *Smith v. Baker,* [1891] A.C. 325.

Schroeder J.A. in giving judgment in the Court of Appeal in *Jurasits v. Nemes*[1], at p. 174 said:

> At common law a master did not warrant the safety of the servant's employment. He bound himself to do no more than to take reasonable care to protect the servant against accidents.

Lord Abinger C.B., in *Priestly v. Fowler*[2], at p. 1032 said:

> He [the employer] is, no doubt, bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief.

I am, therefore, of the opinion that there is a duty by implied term of contract to the servant Harrison in the case of *Harrison v. Toronto Motor Car Ltd. and Krug* and to the

[1] [1957] O.W.N. 166. [2] 150 E.R. 1030.

plaintiff-respondent in this case, to take reasonable care to provide for the safety of that servant when he is engaged in the course of his employment and that there was by the negligence of the defendant Livesey in this case, a breach of that duty and a breach for which the appellant insurance company as the employer of Livesey is responsible in law.

The question then arises whether the appellant is protected by the doctrine of common employment. That doctrine was first enunciated by Lord Abinger C.B. in *Priestly v. Fowler, supra.*

The defence was carefully defined and limited in *Radcliffe v. Ribble Motor Services Ltd.*[1], where Lord Wright said at p. 247:

> But the limitations which I have explained and which for purposes of this opinion I wish to emphasize are based on the fundamental principle that there must be an actual contract between the employer and employee so that it may be possible from the nature and circumstances of that contract to imply, though by a fiction of law, that the employee undertook the particular risks of the negligence of his fellow employees.

And at p. 249:

> But it is clear on the authorities in this House that there is always the limit, however expressed, that it must be the same work in which the workmen are employed. They must be employed in common work, that is, work which necessarily and naturally or in the usual course involves juxtaposition, local or causal, of the fellow employees and exposure to the risk of the negligence of one affecting the other.

Gillanders J.A. in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* cited this and other authorities and was able to come to the conclusion that the plaintiff Harrison and the chauffeur McKenzie were not engaged in "common work" involving "juxtaposition, local or causal", and exposure of the risk of negligence of one affecting the other and that therefore the defence of common employment did not apply.

The learned justice in appeal proceeded, however, at p. 16 to say:

> If I am right in concluding that common employment is not applicable under the circumstances, it is not necessary to consider whether or not the appellant comes under Part II of The Workmen's Compensation Act, in which case in any event, by virtue of s. 122 of that Act, common employment would have no application. It is, however, probably desirable to express my view on this point.

And then having considered the matter, at p. 17, said:

> Under the circumstances here, the appellant, I think, falls within the provisions of Part II of the Act.

[1] [1939] A.C. 215.

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In the present case, this Court is faced with the problem of whether the defence of common employment has been barred by the provisions of the said *Workmen's Compensation Act*. Haines J. said in his reasons for judgment (at trial):

> As for the defence of common employment I find that it is not available to the defendants by reason of the provisions of Part II of the Workmen's Compensation Act, R.S.O. 1960, ch. 437, sec. 125.

In the Court of Appeal, Aylesworth J.A. said:

> Here, but not in those decisions, the plaintiff was not a free agent as to his movements after completion of the work of adjustment upon which he and Livesey were engaged; he had been transported to the place where the work of adjustment occurred in the car of the defendant Livesey and for the very purpose of engaging in that endeavour; he was entitled as part of their joint work as employees of the other defendant, to be returned in the same vehicle to the place whence he came; his employment in that endeavour continued, in our view until that had been done.

I am of the opinion that in this particular case the two employees, the plaintiff Kearney and the defendant Livesey, were jointly engaged in the very same work. Of necessity they were in such juxtaposition as might involve one in the consequence of the negligence of the other. In short, the situation was the exact one in which the defence of common employment as outlined by Lord Wright in *Radcliffe v. Ribble Motor Services Ltd., supra,* would apply. That defence, of course, is no longer available in the United Kingdom because of the provisions of the various employers' liability acts. The defence is, however, available in Ontario unless it is barred by the provisions of *The Workmen's Compensation Act*. That statute now appears as R.S.O. 1960, c. 437, and the sections are word for word those in effect at the date of the accident. Firstly, it should be noted that s. 1 provides:

> (*j*) "industry" includes establishment, undertaking, trade and business; and
>
> (*u*) "workman" includes a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes a learner and a member of a municipal volunteer fire brigade, but when used in Part I does not include an outworker or an executive officer of a corporation.

And ss. 123 to 125 provide:

> 123. Subject to section 126, sections 124 and 125 apply only to the industries to which Part I does not apply and to the workmen employed in such industries, but outworkers and persons whose employment is of casual nature and who are employed otherwise than for the purposes of the

employer's trade or business, who are employed in industries under Part I but who are excluded from the benefit of Part I, are not by this section excluded from the benefit of sections 124 and 125.

124.—(1) Where personal injury is caused to a workman by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of his employer or by reason of the negligence of his employer or of any person in the service of his employer acting within the scope of his employment, the workman or, if the injury results in death, the legal personal representatives of the workman and any person entitled in case of death have an action against the employer, and, if the action is brought by the workman, he is entitled to recover from the employer the damages sustained by the workman by or in consequence of the injury, and, if the action is brought by the legal personal representatives of the workman or by or on behalf of persons entitled to damages under *The Fatal Accidents Act,* they are entitled to recover such damages as they are entitled to under that Act.

(2) Where the execution of any work is being carried into effect under any contract, and the person for whom the work is done owns or supplies any ways, works, machinery, plant, buildings or premises, and by reason of any defect in the condition or arrangement of them personal injury is caused to a workman employed by the contractor or by any subcontractor, and the defect arose from the negligence of the person for whom the work or any part of it is done or of some person in his service and acting within the scope of his employment, the person for whom the work or that part of the work is done is liable to the action as if the workman had been employed by him, and for that purpose shall be deemed to be the employer of the workman within the meaning of this Act, but any such contractor or subcontractor is liable to the action as if this subsection had not been enacted but not so that double damages are recoverable for the same injury.

(3) Nothing in subsection 2 affects any right or liability of the person for whom the work is done and the contractor or subcontractor as between themselves.

(4) A workman shall not, by reason only of his continuing in the employment of the employer with knowledge of the defect or negligence that caused his injury, be deemed to have voluntarily incurred the risk of the injury.

125.—(1) A workman shall be deemed not to have undertaken the risks due to the negligence of his fellow workmen and contributory negligence on the part of a workman is not a bar to recovery by him or by any person entitled to damages under *The Fatal Accidents Act* in an action for the recovery of damages for an injury sustained by or causing the death of the workman while in the service of his employer for which the employer would otherwise have been liable.

(2) Contributory negligence on the part of the workman shall nevertheless be taken into account in assessing the damages in any such action.

It will be seen that the determination of whether the respondent is entitled to plead the provisions of s. 125 as barring the defence of common employment depends on whether the respondent is a "workman". Section 125 applies only to an *industry* to which Part I does not apply. Then,

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was the business of the appellant Co-operators Insurance Association an "industry"? In *Lewis v. Nisbet & Auld Ltd.*[1], at p. 345, Crocket J., giving judgment for a majority of this Court and in dealing with some of the words in the present s. 124 "by reason of any defect in the condition or arrangement of the ways, works, machinery, plant buildings or premises . . .", said:

> It will be seen at once that the enactment is a special one which was clearly passed to extend the liability of the employer in favour of the workman. It is an enactment, therefore, which ought not to be narrowly construed against the workman. No court has any right to add to it any condition which its language does not clearly express or necessarily imply. Rather is it the duty of a court, as said by Brett, M.R., in *Gibbs v. Great Western Ry. Co.* (1884) 12 Q.B.D. 208, at p. 211, in construing a section of the Imperial *Employers' Liability Act* (1880) to construe it "as largely as reason enables one to construe it in their (the workmen's) favour and for the furtherance of the object of the Act."

I accept that as a proper canon of interpretation in order to construe the meaning of the words "workman" and "industry", and I am of the opinion that that course has been followed by the Courts of Ontario in construing this statute. In *Jarvis v. Oshawa Hospital*[2], Raney J. held that a hospital was an "industry" within the words "establishment, undertaking, trade and business" and that a pupil dietitian employed at the hospital at a salary of $8 a week was a "workman".

In *Humphreys v. The City of London*[3], Middleton J.A. in the Court of Appeal considering the question of whether a relief recipient required by the municipality as a term of obtaining relief to perform duties as directed by the municipal officers was a "workman" said at p. 301:

> The Workmen's Compensation Act is intended to apply to *all workmen* and *all employees,* save in a case of farming or domestic or menial servants. These are excepted from the operation of the Act by sec. 122. Sec. 118 provides that secs. 119 to 121, that is practically Part II, shall apply only to the industries to which Part I does not apply and to workmen employed in such industries. (The italicizing is my own.)

In *Wiznoski v. Peteroff*[4], the Court of Appeal of Ontario held that a bakery employing less than five persons and therefore, excluded from Part I of the Act by the order of

[1] [1934] S.C.R. 333.

[2] [1931] O.R. 482.

[3] [1935] O.R. 295.

[4] [1938] 2 D.L.R. 205.

the Board was nonetheless an "industry" to which Part II applied. At p. 206, Middleton J.A. said:

> I think this argument is fallacious, because by s. 1(*i*) of the Act "industry" is defined to include not only the enumerated classes of industries, but establishments, undertaking, trade and business; that is to say, it includes not only the generic but the specific.

I am of the opinion that the enterprise operated by Co-operators Insurance Association is certainly an "undertaking, trade or business" and that therefore it is an "industry" as defined in *The Workmen's Compensation Act*. Similarly, I can see no reason why the respondent who I have held had at the time of the accident entered into or worked under a contract of service which was oral or implied is not a "workman" as defined by s. 1(*u*) of the said Act. It should be noted that the service may be by way of manual labour or otherwise and that by s. 123 "outworkers and persons whose employment is of a casual nature are not by that section excluded from the benefits of ss. 124 and 125 so that if the respondent were considered to be a person whose employment was of a casual nature in that he was only from time to time required to act as a servant in servicing the policyholder, he is nonetheless not excluded from the benefits of ss. 124 and 125.

I have therefore come to the conclusion that the respondent is a "workman" in an industry to which Part II of *The Workmen's Compensation Act* applies and that therefore by the provisions of s. 125(1) of that statute the defence of common employment is barred to the appellant.

The respondent also asserts a right of action by relying upon the provisions of s. 124 of *The Workmen's Compensation Act*. That matter is not referred to in the reasons for judgment either at trial or upon appeal but the respondent has asserted such right in his factum while the appellant, in its factum, confines its reference to the statue to an allegation that it has no application to the relationship between an insurance agent and an insurance company.

For the reasons which I have set out above, I have found that the relationship between the respondent and the appellant at a limited time and for the limited purpose of the adjustment was not solely that of insurance agent and insurance company but was that of master and servant. I find that the respondent was at that time a workman in an industry and I am of the opinion that s. 124 of *The*

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Workmen's Compensation Act gives to the respondent a statutory right of action for damages which occurred "by reason of the negligence of any person in the service of his employer (*i.e.* Livesey) acting within the scope of his employment". There is, of course, no doubt that Livesey at the time was certainly acting within the scope of his employment. He was engaged actively in the duty of adjusting a claim which was one of his main duties. I am therefore of the opinion that the plaintiff is entitled to succeed either on the basis of the common law liability of his employer or on the basis of the statutory liability created by s. 124 of *The Workmen's Compensation Act*. Therefore, I do not find it necessary to deal with the alternative submission of counsel for the respondent that the appellant is liable for the negligence of its servant Livesey on the doctrine of *respondeat superior* whether or not the respondent was also the servant of the appellant. That theory entails a startling explanation of the principle enunciated in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* and one which in my opinion this Court should not make at the present time.

There remains to be dealt with the submission of the appellant that when the action against the defendant Livesey is barred by statute, *i.e.*, s. 50(2) of *The Highway Traffic Act,* then there can be no liability of his employers. This submission was dealt with by Aylesworth J.A. in giving the reasons of the Court of Appeal in the following words:

> The appellants took one other point upon which some observations might properly be made. In appellants' submission the master is excused if the servant who did the wrongful act to the plaintiff is excused. We cannot accede to that submission with respect to the case at bar for the simple reason that in our view the effect of section 105, subsection 2 of The Highway Traffic Act is not to condone a wrongful act by the driver of a motor vehicle qua driver but simply to bar the cause of action with respect to that act. The legislature, in our view, is quite free to do what it has done in a case such as this, namely, to bar a certain cause of action against a wrong-doer without in any way affecting the legal result of the wrongful act with respect to someone else liable for that wrongful act upon some principle of the common law.

With that view, I am in agreement and I am of the opinion that it is in accord with established jurisprudence. In *Smith v. Moss, supra,* Charles J. considered the case of a wife who sued her mother-in-law as the owner of an automobile in which she was riding as a passenger when she was

injured by the negligence of the driver who was her husband. Charles J. held that at the time of the accident the husband was driving the car in the capacity of agent for his mother. At p. 425, the learned trial judge said:

> It is said that the plaintiff cannot recover against her mother-in-law because the accident was caused by the negligence of her husband, and a husband cannot commit a tort on his wife. Strictly, that is right, but I cannot conceive that, if a husband, while acting as agent for somebody else, commits a tort, which results in injury to the wife, the wife is deprived of her right to recover against the principal who is employing the husband as agent. To take an extreme case, suppose that the plantiff had been in the habit of hiring a car from a garage the proprietors of which employed, among a number of other men, the plaintiff's husband as a chauffeur. Suppose, too, that on a particular day, when the plaintiff had telephoned for a car, the husband should be sent out as driver of that car. If an accident happened, for which the husband was responsible, could it then be said that the plaintiff was deprived of her right to recover against the owners of the car? I do not think so, because the active operator in the tort, the husband, would have two capacities, (1) that of husband and (2) that of agent. In the present case the husband was, at the time of the accident, acting in the capacity of agent for his mother and it was his negligence alone, I hold, which caused the accident. Therefore, the plaintiff is entitled to succeed against her mother-in-law, the second defendant.

It is, of course, realized that Charles J. was not considering a case in which any such statutory provision as s. 50(2) of *The Highway Traffic Act* barred action against the actual wrongdoer. *Smith v. Moss* is cited merely to illustrate the proposition that an action may lie against the master even when it is barred against the servant.

The judgment in *Smith v. Moss, supra,* was considered in *Broom v. Morgan*[1], in the Court of Appeal. There, husband and wife were both employed by the defendant in a public house, the husband as manager the wife as helper. Owing to the negligence of the husband in the course of his employment as manager, the wife was injured. Denning L.J. said at p. 607:

> It is said by Mr. Thompson that the liability of the employer is only a vicarious liability—that is to say, that it is a substituted liability whereby a person who is not morally answerable is made responsible for the liability of another, and it cannot exist if that other is not liable.
>
> I am aware that the employer's liability for the acts of his servants has often been said to be a vicarious liability, but I do not so regard it. The law has known cases of a true vicarious liability; for instance, in the old days when a wife uttered slanders at a tea party with her friends, the husband was answerable for her wrongdoing, although it was no concern of his. I do not regard the liability of master and servant as coming into this category. The master is not liable when a servant does something "on a frolic of his own." He is liable only when the servant is acting in the

[1] [1953] 1 Q.B. 597.

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course of his employment. The reason for the master's liability is not the mere economic reason that the employer usually has money and the servant has not. It is the sound moral reason that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done. Take the case of a master who sends a lorry out on to the road with his servant in charge. He is morally responsible for seeing that the lorry does not run down people on the pavement. The master cannot wash his hands of it by saying, "I put a competent driver in charge of the lorry," or by saying, "It was only the driver's wife who was hurt." It is his lorry, and it is his business that it is on. He takes the benefit of the work when it is carefully done, and he must take the liability of it when it is negligently done. He is himself under a duty to see that care is exercised in the driving of the lorry on his business. If the driver is negligent there is a breach of duty not only by the driver himself, but also by the master.

Denning L.J. repeated his view in *Staveley Iron & Chemical Co. Ltd. v. Jones*[1]. In that case Sellers J. at trial considering an action by a workman against his employer for damages caused by an accident occurring in the course of employment had applied *Caswell v. Powell Duffryn Associated Collieries Ltd.*[2] to find that the plaintiff had not been guilty of contributory negligence and then applied the same standard to find that the defendant company's servant also was not guilty of negligence, and in consequence dismissed the action. In the Court of Appeal (Denning, Hodson and Romer L.JJ.) it was decided that the crane operator, the defendant company's servant, had been negligent in her conduct and that therefore the employer was liable for the damage caused to her fellow employee, the plaintiff Jones.

Denning L.J. said, in the course of his judgment:

He [i.e., the employer] acts by his servant; and his servant's acts are, for this purpose, to be considered as his acts. Qui facit per alium facit per se. He cannot escape by the plea that his servant was thoughtless or inadvertent or made an error of judgment. If he takes the benefit of a machine like this, he must accept the burden of seeing that it is properly handled. . . . It is for this reason that the employers' responsibility for the injury may be ranked greater than that of the servant who actually made the mistake: see *Jones v. Manchester Corpn.*, [1952] 2 Q.B. 852, and he remains responsible even though the servant may for some reason be immune: see *Broom v. Morgan*, [1953] 1 Q.B. 597. . . .

In the House of Lords Lord Morton expressed disagreement with that statement and continued at p. 639:

My Lords, what the court has to decide in the present case is, was the crane driver negligent? If the answer is "yes" the employer is liable vicariously for the negligence of his servant. If the answer is "no" the employer is surely under no liability at all.

[1] [1956] A.C. 627.

[2] [1940] A.C. 152.

And Lord Reid said at p. 644:

> In *Broom v. Morgan,* [1953] 1 Q.B. 597, a husband and wife were fellow servants, and the wife was injured by the negligence of the husband. She recovered damages from her employer although she could not sue her husband. But although the husband could not be sued, his injuring his wife was a wrongful act on his part, and again this case is to my mind no authority for a master being liable for an act *which it was not wrongful for a servant to do.* (The italicizing is my own.)

I am of the view that the last statement of Lord Reid supplies the answer to the appellant's argument that when the action against the defendant Livesey is barred by statute there can be no liability on Livesey's employer. The employer is being held liable for an act of Livesey's which was wrongful and the employer is being held because Livesey did that act in the course of his (Livesey's) employment. The actual words of the statutory bar of action against Livesey are significant:

> Notwithstanding subsection (1) the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, *is not liable for any loss or damage resulting from bodily injury to.* . . . (The italicizing is my own.)

There is in these words no declaration that the act is in any way a rightful as distinguished from a wrongful act and, of course, a negligence is quite plainly a tort. All the statute does is to bar recovery against an owner or driver for part of the damage which may flow from the tort. It would be interesting to speculate what would occur if a gratuitous passenger had on his knees a precious object of art which was destroyed in a collision due to the driver's negligence although the passenger was unharmed. The action upon the tort is not barred against the employer.

After the decision of the House of Lords in *Staveley Iron & Chemical Co. Ltd. v. Jones, supra,* McNair J. in *Harvey v. R. G. O'Dell Ltd. et al.*[1], considered an action by one servant against his master based on the negligence of a fellow servant and gave judgment for the plaintiff despite the circumstance that the period of limitations had run out against the personal representative of the deceased servant so she could not be sued nor made the subject of a claim for indemnification by the employer. Therefore, McNair J. came to the same conclusion as to the existence of the master's liability despite the servant's representative's protection

[1] [1958] 1 All E.R. 657.

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from liability as did the learned trial judge and the Court of Appeal in the present case did, in my opinion, correctly.

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

CARTWRIGHT J. (*dissenting*):—The relevant facts out of which this appeal arises and the conclusions arrived at in the Courts below are set out in the reasons of my brother Ritchie and those of my brother Spence. The questions of difficulty are not as to the facts but as to the law.

The following facts are undisputed. The respondent suffered serious injuries when the automobile in which he was riding collided with a train. The automobile was owned by the appellant and was being driven with its consent by its employee Livesey. The collision was caused solely by the negligent driving of Livesey.

The Courts below have proceeded on the view that at the moment of the collision Kearney and Livesey were fellow servants of the appellant and acting in the course of their employment as such servants. For the purposes of this appeal, I accept the view that at the time mentioned, Livesey was a servant of the appellant and acting in the course of his employment. Counsel for the appellant argues that the relationship between the appellant and Kearney was not that of master and servant at any time and alternatively that if it did exist while Kearney was engaged in assisting Livesey to adjust the policyholder's claim it had terminated, before the occurrence of the collision, when Kearney had done everything that was required of him by the appellant and was free and anxious to return to his office to deal with the real estate transaction which was awaiting his attention. There appears to me to be great force in this argument but for the purposes of this appeal I will assume, without deciding, that the contrary view taken by the Courts below is correct.

The judgments below are founded upon the judgment of the Court of Appeal for Ontario in *Harrison v. Toronto Motor Car Ltd. and Krug*[1]. In this Court counsel for the appellant submitted that the *Harrison* case was wrongly decided and alternatively that the case at bar can be distinguished from it on the facts.

The *Harrison* case dealt with the predecessor of s. 50 of c. 167 of R.S.O. 1950, which was in force at the date when

[1] [1945] O.R. 1.

Kearney was injured and which is now s. 105 of R.S.O. 1960, c. 172. Section 50 read as follows:

50.—(1) The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as the owner.

(2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle.

Neither in the *Harrison* case nor in the case at bar was the automobile in which the injured passenger was being carried "a vehicle operated in the business of carrying passengers for compensation" and we are not concerned with the numerous decisions in which the scope and meaning of that phrase have been considered.

At common law the driver of an automobile owes a duty to a passenger being carried gratuitously in the automobile to use reasonable care for his safety and if as a result of negligent driving the passenger is injured the driver is liable to him for the damages suffered. If the automobile belongs to someone other than the driver that person is not liable at common law merely because he is the owner; his liability, if it exists, must be found in a relationship between him and the driver which renders him liable for the latter's negligence or in a relationship between the owner and the passenger which imposes on the former a duty to take care for the safety of the latter.

Subsection (1) of s. 50 of *The Highway Traffic Act* subjects the owner to liability, which did not exist at common law, if his automobile is being driven with his consent; that liability is "for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway". The foundation of this statutory liability is negligence in the operation of the automobile. The effect of subs. (2) which was enacted after subs. (1) had been in force for about five years, was to provide, subject to the exception with which we are not concerned, that neither the owner nor the driver should be liable for loss resulting from bodily injury to or the death of a passenger caused by negligence in operating the automobile. If the words of the subsection are plain and unequivocal the Courts must give effect to them

although they bring about what, in the eyes of the common law, appears to be a grave injustice.

In the *Harrison* case, the defendant Krug, who was in poor health, decided to go on a long motor trip. He employed the plaintiff Miss Harrison to accompany him as a nurse on that trip. The car was owned by Krug and driven by one McKenzie who was held to be Krug's servant. Miss Harrison was injured in a collision caused solely by the negligent driving of McKenzie. It was held by the Court of Appeal (i) that although the predecessor of s. 50(2) relieved Krug from liability *qua* owner it did not relieve him from liability *qua* employer, (ii) that Krug as employer owed a duty (the precise nature of which is not discussed) to Miss Harrison, (iii) that this duty was breached by the negligent driving of McKenzie, (iv) that the defence rested on the doctrine of common employment was not available to Krug, and (v) that consequently Krug was liable.

I agree with the conclusion of my brother Spence that, on the assumption I have made above as to the relationship of the parties at the time of the collision, the appellant is deprived of the defence of common employment by the terms of ss. 124 and 125 of *The Workmen's Compensation Act*. The relevant wording of those sections as applicable to the facts with which we are dealing are as follows:

Section 124:

> Where personal injury is caused to a workman (in this case Kearney) by reason of the negligence of . . . any person (in this case Livesey) in the service of his employer (in this case the appellant) acting within the scope of his employment, the workman . . . is entitled to recover from the employer the damages sustained by the workman by or in consequence of the injury . . .

Section 125:

> A workman shall be deemed not to have undertaken the risks due to the negligence of his fellow workmen. . . .

The effect of these sections is to deprive the employer of a defence which was available to him at common law and to render him liable to his injured employee for the negligence of another of his servants acting within the scope of his employment to the same extent as he would have been liable to a person who was not employed by him but not to any greater extent. The foundation of his liability is the negligence of his servant who has caused the injury.

Assuming, as I do, for the purposes of this appeal that Kearney and Livesey at the moment of the collision, were

fellow servants of the appellant and acting in the course of their employment as such servants, it is clear that but for the provisions of s. 50(2) both Livesey and the appellant would be liable to Kearney. Counsel for the respondent, rightly in my opinion, took the position in the Court of Appeal and in this Court that Livesey is not liable to Kearney. Such a liability is expressly negatived by s. 50(2). It is argued, however, that although the liability for the injury caused directly and solely by Livesey's negligence is taken away as against him the result is that, while Livesey cannot be sued, the liability remains and can be enforced against the appellant. If this was decided in the *Harrison* case then, in my respectful opinion, that decision was wrong and ought not to be followed.

The error in the reasoning in the *Harrison* case arose, in part at least, from considering the effect of the words in s. 50(2) relieving the owner from liability rather than the effect of the words relieving the driver from liability. Gillanders J.A. said at p. 13:

> The provisions now being considered, being directed to the liability of the owner and driver, should be restricted to their liability *qua* owner and *qua* driver, and I think may not bar a right of action due to some other relationship. If the appellant has a cause of action against her master by reason of the negligence of his servant, subs. 2 does not take it away, even though at the time it arose she was being carried in her employer's motor vehicle.

He does not appear to me to have given adequate consideration to the effect upon the liability of the employer, as such, of the act of the legislature doing away with all liability of his employee.

In my view the effect of s. 50(2) is not merely to afford a personal or procedural defence to the driver but to take away the passenger's right of action founded upon the driver's negligence. I am unable to impute to the legislature the intention to free from liability the one person whose negligence was *fons et origo mali* and at the same time to impose liability upon those, morally innocent of any wrongdoing, who would have been required to answer vicariously for the driver's negligence had he remained liable.

Such cases as *Smith v. Moss et al.*[1] and *Broom v. Morgan*[2] do not appear to me to assist the respondent. They were cases in which a particular personal relationship prevented

[1] [1940] 1 K.B. 424. [2] [1953] 1 Q.B. 597.

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the injured person from suing the individual driver. The nature of the immunity possessed by the driver was described by Denning L.J. in the last-mentioned case in the passage from his judgment (at pp. 609 and 610) quoted in the reasons of my brother Ritchie:

> It is an immunity from suit and not an immunity from duty or liability. He is liable to his wife, though his liability is not enforceable by action; and, as he is liable, so also is his employer, but with this difference, that the employer's liability is enforceable by action.

This may be contrasted with the terms of s. 50(2) whereby it is liability which is expressly negatived.

In *Dyer v. Munday et al.*[1] both the servant and his employer were originally liable to the plaintiff for the damages caused by the assault committed by the servant. The conviction of the servant for common assault merely provided him with a personal defence.

Some assistance in arriving at the intention of the legislature may be derived from considering what is now s. 2(2) of *The Negligence Act,* R.S.O. 1960, c. 261. This reads as follows:

> (2) In any action brought for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from a motor vehicle other than a vehicle operated in the business of carrying passengers for compensation, and the owner or driver of the motor vehicle that the injured or deceased person was being carried in, or upon or entering, or getting on to, or alighting from is one of the persons found to be at fault or negligent, no damages are, and no contribution or indemnity is, recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver, and the portion of the loss or damage so caused by the fault or negligence of such owner or driver shall be determined although such owner or driver is not a party to the action.

This subsection was first enacted by Statutes of Ontario 1935, c. 46, s. 2(2) which received Royal Assent on the same day as c. 26 of the same Statutes, by s. 11 of which the predecessor of subs. (2) of s. 50 of *The Highway Traffic Act,* R.S.O. 1950, c. 167, was first enacted.

The two provisions are clearly *in pari materia.* The terms of s. 2(2) of *The Negligence Act* appear to me to indicate an intention on the part of the legislature, for all purposes of determining whether liability exists, to identify a passenger who is being carried gratuitously with the negligent driver of the vehicle in which he is being carried. It appears to me improbable that the legislature would intend that

[1] [1895] 1 Q.B. 742.

such identification should operate to the advantage of a wrongdoer whose negligence in driving another car is one of the causes of the passenger's injuries but not to the advantage of the employer of the driver of the car in which the passenger is riding when such employer is morally free from any blame.

Where the only breach of the duty to take care for the safety of the passenger, whether owed by the driver or the employer of the driver or the employer of the passenger, consists of negligent driving on the part of the driver and liability to the passenger for that negligence is negatived (not because of some personal immunity from suit possessed by the driver because of a particular relationship such as that of husband and wife existing between the passenger and the driver but by an express statutory provision applying to the case of every passenger who is being carried gratuitously) the passenger's right of action is gone because the negligent act, liability for which is negatived, is as much an essential part of the passenger's cause of action against his own employer and of his cause of action against the employer of the driver as it is of his cause of action against the driver.

If the judgments below are upheld it appears to me that the plain purpose of s. 50(2) will be defeated as the appellant will be entitled to sue Livesey for indemnity in respect of the damages it is required to pay to Kearney. Such a right of indemnity appears to me to be recognized by the decision of the Court of Appeal for Ontario in *McFee v. Joss*[1] and in that of the House of Lords in *Lister v. Romford Ice and Cold Storage Co. Ltd.*[2] As the question of the existence of a right of indemnity does not arise directly on this appeal I refrain from examining the other relevant authorities. A number of them are examined and discussed in an article by Mr. Glanville Williams in (1957) 20 Modern Law Review at pp. 220 and 437.

It is interesting to speculate on the result which would flow from this Court upholding the rule laid down in the *Harrison* case if a case where the facts are similar should arise in a province where the right of recovery of a passenger who is being carried gratuitously is not taken away altogether but is limited to cases in which the driver is guilty of gross negligence. Suppose it is found as a fact that

[1] (1924), 56 O.L.R. 578. [2] [1957] A.C. 555.

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the driver was negligent but not grossly negligent, the result presumably would be that the injured passenger could recover from his employer who is also the driver's employer but not from the driver, and the employer in turn could recover indemnity from the driver. In my respectful view we should not uphold a rule which brings about such anomalous results.

As, for the reasons given above, I agree with the submission of appellant's counsel that the *Harrison* case was wrongly decided and that the right of action which the respondent had at common law is taken away by the terms of s. 50(2) it becomes unnecessary for me to consider the question, so fully argued before us, whether the case at bar can be distinguished on its facts from the *Harrison* case.

I would allow the appeal, set aside the judgments below and direct that judgment be entered dismissing the respondent's action. I agree with my brother Ritchie that having regard to all the circumstances there should be no order as to costs in any Court.

JUDSON J.:—I agree with Spence J. that this appeal should be dismissed. My agreement is founded solely upon the judgment of the Ontario Court of Appeal in *Harrison v. Toronto Motor Car Ltd. and Krug*[1], which cannot be distinguished from the present case and unless we are ready to overrule this case, it must govern.

On the findings made both at trial and on appeal, Kearney was injured in the course of his employment by the negligent driving of his fellow servant Livesey, who was driving a car owned by the common master, Co-operators Insurance Association. Although Kearney cannot succeed against the driver because of the provisions of s. 105(2) of *The Highway Traffic Act,* R.S.O. 1960, c. 172, as a servant injured in the course of his employment he still has a right of action against his master and this right of action is not taken away by s. 105(2).

Part II of *The Workmen's Compensation Act* does away with the defence of common employment in this case. Co-operators Insurance Association, the master and owner of the car, is liable to its first servant for the negligent driving of its second servant. There is a master and servant relationship between both passenger and driver and the owner of

[1] [1945] O.R. 1.

the car, as there was in the *Harrison* case. The passenger-servant is the plaintiff. He retains his right of action against the master notwithstanding the statute. I refrain from expressing any opinion on what would happen in any other relationship.

RITCHIE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario[1] dismissing the appeal of the Co-operators Insurance Association from a judgment rendered at trial by Haines J. whereby the respondent was awarded damages in the amount of $16,800 in respect of personal injuries sustained by him while he was travelling in an automobile allegedly owned by the appellant and driven by its servant, one Edward George Livesey. The learned trial judge gave judgment against both the appellant and its servant, but the action against Livesey was dismissed in the Court of Appeal and it was assumed for the purpose of this appeal that he was not liable for any of the damage sustained by the respondent.

The respondent conducts a real estate and insurance business in the town of Meaford and at all times material hereto was an agent of the appellant "in soliciting insurance and servicing policyholders . . . ." under the terms of a written contract which was executed on July 2, 1955. In the event of a claim being made by any policyholder to whom the respondent had sold a policy, it was the general practice of the appellant to send its own adjuster into the area and it was recognized to be part of the respondent's duty to introduce this adjuster to the policyholder and to accompany them both while the loss was being adjusted. On these occasions the respondent was primarily concerned with maintaining good relations between himself and his company on the one hand and the policyholder on the other. The actual work of adjusting the loss was conducted by the company's adjuster. The learned trial judge has found:

> . . . that both the company and the plaintiff considered it the plaintiff's duty to accompany the adjuster on request in the adjusting of losses *with the policyholder*. (The italics are mine.)

On November 26, 1957, Livesey, who was one of the appellant company's adjusters, drove to Meaford for the purpose of adjusting a claim for collision damage to the automobile of one Sewell who had been insured by the

[1] [1964] 1 O.R. 101, 41 D.L.R. (2d) 196.

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appellant through the agency of the respondent. On his arrival Livesey went to the respondent's office and asked him to make arrangements for meeting the insured and visiting the garage where the damaged car was. It appears that the respondent was busy with some real estate matters at the time and did not want to be disturbed, but on Livesey's insistence he agreed to leave the office and, although his own car was available, he went with Livesey so that they could discuss the claim before meeting the insured, and they drove a few blocks to the F. Stanley Knight Manufacturing Co. where Sewell was employed. When Sewell came out, Kearney introduced him to the adjuster and the three men drove together to the garage where Livesey discussed the damage with the garage proprietor and after making an arrangement for repairs, which appears to have been satisfactory to the insured, he drove with Sewell and the respondent back to the Knight Manufacturing Co. where Sewell signed a claim form and returned to his work.

Having performed the function of introducing the adjuster to his client and having accompanied them both to the scene of the adjustment where the insured appeared to be satisfied, the respondent was anxious to get back to his office and his real estate deal, and although his office was only a few blocks away he asked Livesey to drive him back there. It was on the way back to Kearney's office that the accident occurred.

The respondent's claim is framed on the assumption that the accident occurred after the work of adjustment had been completed and that the appellant was under a duty to provide safe transportation for the respondent while he was returning from the investigation after he had discharged his obligation to the company in respect of the Sewell claim.

By paras. 6 and 7 of the statement of claim it is alleged that:

6. The Plaintiff on the 6th day of November, 1957, in company with the Defendant, Edward George Livesey, attended to adjust an insurance claim for the Defendant, Co-Operators Insurance Association, in the east part of the Town of Meaford, in the County of Grey. *Upon completion of the investigation by the plaintiff and defendant, Edward George Livesey,*

the Defendant, Edward George Livesey, drove the Plaintiff in his motor vehicle in a westerly direction on Boucher Street, in the Town of Meaford, and negligently failed to observe a railway train approaching from the south to cross Boucher Street and collided with great force with the said railway train.

7. The Plaintiff alleges that the Defendants were under a duty to provide safe transportation to the Plaintiff while attending at *and returning from the said investigation.* (The italics are my own.)

The allegation that Livesey was driving "his motor vehicle" at the time of the accident is not denied in the pleadings and in the Court of Appeal Aylesworth J.A. referred to the vehicle as "the car of the defendant Livesey". The case was, however, argued before us on the basis that the appellant was the owner and in any event it will be seen that the disposition of this appeal does not, in my view, turn on any question of the ownership of the motor vehicle, but rather on the question of whether or not, after the investigation of the claim had been completed, the respondent was under a duty to the appellant which required him to return to his office in the Livesey car and which therefore gave rise to a concomittant duty on the part of the appellant to ensure his safe carriage to his destination.

By way of defence the appellant pleaded the provisions of s. 105(2) of *The Highway Traffic Act* of Ontario as relieving him from all liability for any loss or damage resulting from bodily injury to the respondent, and in the alternative, pleaded that Livesey and the respondent were engaged on a joint mission on behalf of the appellant at the material time so as to give rise to the defence of common employment.

The relevant sections of *The Highway Traffic Act* read as follows:

105.—(1) The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as the owner.

(2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers

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for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle.

I agree with both the Courts below that under the authority of the case of *Harrison v. Toronto Motor Car Ltd. and Krug*[1] (hereinafter referred to as the *Harrison* case), s. 105(2) does not have the effect of exempting the owner of a motor vehicle from the personal duty which rests on him as the employer of a servant who is injured while a passenger in a motor vehicle in which he is required to drive in the discharge of a duty arising out of his contract of employment.

In the present case the learned trial judge found the driver Livesey to be liable and if this were indeed the case it would seem to me to follow that, in view of the provisions of s. 125 of *The Workmen's Compensation Act,* the appellant would be vicariously liable to Kearney for the actionable negligence of his fellow employee while acting in the course of his employment. The Court of Appeal has however found, and it is now conceded, that by reason of s. 105(2), the driver Livesey is not liable and this gives rise to the question of whether and if so under what circumstances an employer may be held liable for the acts of its servant when that servant himself is for some reason immune from liability. This question was argued before us at length and appears to me to be one of some difficulty and importance.

Until the decision of Charles J. in *Smith v. Moss et al.*[2], it was widely accepted as a general rule, at least in England, that vicarious liability did not attach to an employer unless his servant had committed an actionable tort. This is frequently referred to as "the traditional view of true vicarious liability", *e.g.* (see Salmon on Torts, 13th ed., 1961, p. 109; Winfield on Tort, 7th ed., 1963, p. 759). In *Smith v. Moss,* however, the plaintiff was injured as the result of the negligence of her husband in the operation of his mother's car and Charles J. held that although under *The Married Women's Property Act* the wife could not sue her husband for a tort, he was at the time of the accident

[1] [1945] O.R. 1. [2] [1940] 1 K.B. 424.

acting as his mother's agent, and that she was therefore liable. The judgment is a short one and the conclusion appears to be based on an analogy which Charles J. drew between the circumstances before him and the supposed case of a plaintiff being driven by her husband in a car which she had hired from a garage where the husband was employed as a driver.

The difference between the supposed case and the facts with which Charles J. had to deal is that the wife in the supposed case had entered into a contract of hire with the garage proprietor whose liability would therefore not have been vicarious but personal, whereas in the *Smith* case no such personal liability rested on the mother-in-law, and under the traditionally accepted view of the matter she would not have been held liable unless her son had been liable also. Some commentators treat this case as authority only for the proposition that the position of a husband and wife under *The Married Women's Property Act* constitutes an exception to the general rule of vicarious liability, (see Powell's Law on Agency, p. 240), while others explain it on the ground that the wording of that Act, *i.e.* "No husband or wife shall be entitled to sue the other for a tort", recognizes that there can be a tort between husband and wife but simply establishes a procedural bar to suit on behalf of either of them and that the mother-in-law Smith was therefore vicariously liable for Smith's tort, although his wife was prevented from suing him for it. The decision might also be treated as an application of what has come to be known as "the master's tort" doctrine which will hereafter be discussed, but as has been indicated, the judgment of Charles J. was not fully reasoned and he made no reference to any of these propositions.

Notwithstanding the wide implications which have since been attributed to the decision of Charles J. in *Smith v. Moss, supra,* which was delivered at *nisi prius* apparently on the day of the trial, (see 56 T.L.R. 305), it is, in my view, highly unlikely that the traditional course of the development of the law of master and servant would have been in any way affected by such a "side wind" had it not been for

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the subsequent decision of the Court of Appeal in the case of *Broom v. Morgan*[1], where the husband and wife were fellow employees and the wife, having been injured through the negligence of the husband, in the course of his employment, brought action against their common employer.

In that case the trial judge, Lord Goddard, based his decision (reported in [1952] 2 All E.R. at p. 1007) in great measure on "the master's tort" doctrine of liability, which he expressed in the following language at p. 1009:

> . . . although it is common to speak of the master's liability as vicarious, it is nonetheless regarded as the liability of a principal. The master is just as much liable as though he commits the tort himself because the servant's act is his act.

Lord Goddard also referred to the decision of Cardozo C.J. in the New York Court of Appeals in *Schubert v. Schubert Wagon Co.*[2], where that distinguished judge said, at p. 43:

> A trespass, negligent or wilful, upon the person of a wife, does not cease to be an unlawful act, though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity . . .

In the Court of Appeal, Denning L.J., (as he then was) in dismissing the appeal also relied primarily on the "master's tort" doctrine. At the beginning of his judgment, at p. 607, he observed:

> I am aware that the employer's liability for the acts of his servants has often been said to be a vicarious liability, but I do not so regard it.

After developing this point at some length, the learned judge concluded at p. 609 by saying:

> My conclusion on this part of the case is, therefore, that the master's liability for the negligence of his servant is not a vicarious liability but a liability of the master himself owing to his failure to have seen that his work was properly and carefully done. If the servant is immune from an action at the suit of the injured party owing to some positive rule of law, nevertheless the master is not thereby absolved. The master's liability is his own liability and remains on him notwithstanding the immunity of the servant.

Lord Denning then proceeded to develop an alternative argument to the effect that the immunity afforded by *The*

[1] [1953] 1 Q.B. 597.

[2] (1928), 164 N.E. 42.

Married Women's Property Act was a mere rule of procedure and not a rule of substantive law. At pp. 609 and 610 he said:

> It is an immunity from suit and not an immunity *from duty or liability*. He is liable to his wife, though his liability is not enforceable by action; and, as he is liable, so also is his employer, but with this difference, that the employer's liability is enforceable by action.

The uncertainty raised by the above cases as to the true basis of the doctrine that a master is vicariously responsible for the tort of his servant committed in the course of his employment, was clarified by the House of Lords in *Staveley Iron & Chemical Co. Ltd. v. Jones*[1], hereinafter referred to as the *Staveley* case, and although what was there said in this regard was *obiter,* the decision is nevertheless widely regarded as having decisively rejected the "master's tort" approach to the question. (See Winfield on Tort, 7th ed., 1963, at p. 761). I agree with this view.

In the *Staveley* case, the plaintiff, who was an employee of the appellant, had been injured as the result of an act of the appellant's crane operator and the trial judge, Sellers J., dismissed the action by applying an extension of the rule in *Caswell v. Powell Duffryn Associated Collieries Ltd.*[2] and holding the crane operator's act to have been nothing more than an error in judgment not amounting to negligence. It was the unanimous opinion of the Court of Appeal[3] that the crane operator's act constituted negligence on the part of a servant of the company acting in the course of her employment, and on this ground the majority of the Court found the company to be vicariously liable, but Denning L.J., in a passage which received no support from the other members of the Court, went out of his way to restate the "master's tort" theory of liability. He put this part of his decision on the ground that the fault was the fault of the employer who, having taken the benefit of such a machine as the crane, must accept the burden of seeing that it is properly handled, and he then said, at p. 480:

> It is for this reason that the employer's responsibility for injury may be ranked greater than that of the servant who actually made the mistake: see *Jones v. Manchester Corp.*, [1952] 2 Q.B. 852, and he remains

[1] [1956] A.C. 627. [2] [1940] A.C. 152. [3] [1955] 1 Q.B. 474.

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responsible even though the servant may, for some reason, be immune; see *Broom v. Morgan, (supra)*. (The italics are my own.)

In the House of Lords this phase of the matter was only dealt with in the decisions of Lord Morton of Henryton and Lord Reid. Lord Morton's reasons were concurred in by three other members of the Court, but Lord Reid was speaking only for himself. In expressly rejecting Lord Denning's reasoning as disclosed in the last-quoted passage, Lord Morton said at p. 639:

> My Lords, what the court has to decide in the present case is: Was the crane driver negligent? If the answer is "Yes", the employer is liable *vicariously* for the negligence of his servant. If the answer is "No", the employer is surely under no liability at all.

I pause here to say that in my view the learned law Lord was here using the word "negligence" in the sense of "actionable negligence". Lord Morton continues:

> Cases such as this, where an employer's liability is vicarious, are wholly distinct from cases where an employer is under a personal liability to carry out a duty imposed upon him as an employer by common law or statute. In the latter type of case the employer cannot discharge himself by saying: "I delegated the carrying out of this duty to a servant, and he failed to carry it out by a mistake or error of judgment not amounting to negligence." To such a case one may well apply the words of Denning L.J.: "[the employer] remains responsible even though the servant may, for some reason, be immune." *These words, however, are, in my view, incorrect as applied to a case where the liability of the employer is not personal but vicarious. In such a case if the servant is "immune", so is the employer . . .* This passage in the judgment of Denning, L.J. receives no support in the judgments of Hodson and Romer L.JJ., and I cannot find that the decisions in the cases cited by Denning L.J. lend any support to it, though it may be that the passage is to some extent supported by certain dicta in the first two of these cases. (The italics are mine.)

The distinction between direct personal liability and vicarious liabilty of a master has been most clearly expressed by Rand J. in a much quoted passage from his judgment in *The King v. Anthony*[1], where he says:

> There may be a direct duty on the master toward the third person, with the servant the instrument for its performance. The failure on the part of the servant constitutes a breach of the master's duty for which he must answer as for his own wrong; but it may also raise a liability on the

[1] [1946] S.C.R. 569 at 572.

servant toward the third person by reason of which the master becomes responsible in a new aspect. The latter would result from the rule of *respondeat superior*; the former does not.

By reason of the provisions of s. 105(2) of *The Highway Traffic Act,* the driver's act which occasioned the injury does not constitute a breach of duty giving rise to liability against him and accordingly, in my view, the appellant cannot be held vicariously liable for this act under the rule of *respondeat superior* because, as Lord Morton has said in the *Staveley* case, *supra,* "Where the liability of the employer is not personal but vicarious . . . . if the servant is immune so is the employer".

In the present case the Courts below did not base their decision on any application of the rule of *respondeat superior* but rather, in finding that the circumstances were governed by the *Harrison* case, they decided that the appellant was in breach of a direct personal duty which it owed to its injured servant, the existence of which was dependent upon it being found that Kearney was in the vehicle at the time of the accident in the discharge of a binding obligation to be there which arose out of his contract of service and which in turn gave rise to a concomitant obligation on the part of the appellant to carry him with due care.

That the decisions of the Courts below were predicated on the existence of such a duty appears to me to be made plain by the following excerpts from their judgments. In this respect, the learned trial judge said:

> I think it sufficient if I find that in the circumstances as they existed between the parties, that the plaintiff became a passenger pursuant to an obligation he owed the defendant company and the defendant company and its servants owed to the plaintiff a duty to carry him with due care. This I so find.

In the course of the reasons which he delivered on behalf of the Court of Appeal, Aylesworth J.A. put the matter even more forcefully when he said:

> We think such cases as the *Dallas* case reported in [1938] S.C.R. 244 and the *Hoar* case reported in [1938] O.R. 666 are quite distinguishable from the case at bar upon their respective facts. Here, but not in those decisions, *the plaintiff was not a free agent as to his movements after completion of the work of adjustment* upon which he and Livesey were

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engaged; he had been transported to the place where the work of adjustment occurred in the car of the defendant Livesey and for the very purpose of engaging in that endeavour; *he was entitled as part of their joint work as employees of the other defendant, to be returned in the same vehicle* to the place whence he came; his employment in that endeavour continued, in our view, until that had been done. (The italics are my own.)

In deciding that the appellant's liability was dependent upon the respondent having been obliged to be in the vehicle at the time of the accident, the Courts below appear to me to have been following the principle established in relation to the English *Workmen's Compensation Act, 1906* in the case of *St. Helen's Colliery Co. v. Hewitson*[1], where it was held that before an employee can recover from his employer for personal injuries it was necessary for the injured employee not only to establish that he was in the course of his employment in the sense of being on his master's business at the time of the accident, but also that he was in the place where the accident occurred because his contract required him to be there. In this regard, Hudson J. speaking on behalf of himself and Duff C.J., Crockett, Davis and Kerwin JJ., in *Dallas v. Home Oil Distributors Ltd.*[2] quoted with approval the language of Lord Wrenbury in the *Hewitson* case at p. 95 where he said:

> The man is not in the course of his employment unless the facts are such that it is in the course of his employment, and in performance of a duty under his contract of service that he is found in the place where the accident occurs. If there is only a right and there is no obligation binding on the man in the matter of his employment there is no liability.

The fact that the Courts below based their decision on the existence of such a direct personal duty and that they at the same time found the present case to be governed by *Harrison v. Toronto Motor Car Ltd. and Krug,* is understandable having regard to the fact that in the *Harrison* case Miss Harrison was under an obligation arising out of her contract of employment to be in the Krug vehicle at the time the accident occurred and Mr. Krug was accordingly under a direct personal duty with respect to her safe carriage which arose under the same contract.

[1] [1924] A.C. 59. [2] [1938] S.C.R. 244.

With the greatest respect for the members of the Court of Appeal, I am unable to find any evidence to support the inference that "the plaintiff was not a free agent as to his movements after completion of the work of adjustment". It appears to me to be established by the pleadings and the evidence that at the time of the accident the respondent was no longer under any obligation to the appellant arising out of the Sewell adjustment and it is apparent that the parties directly concerned did not treat the matter of Kearney driving back to his office as a passenger in the Livesey car as being something which he did in the discharge of a duty which he was obliged to perform under his contract. Kearney's evidence in this regard is that:

> Mr. Livesey was going back up to Lon Smith's garage, and I asked him to leave me back up to my office, because I was anxious to be back there.

Livesey's evidence is to the same effect. He says of the conversation with Kearney after dropping Sewell:

> Then I said to him: "Well do you want to come back—come up to Lon Smith's with me or shall I drop you at your office?" which I felt was the only polite thing to do and he said: "No, drop me at the office" and I would say 45 seconds later there was no car.

In light of all the evidence and having regard to the sequence of events outlined in the last-quoted passages, I am of opinion that Kearney was not in the car when the accident occurred pursuant to any obligation which was binding on him in the matter of his employment, and I am therefore unable to find that in the circumstances of the present case there was any direct personal duty resting on the appellant with respect to the safe carriage of the respondent.

I agree with Mr. Justice Aylesworth that Kearney "was entitled" to be returned from whence he came in the Livesey vehicle if he wanted to use it, but if he had preferred to walk the few blocks over to his office or to go and call on a nearby friend, I am unable to see how it could be said that he was bound by any obligation to the appellant which would have prevented him from doing so.

I agree with the Courts below that the doctrine of common employment is of no assistance to the appellant in view

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of the provisions of s. 125 of *The Workmen's Compensation Act,* R.S.O. 1960, c. 437, but I am of opinion that the effect of s. 124 of that Act is to make an employer responsible to an injured employee for the negligent acts of a fellow servant done in the course of his employment which caused such injury, in the same way that the employer is responsible to the rest of the world for such negligent acts. I do not think that the section has the effect of creating a personal liability in the employer if the injured employee was not acting in the course of his employment in the sense above referred to at the time when he sustained the injury.

Like the Court of Appeal, I have confined my consideration of the relative duties of Kearney and his employer to the period of the return journey when the accident took place, but if it were necessary to do so, I would hold that although Kearney had the right to be driven to the garage by the company's adjuster, he was not under any compelling duty to do so arising out of his contract and would not have been in breach of any obligation owing by him to the company if he had travelled in his own vehicle.

In view of all the above, I would allow this appeal, but having regard to all the circumstances, I would make no order as to costs.

Appeal dismissed with costs, CARTWRIGHT *and* RITCHIE JJ. *dissenting.*

Solicitors for the defendant, appellant: Phelan, O'Brien, Phelan & Rutherford, Toronto.

Solicitors for the plaintiff, respondent: McKay & Scheifele, Meaford.

DAVID E. ROUMIEU and LAUREL ROUMIEU (*Plaintiffs*) ..... APPELLANTS;

1964 *Oct. 29, 30 Nov. 20

AND

JERROLD BERTNEY OSBORNE (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Damages—Motor vehicle accident—Personal injuries—Jury's award reduced on appeal—Whether Court of Appeal justified in reducing award.

In an action which arose as a result of a motor vehicle accident, liability for which was admitted by the defendant, the jury awarded the plaintiff $17,500 damages in respect of the injuries that she had sustained. On appeal, the Court of Appeal set aside the jury's award and substituted therefor an award of $6,500; from that judgment the plaintiff appealed to this Court.

Held (Abbott and Judson JJ. dissenting): The appeal should be allowed and the award of the jury restored.

Per Taschereau C.J. and Martland and Ritchie JJ.: The Court of Appeal erred in substituting its own view of the severity of the plaintiff's injuries for that of the jury. It was impossible for the Court to say that the amount of the damages fixed by the jury was so large that the jury reviewing the whole of the evidence reasonably could not properly have arrived at that amount. *Warren v. Gray Goose Stage Ltd.*, [1938] S.C.R. 52, followed; *Praed v. Graham* (1889), 24 Q.B.D. 53; *McCannell v. McLean*, [1937] S.C.R. 341, referred to.

Per Abbott and Judson JJ., *dissenting*: The task of this Court was to determine whether it had been shown that the Court of Appeal was in error, not whether this Court would have done the same thing as the first appellate Court. The appellant had failed to show that the Court of Appeal was in any way wrong. *Donnelly v. McManus Petroleum Ltd.*, [1950] 1 D.L.R. 303, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia, setting aside a jury award for damages for personal injuries received in a motor vehicle accident and substituting therefor a reduced award. Appeal allowed, Abbott and Judson JJ. dissenting, and award of jury restored.

W. J. Wallace and *G. W. Baldwin*, for the plaintiffs, appellants.

G. F. Henderson, QC., and *B. Crane*, for the defendant, respondent.

*PRESENT: Taschereau C.J. and Abbott, Martland, Judson and Ritchie JJ.

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The judgment of the Chief Justice and Martland and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia setting aside the award by a jury of $17,500 damages to the appellant in respect of injuries which she sustained in a motor vehicle accident, and substituting therefor an award of $6,500.

Liability for the accident which occasioned the injuries complained of is admitted by the respondent, and the sole question at issue is whether or not the Court of Appeal was justified in reducing the jury's award as it did. There is no doubt that the Court of Appeal of British Columbia is empowered to make such a reduction under the provisions of R. 36 of the British Columbia Court of Appeal Rules which read as follows:

> 36. Where excessive damages have been awarded by a jury, if the court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party instead of ordering a new trial.

The rule of conduct for a court of appeal when considering whether a verdict should be set aside on the ground that the damages are excessive, has been well described by Lord Esher in *Praed v. Graham*[1], as being

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

This statement was endorsed by Lord Wright in *Mechanical and General Inventions Co. Ltd. and Lehwess v. Austen*[2], and in this Court by Kerwin J. as he then was, in *Warren v. Gray Goose Stage Ltd.*[3], and *Deutch v. Martin*[4].

The principle on which this Court acts in such cases has been clearly stated by Sir Lyman Duff C.J. in *McCannell v. McLean*[5], at p. 343 where he said:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. That is the principle on which this Court has acted for at least thirty years to my personal knowledge and it has been stated with varying terminology in judgments reported and unreported.

As a result of the accident in the present case, the appellant sustained cuts to her face, her dentures were broken

[1] (1889), 24 Q.B.D. 53.
[2] [1935] A.C. 346 at 358.
[3] [1938] S.C.R. 52 at 59.
[4] [1943] S.C.R. 366 at 368.
[5] [1937] S.C.R. 341 at 343.

in her mouth, her right ankle was badly sprained, her right shoulder was broken and she had a dislocation of both ends of the right collar bone. In addition, she complained of a fractured rib on her left side and she had multiple bruises. There was evidence, which the jury was entitled to believe, to the effect that her ankle had suffered an unusual injury resulting in an arthritic process which might require surgery in the future in order to control pain, and that it would require her to curtail her activities. An orthopedic surgeon, who had examined Mrs. Roumieu the day before the trial, which was two years and nine months after the accident, testified, *inter alia,* that she would have a permanent deformity in the shoulder which had some cosmetic effect and that there would always be pain at the outer aspect of her collar bone.

In the course of the reasons for judgment which he delivered on behalf of the Court of Appeal, Mr. Justice Lord made an extensive analysis of the evidence and with the greatest respect, it appears to me that he fell into the error of substituting his own view of the severity of these injuries for that of the jury.

I would adopt as directly applicable to the circumstances of the present case, the words of Mr. Justice Davis in *Warren v. Gray Goose Stage Ltd., supra,* at p. 56 where he said:

> While it may be that the general damages were awarded on a generous scale, there was no firm ground, in our opinion, on which the Court of Appeal was entitled to set aside the jury's assessment. This was essentially a case for a jury and it is quite impossible for the Court to say that the amount of the damages fixed by the jury was so large that the jury reviewing the whole of the evidence reasonably could not properly have arrived at that amount.

I would accordingly allow this appeal with costs, set aside the judgment of the Court of Appeal and restore the award of the jury.

The judgment of Abbott and Judson JJ. was delivered by

JUDSON J. (*dissenting*):—I would not interfere with the judgment of the Court of Appeal. The careful and detailed analysis contained in the unanimous reasons of that Court satisfies me that they were acting well within their powers of review of a non-judicial award and that there was no misunderstanding of the principle to be applied, as set out in

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Warren v. Gray Goose Stage Ltd.[1]; *Deutch and Deutch v. Martin*[2].

Our task is to determine whether it has been shown before this Court that the Court of Appeal was in error, not whether we would have done the same thing as the first appellate Court.

> In such matters this Court cannot overlook the fact that the question of damages is intimately related to the surroundings in which they arise and are determined, and the Court below is so far to be credited with an intimate appreciation of those conditions.

Per Rand J. in *Donnelly v. McManus Petroleum Ltd.*[3]

The appellant has not satisfied me that the Court of Appeal was in any way wrong and I would dismiss the appeal with costs.

Appeal allowed with costs and the award of the jury restored, ABBOTT *and* JUDSON JJ. *dissenting.*

Solicitors for the plaintiffs, appellants: Wilson, King & Baldwin, Prince George.

Solicitors for the defendant, respondent: Harper, Gilmour, Grey & Co., Vancouver.

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*Oct. 13, 14
Dec. 21

ABRAM SCHWEBEL .....(*Plaintiff*) APPELLANT;

AND

HAVA UNGAR .....(*Defendant*) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Conflict of laws—Status—Parties whose domicile of origin was Hungary married in that country—Jewish bill of divorcement obtained in Italy—Parties later acquiring domicile of choice in Israel—Divorce not recognized in Italy or Hungary but recognized in Israel—Female party subsequently married in Ontario while continuing to be domiciled in Israel—Whether Ontario marriage valid.

In 1945 the defendant was married to W in Budapest, Hungary, which country was their domicile of origin. Before their marriage they had decided to leave Hungary permanently for Israel and in furtherance of this intention they left Budapest three weeks after the marriage and, having put themselves in the hands of a Jewish deputy, started for Israel in company with many thousands of other Hungarians. In 1948, while still *en route* to Israel, they obtained a Jewish bill of divorcement in Italy in conformity with rabbinical law by appearing,

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

[1] [1938] S.C.R. 52, 1 D.L.R. 104. [2] [1943] S.C.R. 366, 3 D.L.R. 305.
[3] [1950] 1 D. L. R. 303 at 304.

in the presence of witnesses, before a rabbi at which time a formal document entitled a "gett" was delivered to the defendant. This document was not recognized either in Italy or in Hungary as bringing the marriage to an end, but it was so recognized in Israel, where the defendant and W finally arrived a few weeks after the "gett" was delivered.

As to W's life and activities after his arrival in Israel the evidence was sketchy; as to the defendant, the evidence disclosed that she remained in Israel and lived with her parents. Some years later, while on a trip to Ontario for the purpose of visiting relatives, the defendant met and married the plaintiff in Toronto. Subsequently, the plaintiff obtained a declaration in the Supreme Court of Ontario that the marriage solemnized between the parties at Toronto was null and void because there was a valid and subsisting marriage then in existence between the defendant and W. On appeal by the defendant the judgment at trial was set aside. With leave of the Court of Appeal, an appeal by the plaintiff was then brought to this Court.

Held: The appeal should be dismissed.

The manner of their coming to Israel was such as to justify a finding that immediately upon their arrival W and the defendant acquired a domicile of choice in that country, where the dissolution of their marriage was recognized from the moment when the "gett" was delivered to the defendant, and where each of them therefore had the status of a single person with full capacity to enter into a valid and binding contract of marriage. The defendant was thereafter free to continue and did continue to be domiciled in Israel as an unmarried woman until the time of her marriage to the plaintiff. Accordingly, at the time of her marriage in Toronto the defendant had the capacity to marry according to the law of the country where she was then domiciled.

Although, as a general rule, under Ontario law a divorce is not recognized as valid unless it was so recognized under the law of the country where the husband was domiciled at the time when it was obtained, the Court of Appeal was correct in its conclusion that, for the limited purpose of resolving the difficulty created by the peculiar facts of this case, the governing consideration was the status of the defendant under the law of her domicile at the time of her second marriage and not the means whereby she secured that status.

Bell v. Kennedy (1868), L.R. 1 Sc. & Div. 307, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of McRuer C.J.H.C. granting a declaration of nullity of marriage. Appeal dismissed.

H. W. Silverman, for the plaintiff, appellant.

G. D. Finlayson, Q.C., and *J. H. Francis,* for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought with leave of the Court of Appeal of Ontario from a judgment of that

[1] [1964] 1 O.R. 430, 42 D.L.R. (2d) 622.

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Court[1] setting aside the judgment rendered at trial by McRuer C.J.H.C. which had declared that the marriage solemnized between the parties at Toronto on April 6, 1957, was null and void because there was a valid and subsisting marriage then in existence between the respondent and one Joseph Waktor.

At the time of his marriage to the respondent, the appellant was a bachelor domiciled in the Province of Ontario and the couple thereafter lived together in Toronto where their daughter was born in 1958, but differences appear to have developed between them which culminated in the present litigation.

In essence the argument advanced on behalf of the appellant is that the validity of the bill of divorcement granted before a rabbinical court at Trani, Italy, which purported to dissolve the respondent's first marriage was not, at the time when it was granted, recognized in Hungary which was then the country of Waktor's domicile and accordingly that it should not be recognized in the Province of Ontario. It is further contended, as the learned trial judge has found, that the evidence does not justify a finding that Waktor had acquired a domicile of choice in Israel, where his marriage was regarded as having been legally dissolved, and that the respondent therefore never lost her status as Waktor's wife according to the law of his domicile of origin in Hungary which should be recognized in the Courts of Ontario as the status which she had at the time of her marriage to the appellant.

The respondent, who was born in Hungary, was married to Waktor in Budapest in 1945 when she was 19 years of age. Before her marriage she had decided to leave Hungary for Israel, and Waktor's position in this regard can best be gathered from the following excerpts from the respondent's examination for discovery:

Q. Where were you born? A. I was born in Hungary.

Q. And you lived there all your life prior to this marriage with Joseph Waktor? A. Yes.

Q. What about Joseph Waktor? Do you know where he lived? A. He once went to Israel and after came back.

Q. Was he in business in Hungary, or was he a teacher? What was his occupation? A. He was in the army and after in a forced labour camp.

[1] [1964] 1 O.R. 430, 42 D.L.R. (2d) 622.

Q. But, he always had lived in Hungary? A. He went to Israel for two years previous to our marriage.

Q. When was that he went to Israel? A. Before he was in—it must be in the service.

Q. That was in the early thirties? A. I don't know.

Q. And then he came back to Hungary? A. *Yes, he could'nt get back.*

Q. And he continued to live in Hungary? A. He was in the labour camp, yes.

And again in her examination-in-chief:

Q. And what happened after you were married? Did you decide to leave Hungary? A. We decided to leave Hungary after we got married.

Q. You had made up your mind to leave before you got married? A. I made up my mind when the Germans was in, that I will leave Hungary after the War.

Q. And was Mr. Waktor of the same mind? A. Yes.

Q. Where did you intend to go? A. To Israel.

Q. And is that where your husband intended to go? A. Yes.

In furtherance of this intention, the newly married couple left Budapest a few weeks after the marriage and started for Israel in company with many thousands of other Hungarians. For the purpose of the journey the respondent testified that they put themselves "in the hands of a Jewish deputy, an Israeli deputy" who appears to have been representing "a few Jewish people who arranged to get people out of Europe to Israel" of whom the respondent says: "They was only organized to take people from all over the world, but mostly from European countries to Israel".

It is to be inferred from the evidence that the Waktors left Hungary having already decided that they would never return, but it does not appear to me that they are to be characterized as "political refugees" in the sense of being people who left under the fear of political oppression. In the case of refugees of the latter type, the possibility of the return of a political climate which would make it safe and practical for them to come home is always a factor to be considered before drawing the inference that they have formed a permanent intention to remain in another country. In the case of the Waktors, however, it appears to me that the dominant motive in their departure was not so much a desire to get away from Hungary as it was their decision to become a part of the new community then in the process of development in Israel which was the country of their racial origin.

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For nearly three years the couple moved from one displaced persons camp to another in Germany and Italy *en route* to Israel and in October 1948, when they had reached a camp at Trani in Italy, which proved to be the last stage of their journey, they obtained a Jewish bill of divorcement in conformity with rabbinical law by appearing, in the presence of witnesses, before the rabbi in the camp at which time a formal document entitled a "gett" was delivered to the respondent. This document was not recognized either in Italy where it was delivered or in Hungary which was the Waktors' domicile of origin as bringing the marriage to an end, but it was so recognized in the State of Israel and a few weeks later, when the Waktors finally landed there, they were recognized as having had the status of unmarried persons under the law of that county from the time when the "gett" was delivered.

As I have indicated, there is evidence to the effect that Waktor had lived in Israel for two years before his marriage and that on his return to Hungary he had not been able to get back to Israel because he was placed in a forced labour camp. This affords some ground for the suggestion that when he left Hungary for Israel after his marriage he was returning to a country where he had already established a domicile of choice, and that he was therefore domiciled in a jurisdiction which recognized the validity of a Jewish bill of divorcement at the time when the "gett" was delivered to the respondent at Trani. I do not, however, think that the evidence is sufficiently clear and precise to justify a finding to this effect.

The evidence as to Waktor's life and activities after his arrival in Israel is sketchy but in the course of proving that he was still alive at the time of the respondent's second marriage, the appellant's counsel led evidence to show that, as far as was known, he had remained in Israel from the time that he arrived there, and an extract was introduced from a registration in the census book at Tel Aviv which is dated August 16, 1962, and which states that Waktor is single, that his religion and nationality are Jewish and that he is a resident of Israel from November 20, 1948.

The respondent's evidence discloses that she lived in Israel with her parents for seven and a half years after her arrival and that it was on a trip to New York and Toronto

for the purpose of visiting relatives that she met and married the appellant.

The learned Chief Justice who presided at the trial of this action decided that the respondent was not domiciled in Israel at the time of her second marriage on the ground that while she was in Italy she still retained the domicile of her first husband which was Hungary and that the evidence necessary to support a finding that Waktor had established a domicile of choice in Israel was lacking in this case.

Although there is a presumption against a change of domicile, and the intention to remain permanently in a country other than the country of origin must be accompanied by actual residence in the new country in order to establish a domicile of choice, there may nevertheless be circumstances which so clearly indicate the existence of an intention to remain permanently in the new country that the mere fact of arrival there is enough to establish the new domicile. This proposition finds support in Dicey's Conflict of Laws, 7th ed., p. 96, where it is stated:

> It is not, as a matter of law, necessary that the residence should be long in point of time: residence for a few days or even for part of a day is enough. Indeed, an immigrant can acquire a domicile immediately upon his arrival in a country in which he intends to settle. The length of the residence is not important in itself: it is only important as evidence of *animus manendi.*

In Cheshire's Private International Law, 6th ed., at p. 174, it is said:

> On the other hand, time is not the sole criterion of domicil. Long residence does not constitute nor does brief residence negate domicil. Everything depends upon the attendant circumstances, for they alone disclose the nature of the person's presence in a country.

These views appear to me to be consistent with the observations of Lord Chelmsford in *Bell v. Kennedy*[1], where he had occasion to say:

> It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile.

It would, in my view, be difficult to conceive of circumstances pointing more forcefully to the existence of an intention to permanently reside in a new domicile than those which were present in the case of the Waktors who, on leaving their domicile of origin, immediately placed

[1] (1868), L.R. 1 Sc. & Div. 307.

themselves in the hands of a deputy of the country to which they were destined and who thereafter lived for three years in a community of Jewish people all sharing the common purpose of settling in the country of their racial origin.

As I have indicated, Chief Justice McRuer did not consider that the evidence of Waktor's movements after landing in Israel was sufficiently clear and satisfactory to warrant a finding that he had acquired a domicile of choice there, but in my view any frailties which may be thought to exist in that evidence are more than offset by the circumstances preceding his arrival which point so clearly to the existence of his long-held intention to settle in the new country. I accordingly agree with the conclusion reached by MacKay JA. in the course of the reasons for judgment which he delivered on behalf of the Court of Appeal where he says:

> On a reading of all the evidence in this case, I think the proper conclusion is that Waktor (1) had an intention to abandon his domicile of origin in Hungary, and (2) to establish a domicile of choice in Israel; and did so.

I am, however, of opinion that the emphasis which the Courts below have placed on the evidence or lack of evidence as to Waktor's movements after he came to Israel is unnecessary in the present case. In my view the manner of their coming was such as to justify a finding that immediately upon their arrival the Waktors acquired a domicile of choice in Israel where the dissolution of their marriage had been recognized as valid from the moment when the "gett" was delivered to the respondent, and where each of them therefore had the status of a single person with full capacity to enter into a valid and binding contract of marriage. The respondent was thereafter free to continue and did continue to be domiciled in Israel as an unmarried woman until the time of her marriage to the appellant.

I am accordingly of opinion that at the time of her marriage in Toronto the respondent had the capacity to marry according to the law of the country where she was then domiciled. This does not, however, solve the whole problem because as a general rule, under Ontario law a divorce is not recognized as valid unless it was so recognized under the law of the country where the husband was domiciled at the time when it was obtained, and although the validity of the Jewish divorce was at all times recognized in Israel where

the Waktors established a domicile of choice within three weeks of it having been granted, it was never so recognized according to the law of the husband's Hungarian domicile of origin.

The Court of Appeal of Ontario has treated these singular circumstances as constituting an exception to the general rule to which I have just referred. In the course of his reasons for judgment Mr. Justice MacKay has thoroughly and accurately summarized and discussed the authorities bearing on this difficult question and it would in my view be superfluous for me to retrace the ground which he has covered so well. I adopt his reasoning in this regard and agree with his conclusion that, for the limited purpose of resolving the difficulty created by the peculiar facts of this case, the governing consideration is the status of the respondent under the law of her domicile at the time of her second marriage and not the means whereby she secured that status.

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

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: H. W. Silverman, Toronto.

Solicitors for the defendant, respondent: McCarthy and McCarthy, Toronto.

SAMUEL SILVESTRO .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1964
*Oct. 20, 21
Nov. 19

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Common betting house and book-making—Trial judge expressing doubt as to modus operandi—Whether necessary for Crown to prove precise manner in which offence committed—Criminal Code, 1953-54 (Can.), c. 51, ss. 21, 168, 169, 176(1), 177(1)(e), 592(4)(1), 597(2).

The accused was charged with keeping a common betting house and engaging in book-making. The trial judge found that there was a *prima facie* case against him on both charges. However he acquitted him on the

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

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ground that the first charge had not been proved beyond a reasonable doubt. The Crown appealed to the Court of Appeal and contended that the magistrate erred in holding that the Crown should have proved affirmatively the precise manner in which the offence was committed. The Court of Appeal reversed the judgment at trial and substituted verdicts of guilty in respect of the two charges. The accused appealed to this Court.

Held (Cartwright and Spence JJ. dissenting): The appeal should be dismissed.

Per Taschereau C.J. and Fauteux and Ritchie JJ.: In order to sustain a conviction under s. 176(1) of the Code it is not necessary that there should be direct evidence of the accused having either received or recorded a bet, it being enough, under the provision s. 168(1)(*c*), if it be proved that he kept a disorderly house for the purpose of "enabling any person to receive bets". Once it has been established that the accused was the keeper of such a house, it is not necessary for the Crown to prove affirmatively the manner in which bets were received or recorded therein. The accused would necessarily have been found guilty by the magistrate but for this error in law. The Court of Appeal was justified in entering a verdict of guilty with respect to these offences.

Per Cartwright and Spence JJ., *dissenting*: The magistrate did not misdirect himself but was merely putting to himself the well-known rule in *Hodge's* case. The magistrate was putting to himself the basic proposition of criminal jurisprudence that the Crown must prove its case beyond a reasonable doubt.

APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside two verdicts of acquittal and substituting therefore verdicts of guilty. Appeal dismissed, Cartwright and Spence JJ. dissenting.

A. Maloney, Q.C., and *B. Clive Bynoe,* for the appellant.

F. W. Callaghan, for the respondent.

The judgment of Taschereau C.J., and Fauteux and Ritchie JJ, was delivered by

RITCHIE J.:—This is an appeal brought pursuant to 597(2) of the *Criminal Code* from a judgment of the Court of Appeal of Ontario[1] setting aside two verdicts acquitting the appellant of the offences of keeping a common betting house and of book-making which were entered by Magistrate Howitt of the City of Guelph on August 14, 1963, and substituting therefor verdicts of guilty in respect of the following charges:

1. Samuel Silvestro on the 24th day of April and one month previous thereto at the City of Guelph A.D. 1963 in the County of Wellington did unlawfully keep a disorderly house to wit: a common bet-

[1] [1964] 1 O.R. 602, 2 C.C.C. 116, 42 C.R. 184.

ting house at 165 Ferguson Street in the City of Guelph contrary to the Criminal Code Sec. 176(1).

2. Samuel Silvestro on the 24th of April and one month prior thereto at the City of Guelph, A.D. 1963 in the said County of Wellington did unlawfully engage in bookmaking contrary to the Criminal Code Sec. 177(1)(*e*).

It appears to me to be desirable to analyze the nature of these charges before proceeding to a consideration of the question of law raised by this appeal.

As to the first charge, the relevant sections of the *Criminal Code* read as follows:

176. (1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and is liable to imprisonment for two years.

168. (1) In this Part,

(*c*) "common betting house" means a place that is opened, kept or used for the purpose of

(ii) enabling any person to receive, record, register, transmit or pay bets or to announce the results of betting.

(*h*) "keeper" includes a person who

(i) is an owner or occupier of a place.

(*e*) "disorderly house" means a common bawdy-house, a common betting house or a common gaming house.

169. In proceedings under this Part,

(*a*) evidence that a peace officer who was authorized to enter a place was wilfully prevented from entering or was wilfully obstructed or delayed in entering is *prima facie* evidence that the place is a disorderly house.

It will be seen from the above that any keeper of a disorderly house which is opened, kept or used for the purpose of enabling any person to receive bets is guilty of keeping a common betting house contrary to 176(1).

As to the second charge, the relevant provisions of the *Criminal Code* read as follows:

177. (1) Every one commits an offence who

(*e*) engages . . . in the business or occupation of betting, or . . .

21. (1) Every one is a party to an offence who

(*b*) does or omits to do anything for the purpose of aiding any person to commit it . . .

It will accordingly be seen that anyone who does anything for the purpose of aiding another to engage in the occupation of betting is guilty of an offence under this section.

In the present case the learned Magistrate made the following findings of fact:

1. As to the premises being a disorderly house:

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Ritchie J.

I find as a fact that entry was wilfully delayed by the accused and therefore, there is a prima facie evidence that the place is a disorderly house.

2. As to the appellant being the keeper of the premises:

Although counsel for the accused strenuously argued that there was not sufficient evidence to establish that the accused Silvestro was the keeper of the premises, I find as a fact that he was.

3. As to certain telephone calls made to the premises in question while the telephone was being monitored by the police:

I find as a fact that the telephone conversations were accurately recorded and that such evidence is admissible to prove the nature, character and atmosphere of the premises but not proof of the matters asserted . . . The conversations were about placing bets on horses that were running at various race tracks that day. Such evidence standing by itself, is not enough to substantiate a conclusion that the premises were being kept for betting. It is evidence of some value, however, tending to prove the charge.

In my opinion, the learned Magistrate's finding that the telephone conversations were properly recorded carries with it an acceptance of the record as to the number of betting messages which were received over the telephone at the premises while the police were listening in, and this discloses that between 1:35 and 2:34 p.m. there were eleven such calls, eight of which took place in the first twenty-eight minutes.

None of these findings of fact was disturbed by the Court of Appeal and I can see no basis for interfering with them in this Court. When they are read together, I am unable to construe these findings as amounting to anything other than a *prima facie* case that the appellant was the keeper of a disorderly house which was used for the purpose of enabling persons to receive telephone messages about placing bets on horses, and this, in my opinion, constitutes an offence under s. 176(1) of the *Criminal Code*. In my view also, a keeper of a common betting house is one who does something for the purpose of aiding other persons to engage in the occupation of betting, and I am therefore of opinion that having regard to the provisions of s. 21, the findings of fact above referred to also constitute a *prima facie* case under s. 177(1)(*e*). Notwithstanding the above, however, the learned Magistrate, after considering all the evidence, was left in doubt as to the guilt of the appellant on both charges, and it is the question of whether or not his doubts

were founded solely on an error in law which forms the subject of this appeal.

No evidence was called for the defence, and the considerations which gave rise to doubt in the Magistrate's mind appear to me to be illustrated by the following excerpts from his reasons for judgment:

1. I feel that in order to register a conviction not only must I find as fact that the accused received and recorded bets, but also I must outline and describe how he did it. This I find a little difficult to do as I am faced on the one hand with the suggestion that the accused used a flash board on which to record bets and on the other hand with the suggestion that he used the arborite table top for this purpose.
2. There is no direct evidence that the accused received or recorded a bet.
3. In the present case I am left wondering just what method the accused used to carry out his alleged illegal activity. There are no betting slips and scratch sheets in evidence. Also, I think it is obvious that a book maker must have some printed or written record of the day's racing contestants immediately at hand, as a reference before receiving a bet. In the case before me there is no sign of any such information. Admittedly there were the newspapers in the parked automobile but they were not being used at the time of the raid.
4. I feel the evidence is not strong enough and it does not disclose with reasonable certainty his method of operation.

The following question of law was stated in the notice of appeal of the Attorney-General of Ontario to the Court of Appeal:

The learned Magistrate erred in law in holding that in order to convict the accused it was necessary for the Crown to prove affirmatively the precise manner in which the offence was committed.

It is true that the question so stated does not embody the exact language used in the reasons for judgment delivered at trial, but it does appear to me that in acquitting the appellant the learned Magistrate made it clear that he was acting in accordance with his opinion that in order to convict it was necessary for him to have affirmative proof, not only that the accused received bets, but also that he recorded them and that there must in addition be proof, amounting to reasonable certainty, of the manner in which these things were done.

In my view, one of the questions of law raised by the opinion so expressed by the Magistrate is fairly reflected in the question posed by the notice of appeal.

It will be noted that a substantial part of the difficulty which led the Magistrate to hold that the first charge was

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not proved beyond a reasonable doubt sprang from his being under the impression that in order to convict he must be satisfied as to how the bets were recorded. In fact, as Roach J.A. has pointed out in the course of his reasons for judgment rendered on behalf of the Court of Appeal, the learned Magistrate, like the Court of Appeal of Ontario in *Regina v. Failkaw*[1], was wrong in considering that the *recording* of bets is an essential ingredient of the offence under s. 176(1). Indeed, in order to sustain a conviction under that section it is not necessary that there should be direct evidence of the accused having either received or recorded a bet, it being enough, under the provisions of s. 167(1)(*c*), if it be proved that he kept a disorderly house for the purpose of "enabling any person to receive bets". Once it has been established that the accused was the keeper of such a house, it is not necessary for the Crown to prove affirmatively the manner in which bets were received or recorded therein.

As I consider that the findings of fact above referred to constitute a *prima facie* case of guilt as to both charges, and as there was no evidence for the defence, I am of opinion that the accused would necessarily have been found guilty by the learned Magistrate but for the errors in law which I have indicated, and I am of the further opinion that the Court of Appeal, in the exercise of the jurisdiction conferred upon it by s. 592(1)(i) of the *Criminal Code,* was justified in entering a verdict of guilty with respect to these offences.

I would accordingly dismiss the appeal.

The judgment of Cartwright and Spence JJ. was delivered by

SPENCE J. (*dissenting*):—This is an appeal by the accused from the judgment of the Court of Appeal for Ontario[2] dated January 31, 1964. By that judgment, the Court of Appeal for Ontario allowed the appeal of the Attorney General for Ontario from the acquittal of the accused by His Worship Magistrate Howitt on August 14, 1963. The accused had been charged with two offences as follows:

(1) On the 24th day of April and one month previous A.D. 1963, at the City of Guelph in the said County of Wellington did unlawfully keep a disorderly house, to wit: a common betting house at 165 Ferguson Street, in the City of Guelph, contrary to the Criminal Code, Section 176, subsection (1).

and

[1] [1963] 2 C.C.C. 42, 40 C.R. 151.

[2] [1964] 1 O.R. 602, 2 C.C.C. 116, 42 C.R. 184.

(2) On the 24th day of April and one month prior thereto at the City of Guelph A.D. 1963, in the said County of Wellington did unlawfully engage in bookmaking, contrary to the Criminal Code, Section 177, subsection (1)(*e*).

The trial took place on June 26, 1963, the learned magistrate reserved judgment, and on August 14, 1963, gave written reasons for the acquittal of the accused upon both charges.

The Attorney-General for the Province of Ontario appealed to the Court of Appeal for Ontario by notice of appeal dated August 23, 1963. I repeat in full the grounds of appeal set out therein:

The learned Magistrate erred in law in holding that in order to convict the accused it was necessary for the Crown to prove affirmatively the precise manner in which the offence was committed.

The Court of Appeal for Ontario gave effect to this ground of appeal. In the course of his judgment, Roach J.A. said:

The question of law on which the Attorney General founds this appeal is stated in his notice of appeal, thus:

> The learned Magistrate erred in law in holding that in order to convict the accused it was necessary for the Crown to prove affirmatively the precise manner in which the offence was committed.

In my opinion that objection as applied to these charges is well taken and the learned Magistrate misdirected himself.

The appellant urged many grounds of appeal before this Court. In my view, the appeal may be decided by reference only to the first thereof, i.e., that the learned magistrate did not misdirect himself and that the statement quoted inaccurately in the notice of appeal was not an attempt by the magistrate to direct himself at all. It is probably unnecessary to cite at length the reasons for the judgment given by the learned magistrate and a short summary thereof will be sufficient. Firstly, the magistrate found upon evidence that the provisions of s. 169(*a*) of the Code applied to the circumstances and that there was *prima facie* evidence that the premises were a disorderly house. Secondly, the learned magistrate found that the accused was the keeper of that house. Thirdly, the learned magistrate found that the telephone messages adduced in evidence as having been received at the premises by an officer in the hour which followed the officer's entry upon the premises were accurately recorded in the tape recording produced

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as a witness. Fourthly, the magistrate recounted the other evidence as to what was found in the premises and outside the premises in an automobile, and then continued:

> The evidence which I have outlined is wholly circumstantial. There is no direct testimony that the accused received or recorded a bet. The Crown asks that a conviction be made, suggesting that evidence indicates that the accused received bets over the telephone and recorded them in pencil on the arborite table top or on flash paper, which paper burns instantly on being ignited. It is argued that the burnt match points to the fact that flash paper was used. Further, it is submitted that the pencil found on the accused man was used to record the bets on the table and the smudge mark or marks, barely discernable, on the table, were made after the face cloth was used in an effort to destroy all evidence of bets having been so recorded.
>
> I feel that in order to register a conviction not only must I find as fact that the accused received and recorded bets, but also I must outline and describe how he did it. This I find a little difficult to do as I am faced on the one hand with the suggestion the accused used flash paper on which to record bets and on the other hand, with the suggestion that he used the arborite table top for this purpose.
>
> Also I feel that in cases of this kind, I should look for very tangible evidence. The circumstantial evidence, although any part of it may be capable of innocent interpretation, should be closely connected so that the cumulative effect should almost impel me to find the accused guilty. The evidence should be inconsistent with any other rational conclusion of innocence.
>
> In the present case I am left wondering just what method the accused used to carry out his alleged illegal activity. There are no betting slips and scratch sheets in evidence. Also, I think it is obvious that a book maker must have some printed or written record of the day's racing contestants immediately at hand, as a reference before receiving a bet.
>
> In the case before me, there is no sign of any such printed information. Admittedly there were the newspapers in the parked automobile but they were not being used at the time of the raid. The gist of the offence is the keeping of the premises for betting (and I emphasize "keeping"). No doubt, Samuel Silvestro is a keeper, but there is some evidence, the admissibility of it being doubtful, that a Frank Silvestro is involved. Did the accused use the name of Frank Silvestro in answering the telephone or was a Frank Silvestro actually engaged or about to engage in receiving and recording bets on the 24th day of April 1963? Do Frank and Samuel Silvestro work together in such an illegal enterprise? These questions are not answered.
>
> It may be that a man is so enveloped by a web or network of inculpatory evidence, that it is incumbent upon him to make an explanation or be convicted. This is not so here. I am left to draw too many inferences in order to reach the conclusion that the accused is guilty. Although my suspicions are strong that the accused was carrying on betting operations at 165 Ferguson Street, I feel the evidence is not strong enough and it does not disclose with reasonable certainty his method of operation.

It is the sentence from that portion of the learned magistrate's reasons reading, "I feel that in order to register conviction not only must I find it a fact that the accused received and recorded bets but also I must outline and

describe how he did it", that the Crown took the proposition set out in its notice of appeal. It should first be noted that the magistrate is not even purporting to say what the Crown must prove, he says rather what he must do. He has pointed out the circumstantial nature of the evidence and, of course, there was no other kind of evidence, and by saying, "the circumstantial evidence although any part of it may be capable of innocent interpretation, should be closely connected so that the cumulative effect should almost impel me to find the accused guilty", he was putting to himself the well-recognized rule in *Hodge's* case[1]. When he says, "I am left to draw too many inferences in order to reach the conclusion that the accused is guilty. Although my suspicions are strong that the accused was carrying on betting operations at 165 Ferguson Street, I feel the evidence is not strong enough and it does not disclose with reasonable certainty his method of operation", the learned magistrate is putting to himself again the basic proposition of criminal jurisprudence that the Crown must prove its case beyond reasonable doubt, and when the magistrate used the words objected to and which I have quoted above, the magistrate was simply saying what he felt he should be able to determine in order to come to his conclusion beyond reasonable doubt. It may well be that neither the members of the Court of Appeal nor I, had we heard the evidence adduced at trial, would have any reasonable doubt, but it is not a doubt in our minds which is at issue, it is a reasonable doubt in the mind of the learned magistrate who tried the charges.

I therefore am of the opinion that the appeal should be allowed, the judgment of the Court of Appeal reversed, and that of the magistrate restored.

Appeal dismissed, CARTWRIGHT *and* SPENCE JJ. *dissenting.*

Solicitors for the appellant: Maloney & Hess, Toronto.

Solicitor for the respondent: W. C. Bowman, Toronto.

[1] (1838), 2 Lewin C.C. 227, 168 E.R. 1136.

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*Mars 2, 3
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SA MAJESTÉ LA REINE (*Demanderesse*) ..APPELANTE;

ET

DOCTEUR J. L. SYLVAIN ET GUY SYLVAIN (*Défendeurs*) ..... INTIMÉS.

EN APPEL DE LA COUR DE L'ÉCHIQUIER DU CANADA

Dommages—Commettant et préposé—Couronne—Automobile—Soldat blessé dans un accident d'automobile—Réclamation pour perte de service—Pas de recours sous l'art. 1053 du Code civil de Québec.

Une automobile appartenant à l'un des défendeurs et conduite par son fils entra en collision avec une automobile conduite par un militaire, avec le résultat que ce militaire ainsi que ses quatre passagers, tous membres des forces armées, furent blessés. Plus de deux ans après cet accident la Couronne, se basant uniquement sur l'art. 1053 du *Code Civil,* poursuivit les défendeurs en Cour de l'Échiquier, pour leur réclamer à titre de dommages les déboursés pour soins médicaux prodigués à ces militaires et les sommes versées en solde durant la période de leur indisponibilité. La Cour de l'Échiquier rejeta l'action. D'où le pourvoi devant cette Cour.

Arrêt: L'appel droit être rejeté.

Excluant de la considération l'action *per quod servitium amisit* de la Common Law qui n'existe pas dans le droit civil de Québec, il faut envisager le recours de la Couronne comme étant une action directe dirigée par le maître contre le responsable d'un quasi-délit causant des lésions ou blessures corporelles à son serviteur, pour être remboursé des sommes qu'il a déboursés à cette occasion au bénéfice du serviteur. Si l'accident résulte de la faute d'un tiers, le maître n'a pas contre ce tiers une action personnelle fondée sur l'art. 1053 pour se rembourser des sommes qu'il a dû, en satisfaction d'une obligation contractuelle ou statutaire, verser au bénéfice de son serviteur. Dans le droit civil l'indisponibilité du serviteur ou la privation de ses services ne suffit pas *per se* et sans plus à constituer un dommage donnant lieu, en droit, à réparation, et les prestations imposées contractuellement ou statutairement au maître au bénéfice du serviteur ne peuvent, à elles seules, servir de fondement ou mesure des dommages. Le dommage, s'il existe, doit être recherché dans l'incidence de la privation, temporaire et prématurée, des services et dans leur conséquence réelle à être appréciés dans chaque espèce. La Couronne n'a pas réussi à justifier son recours en le basant uniquement sur l'art. 1053.

La cause de *Regent Taxi & Transport Co. v. Congrégation des Petits Frères de Marie,* [1929] R.C.S. 650, n'a pas réglé ce problème et ne supporte pas la prétention de la Couronne.

APPEL d'un jugement du juge Dumoulin de la Cour de l'Échiquier, rejetant l'action de la Couronne. Appel rejeté.

Rodrigue Bédard, C.R., et *Raymond Roger,* pour la demanderesse, appelante.

*CORAM: Le juge en chef Taschereau et les juges Fauteux, Abbott, Judson et Ritchie.

Richard Drouin et *Jean-Claude Royer,* pour les défendeurs, intimés.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Au cours de la nuit du 2 mai 1959, en la ville de Québec, une automobile appartenant au docteur J.-L. Sylvain et conduite par son fils Guy vint en collision avec une automobile conduite par le caporal L.-P. E. Leblanc. L'une des conséquences de cet accident fut que Leblanc et ses quatre passagers, tous les cinq membres des Forces canadiennes, furent blessés.

Plus de deux ans après cet accident, l'appelante poursuivit les intimés en Cour de l'Échiquier. Elle allégua que, pour des raisons propres à chaque défendeur, cet accident leur était imputable et leur réclama à titre de dommages le paiement d'une somme de $4,661.28 détaillée comme suit: $3,145.05 déboursés pour soins médicaux prodigués à ces militaires et $1,516.23 à eux versés pour solde durant la période de leur indisponibilité.

Contestant cette réclamation en fait et en droit, les intimés plaidèrent particulièrement et spécialement qu'en droit cette action était tardive, illégale et nulle, qu'il n'y avait aucun lien de droit entre eux et l'appelante et que les dommages réclamés ne pouvaient être légalement accordés parce qu'indirects et découlant nullement de l'accident.

Advenant le jour de l'enquête et audition, les intimés admirent les faits et le quantum mais non le droit, l'appelante gardant le fardeau d'établir particulièrement l'existence et la validité de son action contre les intimés. Après avoir argumenté oralement, les parties soumirent des mémoires et, le 19 septembre 1963, M. le Juge Dumoulin de la Cour de l'Échiquier rendit un jugement faisant droit aux prétentions des intimés et rejetant l'action de l'appelante. De là l'appel à cette Cour.

Il importe de bien définir la base juridique sur laquelle la Couronne entend justifier son action, telle que précisée par elle en Cour de première instance comme en cette Cour, au débat engagé entre les parties.

La Couronne ne prétend pas exercer, par voie de subrogation conventionnelle ou légale, l'action pour lésions ou blessures corporelles que pouvaient prendre ces militaires contre les intimés. Une telle action eut été vouée à l'insuccès; le subrogé n'a d'autres droits que ceux de celui

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auquel il est subrogé et, en l'espèce, l'action des militaires pour lésions ou blessures corporelles était déjà prescrite au moment où l'action de la Couronne fut intentée. *Art. 2262 para. 2 C.C.*

La Couronne ne prétend pas non plus fonder cette action sur une loi spéciale, telle par exemple la *Loi sur l'Indemnisation des employés de l'État,* S.R.C. 1952, c.134. On notera cependant que, dans les cas où elle s'applique, cette loi contient à l'article 8(3) une disposition spéciale subrogeant la Couronne aux droits de la victime d'un accident ou des personnes à la charge d'icelle lorsque l'une d'elles décide de réclamer à la Couronne une indemnité.

Enfin, l'appelante n'invoque pas le principe d'équité, source de l'action *de in rem verso* voulant que nul ne doit s'enrichir au détriment d'autrui. Une telle action eut aussi été vouée à l'insuccès. Il faut, pour l'ouverture de l'action que l'enrichissement du défendeur et l'appauvrissement du demandeur soient l'un et l'autre dépourvus de cause. Celui dont l'obligation légale est éteinte par prescription ne s'enrichit pas du fait qu'un tiers peut acquitter la dette ainsi prescrite. La condition du débiteur ne doit pas être rendue pire parce qu'un tiers a payé sa dette et tel serait le cas si le droit du tiers à l'action *de in rem verso* survivait à l'extinction, par prescription ou autrement, de l'obligation légale du débiteur de payer sa dette à son créancier. (Voir les raisons données et autorités citées par le Juge Mignault, aux pages 691 *et seq.*, dans *Regent Taxi and Transport Company v. Congrégation des Petits Frères de Marie*[1]). De plus, comme on le signale dans Planiol et Ripert, Traité pratique de Droit Civil Français, tome 7, p. 57, No. 761:

> L'appauvrissement a une cause d'abord lorsqu'il résulte d'une prestation ou d'un service en exécution d'une convention ou d'une obligation légale ou naturelle.
>
> En l'absence de toute convention et de toute obligation de l'appauvri, l'appauvrissement a encore une cause quand il résulte d'un travail fourni par lui ou du prix qu'il a payé des prestations ou services d'autrui en vue de se procurer un avantage personnel. Il a travaillé ou dépensé pour lui-même, courant pour son propre compte les bonnes chances et les mauvaises de son initiative. Peu importe qu'il échoue et se trouve en perte. Les tiers enrichis par contre-coup ne peuvent être actionnés *de in rem verso.*

Il s'agit, a déclaré l'appelante en son factum et à l'audition, d'une demande en dommages-intérêts, exclusivement fondée sur l'article 1053 du *Code Civil* de la Province de

[1] [1929] R.C.S. 650, [1930] 2 D.L.R. 353.

Québec, en réparation d'un préjudice que les intimés lui auraient causé à elle directement et à la réparation duquel elle aurait contre eux une action directe. Elle invoque la nature de la relation juridique entre la Couronne et les militaires, statutairement déclarée par l'article 50 de la *Loi de la Cour de l'Échiquier* être celle de maître et serviteur, et soumet que son préjudice résiderait dans le fait même de l'indisponibilité ou privation des services de ces militaires durant la période requise à leur rétablissement. L'indisponibilité ou la privation des services du serviteur suffirait *per se* pour donner une action directe au maître sans qu'il lui soit nécessaire d'alléguer et prouver en plus et spécifiquement que cette indisponibilité ou privation de services ait eu des conséquences réelles et dommageables,—comme il peut arriver dans le cas d'une perturbation dans le service. L'appelante n'invoque pas les paiements précités comme base juridique d'une action en demandant le remboursement parce qu'ils auraient été faits sans contrepartie, mais comme mesure dans l'appréciation en espèces du préjudice qu'elle aurait subi du seul fait de la privation des services. On reconnaîtra bien dans une telle action la plupart sinon tous les traits précisés dans Salmond On Torts 13e éd. pp. 630 et seq. de l'action *per quod servitium amisit,* en laquelle on assimile à la privation de la propriété la privation du serviteur. Dans *The King v. Canadian Pacific Railway Company,*[1] M. le Juge Rand, référant à cette règle donnant au maître ce droit d'action, disait au bas de la page 197:

> As it has been many times remarked, this right is an anomalous survival from social conditions in which the servants belong to the household and their relation to the master was more of the nature of status than contractual. But with the evolutions of individualism the economic and remedial position of the employee has long since changed and as it is to-day as ample to protect his interests as those of the employer. Such an anachronism should, therefore, be held to the precise limits within which it has been established.

Admise dans les provinces régies par la Common Law, l'action *per quod servitium amisit* n'existe pas dans le Droit Civil de la Province de Québec. L'appelante l'admet. Aussi bien, déclare-t-elle, est-ce au droit civil du Québec, qui s'applique en l'espèce, qu'il faut recourir pour décider la question. Cependant, et nonobstant la justesse de cette déclaration, l'appelante, à mon avis, nous a virtuellement

[1] [1947] R.C.S. 185, 61 C.R.T.C. 24, 2 D.L.R.I.

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demandé de donner effet aux vues exprimées par cette Cour dans des causes régies par la Common Law et où l'action intentée était une action *per quod servitium amisit,* soit: *A.G. of Canada v. Jackson*[1]; *The King v. Richardson*[2] et *Nykorak v. A.G. of Canada*[3]. Dans ces arrêts, on a interprété et appliqué l'article 50 de la *Loi de la Cour de l'Échiquier* comme ne créant pas un droit d'action au profit de la Couronne mais comme établissant un lien juridique de maître et serviteur entre elle et son militaire et, dès lors, la Cour a ensuite appliqué les règles gouvernant en pareil cas sous le régime de la Common Law. Certes, s'il faut retenir, pour les fins de la présente cause régie par le droit civil, cette interprétation de l'article 50, il ne s'ensuit pas qu'il nous soit permis d'appliquer en l'espèce les règles de la Common Law gouvernant les cas où se présente l'incidence de la relation juridique de maître et serviteur. Aussi bien, sauf en ce qui a trait à l'interprétation de l'article 50, ces arrêts ne trouvent aucune application en la présente cause et, pour cette raison, il n'y a pas lieu d'en poursuivre ultérieurement la considération.

Suivant l'appelante, la proposition voulant que le maître privé des services de son serviteur par la faute d'un tiers ait, du seul fait de cette privation, une action directe en indemnité contre ce tiers, en vertu de l'art. 1053 C.C., serait une proposition qui ne souffre pas de difficulté depuis l'arrêt de cette Cour dans *Regent Taxi supra,* dont le principe, ajoute-t-elle, a été réaffirmé par l'arrêt de cette Cour dans *Driver v. Coca-Cola Limited*[4] et adopté dans quatre arrêts rendus depuis *Regent Taxi, supra,* dont deux de la Cour de l'Échiquier: *Her Majesty the Queen v. The Montreal Transportation Commission*[5], *Fournier J.* et *Her Majesty the Queen v. Lévis Ferry Limited*[6], *Fournier J.*; l'autre de la Cour supérieure: *Procureur Général du Canada v. Cité de Hull*[7]; et le dernier de la Cour du banc de la reine: *Procureur Général du Canada v. Dallaire et al.*[8]

Notons immédiatement qu'on ne peut trouver, aux raisons données au soutien des quatre arrêts précités, aucune assistance; les Juges de première instance ou d'appel qui

[1] [1946] R.C.S. 489, 59 C.R.T.C. 273, 2 D.L.R. 481.
[2] [1948] R.C.S. 57, 2 D.L.R. 305.
[3] [1962] R.C.S. 331, 37 W.W.R. 660, 33 D.L.R. (2d) 373.
[4] [1961] R.C.S. 201, 27 D.L.R. (2d) 20.
[5] [1955] Ex. C.R. 83 à 93, 95.
[6] [1960] Ex. C.R. 243 à 255.
[7] [1948] C.S. 335 à 338.
[8] [1949] B.R. 365 à 369, 374.

les ont formulés se sont contentés de citer la décision de cette Cour dans *Regent Taxi, supra,* s'y soumettant sans aucuns commentaires sauf, parfois, certains suggérant que les vues exprimées en cette décision ne correspondaient pas à celles qu'ils pouvaient avoir. Aussi bien, je ne crois pas manquer de respect en disant que ces arrêts n'ont d'autre valeur que celle de celui sur lequel ils se fondent.

Observons ensuite que la question qui se présentait dans *Driver, supra,* diffère de celle qui se présente en l'espèce. L'appelante voit cependant un *obiter dictum* supportant ses prétentions dans l'extrait suivant des raisons de jugement de notre collègue M. le Juge en chef, apparaissant au premier paragraphe de la page 204:

> Évidemment, la situation pourrait être différente, si la victime n'était pas morte. Car, comme il a été décidé dans cette cause de *Regent Taxi,* supra, le mot «autrui» à l'art. 1053 ne signifie pas seulement la victime immédiate d'un délit ou d'un quasi-délit, mais aussi toute personne qui, comme conséquence d'un tort causé à une autre, souffre un dommage. Mais, tel n'est pas le cas qui nous occupe, vu que la victime est décédée comme conséquence de l'accident.

A mon avis, il ne faut voir en ce passage qu'une constatation et non une approbation des vues exprimées dans *Regent Taxi, supra.*

Enfin, et contrairement à la prétention de l'appelante, je suis d'opinion que la décision de cette Cour dans *Regent Taxi, supra,* n'a pas réglé le problème et que le débat auquel il a donné lieu reste ouvert. Seul le Juge en chef Anglin, avec le concours du Juge Smith, aurait accordé une indemnité pour privation de services. Pour sa part, le Juge Lamont exprima l'avis qu'entre la communauté et le Frère Gabriel, l'un de ses membres, il n'y avait pas de relation juridique de maître et serviteur; ceci étant décisif de la question, ce qu'y ajouta le Juge Lamont en s'appuyant, par ailleurs, exclusivement sur la jurisprudence et la doctrine de la Common Law, me paraît être *obiter dictum.* Quant aux Juges Mignault et Rinfret, ils enregistrèrent une forte dissidence. A mon avis, il n'y a pas eu majorité en cette Cour sur le point qui nous occupe. De toutes façons, le mérite des vues qu'on y a exprimées fut remis en question par un appel au Conseil Privé. L'on sait que cet appel fut décidé sur une question de prescription. Quant au problème qui nous occupe, le Conseil Privé[1], après en avoir signalé l'importance et la complexité, refusa de se prononcer pour en réserver

[1] (1932) 53, B.R. 157, [1932] A.C. 295, 2 D.L.R. 70.

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la détermination dans une cause où cette détermination serait essentielle à la disposition de l'appel, ainsi qu'il appert à la page 164.

Their Lordships having come to this clear opinion upon this part of the case, feel grave doubts as to the advisability or propriety of expressing any opinion upon the remaining question. The importance of that question admits of no doubt, and its difficulty is apparent in the division of judicial opinion; but, unfortunately, any view which their Lordships have formed (and whether clearly or otherwise) would involve no decision upon the point, for the case is determined in any event by the date on which the proceedings were commenced.

In these circumstances, would it be advisable or proper that a view, unnecessary to the decision of the case, should be expressed upon so vexed a question? Their Lordships think not. They are of opinion that no opinion should be expressed by their Lordships upon the question until it comes before them upon an appeal in which they can deal with it as the sole factor for consideration, unhampered by any other competing question which would be decisive of the case.

Aussi bien, dans une conférence intitulée «La responsabilité délictuelle dans la province de Québec», rapportée au Livre-Souvenir des Journées du Droit Civil Français, p. 333, le Juge Mignault pouvait-il dire, à la page 335, que la question restait ouverte, et est-ce à bon droit que M. le Juge Dumoulin de la Cour de l'Échiquier l'a considérée comme telle, en l'espèce, comme il l'avait fait précédemment dans *Her Majesty the Queen v. Poudrier et Boulet Limited*[1].

Excluant de la considération, comme il se doit, l'action *per quod servitium amisit* de la Common Law, je crois qu'à moins de faire abstraction de la réalité, il nous faut envisager le recours de l'appelante comme étant une action directe dirigée par le maître contre le responsable d'un quasi-délit causant des lésions ou blessures corporelles à son serviteur, pour être remboursé des sommes qu'il a déboursées à cette occasion au bénéfice du serviteur. Si faits *ex gratia,* il est évident que ces déboursés n'offrent aucune base juridique au recours du maître. Le problème naît plutôt lorsque ces déboursés sont faits en satisfaction d'une obligation, contractuelle ou statutaire, dont le maître devient alors le débiteur et l'employé le créancier. Si l'accident résulte, non pas d'un cas fortuit ou de la négligence de la victime, mais de la faute d'un tiers, le maître a-t-il contre ce tiers une action personnelle fondée sur l'article 1053 du *Code Civil* pour se rembourser des sommes qu'il doit ainsi obligatoirement verser au bénéfice de son serviteur. La gravité des conséquences de la solution devient plus manifeste si l'on con-

[1] [1960] R.C. de l'É. 261.

sidère que les prestations auxquelles le maître peut s'être obligé peuvent comprendre, outre la continuation du salaire, des soins médicaux, indemnités journalières, pension d'invalidité ou de retraite, ou autres prestations.

Le problème qui nous occupe a donné lieu et donne encore lieu, en France, à de grandes controverses. On paraît l'avoir solutionné, au moins en ce qui concerne le recours de l'État dont le fonctionnaire a été victime d'un quasi-délit. Mais c'est en adoptant assez récemment une législation spéciale subrogeant l'État aux droits du fonctionnaire,—comme c'est le cas sous le régime de la loi fédérale sur *l'Indemnisation des employés de l'État, supra*—qu'on est arrivé à le solutionner. Sirley, Lois et Arrêts 1946-48 p. 1610 No. 27; Dalloz, Jurisprudence Générale 1959, Législation, p. 219, art. 11; A. Carpentier, Codes et Lois, 3e Partie, Droit Administratif, 23 mai 1951 p. 5. Deux arrêts récents de la Cour de Cassation sur le recours de l'État pour obtenir le remboursement des soldes et indemnités versées à un militaire pendant son indisponibilité démontrent bien que ce recours de l'État, en France, ne se fonde pas sur les articles 1382 et 1383 C.N.—lesquels ne diffèrent guère de notre article 1053 C.C.—mais sur la subrogation légale édictée par cette législation spéciale. *Cour de Cassation, Chambres Civiles, 1-2 1960, 2e section civile, p. 90 no 135; Cour de Cassation, Chambres Civiles, 1-2 1961, 2e section civile, p. 111 no 155.* Une telle législation n'existe pas dans le Droit Civil du Québec. Nous avons, par ailleurs, relativement à d'autres situations, des dispositions spéciales, tel l'article 7 de la *Loi des Accidents du Travail,* S.R.Q. 1941, c.160, subrogeant légalement l'employeur ou la Commission des Accidents du Travail aux droits des ouvriers victimes d'accidents, ou leurs dépendants, contre le responsable et tel aussi l'article 2584 du *Code Civil* décrétant, dans le cas d'assurance contre le feu, que l'assureur, en payant l'indemnité, devient cessionnaire des droits de l'assuré contre ceux qui ont causé le feu ou la perte. Autant de dispositions dont l'inutilité apparaît si l'employeur, la Commission ou l'assureur avaient un recours personnel en vertu de l'article 1053 du Code Civil pour se rembourser des prestations statutaires ou contractuelles auxquelles ils ont satisfait. Et si, excluant la présence des ces dispositions, il faut conclure que l'employeur, la Commission ou l'assureur n'ont pas cette

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action à titre personnel contre le responsable, on ne conçoit guère de raisons valables pour qu'il en soit autrement pour l'appelante dans le cas qui nous occupe.

Les recherches pousuivies depuis 1929, année de la décision de *Regent Taxi,* supra, pour solutionner le problème, ont fourni des précisions nouvelles aux motifs juridiques sur lesquels on fonde la négation d'une telle action. Dans une chronique apparaissant dans Dalloz, Jurisprudence Générale 1958, à la page 179, on a considéré particulièrement le cas de l'employeur qui s'adresse à l'auteur d'un quasi-délit pour lui réclamer des dommages-intérêts parce qu'en exécution de son contrat avec son employé ou du statut de ce dernier, il doit verser à celui-ci certaines sommes en raison de l'accident dont il a été victime. Bref, et ainsi qu'il appert des extraits suivants, on précise que l'exclusion de ce recours se fonde sur le fait que les sommes ainsi versées par l'employeur ne représentent pas de dommage au sens de ce mot suivant l'article 1053, du *Code Civil,* et sur l'absence du lien de causalité entre la faute de ce tiers et l'exigibilité des prestations de l'employeur, lesquelles deviennent exigibles à l'occasion de l'accident, sans qu'on ait à se préoccuper aucunement si celui-ci résulte d'un cas fortuit, d'une négligence de la victime ou de la faute d'un tiers.

A la page 185:

> En effet, celui qui acquitte une obligation en vertu d'un contrat qu'il a conclu, ou d'un statut réglementaire qui organise son fonctionnement, ne subit pas de dommages parce qu'il ne subit pas de lésion, ni dans ses droits, (ce qui est évident), ni dans ses intérêts.
>
> * * *
>
> En d'autres termes, il ne s'agit pas là d'un dommage au sens de l'article 1382 C.N. parce que le paiement trouve sa cause dans l'ensemble des stipulations du contrat ou du statut. Remarquons-le, nous ne comprenons pas le mot «cause» dans le sens de cause efficiente, de source du paiement, nous le prenons dans le sens de cause finale, de motif déterminant de ce paiement, dans le sens des articles 1108 et 1131 C.N.

Les articles 984 et 989 C.C. correspondent à ces articles 1108 et 1131 C.N. Et l'auteur continue:*

> Quand un individu s'engage par contrat ou par statut à payer une certaine somme, il ne le fait pas contrairement à ses intérêts, mais bien au contraire, en vue de donner satisfaction à ceux-ci. Comment peut-on soutenir qu'en payant ce à quoi il est ainsi tenu, il subit un dommage dont il peut demander à d'autres réparation?
>
> * * *
>
> A fortiori doit-il en être ainsi lorsqu'il s'agit d'obligations soumises à une condition, dont la naissance est suspendue au hasard. Le débiteur éventuel court l'aléa de voir se réaliser la condition de voir sa dette

éventuelle se transformer en une dette immédiatement exigible; mais il a volontairement couru cet aléa, parce qu'il courait, en compensation, la chance de ne pas voir se réaliser la condition, et de n'avoir aucun paiement à faire. Il a voulu, dans son intérêt, courir ce risque et cette chance, cet aléa. Il ne subit pas de préjudice dont il puisse demander réparation si le risque se réalise, pas plus qu'il ne profite d'un enrichissement injuste si la chance lui sourit.

Et à la page 184:

. . . ; d'autre part, le contrat ou le statut prévoit ce versement dès qu'un accident se produit, sans se préoccuper si celui-ci est dû à la faute d'un tiers ou résulte d'un cas fortuit. La faute du tiers n'est donc que l'occasion d'une dépense qui trouve essentiellement sa source dans ce contrat.

Dans *His Majesty the King v. Canadian Pacific Railways, supra,* on trouvera, bien qu'il s'agissait d'une cause régie par la Common Law, un raisonnement substantiellement similaire, particulièrement aux raisons de notre collègue M. le Juge en chef Taschereau.

L'auteur de la chronique précitée déclare bien que l'entreprise, privée par accident d'un employé, pourra invoquer, sur le fondement de l'article 1382 C.N., contre le responsable, le trouble qui en résultera pour elle dans son fonctionnement mais, dit-il en citant Mazeaud et Tunc et autres autorités, si l'action peut être admise, il faudra être très prudent. Il faut qu'il s'agisse de personnes «irremplaçables» et, ajoute-t-il, la plupart du temps, l'entreprise est organisée de telle sorte que la perte, temporaire ou définitive, d'un collaborateur ne lui causera pas de préjudice.

D'où l'on voit que, dans le Droit Civil, l'indisponibilité du serviteur ou la privation de ses services ne suffit pas *per se* et sans plus à constituer un dommage donnant lieu, en droit, à réparation et, qu'à elles seules, les prestations imposées contractuellement ou statutairement au maître au bénéfice du serviteur ne peuvent servir de fondement ou mesure d'un dommage, mais comme on le suggère dans Marty et Raynaud, Droit Civil, 1962, tome 2, p.383, le dommage, s'il existe, doit être recherché dans l'incidence de la privation, temporaire ou prématurée, des services «*et dans leurs conséquences réelles à apprécier dans chaque espèce.*»

Tel qu'engagé entre les parties, le débat, ainsi que le déclare l'appelante en son factum, «pose la question de l'existence dans la province de Québec d'une action directe en indemnité au profit de la Couronne dont le pendant—quoique l'analogie ne soit pas parfaite—serait, pour les provinces

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de la Common Law, l'action *per quod servitium amisit.»* A cette question, je donnerais une réponse négative et, limitant à l'espèce les considérations qui précèdent, je dirais que l'appelante n'a pas réussi, comme elle a cherché à le faire, à justifier son recours en le basant uniquement sur l'article 1053 du *Code Civil.*

Je renverrais l'appel avec dépens.

Appel rejeté avec dépens.

Procureur de la demanderesse, appelante: E. A. Driedger, Ottawa.

Procureurs des défendeurs, intimés: Drouin, Drouin, Bernier & Drouin, Québec.

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*June 9
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HER MAJESTY THE QUEEN .....APPELLANT;

AND

ROSARIO LEMIRE .....RESPONDENT.

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

Criminal law—Fraud—Employee filing false expense accounts as a means of increasing salary—Belief by accused of employer's sanction—Whether intention to defraud—Conviction quashed by Court of Appeal—Whether quashing based on grounds of law—Whether quashing should be upheld—Criminal Code 1953-54 (Can.), c. 51, s. 323(1).

The respondent, the Chief of the Quebec Liquor Police, was convicted at trial under s. 323(1) of the *Criminal Code* on a number of counts charging him with having defrauded the public and the Government of the Province of Quebec of various sums of money. In 1952, he applied for an increase in his salary. He was told by the head of his Department, the Solicitor General who had referred his application to the Attorney General, that he was entitled to an increase but due to the fact that a general survey of salaries in the Civil Service was in progress, an increase could not be granted at the time. However, he was told that he could draw a certain amount per month by way of expenses. A large number of the expense accounts which were thereafter submitted by the respondent were admittedly fictitious. This practice continued until 1960 when his salary was increased. Thereafter the presentation of expense accounts ceased. The Court of Appeal quashed the conviction. The Crown was granted leave to appeal to this Court.

Held (Taschereau C.J., and Cartwright and Spence JJ., *dissenting*): The appeal should be allowed and the verdict of guilty restored.

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

Per Fauteux, Abbott, Martland and Ritchie JJ.: On the uncontradicted evidence of the respondent himself, no other conclusion could be reached than that he received provincial funds on the basis of the presentation of expense accounts admittedly false and, that being so, no other conclusion in law could be reached save that he had defrauded the provincial government and the public of the amounts which he thus obtained. With the exception of certain counts in the indictment on which he was acquitted, there was no evidence on the basis of which any doubt, let alone a reasonable doubt, could arise as to the respondent having incorporated, to effectuate the agreed scheme, items of expenses which were fictitious and false. On an appeal from a conviction, if an Appellate Court allows the appeal on the ground that certain specified evidence creates a reasonable doubt, when, on a proper view of the law, that evidence is not capable of creating any doubt, there is an error in law. It is no answer to a charge of fraud to say that the fraud was suggested by the superior of the accused nor is the proposition that the province and the public were not defrauded by paying, out of public funds, false expense accounts, merely because the respondent's salary was less than what he and his superiors thought it ought to be. To hold so was an error in law.

The guilt of the respondent in the present appeal depended upon the legal effect of facts found, or inferred, in the Courts below. This raised questions of law in respect of which there was error. There was, therefore, a right of appeal to this Court by the Crown.

Per Taschereau C.J., and Cartwright and Spence JJ., *dissenting*: The judgment of the Court of Appeal was founded on grounds of fact or of mixed fact and law and not solely on any ground of law in the strict sense. It follows that this Court had no power to review the judgment of the Court of Appeal, since it is a well-settled proposition that the Crown's right of appeal to this Court is limited to questions of law in the strict sense and that when a Court of Appeal has quashed a conviction on two grounds of which one is, and the other is not, appealable to this Court, the appeal to this Court must be dismissed.

APPEAL by the Crown from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], quashing the conviction of the respondent. Appeal allowed, Taschereau C.J., and Cartwright and Spence J.J., dissenting.

Yvan Mignault, for the appellant.

René Letarte and *Cyrille Goulet,* for the respondent.

LE JUGE EN CHEF (*dissident*):—Mon collègue M. le Juge Cartwright a résumé tous les faits essentiels à la détermination de cette cause, et il est donc inutile de les relater de nouveau. Il me suffira de dire simplement que le juge de première instance a acquitté le prévenu sous sept des chefs d'accusation, qu'il l'a trouvé coupable de tentative

[1] [1936] Que. Q.B. 697.

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de fraude sous trois chefs distincts et a rendu un jugement de culpabilité sous tous les autres chefs.

La Cour du banc de la reine[1] a cassé le jugement rendu en première instance, et permission spéciale a été accordée au prévenu de loger un appel devant cette Cour. (*Code Criminel* 598).

Cet appel cependant ne peut porter que sur des questions de droit et nullement sur des questions de faits ou des questions mixtes de droit et de faits.

Dans le cas qui nous occupe, il me semble clair que la majorité de la Cour du banc de la reine, en délivrant son jugement, a fait reposer en partie ses conclusions sur des questions de faits, ou au moins sur des questions mixtes de droit et de faits qu'il nous est interdit de reviser.

Il faut, pour que la Cour Suprême du Canada ait juridiction, qu'il s'agisse d'une question de droit stricte dans le vrai sens du mot. (508 C. Cr) (*Rex. v. Décary*[2]).

Comme je crois que cet appel comporte l'appréciation de questions de faits, je suis d'opinion que cette Cour n'a pas juridiction et que l'appel doit être rejeté.

The judgment of Cartwright and Spence JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Queen's Bench, Appeal Side, of the District of Quebec[1], dated July 26, 1963, allowing an appeal from the judgment of His Honour Judge Dumontier dated September 28, 1962, and directing that the respondent be acquitted on all the counts on which he had been convicted.

On July 16, 1962, the respondent, who had elected to be tried by a Judge without a jury, was arraigned before His Honour Judge Dumontier on an indictment containing three counts to which he pleaded "not guilty". We are concerned only with count 3, which reads as follows:

3°. entre le 1er janvier 1952 et le 1er juillet 1960, dans les cité et district de Québec, étant Directeur de la Police des Liqueurs, donc Commandant à Québec, par la supercherie, le mensonge et d'autres moyens dolosifs, soit en faisant ou en faisant faire par des subalternes, des comptes de dépenses faux et fictifs pour lui-même, fraudé le public en général et le Gouvernement de la Province de Québec, pour une somme d'au moins $8,999.10, C.Cr. 323, par. 1 et 21.

[1] [1963] B.R. 697.
[2] [1942] R.C.S. 80, 77 C.C.C. 191, 2 D.L.R. 401.

On July 17, 1962, the learned trial judge ordered that this count be divided into 235 separate counts which are set out in his judgment and in that of the Court of Queen's Bench. The first of these reads as follows:—

3.-1. Le ou vers le 31 mai 1952, dans les cité et district de Québec, étant Directeur de la Police des Liqueurs donc Commandant à Québec, par la supercherie, le mensonge et d'autres moyens dolosifs, soit en faisant ou en faisant faire par des subalternes, des comptes de dépenses faux et fictifs pour lui-même, fraudé le public en général et le Gouvernement de la Province de Québec, pour une somme de $50.00, C.Cr. 323, par. 1 et 21;

The remaining 234 counts were similarly worded except as to date and amount; the last charged an offence committed on May 9, 1960.

The learned trial judge acquitted the respondent on counts 15, 18, 38, 46, 89, 100 and 221; he found him guilty of attempted fraud on count 128; on counts 23 and 229 he found him guilty for lesser amounts than those charged; on all the other counts he found him guilty as charged.

While the printed record consists of many volumes the relevant facts may be stated comparatively briefly.

In May, 1940, the respondent was appointed Chief of the Quebec Liquor Police at a yearly salary of $4,000; in August, 1941, this was increased to $4,500. In 1952 the respondent applied for an increase in salary to the then Solicitor-General who referred the matter to Mr. Duplessis who was then both Attorney-General and Prime Minister. Mr. Duplessis told the Solicitor-General that an enquiry was going on before the Civil Service Commission into the question of raising the salaries of the Quebec Liquor Police and of civil servants in general and that if he granted the respondent an increase he would immediately be pressed with requests by others and then said words to the following effect:

Vous direz à Lemire, ou vous lui ferez dire que je l'autorise à retirer cinquante piastres ($50.00) par mois, à titre de frais de représentation, ou de dépenses,

The evidence of the Solicitor-General continued:

De retour à mon bureau, j'ai dit à Lemire—je ne sais pas si c'est à lui personnellement ou si c'est peut-être à Côté, ma mémoire n'est pas assez fidèle pour vous l'affirmer que je l'ai dit à lui—mais je sais qu'il l'a su, ou à son adjoint, qui était Wellie Côté, que le Procureur Général l'autorisait à retirer mensuellement un montant de cinquante dollars ($50.00) à titre de frais de représentation, et que dans le fond, était pour tenir lieu d'une augmentation de salaire qui s'élevait à six cents piastres ($600.00) par année.

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The substance of this conversation was communicated to the respondent by Wellie Côté who had been appointed associate director of the Quebec Liquor Police in January, 1951, and of whom Tremblay C.J. says that unofficially he was the respondent's superior. At this time Côté handed the respondent a cheque of the Québec Liquor Police for $50. Some days later Côté presented a document to the respondent for signature. This was a printed form partially filled in in typewriting. The following phrase was typewritten:

> Déplacement et frais de séjour pour surveillance du travail.

Several blank spaces in the form intended for the insertion of details were left blank. Above the signature of the respondent appeared the following certificate:

> Je certifie que les dépenses plus haut mentionnées ont été nécessairement encourues dans l'intérêt de cette cause et que le tout est conforme aux allocations accordées.

The form did not specify any "cause". It was dated "May".

Thereafter from time to time Côté presented the respondent with a cheque and a similar form which the respondent signed and in this manner the respondent received amounts totalling $50 a month until the form dated February 17, 1953, was returned to the respondent marked "annulé".

On receipt of this the respondent went to the office of the Provincial Auditor and had an interview with an employee. The learned trial judge ruled that evidence of their conversation was inadmissible and we do not know what was said between them. The question whether this evidence was rightly excluded is not before us, and consequently, I express no opinion on it.

Following this interview the forms signed by the respondent were filled up in detail, specifying the place visited, the hotel at which respondent stayed, the amount paid for railway fare and the price paid for meals. There appears to be no doubt that a large number of these forms were entirely false in fact and described trips which the respondent had not taken.

In the year 1954 Côté advised the respondent that he was authorized to draw $100 a month in this manner instead of $50. This practice continued until May, 1960, when the respondent's annual salary was increased to

$7,400 and he ceased to withdraw any further sums in augmentation of his salary.

The learned trial judge finds as a fact that the authorization to withdraw the sum of $50 was given orally by the Attorney-General and communicated to the respondent but concluded as a matter of law that it was "nulle, de nullité absolue". He goes on to hold that the respondent could not have had an honest belief that he was entitled to obtain the moneys which he did obtain by rendering expense accounts which were false in fact. He finds as a fact that the great majority of the expense accounts signed by the respondent were false and fictitious but does not specify which particular ones were false and finds that about twice a year the respondent went on trips of inspection in connection with which he would have been entitled to receive his expenses. He does not make an express finding as to whether Côté told the respondent he was authorized to draw $100 monthly instead of $50. At the time of the trial both the Attorney-General and Côté had died.

The respondent appealed against his convictions. On October 1, 1962, the Court of Queen's Bench, Appeal Side, granted him leave to appeal on questions of fact.

The appeal was heard by a Court composed of Tremblay C.J.P.Q. and Casey and Taschereau JJ. The appeal was allowed and it was directed that the respondent be acquitted on all the counts on which he had been convicted. All the members of the Court reached the same result but each gave separate reasons.

On October 2, 1963, leave was granted to the Crown to appeal to this Court on the following three questions:

1. La Cour d'Appel du district de Québec a-t-elle erré en droit dans l'interprétation et l'application de l'article 592(1)(a) de Code Criminel du Canada?

2. La Cour d'Appel du district de Québec a-t-elle erré si elle a ignoré les lois gouvernant la manipulation et la dépense des deniers publics et a-t-elle mal interprété les lois applicables dans l'espèce?

3. La Cour d'Appel du district de Québec a-t-elle erré en droit dans l'interprétation et l'application de l'article 323(1) du Code Criminel?

This leave was granted pursuant to s. 598(1)(*b*) of the *Criminal Code*. Authority is not required for the well-settled proposition that the Crown's right of appeal is limited to questions of law in the strict sense.

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It is clear from the judgment of this Court in *The Queen v. Warner*[1], that where a Court of Appeal has quashed a conviction on two grounds of which one is, and the other is not, appealable to this Court, the appeal to this Court must be dismissed.

I am satisfied that in the case at bar the judgment of the Court of Appeal was founded on grounds of fact or of mixed fact and law and not solely on any ground of law in the strict sense.

Tremblay C.J. holds that as to the first 17 counts, in regard to which the certificates signed by the respondent named no "cause" and gave no details, the money was paid over to the respondent before he signed the certificates which constituted rather receipts for money paid than demands for payment and that no one was in fact deceived or induced to pay over the money by any representation on the part of the respondent. This is a finding of fact or, at the highest from the point of view of the appellant, a mixed finding of fact and law.

As to the remainder of the counts the learned Chief Justice expresses himself as follows:

> Quant aux autres chefs, entre en jeu une consideration différente qui me paraît péremptoire.
>
> La preuve révèle hors de tout doute—l'appelant l'a d'ailleurs admis—que certains frais inscrits sur les formules n'ont pas été encourus par l'appelant. Mais il résulte aussi de la preuve que la Couronne n'a pas prouvé hors de doute raisonnable qu'aucun de ces frais n'a été encouru. Le malheur, c'est qu'il est impossible de pointer du doigt ceux qui ont été réellement encourus et ceux qui ne l'ont pas été. La seule preuve apportée par la Couronne sur ce point révèle que l'appelant était à son bureau de Québec la plupart du temps. Les témoins admettent cependant qu'il s'absentait quelques fois par année. L'appelant a retrouvé deux formules qui contenaient des frais réellement encourus. Il a juré qu'il y en avait sûrement d'autres mais que sa mémoire ne lui permettait pas de les retracer après tant d'années. Il faut dire que l'appelant était âgé de 74 ans lors de son témoignage. Son assertion, rendue plausible par la preuve de la Couronne, me paraît nettement suffisante pour engendrer un doute raisonnable. D'ailleurs, le premier juge a acquitté l'appelant des deux chefs d'accusation qu'il a pu préciser. De son propre chef, il a retranché du montant allégué dans d'autres chefs les frais du permis de conduire de l'appelant que celui-ci avait le droit de recouvrer.
>
> De ce qui précède il résulte que, même si j'admets l'existence du lien de causalité entre le paiement et les représentations, je ne puis dire quant à quels chefs d'accusation en particulier les représentations sont fausses et quant à quels chefs elles sont vraies, sauf quant au chef numéro 18 qui fait double emploi avec le chef numéro 17 et sur lequel l'appelant a été acquitté. Le substitut du procureur général a d'ailleurs franchement admis

[1] [1961] S.C.R. 144, 34 C.R. 246, 128 C.C.C. 366.

lors de l'audition qu'il est impossible de prouver quels chefs d'accusation précis sont bien fondés. La seule conclusion logique, c'est qu'aucun n'a été prouvé hors de tout doute raisonnable et que l'appelant doit être acquitté sur tous les chefs.

This appears to me to be a finding of fact. The learned Chief Justice has considered the evidence and reached the conclusion that it does not establish, beyond a reasonable doubt, the guilt of the accused upon any of the counts on which he was convicted. I find it impossible to say that the question whether he was right in reaching this conclusion is one of law in the strict sense.

TASCHEREAU J. delivered the following reasons:

Les faits révélés par la preuve et qu'ont exposés M. le Juge en chef et M. le Juge Casey démontrent que de graves irrégularités ont été commises par l'appelant. Mais la question vitale est celle de savoir si Lemire, un homme maintenant âgé de 74 ans qui a été directeur de la police des liqueurs à Québec, pendant vingt ans, avait l'intention coupable de frauder le public et le gouvernement de la Province de Québec, lorsqu'il a posé les actes qu'on lui reproche.

L'étude du dossier m'a convaincu qu'il fallait répondre négativement à cette question. Aussi, commes mes collègues, j'accueillerais l'appel et libérerais l'accusé:

The first paragraph accurately states a question which the Court of Appeal was called upon to answer. It involves an inquiry into the respondent's state of mind. The state of a man's mind is, in the often quoted words of Bowen L.J., as much a fact as the state of his digestion; vide *Edgington v. Fitzmaurice*[1]. The decision of Taschereau J. to allow the appeal appears to me to be based on a finding of fact certainly it cannot be said that the sole ground on which he has proceeded is a question of law in the strict sense.

From this it appears that a majority of the Court of Appeal, in quashing the convictions, have proceeded on grounds which this Court has no power to review and it follows that the appeal must be dismissed.

Having reached this conclusion it becomes unnecessary for me to consider whether it could be said that the judgment of Casey J. was based only on grounds which this Court has jurisdiction to review and I express no opinion on that question.

I would dismiss the appeal.

[1] (1885), 29 Ch.D. 459 at 483, 55 L.J.Ch. 650.

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

MARTLAND J.:—The material facts involved in this case are not in dispute. At all relevant times the respondent Lemire (hereinafter referred to as "Lemire") was the Chief of the Quebec Liquor Police. There was an Associate Chief, one Wellie Côté, who was in fact, though not in name, the real head of the force. In the year 1952 Lemire applied to the Solicitor-General of Quebec for an increase in his salary, which was then $4,500 per annum. The Solicitor-General referred the application to the Attorney-General, Mr. Duplessis, who was then also the Prime Minister of the Province. The latter, while he approved of an increase for Lemire, was not prepared to grant it, because it might provoke other similar requests, and the whole salary structure of the Quebec civil service was then under review. He told the Solicitor-General to tell Lemire that he would authorize Lemire to draw $50 per month by way of expenses. This information was communicated to Lemire by Côté.

I agree with Casey J. in the Court[1] below when he says that the instructions given by the Attorney-General necessarily implied the making of fictitious expense accounts.

Lemire commenced, in May, 1952, to put in expense accounts, initially for $50 per month and then, commencing on July 15, 1952, for $25 for each half month, represented to be for "Frais de déplacement et de séjour pour surveillance du travail." Each of these expense accounts contained the following certificate, signed by Lemire:

> Je certifie que les dépenses plus haut mentionnées ont été nécessairement encourues dans l'intérêt de cette cause et que le tout est conforme aux allocations accordées.

The expense account dated February 14, 1953, was returned to Lemire, by the Provincial Auditor's Department, marked "annulé". Lemire then saw an employee of that Department who is unkown. The learned trial judge ruled that evidence by Lemire as to his interview with the employee was not admissible. In any event Lemire filed an expense account, dated February 15, 1953, purporting to contain the details of his expenditures, totalling $25.

[1] [1963] Que. Q.B. 697.

Thereafter, until the beginning of the year 1954, he proceeded to file two, and occasionally three, expense accounts each month, appearing to contain items of expenditure which he had incurred, each one of which contained the certificate previously quoted. Each of these was for an odd amount and not for an even $25.

Early in the year 1954 Lemire says that he was advised by Côté that his monthly expense accounts could be increased to $100. At the time of the trial Côté was dead. Evidence was given by the former Solicitor-General that he was unaware of any authority having been given for any increase beyond the initial, fixed amount of $50 per month. Commencing in 1954, Lemire's total expense accounts rendered each month became larger. In most instances two accounts were filed in each month, although on some occasions there would be three or more.

This practice continued until the year 1960, when Lemire received a salary increase to $7,400 per annum. Thereafter the presentation of expense accounts ceased.

The procedure respecting expense accounts was that two forms were required to be filed, one white and one yellow, the latter being retained in the office of the Liquor Police. The white one, signed by the person seeking payment of expenses, had to be verified by the accountant of the Liquor Police, was then forwarded to the Department of the Attorney-General and, from there, was transmitted to the office of the Provincial Auditor for approval. Section 17 of the *Provincial Audit Act,* R.S.Q. 1941, c.72, required that such accounts be examined and that it be ascertained that the payments charged be supported by voucher.

It is clear, from this brief outline of the facts, the material portions of which are admitted by Lemire, that, over a period of years, he submitted expense accounts which he knew to be false and obtained payment out of the public funds of the Province of Quebec of those amounts which were claimed in the expense accounts.

Lemire was charged under s. 323(1) of the *Criminal Code,* which provides:

> 323. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security, is guilty of an indictable offence and is liable to imprisonment for ten years.

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The learned trial judge required that the original count, which had charged Lemire with defrauding the public and, in particular, the Government of the Province of Quebec, of the sum of $8,999.10, be divided into 235 separate counts, each dealing with one expense account.

Count No. 1 will serve as an example of the form in which these various charges were made:

1. le ou vers le 31 mai 1952, dans les cité et district de Québec, étant Directeur de la Police des Liqueurs dont Commandant à Québec, par la supercherie, le mensonge et d'autres moyens dolosifs, soit en faisant ou en faisant faire par des subalternes, des comptes de dépenses faux et fictifs pour lui-même, fraudé le public en général et le Gouvernement de la Province de Québec, pour une somme de $50.00, C.Cr. 323, par. 1 et 21;

The learned trial judge acquitted the respondent on counts 15, 18, 38, 46, 89, 100 and 221; he found him guilty of attempted fraud on count 128; on counts 23 and 229 he found him guilty for lesser amounts than those charged; on all the other counts he found him guilty as charged.

Lemire's appeal to the Court of Queen's Bench, Appeal Side[1], was allowed by unanimous decision. The Court was composed of Tremblay C.J.P.Q. and Casey and Taschereau JJ., each of whom gave separate reasons.

As to the first 17 counts, which dealt with those expense accounts rendered by Lemire prior to and including that dated February 14, 1953, which was annulled by the Auditor-General, Tremblay C.J. says:

Pour ces 17 premiers cas, l'appelant témoigne, et il n'est pas contredit, que les chèques lui étaient remis soit avant, soit au moment même où on lui demandait de signer les formules. Ce ne sont donc pas les représentations contenues dans ces formules qui ont amené le consentement au paiement. C'était un reçu que l'appelant signait plutôt qu'une demande de paiement.

De plus, il ne me paraît pas raisonnable de croire que quelqu'un ait pu être trompé par ces formules. Bien que la partie imprimée de la formule l'exigeât, aucune date de départ ou de retour, aucun détail des supposés frais ne sont donnés. Le certificat qui réfère à «l'intérêt de cette cause» n'a pu tromper personne puisqu'aucune cause n'est mentionnée. Il manque donc un élément de l'offense: le lien de causalité entre le consentement au paiement et les représentations de l'appelant. Il est possible que ceux qui ont payé n'avaient pas le pouvoir de disposer ainsi des fonds publics, mais il y aurait alors recours civil en répétition de l'indû mais non crime de fraude.

L'on dira peut-être que ce raisonnement est exact quant au «gouvernement de la province de Québec» mais non quant «au public en général» que l'appelant est aussi accusé d'avoir «fraudé». Si l'on considère le public indépendamment de son mandataire, le gouvernement de la province, il faut décider que, si l'appelant est coupable d'un crime, ce n'est pas de

[1] [1963] Que. Q.B. 697.

celui de fraude, parce que le public n'a jamais consenti au paiement et que le consentement de la personne frustrée est un élément essentiel du crime de fraude.

With respect, I think it is an error in law to construe the forms signed by Lemire as being receipts, rather than demands for payment, merely because, according to his evidence, after the first occasion, the signed form was handed him by Côté at the same time that he received the cheque from Côté. The cheques which were delivered by Côté were drawn on the account of the Liquor Police. They were signed by Côté, as director, and also by the accountant of the Liquor Police. They represented payments from public funds, which, admittedly, could only be validly justified by proper vouchers, and these Côté had to obtain. Expense moneys were payable only on the basis of a certified statement of actual expense. Each such statement had to be verified and thereafter to be approved by the Auditor-General. It is obvious that Lemire could not have continued to receive the cheques without having provided the false statements which were the basis for their issuance. The scheme must be examined as a whole and, when that is done, there is no question but that false expense accounts were submitted by Lemire as a basis for his receipt of public funds. This constitutes the "lien de causalité" between the vouchers and the payments which the learned Chief Justice felt was lacking in this case.

It is suggested that no one was deceived by these expense accounts because they did not contain a detailed list of the expenditures as contemplated by the form. To say this is to say either that the persons required by law to check the forms were themselves also parties to the fraud, or that they failed to perform their duties properly. However, even if this be so, and whichever is the case, this does not provide Lemire with an answer in law to the charges under s. 323(1). Whether or not they deceived the people who were supposed to check and verify them, the point is that, without filing of the expense accounts, the payments to Lemire from public funds could not have been obtained or continued. Section 323(1), in addition to mentioning deceit and falsehood, also refers to "other fraudulent means". Whether or not they deceived the people who saw them, they were the necessary means used to obtain the payments and without them the payments would not have

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been made. They were fraudulent. In my opinion the ground taken in the second paragraph above quoted is wrong in law.

In the third paragraph of the passage above quoted it is said that the public was not defrauded because the public never consented to the payment. There is here an error in law. The public, through its elected representatives, had consented to the expenditure of public funds only on the basis of compliance with the requisite statutory procedures. In my opinion any one who, by fraudulently purporting to fulfill those requirements, obtained payment of public moneys, to which he was not lawfully entitled, would thereby have defrauded the public within the meaning of s. 323(1).

I find it impossible to see how, on the uncontradicted evidence of Lemire himself, any other conclusion can be reached than that he received provincial funds on the basis of the presentation of expense accounts admittedly false and, that being so, I do not see how any other conclusion in law can be reached save that he had defrauded the Provincial Government and the public of the amounts which he thus obtained.

In this connection the reasoning of Cartwright J., who delivered the unanimous decision of this Court in *Cox and Paton v. The Queen*[1], is relevant. In that case the accused were charged with having conspired to commit an indictable offence; i.e., by deceit, falsehood or other fraudulent means to defraud Brandon Packers Limited. It was contended in argument that there was no evidence that any official of that company had been deceived, particularly as the president of the company and its controlling shareholder was fully aware of all that was being done by the accused. Dealing with this argument, Cartwright J., at p. 512, said:

> In the course of argument on this branch of the appeal counsel for the appellants submitted that there was no evidence that the appellants defrauded Brandon Packers Limited or that they intended to do so because, as it was said, there was no evidence of any false representation made to the company or of any official of the company have been deceived into parting with the moneys referred to in the particulars furnished. Assuming, without deciding, that there was a dissent on this point within the meaning of s. 597(1) of the *Criminal Code,* I would reject this argument. I will examine it only in connection with the transaction relating to the $200,000 which is the first item in the particulars. I have already indicated my agreement with the statement of Freedman J.A.

[1] [1963] S.C.R. 500, 40 C.R. 52, 2 C.C.C. 148.

that "implicit in the entire transaction was the representation of the accused that this was a legitimate *bona fide* investment for Brandon Packers Limited to make" and with his view that there was ample evidence to warrant a finding that this representation was false to the knowledge of the accused. If it deceived Donaldson, who was still nominally at least in control of the company into paying over the $200,000 to Fropak that would be a fraud on the company. If, on the other hand, it is suggested that Donaldson was not deceived but paid the money over knowing that the transaction was not *bona fide,* that the Fropak shares were worthless and that their purchase was merely a step in a scheme to enable the accused to buy the shares of Brandon Packers Limited with its own money, that would simply be to say that Donaldson was *particeps criminis.* If all the directors of a company should join in using its funds to purchase an asset which they know to be worthless as part of a scheme to divert those funds to their own use they would, in my opinion, be guilty under s. 323(1) of defrauding the company of those funds. Even supposing it could be said that, the directors being "the mind of the company" and well knowing the true facts, the company was not deceived (a proposition which I should find it difficult to accept), I think it clear that in the supposed case the directors would have defrauded the company, if not by deceit or falsehood, by "other fraudulent means".

As to the expense accounts submitted after February 14, 1953, the learned Chief Justice says:

Quant aux autres chefs, entre en jeu une considération différente qui me paraît péremptoire.

La preuve révèle hors de tout doute—l'appelant l'a d'ailleurs admis—que certains frais inscrits sur les formules n'ont pas été encourus par l'appelant. Mais, il résulte aussi de la preuve que la Couronne n'a pas prouvé hors de doute raisonnable qu'aucun de ces frais n'a été encouru. Le malheur, c'est qu'il est impossible de pointer du doigt ceux qui ont été réellement encourus et ceux qui ne l'ont pas été. La seule preuve apportée par la Couronne sur ce point révèle que l'appelant était à son bureau de Québec la plupart du temps. Les témoins admettent cependant qu'il s'absentait quelques fois par année. L'appelant a retrouvé deux formules qui contenaient des frais réellement encourus. Il a juré qu'il y en avait sûrement d'autres mais que sa mémoire ne lui permettait pas de les retracer après tant d'années. Il faut dire que l'appelant était âgé de 74 ans lors de son témoignage. Son assertion, rendue plausible par la preuve de la Couronne, me paraît nettement suffisante pour engendrer un doute raisonnable. D'ailleurs, le premier juge a acquitté l'appelant des deux chefs d'accusation qu'il a pu préciser. De son propre chef, il a retranché du montant allégué dans d'autres chefs les frais du permis de conduire de l'appelant que celui-ci avait le droit de recouvrer.

De ce qui précède il résulte que, même si j'admets l'existence du lien de causalité entre le paiement et les représentations, je ne puis dire quant à quels chefs d'accusation en particulier les représentations sont fausses et quant à quels chefs elles sont vraies, sauf quant au chef numéro 18 qui fait double emploi avec le chef numéro 17 et sur lequel l'appelant a été acquitté. Le substitut du procureur général a d'ailleurs franchement admis lors de l'audition qu'il est impossible de prouver quels chefs d'accusation précis sont bien fondés. La seule conclusion logique, c'est qu'aucun chef n'a été prouvé hors de tout doute raisonnable et que l'appelant doit être acquitté sur tous les chefs.

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Before this Court, counsel for the appellant impressed upon us that there must have been a misunderstanding with respect to the admission referred to in the last paragraph, in the passage above quoted, as having been made by counsel for the Attorney-General. Counsel before us advised that he did not think that such an admission had been made. It certainly had not been intended to make any such admission on behalf of the Crown, and the record would not support the making of it.

In my opinion the conclusion reached in this passage is also wrong. Lemire was asked, in his evidence, to indicate which of the expense accounts in evidence represented expenditures really incurred by him. He was able to identify only two. The following is the evidence which he gave in chief in this connection:

PAR Me RENÉ LETARTE,

De la part de l'accusé:

Q. Alors, en somme, monsieur Lemire, dans cette période, allant de mai, mil neuf cent-cinquante-deux (1952), à mai, mil neuf cent-soixante (1960), vous dites que vous avez été autorisé à recevoir cinquante dollars ($50.00) par mois jusqu'en mil neuf cent cinquante-quatre (1954)?

R. Oui.

Q. C'est-à-dire huit (8) mois en mil neuf cent cinquante-deux (1952), c'est ça?

R. C'est ça.

Q. Et douze (12) mois, en mil neuf cent cinquante-trois?

R. Oui.

Q. Ce qui fait vingt (20) mois à cinquante dollars ($50.00), soit mille dollars ($1,000.00)?

R. C'est ça.

Q. Et, ce que vous dites, c'est qu'à partir de mil neuf cent cinquante-quatre (1954), jusqu'à mil neuf cent soixante (1960), c'était cent dollars ($100.00) par mois?

R. C'est ça.

Q. Est-ce que vous pourriez nous dire, effectivement, combien vous avez pris sur ces montants-là, pendant cette période-là?

R. Bien, je calcule que je dois avoir pris entre huit mille (8,000) et huit mille six cents piastres ($8,600.00).

Q. Je comprends également qu'il y a des comptes de dépenses, pour plus ce montant-là?

R. Absolument.

Q. Comment expliquez-vous cette différence-là?

R. Bien ça, je ne peux pas le dire, parce que j'ai fait des voyages, et dans les comptes, je ne les ai pas vus.

Q. Alors, est-ce que vous voulez dire que la différence représenterait vos dépenses réelles?

R. Oui.

Q. Et, vous avez dit tout à l'heure que vous êtes même d'opinion qu'il en manque des comptes de dépenses?

R. Je le crois.

PAR LA COUR:

Q. Seriez-vous capable, en examinant chacun des exhibits, nous dire si vous ne pourriez pas reconnaître des comptes, pour des dépenses que vous auriez réellement faites pour des voyages?

R. Bien, j'ai regardé avec Me Letarte, j'en ai vu une couple.

D'autre part, j'ai des comptes qui ont été faits pour des voyages, et je ne les ai pas vus.

Q. Alors, est-ce que vous pourriez m'indiquer ceux-là que vous avez vus?

Si vous avez besoin d'un ajournement pour examiner les comptes attentivement, je vais vous permettre de le faire.

R. On les a examinés tous les deux.

PAR Me RENÉ LETARTE,

De la part de l'accusé:

Moi, je ne peux pas témoigner.

PAR LA COUR:

Q. Mais, vous m'avez dit, si j'ai bien compris, que dans les exhibits produits, il y en aurait deux (2) que vous avez reconnus comme représentant des dépenses que vous auriez réellement faites à l'occasion de voyages?

R. Oui.

Q. Pour le bénéfice de la Police des Liqueurs?

R. Oui.

Q. Alors, pourriez-vous les indiquer à la Cour, dans les exhibits, ces deux-là?

R. Oui, il y a un voyage en Gaspésie, je pense, au commencement de septembre, mil neuf cent cinquante-neuf (1959).

Q. Il s'agit de quel exhibit?

PAR LE GREFFIER:

P.-221.

PAR LE TÉMOIN:

R. Oui, quarante-deux piastres et trent-cinq ($42.35).

PAR LA COUR:

Q. Ce sont des dépenses réelles que vous avez assumées pour du travail à la Police des Liqueurs?

R. Oui.

Et il y en a un autre, je me rappelle pas de la date, c'est un voyage aux environs de La Tuque et Berthier.

PAR Me LETARTE,

De la part de l'accusé:

Q. Maintenant, voici à part ces deux voyages-là, voulez-vous dire qu'intégralement . . .

PAR LA COUR:

J'aimerais bien qu'on le retrace avant de clore la Défense; j'aimerais bien qu'on le retrace.

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PAR Me RENÉ LETARTE,

De la part de l'accusé:

Q. Ce serait en quelle année, çà, celui-là en particulier?

R. Je me rappelle pas, je ne sais pas si c'est en cinquante-six (56), ou en cinquante-sept (57), c'est pas mal loin en arrière.

Q. Est-ce qu'il y aurait eu une note particulière, sur ce compte-là?

R. Oui, il y aurait eu le nom de Letarte et de Laforest, dessus.

PAR LE GREFFIER:

Alors, ce serait P.-38.

PAR Me RENÉ LETARTE,

De la part de l'accusé:

Q. C'est ça, P.-38, en novembre, mil neuf cent cinquante-trois (1953)?

R. Oui, pour un montant de vingt-neuf et vingt-cinq ($29.25).

Q. Alors, ça, ce sont deux comptes, dans les comptes auxquels vous venez de référer, pour lesquels vous vous souvenez positivement qu'il s'agit intégralement de dépenses réelles?

R. Absolument.

Q. Maintenant, dans les autres cas, dans les autres comptes, qu'est-ce qu'il y a là-dedans?

R. C'est parce qu'on a fait un voyage à Saint-Hilaire, aussi, dans le temps, c'est près de Belœil, ça.

PAR LA COUR:

Q. Dans le comté de Rouville?

R. Oui.

Ensuite, j'en ai fait à Chicoutimi.

PAR Me RENÉ LETARTE,

De la part de l'accusé:

Q. Maintenant, est-ce que des comptes séparés et distincts étaient faits pour ces autres voyages-là, ou bien non, si vos dépenses étaient dissimulées dans d'autres comptes?

R. Je ne faisais pas de distinction, des fois je le marquais dans le mois, avec l'autre, là.

Q. Vous mêliez ça ensemble?

R. Oui.

Q. Et ce que nous allons appeler votre allocation, et les dépenses réelles qui vous étaient occasionnées dans le mois?

R. Absolument.

Q. C'était fondu ensemble?

R. Oui.

Q. Maintenant, vous dites que, toutefois, dans cette liste-là, il y a deux cas où ce sont des comptes réellement distincts pour des voyages en particulier?

R. Oui.

This evidence can be summarized as follows:

1. Of the expense accounts which were exhibits, Lemire could identify only two as representing genuine expenses.

2. He thought there were other expense accounts which

he had submitted which were not included among the exhibits at the trial.

3. He thought that some of the expense accounts which were exhibits, apart from the two which he had specifically identified, included both real and false expenses mingled together.

To say that, on this evidence, a reasonable doubt exists as to Lemire's guilt on each and every charge is, in my view, wrong in law.

In the first place, Lemire does not appear to go any further in relation to the expense accounts, other than the two which he identified, than to say that some of them may have contained a mixture of real and false expenditures. Even accepting this evidence, it would be wrong in law to hold that he was entitled to an acquittal in respect of an expense account which contained some real expenditures as well as false expenditures merely because the amount charged in the count would then be larger, by the amount of the real expenditures, than the amount which he actually obtained by fraud. To hold that, in such a case, Lemire was entitled to an acquittal is an error in law.

In the second place, the conclusion of the learned Chief Justice as to the existence of a reasonable doubt on all counts has no basis on the evidence. Lemire admitted that the express purpose of filing the expense accounts was in order to obtain payments to him equivalent to $50 per month, and later $100 per month. An examination of the total of the accounts rendered for each month and also for each year establishes, beyond peradventure, that in practically every month, from 1952 to 1960, inclusive, a part, if not the whole, of each account rendered represented expenses not actually incurred. An example will illustrate the point which I am seeking to make. In October, 1954, after Lemire had increased his expense account payments from $50 to $100 per month, he rendered two expense accounts, one on October 8 for $48.90, another on October 22 for $53.25, making a total for the month of $102.15. This total exceeds the $100 which he was seeking to obtain in lieu of salary increase by only $2.15. Each of the two expense accounts was for more than that amount. Similarly, in the following month of November three accounts were

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rendered, one on November 8 for $35.90, one on November 20 for $41.90, one on November 25 for $29.10, making a total of $106.90. In December the monthly total was $76.50, made up of two accounts, one on December 4 for $33.85, the second on December 16 for $42.65. In view of Lemire's own admission as to the basic purpose for which the accounts were rendered, it seems to me to be impossible to conclude that any one of these seven accounts mentioned related only to expenditures genuinely incurred. This illustration could be repeated many times.

With the exception of those counts on which Lemire was acquitted, in my opinion, there was no evidence on the basis of which, as to each and every expense account submitted by him, any doubt, let alone a reasonable doubt, could arise as to Lemire's having incorporated, to effectuate the agreed scheme, items of expense which were fictitious and false.

In my opinion, on an appeal from a conviction, if an appellate court allows the appeal on the ground that certain specified evidence creates a reasonable doubt as to the guilt of the accused, when, on a proper view of the law, that evidence is not capable of creating any doubt as to his guilt, there is an error in law.

I turn now to the reasons given by Casey J., who said:

> Despite what is said in the judgment and in respondent's factum, the facts of this case are crystal clear and surprisingly simple. Appellant wanted an increase and the one who controlled every aspect of the Government's business and certainly that of appellant's department, the Attorney General and Prime Minister, felt that his request was a legitimate one and that it should be granted. But there was a fly in the ointment. An enquiry into the government's salary structure was under way and it would have been embarrassing to grant an increase at that moment. In fact "that moment" dragged on and on and the results of the enquiry were given effect only in November of 1959. So the means above described were devised.
>
> Without commenting on the propriety or prevalence of this method of granting disguised salary increases, and without asking why appellant's situation was not regularized post factum, I give it as my view that in the circumstances obtaining throughout this whole period appellant was entitled to believe that for reasons of higher policy he was given an increase in this fashion and that the procedure, irregular though it may have been on its face, could and would in the fullness of time be ratified and validated. After all he was dealing with the person who gave the orders, and who had—"l'autorité pour augmenter ou diminuer les salaires".
>
> Since the instructions given by the Attorney General necessarily implied the making of fictitious expense accounts I am unable to find in appellant the intention to defraud contemplated by the *Criminal Code,* nor since we are dealing with a salary increase that his superiors considered

warranted, am I able to see in what respect the public or the Province was defrauded.

The effect of the second paragraph, above quoted, may be rather bluntly summarized in this way. Because the augmentation of Lemire's income by the filing of false expense accounts was suggested and approved by the Attorney-General and Prime Minister of the Province, Lemire, who deliberately filed false documents and thereby obtained payments from the provincial public funds, could not be held guilty of fraud, because he could reasonably anticipate that the fraudulent system would later be somehow validated. In other words, there is no intent to defraud within the requirement of s. 323(1) if the accused person, while deliberately committing an act which is clearly fraudulent, expects that that which he is doing may, at a later date, be validated. To me the very statement of this proposition establishes its error in law.

Incidentally, it may be noted that when, in 1960, Lemire's salary was increased, no attempt was made to validate his receipt of the moneys paid to him on the basis of the false expense accounts in the preceding years.

The implication of the third paragraph is that, because the suggestion for the proposed fraudulent method emanated from the Attorney-General of the Province, Lemire, who was the one who deliberately certified the fraudulent expense accounts, could not be found to have intended to defraud and, further, that because his superiors thought Lemire was entitled to a salary increase (which they would not grant), a fraudulent scheme for the obtaining of payment of fictitious expense accounts did not constitute a fraud on the public.

To me the idea that it is an answer to a charge of fraud to say that the fraud was suggested by the superior of the accused is completely erroneous in law, as is also the proposition that the Province of Quebec and the public of Quebec were not defrauded by paying, out of public funds, false expense accounts, merely because Lemire's salary was less than what he and his superiors thought it ought to be.

In conclusion, with respect to the reasons given by the learned judges to which I have referred, it appears to me that, while each of them contains findings which, viewed in isolation, might, at first glance, be regarded as findings of

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fact, or of mixed fact and law, each judgment is palpably based on a misconception of the effect of s. 323(1) of the *Criminal Code*. We have, in this case, an accused person who admits to having obtained, out of the public funds of the Province of Quebec, between $8,000 and $8,600 and, for that purpose, to have rendered certified expense accounts which were fictitious. These facts are not in dispute. In the reasons given in the Court below, which I have reviewed, certain inferences have been drawn from the facts in evidence, but the fundamental error which exists in each, and which is an error in law, is in holding that, on the basis of those inferences, some element in the offence was lacking.

In *Belyea and Weinraub v. The King*[1], this Court considered a case in which the Appellate Division of the Supreme Court of Ontario had allowed an appeal by the Crown from an acquittal by the trial court in proceedings by indictment. The right of appeal to the Appellate Division was limited, as is the appellant's right to appeal to this Court in the present case, to questions of law. It was contended by the appellants in that case that the issues before the Appellate Division did not involve a question of law alone. Chief Justice Anglin, who delivered the judgment of the Court, said at p. 296:

> 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.

In my opinion, the guilt of the respondent in the present appeal depends upon the legal effect of facts found, or inferred, in the Court below. This raises questions of law in respect of which, for the reasons already stated, I think there was error. There is no ground not involving such questions upon which Lemire's appeal could have been allowed. There was, therefore, a right of appeal to this Court and the appeal should succeed. The judgment of the learned trial judge, with respect to the question of guilt, should be restored.

[1] [1932] S.C.R. 279.

Lemire also appealed against sentence, but, in view of the conclusions there reached, no decision was rendered on this point by the Court below. The case should therefore, be returned to the Court of Queen's Bench, Appeal Side, to deal with the appeal from sentence.

Appeal allowed, conviction restored, TASCHEREAU CJ. *and* CARTWRIGHT *and* SPENCE JJ. *dissenting.*

Attorneys for the appellant: Ivan Mignault and Jean Bienvenue, Quebec.

Attorney for the respondent: René Letarte, Quebec.

VIEWEGER CONSTRUCTION CO. LTD. (*Defendant*) ..... APPELLANT;

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*Nov. 4, 5
Dec. 21

AND

RUSH & TOMPKINS CONSTRUCTION LTD. (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contracts—Agreement between subcontractors to undertake highway contract—Subsequent agreement of contractor with one of the subcontractors to perform the contract—Whether contractor entitled to enforce provisions of agreement betwen itself and one of the subcontractors as against the other subcontractor—Counterclaim for arrears of equipment rental—Claim for damages flowing from interim injunction preventing subcontractor removing machinery.

The plaintiff company, which was the successful tenderer for the construction of certain sections of a highway, had proposed an arrangement with another company L that when the tender was accepted the plaintiff would immediately assign the contract in whole to L. The plaintiff had advised L to obtain the services of someone who had knowledge of excavating through rock and who possessed the necessary equipment for that type of work. L made arrangements with the defendant company V and an agreement between them was executed on July 22, 1958. On the following day a copy of this agreement was delivered to the plaintiff's manager, and on July 28th the plaintiff entered into a contract with L. The job was commenced by L and V and some financial assistance required by the latter in connection with its equipment was given by the plaintiff. The work progressed badly and on April 1, 1959, L was to a large extent removed by the plaintiff from the operation of the contract; L formally abdicated its position under the contract on July 23rd.

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

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Under an agreement made between a representative of the plaintiff and a representative of V, and later confirmed by a letter which the plaintiff wrote to V, the plaintiff used V's equipment through the working season of 1959 and certain rental payments were made. When these rentals fell into arrears, V threatened to remove its machinery. The plaintiff took the position that a partnership existed between V and L, which partnership was evidenced by the agreement between the two on July 22, 1958, and that, since such partnership existed, V was bound as was L by the provisions of the contract between the plaintiff and L and particularly by para. 12 thereof, which contained specific provisions in the event of default by the subcontractor.

Upon V insisting that it must be paid the equipment rentals or that it would remove its equipment, the plaintiff applied for and obtained an interim injunction preventing V from so doing. At trial, the judge dismissed the plaintiff's action and allowed the defendant's counterclaim, but refused to grant to the defendant any damages attributable to the interim injunction. On appeal, the Court of Appeal held that the plaintiff was entitled to the interim injunction and dismissed the defendant's counterclaim. The defendant appealed to this Court.

Held: The appeal should be allowed, the judgment in favour of the defendant upon the counterclaim restored, and a reference directed to determine the damages attributable to the interim injunction, such damages to be granted to the defendant.

It was unnecessary to determine whether or not V and L were partners. Even if one presumed that the relationship of these two companies was a partnership, it was abundantly clear that the plaintiff elected to deal with L alone. Having so elected the plaintiff now could not attempt to hold the defendant liable and require it to perform the contract of L even if it were a partner of L. *British Homes Assurance Corporation, Ltd. v. Paterson,* [1902] 2 Ch. 404, applied; *Calder v. Dobell* (1871), 6 C.P. 486; *Basma v. Weekes et al.,* [1950] A.C. 441, distinguished. Accordingly, the plaintiff was not entitled to enforce the provisions of para. 12 of the agreement between itself and L, as against V, and prevent V from removing its equipment either in April 1959, when L abandoned the contract, or later, when the plaintiff failed to pay the equipment rental.

The defendant was entitled to succeed on its counterclaim for the arrears of equipment rental which it alleged was owed to it by the plaintiff. The transaction between the defendant company and the plaintiff company was a contract for the payment of equipment rental at scheduled rates, the schedule being that set out in the agreement of July 22, 1958, between V and L.

With respect to the defendant's claim for damages flowing from the interim injunction, this was an ordinary case of an injunction granted upon a plaintiff's application and upon the plaintiff's undertaking to abide by any order which the Court might make as to damages, and the plaintiff should be required to make good its undertaking. Accordingly, an inquiry as to damages was granted. *Griffith v. Blake* (1884), 27 Ch. D. 474, approved.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], granting an appeal from

[1] (1964), 45 D.L.R. (2d) 122.

a judgment of Riley J. Appeal allowed, judgment of the Appellate Division set aside and judgment at trial varied.

R. A. McLennan and *T. C. Fraser,* for the defendant, appellant.

T. Mayson, for the plaintiff, respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta[1] pronounced on May 6, 1964, granting an appeal from the judgment pronounced after trial by Riley J. on June 24, 1963. In that judgment, the learned trial judge dismissed the action of the respondent Rush & Tompkins Construction Ltd. and allowed the appellant's, Vieweger Construction Ltd., counterclaim in the amount of $42,769.64, but refused to grant to the appellant any damages attributable to the interim injunction to which reference shall be made hereafter.

Rush & Tompkins Construction Ltd., hereinafter referred to as Rush & Tompkins, had acted as the financial backer of a company known as Layden Construction Ltd., and in some considerable number of cases had submitted tenders under its own name to owners contemplating certain construction work. Then, when its tender was accepted, Rush & Tompkins immediately assigned that contract in whole to Layden Construction Ltd.

Upon a call for tenders having been issued by the Government of Canada for the construction of certain sections of the Trans-Canada Highway in the Rogers Pass area of British Columbia, Rush & Tompkins proposed to make a similiar arrangement with Layden Construction Ltd. but first advised Layden Construction Ltd. to obtain the services of someone who had knowledge of excavating through rock and who possessed the necessary equipment for that type of work. There is some indication in the evidence that Rush & Tompkins actually designated to Layden Construction the appellant company and its chief officer, Mr. Luther Vieweger, as being acceptable. Be that as it may, Layden Construction Ltd., through its officers, Mr. James Layden and Mr. Earl Layden, met with Mr. Luther Vieweger who assisted them with advice and figures and took an active

[1] (1964), 45 D.L.R. (2d) 122.

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part in the preparation of the tenders for two sections of the said highway. The tenders were submitted in Rush & Tompkins' name and upon Rush & Tompkins being advised that they were the successful tenderers the general manager of that company, John Ford, advised Mr. James Layden, the manager of Layden Construction Ltd. of that fact, and told him to make his own arrangements with Vieweger Construction Ltd. Mr. James Layden, at trial, testified:

> Q. Following this meeting, did you or Mr. Vieweger have a meeting or discussion as to your relationship? A. Mr. Ford told me to make my own agreement with Mr. Vieweger, which we done later on.

And Mr. Ford testified:

> I discussed the matter with Jim Layden that I wanted an agreement between he and Vieweger Construction as to how they were going—what arrangements they were going to have between themselves.

Upon receiving such instructions, James Layden, Earl Layden, and their accountant, one James Butler, met with Luther Vieweger and discussed the arrangement between Layden Construction Ltd. and the appellant company. As a result an agreement was prepared and executed by the respective companies. That agreement was produced at trial as Exhibit 4 and will be referred to hereafter.

On the very following day, *i.e.*, July 23, 1958, James Layden delivered a copy of Exhibit 4 to Mr. John Ford, the manager of Rush & Tompkins, and on July 28th Rush & Tompkins entered into a contract with Layden Construction Ltd. This first agreement between Rush & Tompkins and Layden Construction Ltd. was of an informal nature, produced as Exhibit 12, and was later replaced by a formal contract which although it also bore the date July 28, 1958 was not actually executed until some considerable time thereafter. The latter formal contract was produced at trial as Exhibit 9 and it will be referred to hereafter.

Layden Construction Ltd. and the appellant commenced work. It appeared that the appellant company required some financial assistance at the very beginning. Various items of their equipment were repaired and the repairmen were paid directly by Rush & Tompkins. In addition, the latter company paid to various finance companies accounts which were alleged to be in arrears on equipment which the appellant company had purchased. All of these payments were charged in Rush & Tompkins' accounts to

Layden Construction Ltd. and none were charged to nor were payments of any kind received from the appellant company.

Luther Vieweger was active on the site of the work and in a short time differences of temperament between him and the foreman of the Layden Construction company became a source of concern, which seems to have been adjusted by Mr. Luther Vieweger suggesting that a completely independent foreman be retained and given full authority and by Luther Vieweger undertaking to "continue to serve to the best of my ability under the circumstances centering particularly on getting some rock drilled off". The work progressed badly and on April 1, 1959, Layden Construction were to a large extent removed by Rush & Tompkins from the operation of the contract. Layden Construction Ltd., on July 23, 1959, by letter of that date, Exhibit 10, formally abdicated its position under the contract of July 28, 1958.

It is of some considerable significance that Luther Vieweger has sworn that he was never informed of the final amount of the tenders submitted by Rush & Tompkins to the Canadian Government and that he never received any copy of either Exhibit 12 or the formal agreement which followed it, Exhibit 9, nor was he shown a copy of the abdication letter to which I have just referred. He was informed by Mr. John Ford, the general manager of Rush & Tompkins, that the Layden Construction company was being removed from the operation and he was asked to confer with the new project manager, a Mr. Murphy. He met Mr. Murphy in Vancouver, after Mr. Murphy had inspected the site of the operations, and Mr. Vieweger swore that at this meeting Mr. Murphy, on behalf of Rush & Tompkins, agreed to use certain of the defendant's (here appellant's) equipment and to pay rental therefor "as scheduled" and on July 8, 1959, Rush & Tompkins, over the signature of Mr. Ford, wrote to Mr. Vieweger a letter which read as follows:

On April 1, 1959, our Mr. B. N. Murphy took over from Mr. Jim Layden as Project Manager on our road contract 15/58/TCH-G at Stoney Creek Siding, Glacier Park, B.C.

This is to confirm arrangements made by Mr. Murphy with you subsequent to that date that you were not required on job. However, as your equipment was to be used on this project, it was agreed that you should draw a salary of $500.00 per month, while job was in operation. Moreover,

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it was agreed that such wages received would be deducted from any machine rental earned.

The appellant company worked under this new arrangement with Rush & Tompkins and the respondent used the equipment through the working season in 1959 and made certain payments on account of rentals to the appellant company. When these equipment rentals fell into arrears, the appellant company threatened to remove its machinery and for the first time the respondent Rush & Tompkins took the position that a partnership existed between the appellant company and Layden Construction Ltd., which partnership was evidenced by the agreement between the two on July 22, 1958, Exhibit 4, and that, since such partnership existed, the appellant company was bound as was Layden Construction Ltd. by the provisions of the contract between Rush & Tompkins and Layden Construction Ltd., Exhibit 9, and particularly by para. 12 thereof, which read as follows:

12. If the Subcontractor shall fail to commence the work or to prosecute the work continuously with sufficient workmen and equipment to insure its completion within the time fixed by the principal contract or to comply with the lawful orders of the Engineer or to perform the work in strict accordance with the provisions of the principal contract, or if for any other cause or reason the Subcontractor shall fail to carry on the work in a manner acceptable to the Engineer or the Contractor, the Contractor may give notice to the Subcontractor requiring it to remedy such defects, orders, defaults or delays and if such orders are not complied with or should such defaults or delays continue for Seventy-two hours after such notice shall have been given or should the Subcontractor make default in completion of the works or should the Subcontractor become insolvent or abandon the work or make an assignment of this contract without the consent of the Contractor, or otherwise fail to observe and perform any of the provisions of the principal contract or of this contract, then in any of such cases the Contractor without process of law and without any further authorization may take all of the work out of the hands of the Subcontractor and may employ such means as the Contractor may see fit to complete the works and in such case the Subcontractor shall have no claim for any further payment in respect of work performed and shall be chargeable with and shall remain liable for all loss and damage which may be suffered by the Contractor by reason of such non-compliance, default, delays or non-completion: PROVIDED that should the expense incurred by the Contractor in taking over and completing the work be less than the sum that would have become payable under this agreement if said work had been completed by the Subcontractor, then the Subcontractor shall be entitled to

the difference, and should such expense exceed the said sum, then the Subcontractor shall be liable to and shall pay the Contractor the amount of such excess. In the event of the Contractor taking over the work as aforesaid, all machinery, tools, plant, equipment or other property of the Subcontractor on the work may be used by the Contractor for the purpose of completing the work without charge. Upon the taking over of the work by the Contractor as herein provided, no further payment will be made to the Subcontractor until the work is completed, and any monies due or that may become due to the Subcontractor under this agreement will be withheld and may be applied by the Contractor to payments for labour, materials, supplies and equipment used in the prosecution of the work by the Contractor, or to the payment of any excess cost to the Contractor of completing the work.

Upon the appellant company insisting that it must be paid the equipment rentals or that it would remove its equipment, the respondent company applied for and on October 13, 1959, obtained an injunction preventing the appellant company so doing. That injunction contained the usual provision reading:

and the Plaintiff, by its Counsel, undertaking to abide by any order which this Court may make as to damages in case this Court shall hereafter be of opinion that the defendant shall have sustained any by reason of this order which the Plaintiff ought to pay.

The defendant moved to vacate that injunction order and such application was refused by the order of the Court on November 6, 1959.

Much argument before this Court was directed to whether in these circumstances a partnership existed between Layden Construction Ltd. and the appellant company and if so, whether the appellant company was bound by the provisions of s. 12 of the agreement between the respondent and Layden Construction Ltd. which I have set out above. The learned trial judge was of the opinion that such partnership did not exist and in carefully considered reasons based his finding upon the circumstances to which I have referred briefly aforesaid, although he did take into consideration the agreement between Layden Construction Ltd. and the appellant company, Exhibit 4.

The Appellate Division of the Supreme Court of Alberta in reversing the judgment of the learned trial judge relied very strongly upon the terms of that agreement, Exhibit 4, and were of the opinion that the presumption of

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partnership which it evidenced was not in any way rebutted by the circumstances upon which the learned trial judge had relied.

I am of the opinion that it is not necessary to determine whether or not the appellant company and Layden Construction Ltd. were partners. Even if one presumes that the relationship of these two companies was a partnership, it is abundantly clear that the respondent elected to deal with Layden Construction Ltd. alone. It is to be remembered that the respondent company had in its possession, when it drafted the agreements between it and Layden Construction Ltd.—both the early informal agreement, Exhibit 12, and the later formal agreement, Exhibit 9—a copy of Exhibit 4, yet it chose to make both the informal and later the formal agreements with Layden Construction Ltd. alone. As I have recited above, Mr. Ford earlier instructed Mr. James Layden to make what arrangements *he* deemed fit with the appellant company. It is not necessary to recite the many occasions in his testimony in which Mr. Ford reiterated his position that he was dealing with Layden Construction Ltd. and James Layden alone, and every piece of evidence is consistent with that position and inconsistent with any other. It was argued before us that the respondent company was not required to make an election as to what remedies it would pursue until the appellant company threatened to remove its equipment from the site. At that time, it was submitted, in a further consideration of the contract between the appellant company and Layden Construction Ltd., Exhibit 4, it came to the view that such agreement created a partnership and it could then elect to hold the partner, the appellant company, bound by the provisions of the contract between it, the respondent, and Layden Construction Ltd., *i.e.*, Exhibit 9. I cannot accept this argument. I am of the opinion that the date on which the respondent company came to the conclusion that the appellant company and Layden Construction Ltd. were partners is quite irrelevant. The respondent company knew throughout that the other two were in some sort of business relationship. It had, in fact, caused that relationship to be

created and it had knowledge of the details of that relationship and yet the respondent company carefully chose to enter into contractual arrangements with Layden Construction Ltd. alone.

I am of the opinion that *British Homes Assurance Corporation, Ltd. v. Paterson*[1] is sound authority for the proposition that having so elected the respondent company now cannot attempt to hold the appellant company liable and require it to perform the contract of Layden Construction Ltd. even if it were a partner of Layden Construction Ltd. There, Farwell J., at p. 408, quoted Lord Blackburn in *Scarf v. Jardine*[2]:

> Where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered.

Lindley on Partnership, 11th ed., accepts the authority of this decision at p. 183 where, after quoting s. 5 of the *Partnership Act* of 1890, which is a counterpart of s. 7 of the Alberta *Partnership Act,* the learned author states:

> It is hardly necessary to observe that this section imposes no liability on a firm for acts done by a partner, who is acting and is dealt with as acting, on his own behalf, and not on behalf of the firm.

giving the *British Homes Assurance* case as the authority for that proposition.

And at p. 248, the learned author states:

> The general proposition that a partnership is bound by those acts of its agents which are within the scope of their authority, in the sense explained in the foregoing pages, must be taken with the qualification that the agent whose acts are sought to be imputed to the firm was acting in his character of agent, *and not as a principal.* (The italicizing is my own.)

The learned trial judge accepted the authority of this decision and quoted therefrom as I have.

In the Court of Appeal, Johnson J. A., giving the judgment for the Court, outlined the reliance of the present appellant upon the decision and then continued:

> In entering into the contract the Layden company was acting as agent for itself and the respondent and *Calder v. Dobell,* (1871), L.R. 6 C.P. 486, would be applicable.

[1] [1902] 2 Ch. 404.

[2] (1882), 7 App. Cas. 360.

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And then quoted Kelly C. B. at p. 499, noting that the passage was approved in *Basma v. Weekes et al.*[1]

Those two decisions and the others which are discussed in the judgments deal with cases where a partner or agent was acting as such for either a disclosed or non-disclosed principal and with the subsequent suit by the opposite party against such principal.

In the present case, the learned trial judge concluded, and for the reasons which I have outlined I agree with his conclusion, that Layden Construction Ltd. was dealing with the appellant company as principal and was doing so at the insistance of the respondent company through the agency of its general manager Ford. Therefore, with respect, the cases cited by Johnson J. A. are not applicable and *British Homes Assurance* is exactly applicable.

For these reasons, I have come to the conclusion that the respondent company was not entitled to enforce the provisions of s. 12 of the agreement between itself and the Layden Construction company, Exhibit 9, as against the appellant company, and prevent the appellant company from removing its equipment either in April 1959, when Layden Construction Ltd. abandoned the contract, or later, when the respondent company failed to pay the equipment rental. Having come to that conclusion, therefore, I turn to the counterclaim of the appellant company for the arrears of equipment rental which it alleges is owed to it by the respondent company. The learned trial judge gave effect to this counterclaim acting on the basis which he termed an implied contract.

Johnson J.A., giving judgment for the Court in the Appellate Division, took the view that Murphy, as the agent for the respondent company in his conversations with Mr. Luther Vieweger, "went no further than to assume the obligations which the partnership by the agreement of July 22nd assumed to the respondent".

I have concluded that no partnership assumed such obligations; Layden Construction alone did so. It is to be

[1] [1950] A.C. 441.

remembered that this was certainly the view of Mr. Luther Vieweger at the time of his conversation with Mr. Murphy, and Mr. Ford for the respondent company has admitted that it never took the position that it could bind the appellant company as a partner of Layden Construction Ltd. until months after when it ceased paying the equipment rental.

I am of the opinion, therefore, that the transaction between the appellant company and the respondent company, the former represented by Mr. Luther Vieweger and the latter by Mr. Murphy, was simply a contract for the payment of equipment rental at scheduled rates, the schedule being that set out in Exhibit 4, the agreement between the appellant company and Layden Construction Ltd. I cannot appreciate the argument of counsel that what Mr. Vieweger was doing then was agreeing to continue the agreement between the Layden company and the respondent company, Exhibit 9, and be paid the schedule of rentals only from possible profits. It is agreed that at that time the contract was $300,000 in deficit, and I do not see how it can be imagined that Mr. Vieweger would agree to have his equipment worked with such a faint hope of reward, when he did not then and for months later know that the respondent company was taking the position that they were entitled to hold the equipment on the site and he has never yet, let alone in April 1959, agreed to that contention. An attempt was made to interpret the agreement between Mr. Murphy and Mr. Vieweger as being to pay rentals in accordance with Exhibit 4. That is not Mr. Vieweger's evidence of what occurred. He swore that Mr. Murphy said:

> Mr. Vieweger, we will pay you for them, we will maintain them and keep them in order, and we will pay you rentals as scheduled.

And in cross-examination, he was asked these questions:

> Q. Now, I say to you that your arrangement, if you ever had one with Murphy, was that you were to get the rentals on the same terms as you were entitled to under your agreement with Layden?
> A. My understanding with Murphy, as I have told you, it was that we would be paid at that rate, on the 15th of the month following, basis.

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Q. Did you understand that Rush & Tompkins was stepping in, and was going to do the best he could to see that you were paid rentals, if the project made money? A. Nobody ever told me that, no.

Mr. Murphy did not give evidence for the respondent company.

Counsel for the respondent company submitted that practically all subcontracts bear a clause similar to cl. 12 of Exhibit 9 and that Mr. Vieweger would know the existence of such a clause and would expect that Rush & Tompkins would keep his equipment on the site and use it for the completion of the contract. On the other hand, Mr. Vieweger knew that he had made no such agreement and he could be under no such impression. The agreement made between Mr. Vieweger and Mr. Murphy was, in my opinion, confirmed by the letter which the respondent company wrote to the appellant company on July 8, 1959, which I have recited above. I have no difficulty in finding consideration for this contract. By virtue of it the machines were left on the site and were used for months by the respondent company, and the learned trial judge has found that there were payments made on account of the equipment rentals, although no invoices were rendered by the appellant company. The amount of the equipment rental in arrears has been agreed at by counsel at the sum of $42,769.64 and the judgment at trial in favour of the appellant on its counterclaim should be restored to such an extent.

I turn now to the appellant company's claim for damages flowing from the interim injunction granted on October 13, 1959, and continued on the motion to vacate. The learned trial judge in refusing the appellant company's claim for such damages adopted the principle stated by Hyndman J. in *McBratney et al. v. Sexsmith*[1], at p. 459, as follows:

The law is well settled that it does not follow that because an interlocutory injunction is dissolved before or after trial the successful defendant is therefore or in any event entitled to damages. The test is whether the plaintiff, by the suppression of facts, or misrepresentation, or maliciously, improperly obtains the injunction.

[1] [1924] 2 W.W.R. 455.

It would appear that the proper test was laid down by the Court of Appeal in *Griffith v. Blake*[1]. There, the Court of Appeal was concerned with a dictum of the late Master of the Rolls in *Smith v. Day*[2], to the effect that the undertaking as to damages only applies where the plaintiff has acted improperly in obtaining the injunction, and all the members of the Court expressed dissent with that view. Baggallay L.J. said, at p. 476:

> If the Defendants turn out to be right, it appears to me that they can, under the undertaking, obtain compensation for all injury sustained by them from the granting of the injunction.

And Cotton, L.J., said at p. 477:

> But I am of opinion that his *dictum* is not well founded, and that the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted *unless there are special circumstances to the contrary.* (The italicizing is my own.)

Counsel for the respondent company before this Court agreed to such statement of the principle, but submitted that in this case there were special circumstances as it had not been shown that the respondent company obtained the injunction by any perjury or misrepresentation and that since two judges in the Trial Division and three judges in the Court of Appeal were of the opinion that the respondent company was entitled to its injunction, if this Court were of the other view it would be an example of judicial error and not any misrepresentation by the respondent company which caused the injunction to issue.

I am of the opinion that these circumstances do not constitute such "special circumstances" as were in the mind of Cotton L.J. There are examples of plaintiffs who are public bodies and who acted in the public interest to hold the situation in *statu quo* until the rights were determined. There are other cases where the defendant, although he succeeded upon technical grounds, certainly had been guilty of conduct which did not move the Court to exercise its discretion in his favour. In these cases, the Court has found the "special circumstances" which entitled it to

[1] (1884), 27 Ch. D. 474. [2] (1882), 21 Ch. D. 421.

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refuse a reference as to damages. Here, the respondent company throughout has insisted that very considerable items of heavy construction machinery be held so the defendant could not use them and therefore make any profit from them, and that situation continued for months until the respondent company's use for the equipment ended. I am of the opinion that it is an ordinary case of an injunction granted upon a plaintiff's application and upon the plaintiff's undertaking, and that the plaintiff should be required to make good its undertaking. I would, therefore, direct that there be a reference in the ordinary course of procedure in the Province of Alberta to determine such damages and that the appellant company be granted judgment for such damages and the costs of the reference.

It is said that the damages can now be ascertained at the sum of $30,500. Counsel for the respondent, however, submits that there has been no proper proof of damages in that amount and, reading the record, I am of the opinion that under the circumstances in this case this Court would not be entitled to make a specific award of damages upon the evidence set out therein.

In the result, I would allow the appeal, restore the judgment in favour of the appellant company upon the counterclaim for $42,769.64, direct a reference as aforesaid, and allow the appellants its costs throughout.

Appeal allowed, judgment of the Appellate Division set aside and judgment at trial varied, with costs.

Solicitors for the defendant, appellant: Becker, Weeks, Peterson, Clark, McLennan and Fraser, Edmonton.

Solicitors for the plaintiff, respondent: Milner, Steer, Dyde, Massie, Layton, Cregan and Macdonnell, Edmonton.

GEORGES MARCOTTE .....APPELANT;

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*Nov. 18
Nov. 24

ET

SA MAJESTÉ LA REINE .....INTIMÉE.

APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Droit criminel—Meurtre qualifié—Verdict de culpabilité affirmé par la Cour Suprême du Canada—Ministre déférant la cause à la Cour d'appel pour nouvelle audition—Nouvel appel à la Cour Suprême du Canada—Loi sur la Cour Suprême, S.R.C. 1952, c. 259, art. 55—Droit criminel, 1953-54 (Can.), c. 51, arts. 596, 597.

L'accusé, dont le verdict de culpabilité pour meurtre qualifié fut maintenu par cette Cour, fit une demande de clémence. Le Ministre de la Justice déféra la cause pour une nouvelle audition à la Cour d'appel en vertu de l'art. 596 du *Code Criminel.* La Cour d'appel procéda à rendre jugement comme s'il s'agissait d'un appel interjeté par la personne condamnée et rejeta cet appel. D'où le pourvoi de l'accusé devant cette Cour.

Arrêt: L'appel doit être rejeté.

Il n'y a pas d'analogie entre l'art. 55 de la *Loi sur la Cour Suprême du Canada* et l'art. 596(*b*) du *Code Criminel.* Les dispositions de l'art. 596(*b*) prescrivent en termes bien clairs que la cause est déférée pour audition et décision comme s'il s'agissait d'un appel interjeté par la personne condamnée. Dans le cas présent, la Cour d'appel ayant rejeté l'appel, l'accusé avait droit d'interjeter appel à la Cour Suprême du Canada en vertu de l'art. 597A du *Code Criminel.*

Sur le mérite, l'accusé n'a pas réussi à établir le bien-fondé de ses griefs.

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

Criminal law—Capital murder—Conviction affirmed by Supreme Court of Canada—Minister remitting case to Court of Appeal for further hearing—Whether further appeal to Supreme Court of Canada—Supreme Court Act, R.S.C. 1952, c. 259, s. 55—Criminal Code, 1953-54 (Can.), c. 51, ss. 596, 597.

The accused, whose conviction on a charge of capital murder was upheld by this Court, applied for clemency. The Minister of Justice remitted the case for further hearing to the Court of Appeal pursuant to s. 596 of the *Criminal Code.* The Court of Appeal proceeded to decide the matter as though it were an appeal by the accused and dismissed the appeal. The accused appealed to this Court.

Held: The appeal should be dismissed.

There is no analogy between s. 55 of the *Supreme Court Act* and s. 596(*b*) of the *Criminal Code.* Section 596(*b*) prescribes in clear terms that the

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*CORAM: Les juges Fauteux, Abbott, Martland, Judson, Ritchie, Hall et Spence.

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case is remitted for hearing and determination as if it were an appeal by the convicted person. In the present case, the Court of Appeal having dismissed the appeal, a further appeal to the Supreme Court of Canada was opened to the accused under s. 597A of the Code.

On the merits, the accused has failed to establish that his grounds of appeal were well founded.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], rejetant un appel déféré à cette Cour par le Ministre de la Justice. Appel rejeté.

Yves Mayrand, pour l'appelant.

J. Ducros et *J. G. Boilard,* pour l'intimée.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Le 2 mars 1963, à Montréal, un jury de la Cour du banc de la reine (Juridiction criminelle), présidé par M. le Juge Roger Ouimet, trouva l'appelant coupable d'avoir, le 14 décembre 1962, en la cité de St-Laurent, district de Montréal, intentionnellement causé la mort du constable Claude Marineau et ce à l'occasion et aux fins de la perpétration d'un vol qualifié, commettant ainsi un meurtre qualifié. L'appel de cette déclaration de culpabilité, impérativement prescrit en pareil cas par l'article 583(A) du *Code Criminel,* fut rejeté le 15 janvier 1964 par un jugement unanime de la Cour du banc de la reine[2]. Marcotte, ainsi que le permet l'article 597(A) du *Code Criminel,* logea un appel à la Cour Suprême du Canada[3] lequel fut également rejeté, le 11 mai 1964, par une décision unanime de cette Cour.

Par la suite, le Ministre de la Justice, en vertu du pouvoir que lui confère l'article 596 du *Code Criminel,* déféra cette cause à la Cour d'Appel. Ce renvoi, signé le 27 juillet 1964, est ainsi libellé:

AU JUGE EN CHEF ET JUGES PUÎNÉS
DE LA COUR D'APPEL DE QUÉBEC

Une demande de clémence de la Couronne ayant été faite par et pour Georges Marcotte qui a été trouvé coupable à Montréal le 2 mars 1963 du meurtre qualifié de Claude Marineau et condamné à la peine capitale,

[1] [1964] B.R. 837.
[2] [1964] B.R. 155.
[3] [1964] R.C.S. 559.

et dont les appels à la Cour d'Appel de la province de Québec et à la Cour Suprême du Canada ont été rejetés par lesdites Cours;

Et le soussigné, ayant reçu de l'avocat dudit Georges Marcotte, des représentations à l'effet:

1. Que le juge présidant au procès aurait dû, mais ne l'a pas fait, donner aux jurés, d'une façon expresse, les directives suivantes savoir, qu'ils ne pouvaient condamner ledit Georges Marcotte de meurtre qualifié à moins qu'ils fussent convaincus, hors de tout doute raisonnable, que ledit Georges Marcotte, par son propre fait, avait causé ou avait aidé à causer la mort dudit Claude Marineau ou la blessure corporelle ayant entraîné la mort de celui-ci, ou qu'il avait lui-même utilisé ou avait sur sa personne l'arme qui a provoqué la mort, ou qu'il avait conseillé ou incité une autre personne à faire un tel acte ou à utiliser une telle arme; que si le juge présidant au procès, à des directives en accord avec le paragraphe 1, aurait pu raisonnablement rendre un verdict de non coupable de meurtre qualifié; et que le fait de la part du juge présidant au procès d'avoir omis de donner de telles instructions ne fut point soulevé lors de l'appel de Georges Marcotte à la Cour d'Appel ou à la Cour Suprême du Canada.

2. Qu'une nouvelle preuve a été découverte par ledit avocat laquelle, si elle avait été disponible lors du procès et associée, de la part du juge présidant au procès, à des directives en accord avec le paragraphe 1, aurait raisonnablement accru la possibilité pour les jurés de rendre un verdict de non coupable de meurtre qualifié; ladite preuve étant celle de madame Helen Dallos; ci-joint son affidavit indiquant la portée de cette preuve ou partie d'icelle de même qu'une traduction française dudit affidavit.

3. Qu'une autre nouvelle preuve a été découverte par ledit avocat laquelle, si elle avait été disponible au procès, aurait pu raisonnablement entraîner carrément l'acquittement dudit Georges Marcotte; ladite preuve étant celle de Frank Grilly; ci-joint son affidavit, en original et copie certifiée, indiquant la portée de cette preuve ou partie d'icelle;

En conséquence, le soussigné, en vertu de l'article 596 du Code criminel, défère maintenant par les présentes ce qui suit, à savoir:

a) les soi-disant directives erronées données aux jurés par le juge présidant au procès;

b) les soi-disant nouvelles preuves;

c) toute autre preuve ou argumentation par ou au nom de l'accusé ou la Couronne que la Cour jugera approprié de recevoir ou de prendre en considération

à la Cour d'Appel de la province de Québec pour audition et décision par cette Cour comme s'il s'agissait d'un appel interjeté par ledit Georges Marcotte.

Donné à Ottawa ce 27e jour de juillet 1964.

GUY FAVREAU
Ministre de la Justice

Les affidavits auxquels réfèrent les paragraphes 2 et 3 de ce renvoi se lisent comme suit:

Déposition assermentée de Dame Helen Dallos.

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—Est-ce que vous êtes allée le 14 déc. 1962 à l'édifice portant le numéro 6007 Côte de Liesse, qu'on voit sur la photographie produite comme exhibit P. 3? Oui.

—Qu'est-ce que vous faisiez là? Le bureau de placement m'a envoyée pour trouver du travail dans l'établissement situé à côté de la banque.

—Quel bureau de placement? Il est situé sur la rue Jean Talon.

—Finalement avez-vous parlé à quelqu'un relativement à du travail? Oui, avec le «gérant».

—Savez-vous le nom de la Compagnie? Je ne sais pas, mais je pense qu'on s'occupe de moteurs Diesel et aussi de moteurs électriques, où les femmes embobinent les moteurs. C'est le même groupe de bâtiments à côté de cette banque. Le nom: Electric Products.

—Quelle heure était-il? Je ne sais pas exactement, mais je pense qu'il était 11.30. A cause des événements près de la banque je n'avais pas de goût pour aller nulle part, mais j'ai pensé comme ça; qu'il fallait aller à l'adresse indiquée puisque le bureau m'y avait envoyée. Comme ça, je suis allée et je me suis présentée aux bureaux.

—Avant d'aller aux bureaux pour chercher du travail, est-ce que vous avez été témoin d'un incident malheureux? Oui.

—Dans vos propres termes, dites-nous ce que vous avez vu? Moi je suis arrivée avec l'autobus et quand je suis descendue j'avais l'intention de me rendre à la compagnie qui porte le nom Electric Products.

—Qu'est-ce qu'il est arrivé avec le policier du côté droit? Je sais exactement que le policier du côté gauche est descendu en première.

—Qu'est-ce qu'il est arrivé avec ce policier du côté gauche? Moi je n'ai vu que sa tête. J'ai entendu des coups et j'ai vu que ce policier est tombé.

—Qu'est-ce qu'il est arrivé avec le policier du côté droit? Celui-ci a ouvert la porte de sa voiture et il était en train de sortir. Son revolver à la main. Comme il venait de sortir il a reçu les coups et il a tombé à terre.

—Est-ce que vous avez vu tomber ce deuxième policier à cause de ces coups? Moi j'ai vu qu'à cause de ces coups le premier policier est disparu, cette rafale a continué sur la voiture; après, le deuxième policier du côté droit a porté sa main sur l'estomac et il est tombé à terre.

—Est-ce que le sang a coulé beaucoup? Oui. Il a porté sa main sur l'estomac et du sang jaillissait sur sa main.

—Est-ce qu'il y avait un revolver dans la main du policier? Oui. Je ne sais pas s'il voulait tirer ou non, mais il y avait un revolver dans sa main.

—Combien de rafales avez-vous entendues? Seulement une.

—Est-ce que les deux policiers sont tombés à la suite de cette même rafale de coups? Oui.

—Est-ce que vous pouvez dire qui a tiré? Je ne sais pas. J'ai vu l'homme avec l'habit de Père Noël et d'autres aussi à côté de lui, mais je ne sais pas qui a tiré.

—Quelle était la grandeur du Père Noël? Il était plus grand que mon mari, qui mesure 5'8", mais il était plus petit que ce M. Parisse, qui est

6′ 4½. Il était approximativement un pouce de moins grand que M. Parisse, alors 6′3.

—Combien de personnes se trouvaient devant la banque au moment de la fusillade? Au moins trois.

—Avez-vous déclaré la même chose aux policiers qui vous ont interrogée? Approximativement oui, mais ils m'ont dit de ne parler à personne d'autre qu'eux.

Signé: Helen Dallos

Affidavit de Frank Grilly.

July 4, 1964

I hereby swear that on the morning of December 13, 1962, the establishment known as the Coffee Pot, of which I was the registered proprietor, was opened at approximately 7:00 A.M. by my employee, Jeanne Sicard. She was the only person in charge of the premises and serving customers until about 11.30 A.M., when the noon hour staff began to enter. I also swear that on the following morning, Friday, December 14, I arrived in my car in front of the Coffee Pot at 9:30 A.M., where I picked up Harold Green, who was waiting outside the restaurant, and gave him a lift in my car to Chomedey, where I dropped him off. I left him in Chomedey at about 10:05 A.M., December 14, 1962.

Frank Grilly

Montreal, July the 4th, 1964

Considéré au regard des dispositions de l'article 596 du Code, il est clair que ce renvoi du Ministre de la Justice est celui qu'autorise le paragraphe (b) de cet article 596.

596. Sur une demande de clémence de la Couronne, faite par ou pour une personne qui a été condamnée à la suite de procédures sur un acte d'accusation, le ministre de la Justice peut

a) prescrire, au moyen d'une ordonnance écrite, un nouveau procès devant une cour qu'il juge appropriée, si, après enquête, il est convaincu que, dans les circonstances, un nouveau procès devrait être prescrit;

b) à toute époque, déférer la cause à la cour d'appel pour audition et décision par cette cour comme s'il s'agissait d'un appel interjeté par la personne condamnée; ou

c) à toute époque, soumettre à la cour d'appel, pour connaître son opinion, toute question sur laquelle il désire l'assistance de cette cour, et la cour doit donner son opinion en conséquence.

Dans une requête subséquement produite au greffe de la Cour d'Appel, l'appelant demanda à la Cour d'entendre, outre dame Helen Dallos et Frank Grilly, trois autres personnes, soit Armand Morin, André Gagnon et Jean-Paul Fournel. Cependant, advenant l'audition, l'appelant, d'une part, renonça à faire entendre Gagnon et Fournel, et la

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Cour, d'autre part, étant d'avis que le témoignage de Morin ne pouvait assister l'appelant, exerça la discrétion qui lui est conférée au paragraphe (*c*) du dispositif du renvoi et refusa d'entendre ce témoin. Quant à Frank Grilly et dame Helen Dallos, les parties déclarèrent s'en tenir à l'affidavit de Grilly purement et simplement et à celui de dame Dallos, sujet dans ce dernier cas au droit de la Couronne de contre-interroger.

Il fut alors procédé à un très bref interrogatoire de dame Dallos et la Cour du banc de la reine[1], après avoir entendu les avocats des parties, examiné le dossier et délibéré, procéda, le 17 septembre 1964, à rendre jugement comme s'il s'agissait d'un appel interjeté par la personne condamnée et rejeta cet appel par un jugement unanime. Le présent pourvoi est de ce jugement.

Il convient de référer d'abord à l'objection faite par la Couronne à la juridiction de cette Cour. Il n'y a pas d'appel, dit-on, à la Cour Suprême du Canada d'une décision rendue par un tribunal d'appel d'une province sur un renvoi fait en vertu de l'article 596(*b*) du Code et, ajoute-t-on subsidiairement, au factum de la Couronne, si un tel appel existe, il ne peut être question d'un appel *de plano* mais d'un appel qui doit être permis à la suite d'une requête pour permission d'appeler. Au soutien de la négation de l'appel, on cherche à faire une analogie entre les termes suivants de l'article 596 (*b*) du Code, «comme s'il s'agissait d'un appel interjeté par la personne condamnée» et les termes suivants de l'article 55(2) de la *Loi sur la Cour Suprême* du Canada relatif aux questions déférées à cette Cour par le Gouverneur en conseil «de la même manière que dans le cas d'un jugement rendu sur un appel porté devant la Cour»; on en déduit que le renvoi autorisé par l'article 596 (*b*) du Code n'est pas un appel mais que, par les termes ci-dessus de l'article, le Parlement a tout simplement indiqué que la procédure à suivre était celle régissant les appels ordinaires et que la conclusion de la Cour d'Appel sur un tel renvoi n'équivaut en substance qu'à une simple opinion et non à un jugement. Pour disposer de cet argument, il suffit de

[1] [1964] B.R. 837.

dire, à mon avis, que le renvoi autorisé par l'article 55 de la *Loi sur la Cour Suprême* du Canada a pour objet l'obtention d'une «*opinion*», ainsi qu'il appert du paragraphe 2 de cet article et que celui qu'autorise l'article 596(*b*) du *Code Criminel* a pour objet l'obtention d'une «*décision*», ainsi qu'il appert du texte même de l'article 596(*b*). Il n'y a donc pas d'analogie. Les dispositions de l'article 596(*b*) du Code prescrivent en termes bien clairs que la cause est déférée «*pour audition et décision comme s'il s'agissait d'un appel interjeté par la personne condamnée*» ou, suivant la version anglaise de l'article 596(*b*) du Code, «*for hearing and determination as if it were an appeal by the convicted person.*» Tel qu'indiqué à l'article 592 du Code, les décisions que la Cour d'Appel peut rendre dans un appel interjeté par la personne condamnée sont, soit de rejeter l'appel purement et simplement ou l'accueillir, et, dans ce dernier cas, ordonner un nouveau procès ou prononcer un acquittement. Dans le cas qui nous occupe, la Cour d'Appel a décidé de rejeter l'appel, confirmant ainsi la déclaration de culpabilité, et, dès lors, les dispositions de l'article 597A du *Code Criminel* sont applicables:

> 597A. Nonobstant toute autre disposition de la présente loi, une personne
>
> *a*) qui a été condamnée à mort et dont la déclaration de culpabilité est confirmée par la cour d'appel, ou
>
> *b*) qui est acquittée d'une infraction punissable de mort et dont l'acquittement est écarté par la cour d'appel,
>
> peut interjeter appel à la Cour Suprême du Canada sur toute question de droit ou de fait ou toute question mixte de droit et de fait.

Il s'ensuit que la prétention principale et la prétention subsidiaire de la Couronne ne peuvent être admises.

Au mérite de l'appel, les prétentions de l'appelant, telles que formulées à l'audition, sont que la Cour d'Appel aurait erré dans l'appréciation du renvoi du Ministre, dans l'appréciation de l'affidavit de Grilly et de la déposition complète de dame Dallos et qu'elle aurait aussi erré en refusant d'entendre Morin. Et, ajoute-t-on, si les faits ainsi rapportés par Grilly et dame Dallos et ceux dont Morin aurait pu témoigner avaient été soumis aux jurés, avec les directives

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légalement appropriées, ceci aurait raisonnablement accru la possibilité pour les jurés de rendre un verdict de meurtre non qualifié ou voire même un verdict d'acquittement.

Nonobstant toute la latitude accordée au procureur de l'appelant pour lui permettre d'établir, si possible, le bien-fondé de ces griefs, aussi bien que le bien-fondé du grief additionnel par lui soulevé en réplique, quant à l'absence de directives au procès sur la question d'ivresse, nous sommes tous d'avis qu'il n'a pas réussi à ce faire.

En Cour d'Appel, M. le Juge en chef Tremblay, référant à ces témoignages et parlant pour lui et pour tous ses collègues, a déclaré:

> Sur le tout, je suis absolument convaincu que si ces témoignages avaient été donnés au procès, le verdict eût été nécessairement le même.

C'est là la conclusion à laquelle nous en sommes arrivés après avoir considéré attentivement les arguments faits de part et d'autre sur la portée des témoignages offerts par l'appelant.

Avant de clore, il est peut-être à propos d'ajouter que du fait que les policiers aient pu inviter dame Dallos à ne parler à personne autre qu'à eux, ainsi qu'elle en témoigne à la fin de sa déposition, on ne saurait inférer, sous les circonstances, qu'ils aient voulu ainsi l'empêcher de communiquer avec la défense.

Nous sommes tous d'opinion que cet appel doit être rejeté.

Appel rejeté.

Procureurs de l'appelant: D. Dansereau et Y. Mayrand, Montréal.

Procureur de l'intimée: J. Ducros, Montréal.

SKUTTLE MFG. CO. OF CANADA LTD., B. D. WAIT CO. LIMITED, carrying on business under the firm name and style of WAIT-SKUTTLE COMPANY and the said WAIT-SKUTTLE COMPANY ..APPELLANT;

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*Oct. 15, 16, 19
Dec. 3

AND

HER MAJESTY THE QUEEN, on the Information of the Deputy Attorney General of Canada ..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales tax—Exemptions—Humidifiers—Used in manufacture of tax-exempt furnaces—Certificates of exemption—Whether exempt as "building material" whether "partly manufactured goods"—Estoppel of the Crown—Excise Tax Act, R.S.C. 1952, c. 100, ss. 29(1)(d), 30(1)(a), 30(2), 32(1), 44(4), and Regulations.

The appellant manufactured humidifiers and sold them to manufacturers of furnaces, who supplied them with the furnace as a matter of course. The furnaces were exempt from sales tax as "building materials". When a manufacturer of furnaces ordered humidifiers, he quoted his licence number and gave a certificate as prescribed by the regulations. The appellant reported the sales as not taxable. This practice was accepted by the Revenue Department until July 1958, when the Crown took the view that the humidifier was not part of the furnace, and, later, that it was wrong to act on the certificates in the circumstances of this case. The Crown's claim to recover sales tax from the period of August 1, 1956, to December 31, 1958, was upheld by the Exchequer Court. The judgment was appealed to this Court.

Held: The appeal should be allowed.

The humidifier was part of the tax-exempt furnace supplied by the furnace manufacturer. It was not part of the duct work as was contended by the Crown. The manufacturer of humidifiers was entitled to rely on the certificate of the furnace manufacturer. The regulations provided that in those odd cases where the humidifier was not in fact used in the furnace, it was the purchaser of the humidifier who became responsible for the sales tax. These regulations did not require the manufacturer of humidifier to enter into contractual relations as to the use to which the manufacturer of furnaces could put the goods and to conduct an investigation for the purpose of ensuring that the goods were in fact put to that use.

It was not necessary to deal with the claim for exemption under s. 30(2) of the *Excise Tax Act* for "partly manufactured goods", nor as to whether the Crown was estopped as a result of its representations and conduct during that preceding period.

Revenu—Taxe de vente—Exemptions—Humidificateurs employés dans la fabrication de fournaises non sujettes à la taxe—Certificats d'exemption—Exempts comme matériaux de construction ou marchandise partiellement fabriquée—Fin de non-recevoir contre la Couronne—Loi sur la taxe d'accise, S.R.C. 1952, c. 100, arts. 29(1)(d), 30(1)(a), 30(2), 32(1), 44(4), et Règlements.

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*PRESENT: Taschereau C.J., and Fauteux, Judson, Ritchie and Spence JJ.

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L'appelant fabriquait des humidificateurs et les vendait à des fabricants de fournaises qui les fournissaient avec les fournaises. Comme «matériaux de construction» les fournaises n'étaient pas sujettes à la taxe. Lorsqu'un fabricant de fournaises commandait un humidificateur, il citait le numéro de sa licence et produisait un certificat tel que prescrit par les règlements. L'appelant rapportait cette vente comme n'étant pas sujette à la taxe. Cette manière d'agir fut acceptée par le ministère du Revenu jusqu'en juillet 1958, alors que la Couronne prit la position que ces humidificateurs ne faisaient pas partie de la fournaise, et, plus tard, que dans les circonstances l'appelant avait eu tort d'agir sur la foi de ces certificats. La réclamation de la Couronne pour le recouvrement de la taxe de vente entre le premier août 1956 et le 31 décembre 1958 fut maintenue par la Cour de l'Échiquier. D'où le pourvoi devant cette Cour.

Arrêt: L'appel doit être maintenu.

L'humidificateur fait partie de la fournaise, non sujette à la taxe, fournie par le fabricant de fournaises. Il ne fait pas partie des conduits, tel que la Couronne l'a prétendu. Le fabricant des humidificateurs était justifié de se fier au certificat du fabricant de fournaises. Les règlements stipulent que dans les quelques cas où l'humidificateur n'était pas en fait incorporé dans la fournaise, c'est l'acheteur de l'humidificateur qui devenait responsable de la taxe de vente. La fabricant de l'humidificateur n'est pas requis par les règlements d'entrer en relations contractuelles avec le fabricant de fournaises concernant l'usage que ce dernier pourrait faire de ces articles et de faire enquête dans le but de s'assurer que ces articles étaient en fait utilisés de cette manière.

Il n'est pas nécessaire de traiter de l'exemption sous l'article 30(2) de la *Loi sur la taxe d'accise* concernant les «marchandises partiellement fabriquées», non plus de la question de savoir s'il y avait fin de non-recevoir contre la Couronne à la suite de ses représentations et de sa conduite durant la période précédant la réclamation.

APPEL d'un jugement du juge Thurlow de la Cour de l'Échiquier du Canada[1], maintenant la réclamation pour taxe de vente. Appel maintenu.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], maintaining the Crown's claim for sales tax. Appeal allowed.

P. B. C. Pepper, Q.C., and *William R. Herridge,* for the appellant.

C. R. O. Munroe, Q.C., and *R. A. Wedge,* for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is a claim by the Crown for sales tax on humidifiers sold by the manufacturer, Skuttle Mfg. Co. of Canada Ltd., to a number of manufacturers of furnaces.

[1] [1964] Ex. C.R. 311, [1963] C.T.C. 500, 63 D.T.C. 1314.

The claim was allowed at $42,292.51, together with interest and penalties of $20,168.55. The period covered is from August 1, 1956 to December 31, 1958. During this period Skuttle carried on its business as it had done since 1945 without collecting sales tax. Its books had been audited by the Revenue Department from time to time and no question was raised against the propriety of this course until July of 1958, when the Crown decided that there was no exemption. Skuttle had hitherto reported all the sales of humidifiers to furnace manufacturers as tax free.

The company's claim for exemption is under s. 32(1) and Schedule III of the *Excise Tax Act*. This section reads:

> 32. (1) The tax imposed by section 30 does not apply to the sale or importation of the articles mentioned in Schedule III.

Schedule III is a long classified list. Furnaces are included in the list under the heading of certain building materials. Also included in this list are:

> Articles and materials to be used exclusively in the manufacture or production of the foregoing building materials.

The evidence was that when a customer bought a furnace from a furnace manufacturer, the humidifier was supplied with the furnace as a matter of course and was included in the price, just as were other accessories such as pressure regulators, thermostats and other controls. When a manufacturer of furnaces ordered humidifiers, he quoted his licence number and gave a certificate as prescribed by the Regulations in the following form:

> I/We certify that the goods ordered/imported hereby are to be used in, wrought into, or attached to taxable goods for sale.
>
> Licence Number..... .....
> Name of Purchaser)

Before 1945 furnaces were subject to sales tax. After 1945 furnaces and articles and materials to be used exclusively in the manufacture or production of furnaces were exempted from sales tax by inclusion in Schedule III of the *Excise Tax Act*, 1945 (Can.), c. 30, s. 8. After 1945, this manufacturer of humidifiers continued as before to accept the above quoted certificate. I think that it was authorized to do this under the Regulations, the particular one reading as follows:

> (*b*) A licensed manufacturer shall not quote his licence number nor give the certificate as above when purchasing or importing goods to be

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used in, wrought into, or attached to articles specified as exempt from the Consumption or Sales Tax. (Note.—Except in respect of goods conditionally exempted according to use.)

These humidifiers were, in my opinion and evidently in the opinion of the Department until July of 1958, goods conditionally exempted according to use. In July of 1958, when the Department first raised the question, its only ground for saying that the humidifiers were not exempt from sales tax was that they were not part of the furnace but part of the duct work. This, I think, it is impossible to accept. These humidifiers had to be placed in the furnace close to the heating distributor if they were to function at all. Sometimes the humidifier was placed in that part of the furnace which is called the "plenum", which is the air pressure mixing chamber and serves as a lid for the furnace. Some furnaces were sold with the plenum already made. Some were sold while still requiring adaption to connect them with the duct system. But however sold, both the plenum and humidifier were part of the furnace.

In the Courts the Department extended its claims. In addition to the claim that the humidifier was part of the duct work, the Department said that it was wrong to act on the certificate in the circumstances of this case. Notwithstanding the fact that the furnace manufacturer certified, in accordance with the regulations, that the goods were to be used, wrought into or attached to taxable goods for sale, a few of these humidifiers might have been used in space heaters or sold as replacement parts for existing furnaces, and in both these cases there was no exemption. The evidence is that very few of the humidifiers would be so disposed of.

This led the Exchequer Court[1] to say that the certificates offered no protection and that in the absence of any contractual arrangements that the humidifiers were to be used exclusively in the manufacture or production of furnaces, the sales tax had to be paid. The manufacturer of humidifiers was not entitled to rely on the furnace manufacturer's certificate and the burden was imposed on the humidifier manufacturer of seeing to it both by contractual arrangements and by subsequent investigation that its products were used exclusively in the manufacture of furnaces. The difficulty or even impossibility of operating under these conditions is apparent.

[1] [1964] Ex. C.R. 311, [1963] C.T.C. 500, 63 D.T.C. 1314.

In so deciding, I think that the Exchequer Court was in error. The manufacturer of humidifiers is entitled to rely on the certificate of the furnace manufacturer. The Regulations provide that in those odd cases where the humidifier is not in fact used in the furnace, it is the purchaser of the humidifier who becomes responsible for the sales tax. This follows from those sections in the Regulations dealing with Certificates of Exemption, which are numbers (*b*), (*l*) and (*m*) and which read:

(*b*) A licensed manufacturer shall not quote his licence number nor give the certificate as above when purchasing or importing goods to be used in, wrought into, or attached to articles specified as exempt from the Consumption or Sales Tax. (NOTE.—Except in respect of goods conditionally exempted according to use.)

(*l*) Where a purchaser quotes a licence number *only* on his order for goods, the vendor is responsible for Sales Tax on the sale.

Where a purchaser erroneously quotes both licence number and certificate on his order, the purchaser is liable for the tax, except in such cases where it is obvious to the vendor that the quotation was made in error.

(*m*) A licensed manufacturer or producer, who also operates a retail branch or branches, shall not use his licence when purchasing or importing merchandise for such retail businesses.

These do not require the manufacturer of humidifiers to enter into contractual relations as to the use to which the manufacturer of furnaces can put the goods and to conduct an investigation for the purpose of ensuring that the goods are in fact put to that use.

It is unnecessary to deal with the claim for exemption under s. 30, subs. (2), of the *Excise Tax Act,* which exempts goods sold by a licensed manufacturer to another licensed manufacturer "if the goods are partly manufactured goods." I note that the Minister by s. 29(1)(*d*) is made the sole judge whether or not goods are "partly manufactured goods." Nor do I express any opinion on the argument that the Crown is estopped from collecting for the period in question as a result of its representations and conduct during the preceding period. It is, however, clear that everything that the Department did in the preceding period led this manufacturer to assume that its course of conduct was in accordance with the departmental interpretation of the Statute and Regulations. Nothing happened during the period August 1, 1956 to December 31, 1958, except a change of opinion on the part of the enforcement officers in July of

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1958, on the meaning and effect of the Statute and Regulations. I think that they were wrong in the second meaning which they attached to them.

I would allow the appeal with costs, set aside the judgment of the Exchequer Court and dismiss the Crown's Information with costs.

Appeal allowed with costs.

Solicitors for the appellant: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

Solicitor for the respondent: E. A. Driedger, Ottawa.

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GALLOWAY LUMBER CO. LTD. .....APPELLANT;

AND

THE LABOUR RELATIONS BOARD OF BRITISH COLUMBIA

AND

INTERNATIONAL WOODWORKERS OF AMERICA LOCAL NO. 1-405 .. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour—Arbitration—Appointment of arbitrator by Labour Relations Board—Application for writ of certiorari to quash appointment—Labour Relations Act, R.S.B.C. 1960, c. 205, s. 22(3)(a) [enacted 1961 (B.C.), c. 31, s. 17(b)].

In the matter of the dismissal of one G, the respondent union by a letter of February 21, 1962, advised the appellant company that it was going to proceed to arbitration in compliance with the provisions of a collective agreement and in a further letter of February 27th it notified the company as to the name and address of its nominee on the arbitration board. On February 28th, upon instructions of the appellant, its solicitors wrote to the union taking the position that the union's letter of February 21st did not comply with the provisions of the collective agreement in that it neither set out the question to be arbitrated nor gave the name and address of the union's nominee as arbitrator.

On May 28th, the respondent Labour Relations Board notified the appellant of its contention that it had been requested to appoint an arbitrator to be the appellant's member of an arbitration board and that it intended to consider the matter at a Board meeting on June 12th. Despite the appellant's objections that the grievance had been abandoned pursuant to the provisions of the collective agreement, the

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

Board determined that the dispute between the company and the union was arbitrable and on June 21st again requested the company to nominate its arbitrator. When the company did not do so the Board, purporting to act under s. 22(3) of the *Labour Relations Act*, R.S.B.C. 1960, c. 205, nominated an arbitrator. An application by the company for a writ of *certiorari* to quash the appointment was dismissed and, on appeal, the judgment of the trial judge was affirmed by a majority decision of the Court of Appeal. The company then appealed to this Court.

Held: The appeal should be dismissed.

Per Martland, Judson and Ritchie JJ.: Section 22(3)(*a*) of the *Labour Relations Act* gave the Board power to appoint an arbitrator if in its opinion the question was arbitrable. The appellant's argument that the Board had to come to a correct decision on this question before it could make the appointment and that the correctness of the decision was reviewable by way of *certiorari* was rejected. The Board's jurisdiction did not depend upon whether or not a Court might think its opinion to be erroneous. There was nothing "collateral" or "preliminary" or "jurisdictional" about this question; it was "of the very essence" of the inquiry. Further, there could be no ground here for judicial review based on an opinion of error in statutory interpretation or an exercise of power beyond that conferred by the statute.

The Board made the decision which it alone had the power to make. It was made within the assigned area of the exercise of the power. It was final and not reviewable.

Per Hall and Spence JJ.: The determination of the Labour Relations Board that the question was arbitrable was at least a quasi-judicial decision and such determination was reviewable on *certiorari*. *Jarvis v. Associated Medical Services Inc.* (1962), 35 D.L.R. (2d) 375, affirmed [1964] S.C.R. 497, referred to.

Upon such a review, however, the conclusion was reached that the decision of the Board was correct. The appellant's argument that the grievance had been abandoned failed. The union's letter of February 27th was dispatched within the time limited by the provisions of the collective agreement, and reading the union's previous letter of February 21st together with a letter of G, dated February 12, 1962, in which he had set out his grievance, there was no doubt that the question to be arbitrated was sufficiently set out in writing.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from an order of Maclean J. dismissing an application for *certiorari* to quash an appointment of an arbitrator. Appeal dismissed.

D. McK. Brown, Q.C., for the appellant.

H. E. Hutcheon, for the respondent Union.

A. W. Mercer, for the respondent Board.

[1] (1964), 48 W.W.R. 78, 44 D.L.R. (2d) 575.

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GALLOWAY LUMBER CO. LTD. v. LABOUR RELATIONS BOARD OF BRITISH COLUMBIA *et al.*

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

JUDSON J.:—Throughout these proceedings the appellant company has pressed two objections to the appointment of an arbitrator by the Labour Relations Board. First, it says that a complaint in writing from an employee that his dismissal is wrongful is not a notification of any cause to be arbitrated under the collective bargaining agreement because something equivalent to a bill of particulars ought to have been delivered. This is more than the technicalities of common law pleading ever required at any time in a case of this kind. The objection is entirely without merit.

The second objection that the grievance had been abandoned is equally technical. There was evidence on which the Board could act that the third step in the grievance was not completed until February 13, 1962. Then followed the union's letter of February 21st that they were going to arbitration, and the registered letter of February 27th naming their arbitrator. The collective agreement provides that the notice may be given by registered mail. There was, therefore, evidence before the Board on which it could find, as it must have done, that the union had complied with the grievance procedure. The company's submission of the truism that by contract law an offer is effective only when it is communicated to the offerer does not establish reviewable error under the terms of this agreement.

By s. 22(3)(*a*) of the *Labour Relations Act,* R.S.B.C. 1960, c. 205, as amended by 1961 (B.C.), c. 31, the Board has power to appoint an arbitrator "if in its opinion the question is arbitrable". The company's argument before this Court was based on the dissenting reasons delivered in the Court of Appeal that the Board must come to a correct decision on this question before it can make the appointment and that the correctness of the decision is reviewable by way of *certiorari.*

With respect, the Board's jurisdiction does not depend upon whether or not a Court may think its opinion to be erroneous. There is nothing "collateral" or "preliminary" or "jurisdictional" about this question. To continue with the established vocabulary in this branch of the law, it is "of the very essence" of the inquiry. Further, there can be no ground here for judicial review based on an opinion of error

in statutory interpretation or an exercise of power beyond that conferred by the statute.

It is undisputed that there was a complaint of wrongful dismissal and a demand for the appointment of an arbitrator. Power to appoint an arbitrator in these circumstances belongs to the Board "if in its opinion the question is arbitrable". The company's argument wishes to change this language to read "if in the opinion of the Board, which will be supported by a Court asserting a power of review, the question is arbitrable". I happen to think that the Board's decision in this case was correct but that opinion has nothing to do with my task. The Board made the decision which it alone had the power to make. It was made within the assigned area of the exercise of the power. It is final and not reviewable.

I would dismiss the appeal with costs in favour of International Woodworkers of America, Local No. 1-405. There should be no award of costs to or against the Labour Relations Board in this Court.

The judgment of Hall and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia[1] pronounced on March 11, 1964, dismissing an appeal from the order of Maclean J. made on February 19, 1963, whereby the application of the appellant Galloway Lumber Co. Ltd. for a writ of *certiorari* was dismissed.

By a collective agreement between the appellant and the International Woodworkers of America, Local No. 1-405, made in August 1960, it was provided, *inter alia*:

ARTICLE XV—GRIEVANCE PROCEDURE

Section 1:

The Company and the Union mutually agree that, when a grievance arises in the plant or camp coming under the terms of this Agreement, it shall be dealt with without stoppage of work, in the following manner:

Step 1: The individual employee, with or without a job steward, shall first take up the matter with the foreman in charge of the work within fourteen (14) calendar days.

Step 2: If a satisfactory settlement is not then reached, it shall be reduced to writing by both parties, when the same employee and the Committee shall take up the grievance with the superintendent or the personnel officer, or both, as designated by the Company. If desired, the Union business agent shall accompany the Committee.

[1] (1964), 48 W.W.R. 78, 44 D.L.R. (2d) 575.

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GALLOWAY LUMBER CO. LTD. v. LABOUR RELATIONS BOARD OF BRITISH COLUMBIA *et al.*

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Step 3: If the grievance is not then satisfactorily solved, it shall be referred to an authorized representative of the Union and the Management.

Step 4: If a satisfactory settlement is not then reached, it shall be dealt with by arbitration, hereinafter provided.

Section 2:

If a grievance has not advanced to the next stage under Step 2, 3 or 4, within fourteen (14) days after completion of the preceding stage, then the grievance shall be deemed to be abandoned, and all rights of recourse to the grievance procedure shall be at an end. Where the Union is not able to observe this time limit by reason of the absence of the Aggrieved Employee or the Committee from camp the said time limit shall not apply. The Union shall be bound to proceed in such a case as quickly as may be reasonably possible.

Section 3:

Grievance meeting shall, except in cases of emergency, and whenever possible, be held out of working hours.

ARTICLE XVII—ARBITRATION

Section 2:

(*a*) In the case of a dispute arising regarding the discharge of an employee or the failure to re-hire an employee under this Agreement, which the Parties are unable to settle between themselves as set out in Article XV, the matter shall be determined by arbitration in the following manner:

Either Party may notify the other Party in writing, by registered mail, of the question or questions to be arbitrated, and the name and address of its chosen representative for the Arbitration Board. After receiving such notice and statement the other Party shall, within five (5) days, appoint an Arbitrator and give notice in writing of such appointment and the name and address of its Arbitrator. If the two Arbitrators appointed by the Parties fail to agree upon a Chairman within five (5) days, they, or either one of them, shall forthwith request the Labour Relations Board of British Columbia to appoint a Chairman.

(*b*) The decision of the Arbitration Board shall be by majority vote and all decisions regarding discharge or failure to rehire employees which have been referred to arbitration will be final and binding upon the Parties of the First and Second Parts.

(*c*) If any Arbitration Board finds that an Employee has been unjustly suspended or discharged such Employee shall be reinstated with all his rights and privileges preserved under the terms of this Agreement. The Arbitration Board shall further make the determination of the amount of lost pay, if any, to be paid to the Employee.

Section 3:

The Parties of the First and Second Parts will each bear the expense and charges of its representatives on any Arbitration Board, and shall bear in equal proportions the expenses and allowances of the Chairman or Sole Arbitrator, as the case may be, and the stenographic and secretarial expense, and rent.

Section 4:

Any arbitration to be held hereunder shall be held at such place as may be decided by the Board.

Such grievance procedure was instituted by one Gorrie by his letter of February 12, 1962. On that day, a meeting in compliance with step 3, *supra,* was convened but the representatives of the appellant refused to reinstate Gorrie at such meeting.

On the next day, the representative of the respondent union telephoned to the president of the appellant company and sought to have the latter reconsider his decision of the previous day but his effort was in vain.

On February 21st, the respondent union forwarded to the appellant company a registered letter which read:

Mr. Henry Nelson,
Manager,
Galloway Lumber Company Ltd.,
Galloway, B.C.

Dear Sir:

In the matter of the discharge of Mr. Earl Gorrie, please be advised that Local 1-405 International Woodworkers of America, AFL-CIO-CLC are going to proceed to Arbitration, in compliance with ARTICLE XV STEP 4 and as provided for under ARTICLE XVII Section 2(*a*) of the 1960-1962 Master Agreement.

You will be notified shortly the name and address of the Union's chosen representative for the Arbitration Board.

Yours truly,
"Art Damstrom"
Art E. Damstrom,
President,
International Woodworkers
of America,
Local 1-405.

and on February 27th forwarded a further letter which read:

Mr. Henry Nelson,
Manager,
Galloway Lumber Co. Ltd.,
Galloway, B.C.

Dear Sir:

Further to my letter of February 21st, 1962, please be advised that Mr. John A. McNiven, 517 East Broadway, Vancouver, B.C., has been chosen as a Union nominee on the Arbitration Board in the matter of the discharge of Mr. Earl Gorrie.

Yours truly,
LOCAL 1-405, I.W.A.,
"Art Damstrom"
A. Damstrom,
President.

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This letter was received by the appellant company on February 28th. On the same day, upon the instructions of the appellant company, its solicitors wrote to the union taking the position that the union's letter of February 21st *supra* did not comply with the provisions of art. XVII of the collective agreement in that it neither set out the question to be arbitrated nor gave the name and address of the union's nominee as arbitrator.

On May 28th, the respondent Labour Relations Board notified the appellant company of its contention that it had been requested to appoint an arbitrator to be its member of the arbitration board and that it intended to consider the matter at the Board meeting on June 12th. Despite the appellant company's objections that the grievance had been abandoned pursuant to art. XV of the collective agreement the Labour Relations Board determined that the dispute between the appellant company and the respondent union was arbitrable and on June 21st again requested the company to nominate its arbitrator. When the company did not do so the Labour Relations Board by its Notice of Appointment dated July 17, 1962, purporting to act under s. 22(3) of the *Labour Relations Act,* nominated George Haddad to act as a member of the arbitration board. This application for *certiorari* followed.

Section 22(3) of the *Labour Relations Act,* R.S.B.C. 1960, c. 205, as amended by 1961 (B.C.), c. 31, provides:

> 22. (3) Where the provision required or prescribed under this section provides for the appointment of a board of arbitration or other body,
>
> (*a*) if either party to the collective agreement within five days of the written notice from the other party of the appointment of his member or members fails or neglects to appoint a member or members, the Labour Relations Board may, if in its opinion the question is arbitrable, appoint a person or persons it deems fit for such purpose, and such person or persons is or are deemed to be appointed by the said party; and
>
> (*b*) if the appointed members, within five days from the date of the appointment of the last appointed member, fail to agree upon a person to act as Chairman, and any one of the members has been appointed under clause (*a*), the Minister may appoint a Chairman.

The respondent Labour Relations Board submits that the finding by that Board that the question was arbitrable and the consequent appointment of an arbitrator when the company failed to do so were merely exercises of administrative power and neither judicial nor quasi-judicial acts so that no *certiorari* lay therefrom.

This submission seems to be the one which found favour before the Court of Appeal of British Columbia. Davey J.A., giving the majority judgment in that Court, said:

> The appointment of the arbitrator is not a matter of jurisdiction, but the exercise of a mere power. The appointment of the arbitrator only completes the membership of the arbitration board and enables it to function if it truly has jurisdiction. The appointment of the arbitrator is in effect no different from the appointment of a chairman of the Labour Relations Board under s. 22(3)(*b*) of the Act. The consequences end with the appointment; it does not clothe the arbitration board with jurisdiction to decide the question, if in law it has none. All counsel agree that the question of the jurisdiction of the arbitration board remains for the proper tribunal to determine, untrammelled by the Labour Relations Board's opinion; that is to say, in this case by the ordinary courts of law. That is my conclusion and the opinion expressed by Professor Carrothers in his work on "Labour Arbitration in Canada", p. 27.
>
> Since the opinion of the Labour Relations Board that the question is arbitrable binds no one, and decides nothing, but merely leads in the discretion of the Labour Relations Board to the appointment of an arbitrator so that the arbitration board may function if the question is truly arbitrable, it is not a judicial or quasi judicial act that can be reviewed by *certiorari*.

With respect, I am unable to agree. It may well be that the appointment itself is a purely administrative act. But before the Labour Relations Board may make the appointment it must determine "if in its opinion the question is arbitrable". This entails a consideration and interpretation of the collective agreement. If the grievance has not advanced to the next stage within 14 days after completion of the preceding stage the grievance was "deemed to be abandoned" by the terms of art. XV, s. 2, of the collective agreement. If the grievance were abandoned, then there could be no question to be arbitrated. The determination therefore was a judicial question not merely an administrative one.

Moreover, the opinion of the Labour Relations Board that the question was arbitrable cannot be described as one which "binds no one and decides nothing". Section 2 of art. XVII of the collective agreement would become operative upon the Labour Relations Board's appointment, an arbitration would proceed, the decision in the words of s. 2(*b*) of the article would be final, and the parties to the arbitration by the provisions of s. 3 of the article would have to bear the cost equally. Even if it were open to the arbitration board to hold after a hearing that the question were not arbitrable, upon which I express no opinion, the

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GALLOWAY LUMBER CO. LTD. v. LABOUR RELATIONS BOARD OF BRITISH COLUMBIA et al.

Spence J.

determination by the Labour Relations Board that it were would have required the appellant company to engage in the arbitration proceedings and incur the necessary costs thereof.

Being of the opinion that the determination of the Labour Relations Board that the question was arbitrable was at least a quasi-judicial decision, I am strongly of the opinion that such determination may be reviewed in the Courts. I adopt the language of Aylesworth J.A. in giving the judgment of the Court of Appeal for Ontario in *Jarvis v. Associated Medical Services Inc. et al.*[1] at p. 379:

> . . . it is trite to observe that the Board cannot by an erroneous interpretation of any section or sections of the Act confer upon itself a jurisdiction which it otherwise would not have.

That judgment was affirmed in this Court[2], and both Cartwright J. at p. 502 and I in my reasons at p. 520, although dissenting on another issue, expressed strongly the view that a judicial or quasi-judicial decision of an administrative board delimiting its field of jurisdiction was reviewable on *certiorari*.

Upon such a review, however, I have come to the conclusion that the decision of the Labour Relations Board was correct. Article XV of the collective agreement in s. 2 provided that if the grievance had not advanced to the next stage within 14 days after completion of the preceding stage it should be deemed to have been abandoned.

Step 3 of the said s. 1 of art. XV read as follows:

> If the grievance is not then satisfactorily solved, it shall be referred to an authorized representative of the Union and the Management.

Counsel for the appellant has proceeded throughout upon the basis that step 3 was completed when Mr. Damstrom, the president of the local of the union, and Mr. H. Nelson, the manager of the appellant company, met and conferred on February 12, 1962. At the close of that meeting there was, however, no formal entry made setting out the result thereof and I cannot see why the telephone conversation between the same two men on the next day, February 13,

[1] (1962), 35 D.L.R. (2d) 375, *sub nom. Associated Medical Services Incorporated v. Ontario Labour Relations Board et al.*

[2] [1964] S.C.R. 497.

1962, cannot be considered a continuation of step 3 so that step 3 did not terminate until the latter date. On the 14th day thereafter, *i.e.*, the 27th of February, and within the time limited by s. 2 of art. XV, Mr. Damstrom dispatched to Mr. Nelson the letter which I have recited above. In that letter Mr. Damstrom gives the name and address of the union's nominee to the arbitration board. In my view, this disposes of one of the two bases of the appellant company's argument that the grievance had been abandoned. The second objection was that the registered letter dated February 21, 1962, which I have quoted above, did not contain the statement of the questions to be arbitrated. That letter read in part: "In the matter of the discharge of Earl Gorrie . . ." Gorrie's first letter of February 12th had set out his grievance in writing as follows:

"That I was fired from my job without proper cause."

Reading those two documents together, I have no doubt that the question to be arbitrated was sufficiently set out in writing. I am of the opinion that in the matter of labour relations and arbitration thereon to take a narrow, technical and pedantic view of the procedure is to defeat the purpose for which the statute was enacted.

For these reasons, I would dismiss the appeal with costs in favour of International Woodworkers of America, Local No. 1-405. There should be no award of costs to or against the Labour Relations Board in this Court.

Appeal dismissed with costs.

Solicitors for the appellant: Russel & DuMoulin, Vancouver.

Solicitors for the respondent, Labour Relations Board of British Columbia: Paine, Edmonds, Mercer & Williams, Vancouver.

Solicitors for the respondent, International Woodworkers of America, Local No. 1-405: Shakespeare & Hutcheon, Vancouver.

1964
*Nov. 23
Dec. 21

PAOLO VIOLI .....APPELLANT;

AND

THE SUPERINTENDENT FOR THE EASTERN DISTRICT OF THE IMMIGRATION BRANCH OF THE CANADIAN DEPARTMENT OF CITIZENSHIP AND IMMIGRATION AND THE HONOURABLE THE MINISTER OF CITIZENSHIP AND IMMIGRATION OF CANADA .....RESPONDENTS.

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

Immigration—Deportation—Habeas corpus—Deportation order suspended for specified period of probation—Review without notice—Attempt to implement order long after expiry of probationary period—Whether authority to enforce order—Immigration Act, R.S.C. 1952, c. 325, ss. 8, 15(1), 17, 19(e), 26, 31(4), 33—Canadian Bill of Rights, 1959-60 (Can.), c. 44.

The appellant's two brothers, R and G, were admitted to Canada as immigrants. After they had both been convicted of an offence under the *Criminal Code,* within the meaning of s. 19(1)(e)(ii) of the *Immigration Act,* they were ordered to be deported by a special inquiry officer whose order was upheld by the Immigration Appeal Board. Then each brother was informed by letter that his deportation order was deferred, in the case of R for a period of twelve months and in the case of G for a period of six months, provided no unfavourable report was received during that period, at the end of which a further study of their cases was to be made. Some three years later in the case of R and eighteen months in the case of G, they were arrested and detained pursuant to a warrant of arrest signed by the Minister, and both were informed by letter that their cases had been reviewed and that the deportation orders were to be implemented. Neither had had any notice of the time or place of this review. The issuance of a writ of habeas corpus with certiorari in aid was refused by the trial judge. This judgment was affirmed by a majority in the Court of Appeal. An appeal was launched in this Court.

Held (Taschereau C.J. and Abbott and Judson JJ. dissenting): The appeal should be allowed.

Per Cartwright, Fauteux, Martland, Ritchie, Hall and Spence JJ.: Following the expiration of the stipulated periods of probation, the Minister could not thereafter hold the deportation orders in suspense and require their enforcement at any time he chose, at his own discretion. Having exercised his power of review, as he chose to do, under s. 31(4) of the Act, his decision to grant a probationary period was, by the terms of that subsection, final. After the expiration of the probationary periods, the Minister did not have power to make a further review and to decide to extend the probationary period for an additional time. In the absence of any event occurring during the probationary period which

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

would have justified his so doing, the Minister did not thereafter have the statutory authority to enforce the deportation orders. The position was the same as if he had allowed the appeals from the decisions of the Immigration Appeal Board.

Per Taschereau C.J. and Abbott and Judson JJ., *dissenting*: What the Minister did was to confirm the deportation orders but defer their execution. The Minister alone had power to do so under s. 31(4). Had the brothers been able to satisfy the Minister that they should be allowed to remain, he could then have exercised the discretionary power conferred upon him by s. 31(4) and have quashed the orders. The Minister is the only person authorized to quash such an order. The Courts have no power to do so. The exercise of that power requires positive action on the part of the Minister and is not to be inferred from circumstances such as a delay in the execution. Even if such a delay were relevant to the continuing validity of the orders, which it was not, deferment in this case was not unreasonable. The fact that the Minister signed the warrants of arrest was evidence that he had no intention of quashing the deportation orders.

Immigration—Expulsion—Habeas corpus—Ordonnance d'expulsion suspendue pour une période spécifique sous surveillance—Revision sans avis—Tentative de donner suite à l'ordonnance longtemps après l'expiration de la période sous surveillance—Autorité de mettre en vigueur l'ordonnance—Loi sur l'immigration, S.R.C. 1952, c. 325, arts. 8, 15(1), 17, 19(e), 26, 31(4), 33—Loi sur la déclaration canadienne des droits, 1960 (Can.), c. 44.

Les deux frères de l'appelant, R et G, furent admis au Canada comme immigrants. Après qu'ils furent tous deux trouvés coupables d'une infraction sous le Code criminel, selon les prévisions de l'art. 19(1)(*e*)(ii) de la *Loi sur l'immigration,* une ordonnance d'expulsion fut émise par un enquêteur spécial. Cette ordonnance fut maintenue par la Commission d'Appel. Chacun des frères fut informé par lettre que son ordonnance d'expulsion était retardée, dans le cas de R pour une période de douze mois et dans le cas de G pour une période de six mois, à condition qu'aucun rapport défavorable ne soit reçu durant cette période, à la fin de laquelle une autre étude de leur cas serait faite. Quelques trois ans plus tard dans le cas de R et dix-huit mois dans le cas de G, ils furent tous deux arrêtés et détenus en vertu d'un mandat d'arrestation signé par le ministre, et tous deux furent informés par lettre que leur cas avait été revisé et que les ordonnances de déportation devaient être effectuées. Ils n'avaient reçu aucun avis du temps et de la place de cette revision. Le juge au procès a refusé d'émettre le bref d'habeas corpus. Ce jugement fut confirmé par une décision majoritaire de la Cour d'Appel. D'où le pourvoi devant cette Cour.

Arrêt: L'appel doit être maintenu, le Juge en Chef Taschereau et les Juges Abbott et Judson étant dissidents.

Les Juges Cartwright, Fauteux, Martland, Ritchie, Hall et Spence: A l'expiration de la période sous surveillance spécifiée, le ministre ne pouvait pas maintenir l'ordonnance d'expulsion en suspens et exiger leur expulsion à n'importe quel temps de son choix, de sa propre discrétion. Ayant exercé son pouvoir de revision, comme il l'a fait, sous l'art. 31(4) de la loi, sa décision d'accorder une période sous surveillance était finale de par les termes de cet article. Après l'expiration de la période sous surveillance, le ministre n'avait pas le pouvoir de faire une autre revision et de décider d'étendre pour un temps additionnel

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cette période sous surveillance. En l'absence de tout événement survenant durant cette période qui l'aurait justifié de le faire, le ministre n'avait pas alors l'autorité statutaire de mettre en vigueur les ordonnances d'expulsion. La situation était la même que s'il avait maintenu les appels de la décision de la Commission d'Appel.

Le Juge en Chef Taschereau et les Juges Abbott et Judson, *dissidents:* Le ministre approuva les ordonnances de déportation mais décida d'en retarder leur exécution. Seul le ministre avait ce pouvoir sous l'art. 31(4). Si les deux frères avaient pu satisfaire le ministre qu'on devait leur permettre de demeurer, il pouvait alors exercer le pouvoir discrétionnaire qui lui est conféré par l'art. 31(4) et annuler les ordonnances. Seul le ministre a l'autorité pour annuler une telle ordonnance. Les Cours n'ont pas ce pouvoir. L'exercice de ce pouvoir requiert une action positive de la part du ministre et ne peut pas être inféré des circonstances telles que le délai dans l'exécution. Même si un tel délai était pertinent à la continuité de la validité de l'ordonnance, ce qui n'est pas le cas ici, le retardement dans ce cas n'était pas déraisonnable. Le fait que le ministre ait signé les mandats d'arrestation était une preuve qu'il n'avait pas l'intention d'annuler les ordonnances d'expulsion.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec, affirmant un jugement du Juge Martel qui avait refusé l'émission d'un bref d'habeas corpus. Appel maintenu, le Juge en Chef Taschereau et les Juges Abbott et Judson étant dissidents.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of Martel J. which had quashed a writ of habeas corpus with certiorari in aid. Appeal allowed, Taschereau C.J. and Abbott and Judson JJ. dissenting.

A. H. J. Zaitlin, Q.C., for the appellant.

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

The judgment of the Chief Justice and Abbott and Judson JJ. was delivered by

ABBOTT J. (*dissenting*):—The facts and the relevant provisions of the *Immigration Act,* R.S.C. 1952, c. 325, are set out in the reasons of my brother Martland which I have had the advantage of perusing. I agree with him that the letters written by officers of the Department of Citizenship and Immigration which he has quoted, should be accepted as evidence that the Minister of Citizenship and Immigration had seen fit to exercise the power of review given to him under subs. 4 of s. 31 of the Act. I regret however that I am obliged to differ as to the legal effect of that review.

[1] [1965] Que. Q.B. 81.

The only persons entitled to enter Canada and to remain here as of right, are Canadian citizens and persons having a Canadian domicile. All others desiring to do so must comply with the requirements of the *Immigration Act* and the regulations made thereunder.

Rocco Violi and his twin brother Giuseppe were admitted to Canada as immigrants, on December 28, 1958, and thereafter under s. 4 of the Act, could acquire a Canadian domicile by having their place of domicile for at least five years in Canada after landing. During that period they were, in effect, here on probation and liable to deportation in the circumstances set out in s. 19 of the Act. Among other grounds deportation may be ordered if a landed immigrant has been convicted of an offence under the *Criminal Code*. Each of the brothers was convicted of such an offence.

Under the Act, residence in Canada after the making of a deportation order and prior to its execution is not to be counted towards the acquisition of Canadian domicile by a person against whom such order has been made.

The validity of the deportation orders made against the Violi brothers is not challenged. In my view, what the Minister did was to confirm the two deportation orders but defer their execution to enable each of the two brothers, as stated in one of the letters, "to demonstrate that you can rehabilitate yourself". There is no express power given under the Act to grant such a deferment but in my view the Minister—and the Minister alone—had power to do so under s. 31(4). Such deferment was certainly not adverse to the interests of the two brothers. Had they been able to satisfy the Minister that they should be allowed to remain in Canada, he could then have exercised the discretionary power conferred upon him in s. 31(4) and have quashed the deportation orders. In the final analysis the Minister is the only person authorized under the Act to quash such an order. The courts have no power to do so.

In my view the exercise of that power by the Minister requires positive action on his part and is not to be inferred from circumstances such as delay in the execution of the deportation order.

Execution of the deportation order against Rocco Violi was deferred for some three years and that against Giuseppe for some eighteen months. Even if such a delay were relevant to the continuing validity of the orders (which in

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my opinion it was not) deferment for such periods was not in my view unreasonable in the circumstances.

That the Minister himself had no intention of quashing the deportation orders is evidenced by the fact that he signed the warrants under s. 15(1) of the Act for the arrest of the two brothers.

For these reasons as well as for those of Rivard J. in the Court below, with which I am in substantial agreement, I would dismiss the appeal with costs.

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

MARTLAND J.:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side) of the Province of Quebec[1], which, by a majority of three to two, dismissed the appellant's appeal from a judgment of the Superior Court for the District of Montreal, which had dismissed the appellant's petition for a writ of habeas corpus and for a writ of certiorari in aid. The facts involved in the appeal are not in issue.

Rocco Violi and Giuseppe Violi, both brothers of the appellant, were admitted to Canada as immigrants on December 28, 1958. On July 20, 1960, Rocco Violi was found guilty of causing bodily harm with a knife, contrary to s. 216A of the *Criminal Code,* and was sentenced to six months' imprisonment. On December 22, 1961, Giuseppe Violi was convicted for failure to stop his motor vehicle at the scene of an accident, contrary to s. 221(2) of the *Criminal Code.* He was sentenced to a fine and costs, which he paid.

Following each of these convictions an inquiry was held by a Special Inquiry Officer, pursuant to s. 19(2) of the *Immigration Act,* R.S.C. 1952, c. 325 (which statute is hereinafter referred to as "the *Act*"). In each case an order for deportation was issued, pursuant to s. 28(3) of the Act. The one relating to Rocco Violi was made on February 1, 1961, and the one relating to Giuseppe Violi was made on October 16, 1962. In each case an appeal was taken to an Immigration Appeal Board, in accordance with s. 31 of the Act, and in each case the appeal was dismissed. The decisions were delivered in the case of Rocco Violi on February 20, 1961, and in the case of Giuseppe Violi on November 19, 1962.

[1] [1965] Que. Q.B. 81.

Before continuing with the recital of the facts, it would be desirable, at this point, to quote s. 31 of the Act, as the subsequent events have to be considered in the light of this section and, in particular, subs. (4).

31. (1) Except in the case of a deportation order referred to in subsection (5) of section 7, subsection (4) of section 8 or section 30, an appeal may be taken by the person concerned from a deportation order if the appellant forthwith serves a notice of appeal upon an immigration officer or upon the person who served the deportation order.

(2) All appeals from deportation orders shall be reviewed and decided upon by the Minister with the exception of appeals that the Minister directs should be dealt with by an Immigration Appeal Board.

(3) An Immigration Appeal Board or the Minister, as the case may be, has full power to consider all matters pertaining to a case under appeal and to allow or dismiss any appeal, including the power to quash an opinion of a Special Inquiry Officer that has the effect of bringing a person into a prohibited class and to substitute the opinion of the Board or of the Minister for it.

(4) The Minister may in any case review the decision of an Immigration Appeal Board and confirm or quash such decision or substitute his decision, therefor as he deems just and proper and may, for these purposes, direct that the execution of the deportation order concerned be stayed pending his review and decision, and the decision of the Minister on appeals dealt with or reviewed by him or the decision of the majority of an Immigration Appeal Board on appeals, other than those reviewed by the Minister, is final.

In the case of Rocco Violi, following the decision of the Immigration Appeal Board, he received a letter, dated February 24, 1961, as follows:

OTTAWA, February 24, 1961.

Mr. Rocco Violi,
c/o Governor, Montreal Gaol,
800 Gouin Boulevard West,
MONTREAL, Quebec.

Dear Sir:

In his letter of February 24, 1961, the Appeal Clerk, General Board of Immigration Appeals, informed you that your appeal against the order of deportation made at Montreal, Quebec, on February 1, 1961, had been carefully considered and dismissed.

This letter is to inform you that it has been decided to defer deportation proceedings for a period of 12 months to give you a chance to demonstrate that you can rehabilitate yourself.

The local Immigration office will be required to submit a report on your circumstances in one year and I would therefore ask you to keep them informed of your address. I would also like to advise you that any unfavourable reports could mean the carrying out of the deportation order.

Yours very truly,
E. P. Beasley,
Chief,
Admissions Division.

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c.c. Governor, Montreal Gaol, 800 Gouin Boulevard West, MONTREAL, P.Q. Please hand the original of this letter to Mr. Violi who is an inmate of your institution.

c.c. Appeal Clerk, General Board of Immigration Appeals, OTTAWA. File 61-48.

c.c. (in dup.) District Superintendent, MONTREAL. File ED 2-10217. For your information and report in 12 months' time.

In the case of Giuseppe Violi, following the decision of the Immigration Appeal Board, he received a letter, dated December 10, 1962, as follows:

OTTAWA 4, December 10, 1962.

Mr. Giuseppe Violi,
4666 Charleroi,
Montreal North, P.Q.

Dear Sir:

On November 26th, 1962, you were informed by the Appeal Clerk of the Immigration Appeal Board that your appeal, taken from a deportation order made against you at Montreal on October 16, 1962 had been dismissed.

I have been directed to advise you that the deportation proceedings are being suspended for a period of six months provided no unfavourable report is received during that period. A further study of this case will be made in six months' time.

I wish to make it quite clear to you that should a further unfavourable report be received, consideration will be given to proceedings immediately with your deportation to Italy.

A copy of this letter has been sent to your Counsel, Mr. Jean Blain.

Yours very truly,

C. J. Dagg,
for A/Chief, Admissions Division.

c.c. Mr. Jean Blain, Barrister and Solicitor, 170 Dorchester Blvd. East, Suite 204, Montreal, P.Q.

c.c. Appeal Clerk, Immigration Appeal Board, Ottawa, Ontario.

c.c. Eastern District Superintendent, Montreal. Reference file ED2-10217. Should there be an unfavourable report during this six-month period, an immediate report should be submitted. If there is no unfavourable report, please investigate the present circumstances and submit a report on the same in six months' time, together with your recommendation.

This letter was followed by a letter dated May 28, 1963, in the following terms:

305 Dorchester Boulevard West
Montreal 1, Que.
ED. 3-347
May 28, 1963.

Mr. Giuseppe Violi,
4666 Charleroi Street,
Montreal North 39, P.Q.

Dear Sir:

This is to inform you that your case has been reviewed and it has been decided that it will not be necessary for you to report to this office as you have been doing in the past; however, it will be necessary for you to present yourself at this office on May 15, 1964.

Meanwhile, it will be necessary for you to inform us of any change of address.

Yours very truly,
for District Supervisor of Admissions.

There is no evidence of any further action on the part of the Department of Citizenship and Immigration, or of any further communication to either of the two brothers until the end of March, 1964. On April 1, 1964, each of them received a letter, in the same form, save as to the date of the deportation order. The one to Rocco Violi is as follows:

Dear Sir:

I have been directed to inform you that your case has been carefully reviewed and that it has been decided to implement the deportation order rendered against you at Montreal on February 1, 1961.

Your deportation to Italy will be effected as soon as the necessary arrangements in this regard have been completed.

Yours very truly,
(Sgd.) Leo R. Vachon.
Leo R. Vachon,
Regional Administrator,
Eastern Region.

It is admitted that neither Rocco Violi nor Giuseppe Violi had any notice of the time or place of any review of the deportation order affecting him.

Each of the two letters dated April 1, 1964, was dispatched to the recipient in care of the Governor of Montreal Gaol, where each was detained pursuant to a warrant of arrest, which had been issued by the Minister of Citizenship and Immigration (hereinafter referred to as "the Minister"), dated March 25, 1964, and a letter, from a departmental official to the Governor of the Gaol, dated March 26, 1964, requiring his detention there for deportation.

The appellant filed his petition in the Superior Court of Quebec, District of Montreal, for the issuance of a writ of

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habeas corpus and a writ of certiorari in aid on April 2, 1964.

From the foregoing facts it is clear that each of the two persons involved committed an offence under the *Criminal Code,* within the meaning of s. 19(1)(*e*)(ii) of the Act, and thereby became subject to deportation. The relevant portions of s. 19 provide as follows:

> 19. (1) Where he has knowledge thereof, the clerk or secretary of a municipality in Canada in which a person hereinafter described resides or may be, an immigration officer or a constable or other peace officer shall send a written report to the Director, with full particulars, concerning
>
> . . . .
>
> (*e*) any person, other than a Canadian citizen or a person with Canadian domicile, who
>
> . . . .
>
> (ii) has been convicted of an offence under the *Criminal Code,*
>
> . . . .
>
> (2) Every person who is found upon an inquiry duly held by a Special Inquiry Officer to be a person described in subsection (1) is subject to deportation.

It is also clear that the Special Inquiry Officer properly made deportation orders, pursuant to s. 28 of the Act, and that the appeals from the deportation orders were properly dealt with, pursuant to s. 31, by the Immigration Appeal Boards. None of these matters is questioned by the appellant as to its legal validity.

At that stage the Minister had discretion, pursuant to s. 31(4), to review, or to refrain from reviewing, the decision of the Immigration Appeal Board. Had he adopted the latter course, the decision of the Board in each case would have been final. However, he elected in each case to review the decision of the Board and it is necessary to consider what are the consequences of that action on his part.

Counsel for the respondent urged that the letter of February 24, 1961, to Rocco Violi and the letters of December 10, 1962, and May 28, 1963, written to Giuseppe Violi were written by departmental officials without any statutory authority to do so. I am not prepared to accept that submission. The first-mentioned letter uses the phrase "it has been decided to defer deportation proceedings . . . ." The second letter contains the phrase "I have been directed to advise you that the deportation proceedings are being suspended . . . ." The last-mentioned letter states: "This

is to inform you that your case has been reviewed . . . ." I think we are entitled to presume that these were properly authorized communications, in the absence of any evidence to the contrary, and the only authority for them is the exercise by the Minister of his power to review the decision of an Immigration Appeal Board under s. 31(4).

The power there given is to confirm or quash the Board's decision, neither of which was done, or to "substitute his decision therefor as he deems just and proper." What then is the interpretation to be given to these letters? The respondent argues that they merely hold out the hope that eventually, if the recipient of the letter succeeds in rehabilitating himself in the opinion of the Department, the deportation order against him may be revoked, and that they do not promise a revocation nor promise a decision within any specified delay. The appellant contends that the decision made by the Minister, on his review of an appeal to the Immigration Appeal Board, is final and that he cannot, by such decision, retain power to enforce the deportation orders at any time he should see fit, arbitrarily.

Counsel for the appellant placed reliance upon s. 33(1) of the Act, which provides: "Unless otherwise provided in this Act, a deportation order shall be executed as soon as practicable."

He contended that this is not a case in which the Act otherwise provides and that failure to observe the provision resulted in the lapse of the order.

Counsel for the respondent relied upon s. 33(2) which provides: "No deportation order becomes invalid on the ground of any lapse of time between its making and execution."

I am not prepared to agree that the two deportation orders lapsed because of the delay which was stipulated in the letters written to Rocco and Giuseppe Violi. However, subs. (1) does contemplate that if a deportation order is to be enforced there shall not be undue delay. Subsection (2), in my opinion, means that lapse of time *per se* does not result in a deportation order becoming invalid. In the present case, however, there is more involved than mere lapse of time. The issue here involves the powers of the Minister in respect of the enforcement of deportation orders.

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The letter of February 24, 1961, to Rocco Violi stipulated a probationary period of 12 months and required a report, at the end of that time, from the District Superintendent. The letter of December 10, 1962, to Giuseppe Violi provided for a probationary period of six months and required a report from the District Superintendent at the end of that time. Both periods expired and no steps were then taken to enforce the deportation orders.

The question in issue is whether, following the expiration of those stipulated periods, the Minister can thereafter hold the deportation orders in suspense and require their enforcement at any time he chooses, at his own discretion. I do not think he can. Having exercised his power of review, under s. 31(4), his decision is, by the terms of that subsection, final. This decision was to grant to each of the persons involved a probationary period. The probationary periods expired and no steps was then taken to enforce the orders. The Minister did not, thereafter, have power to make a further review and to decide to extend the probationary period for an additional time. Nothing has been said on behalf of the respondent to establish the existence of any authority given to the Minister to adopt such a course.

In my opinion, having made the decision which he did in each case, on his review of the decisions of the Immigration Appeal Boards, in the absence of any event occurring during the probationary period which would have justified his so doing, the Minister did not thereafter have the statutory authority to enforce the deportation orders. The position is the same as if he had allowed the appeals from the decisions of the Immigration Appeal Boards.

In my opinion, therefore the appeal should be allowed, the detention of Rocco and Giuseppe Violi should be declared illegal and they should be released from detention forthwith. It should be recommended that the Minister should pay the appellant's costs throughout.

Appeal allowed with costs, TASCHEREAU C.J. *and* ABBOTT *and* JUDSON J.J. *dissenting.*

Attorney for the appellant: A. H. J. Zaitlin, Montreal.

Attorneys for the respondents: Geoffrion & Prud'Homme, Montreal.

GREGORY JAVITCH (*Défendeur*) .....APPELANT;

1964
*Juin 3
Décembre 21

ET

RENE BRIEN (*Demandeur*) .....INTIMÉ;

ET

PAUL-EMILE SAVAGE .....MIS-EN-CAUSE.

APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUEBEC

Appel—Inscription en Cour d'appel non signifiée dans les trente jours du jugement—Rejet de l'appel—Délai de rigueur—Déchéance du droit d'appel—Code de Procédure civile, arts. 537, 1209—Loi sur la Cour suprême, S.R.C. 1952, c. 259, arts. 36, 41.

Le juge de première instance déposa son jugement, en faveur de l'intimé, au greffe de la Cour, tel qu'autorisé par le second paragraphe de l'art. 537 du *Code de Procédure civile*. Ce jugement portait la date du 5 mars 1963. L'inscription en appel ne fut signifiée à l'intimé que le 5 avril 1963, soit le jour suivant l'expiration du délai d'appel de trente jours prescrit par l'art. 1209 du *Code de Procédure civile*. L'intimé fit alors une motion pour faire déclarer la déchéance du droit d'appel. La Cour d'appel considéra que l'appelant n'avait pas réussi à démontrer que le jugement avait été rendu à une date ultérieure à celle qu'il portait et rejeta l'appel. Un appel *de plano* fut inscrit devant cette Cour. Par la suite, l'appelant fit une motion pour permission d'appeler et l'intimé produisit une motion pour faire rejeter l'appel *de plano*. Ces deux motions furent entendues lors de l'audition de la cause.

Arrêt: L'appel doit être rejeté.

Le Juge en chef Taschereau et le Juge Abbott: Il n'y a aucun montant en jeu et tout ce que cette Cour pourrait accorder par son jugement serait de déterminer seulement une question de délai. Le droit de juger qui est donné à cette Cour dépend non pas de la demande contenue dans l'action, mais de ce qui fait l'objet de la contestation de l'appel projeté et dont est saisie la Cour. La motion pour faire rejeter l'appel *de plano* doit être accordée.

Cette Cour a le droit d'accorder une permission d'appeler en vertu des dispositions de l'art. 41 de la *Loi sur la Cour suprême,* mais dans les circonstances actuelles une telle permission ne peut pas être accordée. Il n'y a aucune question importante qui autorise l'intervention de cette Cour suivant les normes établies par les jugements antérieurs.

Le Juge Cartwright partage l'opinion que l'appel doit être rejeté.

Le Juge Fauteux et le Juge Hall: Si la Cour venait à la conclusion que le jugement dont est appel est mal fondé, il faudrait alors remettre la cause à la Cour d'appel pour audition au mérite. Le jugement *a quo* n'est donc pas un jugement prononcé selon l'art. 36(*a*) de la *Loi sur la Cour suprême* «dans une procédure judiciaire où le montant ou la valeur de la matière en litige dans l'appel dépasse $10,000». La motion pour rejet d'appel doit donc être admise.

*CORAM: Le Juge en chef Taschereau et les Juges Cartwright, Fauteux, Abbott et Hall.

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D'autre part, la demande pour permission d'appeler paraît justifiée et doit être accordée. Les circonstances de cette cause militaient pour considérer au mérite, comme d'ailleurs il a été jugé nécessaire de ce faire, le bien ou mal fondé du présent appel.

Au mérite, la Cour d'appel, en présence du dossier tel qu'alors constitué, a eu raison de dire que l'appelant n'avait pas réussi à démontrer que le jugement du juge de première instance avait été rendu à une date ultérieure à celle qu'il porte. Il y a lieu, à moins d'indices au contraire, de présumer que la prononciation d'un jugement à l'audience ou son dépôt au greffe ont lieu à la date inscrite au jugement. Il incombait donc à l'appelant de repousser cette présomption lorsque cette question fut soulevée devant la Cour d'appel. La Cour d'appel n'avait pas devant elle une preuve adéquate pour lui permettre de conclure que le jugement avait été rendu à une date ultérieure à celle qu'il porte. Il s'ensuit que la computation du délai d'appel devait se faire à compter de cette date et que l'inscription fut signifiée après l'expiration de ce délai.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], déclarant l'appelant déchu de son droit d'en appeler d'un jugement du juge Prévost. Appel rejeté.

Melvin L. Rothman et *Daniel Miller,* pour le défendeur, appelant.

Jean Martineau, C.R., et *Jacques Viau, C.R.,* pour le demandeur, intimé.

Le jugement du Juge en chef et du Juge Abbott fut rendu par

LE JUGE EN CHEF:—L'intimé dans la présente cause a intenté contre l'appelant une action qui a donné naissance à un litige assez compliqué. La cause a été entendue par M. le Juge Claude Prévost qui a maintenu l'action du demandeur avec dépens.

Le jugement de M. le Juge Prévost n'a pas été prononcé à l'audience tel que l'autorise le para. 1 de l'art. 537 du *Code de procédure,* mais a été rendu par le juge au procès qui l'a déposé au greffe de la Cour sous sa signature. C'est le second paragraphe de l'art. 537 qui autorise ce mode.

Le défendeur contre qui jugement a été rendu le 5 mars 1963, a porté cette cause en appel mais n'a fait signifier l'inscription à l'intimé-demandeur que le 5 avril 1963, soit le trente et unième jour après que le jugement fut rendu. Les procureurs du présent intimé ont alors présenté une motion le 10 avril de la même année à la Cour

[1] [1963] B.R. 865.

du banc de la reine, demandant le rejet de cet appel comme tardif vu que, selon eux, les délais expiraient le 4 avril. Il y avait donc, à cause de ce retard, déchéance du droit de se pourvoir. Devant la Cour inférieure, l'appelant a plaidé que les délais ne devaient pas être computés depuis la date d'inscription, mais bien depuis la date où les parties ont été avisées du prononcé de ce jugement vu qu'il n'a pas été rendu séance tenante.

La Cour du banc de la reine[1] a décidé que l'appelant n'a pas réussi à démontrer que le jugement aurait été rendu à une date ultérieure à celle qui est indiquée et que, conséquemment, cette dernière doit être tenue comme exacte. La Cour du banc de la reine ajoute que l'appelant Javitch a fait signifier son avis le trente et unième jour et que celui-ci doit être tenu comme tardif et illégal. *Sa Majesté le Roi v. Thomas*[2]; *Dame Gagné v. La Banque Provinciale du Canada*[3]. La Cour a donc accordé la motion de l'intimé et a déclaré l'appelant déchu de son droit en appel qu'il avait formé, a refusé d'entretenir son recours et a rejeté l'action avec dépens.

La question primordiale en litige est de déterminer si la Cour du banc de la reine a mal jugé en décidant que le pourvoi en appel était tardif. Il n'y a aucun montant en jeu, et tout ce que cette Cour pourrait accorder par le jugement que nous serions appelés à rendre serait de déterminer seulement une question de délai. Le même problème a été analysé et décidé dans la cause de *Tremblay v. Duke-Price Power Co.*[4]. Il ne faut pas oublier que le droit de juger qui est donné à notre Cour dépend non pas de la demande contenue dans l'action, mais de ce qui fait l'objet de la contestation de l'appel projeté et dont est saisie la Cour. Vide *Fiset v. Morin*[5]. Dans cette cause la Cour suprême a décidé qu'elle n'avait pas juridiction pour entendre cet appel. Il s'agissait de déterminer le montant d'un cautionnement qui devait être fourni. On en est unanimement arrivé à la conclusion qu'il n'y avait pas de montant en jeu suivant les dispositions de l'art. 39 de *la Loi sur la Cour suprême* du temps, qui est maintenant l'art. 36.

L'appelant a produit une motion pour obtenir permission d'appeler, et l'intimé a également produit une motion

[1] [1963] B.R. 865.
[2] (1933), 56 B.R. 83.
[3] [1957] B.R. 471.
[4] [1933] R.C.S. 44, 1 D.L.R. 184.
[5] [1945] R.C.S. 520, 3 D.L.R. 800.

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pour faire rejeter l'appel *de plano*. Certainement que cette Cour a le droit d'accorder une permission d'appeler en vertu des dispositions de l'art. 41, mais je ne crois pas, dans les circonstances actuelles, qu'une telle permission doive être accordée. Rien ne justifie, en effet, même si le jugement antérieur était erroné, que cette demande soit accordée. Je ne vois aucune question importante qui autorise l'intervention de cette Cour suivant les normes établies par les jugements antérieurs.

Il s'ensuit donc que la motion pour permission d'appeler doit être rejetée avec dépens. Quant à la motion pour faire rejeter l'appel *de plano,* il s'ensuit logiquement qu'elle doit être accordée avec dépens et que l'appel doit être rejeté également avec dépens. Il n'y aura pas de frais pour ou contre le mis-en-cause qui est registrateur de la Division d'Enregistrement de Montréal.

CARTWRIGHT J.:—I agree in the result, reached by all the other Members of the Court, that the appeal should be dismissed, that the respondent should recover from the appellant the costs of the appeal, of the motion to quash and of the motion for leave to appeal, and that there should be no order as to costs for or against the mis-en-cause.

Le jugement des Juges Fauteux et Hall fut rendu par

LE JUGE FAUTEUX:—Par jugement en date du 5 mars 1963, M. le juge Prévost de la Cour supérieure à Montréal, accueillant une action intentée par l'intimé à l'appelant, annulait une promesse d'achat d'une ferme au prix de $50,000 et ordonnait la radiation du bordereau enregistré sur cette ferme par l'appelant. Ce dernier appela de ce jugement; mais son inscription en appel datée du 4 avril 1963 ne fut signifiée à l'intimé que le 5 avril 1963, soit le jour suivant l'expiration du délai d'appel de trente jours prescrit à l'art. 1209 du Code de Procédure Civile. C'est alors que le 10 avril suivant, l'intimé fit motion pour faire déclarer la déchéance du droit d'appel. La Cour d'appel[1] considéra que ce délai de trente jours est de rigueur, que l'appel doit se former par la production d'une inscription et de sa signification dans ce délai de trente jours, sous peine de déchéance, que l'appelant n'avait pas réussi à démontrer que le jugement du juge Prévost aurait été rendu à une date ultérieure à la date qu'il porte, que

[1] [1963] B.R. 865.

cette date doit être tenue comme exacte et que la signification de l'inscription, faite trente et un jours après la date du jugement, devait être tenue comme tardive et illégale. Et la Cour après avoir référé à *Sa Majesté le Roi v. Thomas*[1], *Dame Gagné v. La Banque Provinciale du Canada*[2], déclara par un jugement unanime rendu le 16 avril 1963 que la motion de l'intimé était bien fondée et que l'appelant était déchu du droit à l'appel qu'il avait formé, et cet appel fut rejeté avec dépens. Le présent pourvoi, interjeté *de plano,* est de ce jugement.

Par la suite, l'appelant fit d'autres procédures. Le 12 septembre 1963, il demanda à la Cour d'appel la permission de produire au dossier, comme exhibit A-1, un extrait du plumitif où il apparaît que le jugement de M. le juge Prévost, daté du 5 mars, fut produit au bureau du protonotaire le 6 mars et, comme exhibit A-2, une attestation du greffier de la Cour supérieure que ce jugement du juge Prévost avait été rendu le 6 mars. En fait, l'appelant avait communiqué, sans les produire, la teneur de ces pièces à la Cour d'appel lors de l'audition sur la motion pour faire déclarer la déchéance du droit d'appel. Cette motion pour production d'exhibits fut rejetée. Le 7 octobre 1963, l'appelant logea à la Cour suprême du Canada une demande de permission d'appeler du jugement *a quo*; la considération de cette demande fut ultérieurement différée à l'audition de l'appel au mérite. Le 17 octobre 1963, l'appelant, invoquant les dispositions de l'art. 67 de la *Loi sur la Cour suprême* du Canada, demanda à la Cour d'appel d'inclure au dossier les exhibits A-1 et A-2 et, en plus, un affidavit de M. le juge Prévost établissant que le jugement de ce dernier n'avait pas été prononcé à l'audience; cette demande fut accordée, sauf en ce qui concerne l'affidavit en question, vu que celui-ci n'avait pas été soumis à la Cour d'appel quand le jugement du 16 avril prononçant la déchéance fut rendu.

D'autre part, l'intimé demanda à cette Cour d'annuler l'appel logé *de plano,* alléguant que le jugement *a quo* n'est pas un jugement rendu dans une procédure où le montant ou la valeur de la matière en litige excède $10,000, mais qu'il s'agit tout simplement d'un jugement déclarant la déchéance du droit d'appel sans aucune référence au mérite de la cause.

[1] (1933), 56 B.R. 83. [2] [1957] B.R. 471.

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La seule question en litige devant nous a trait au bien ou mal fondé du jugement de la Cour d'appel, accueillant la motion de l'intimé pour faire déclarer la déchéance du droit de l'appelant à former un appel en Cour du banc de la reine. Dussions-nous conclure au mal fondé de ce jugement, tout ce que nous pourrions faire serait de remettre la cause à la Cour d'appel pour audition au mérite. *Gatineau Power Co. v. Cross*[1]. Le jugement *a quo* n'est donc pas un jugement prononcé «dans une procédure judiciaire où le montant ou la valeur de la matière *en litige dans l'appel* dépasse $10,000». Art. 36(*a*) *Loi sur la Cour suprême.* Aussi bien cette motion de l'intimé pour annulation de l'appel logé *de plano* à cette Cour doit être admise avec dépens.

D'autre part, la demande de l'appelant pour permission d'appeler à cette Cour me paraît justifiée et doit être accordée aux conditions ordinaires, soit frais à suivre le sort de l'appel. L'importance du montant ou de la valeur de la matière en litige en première instance, les circonstances relatives à la publicité du jugement de la Cour supérieure, le point de départ pour la computation des délais d'appel de ce jugement, la déclaration de la déchéance de ce droit d'appel sont autant de circonstances qui, entre autres, militaient, à mon avis, pour considérer au mérite, comme d'ailleurs il a été jugé nécessaire de ce faire, le bien ou mal fondé du présent appel. Une telle demande fut accordée par cette Cour dans *Robert v. Marquis*[2] où il s'agissait précisément de l'appel d'un jugement de la Cour du banc de la reine accueillant une motion pour faire rejeter un appel au motif que l'inscription en appel était illégale.

Après audition sur le mérite, cependant, je dois conclure que la Cour d'appel, en présence du dossier tel qu'alors constitué, a eu raison de dire que l'appelant n'avait pas réussi à démontrer que le jugement du juge Prévost avait été rendu à une date ultérieure à celle qu'il porte.

Le jugement de M. le juge Prévost n'est pas accompagné des instructions que mentionne l'art. 538 C.P.C.; rien au dossier ne suggère une application des dispositions de cet article à l'espèce. Par ailleurs, ce jugement de M. le juge Prévost pouvait, suivant le premier alinéa de l'art. 537 C.P.C. être prononcé à l'audience, ou suivant le second

[1] [1929] R.C.S. 35, [1928] 3 D.L.R. 706. [2] [1958] R.C.S. 20.

alinéa du même article, en le déposant au greffe à la date qu'il porte avec alors obligation du protonotaire d'en donner avis. Tenant compte de la maxime *omnia praesumuntur rite esse acta,* je crois qu'il y a lieu, à moins d'indices au contraire, de présumer que la prononciation à l'audience ou le dépôt au greffe ont lieu à la date inscrite au jugement. Il incombait donc à l'appelant de repousser cette présomption lorsque cette question fut soulevée en Cour d'appel.

Aux termes mêmes de son inscription en appel, l'appelant lui-même précise qu'il appelle «from the judgment of the Superior Court for the District of Montreal, Province of Quebec, *rendered by Prévost J., on March 5, 1963*». Quant aux entrées au plumitif, exhibit A-1, elles se lisent comme suit:

1963
March 5.—Jugement DONNE ACTE au demandeur de son offre et de son renouvellement d'offre de la somme de $2,000.00 en capital et de $213.90 en intérêt etc.
Juge Prévost.
Prod. 6 March 1963.
April 4.—Inscription in Appeal sign. et rapp. Me Philipp, Bloomfield and Co.

Il est manifeste et admis que l'entrée du 4 avril indiquant que l'inscription fut signifiée le 4 avril est inexacte; le rapport du huissier fait foi que cette signification ne fut faite que le 5 avril après l'expiration du délai de l'appel. Si, par ailleurs, il faut retenir que l'entrée apparemment faite le 5 mars indique que le jugement fut produit le 6 mars, il ne s'ensuit pas que le jugement n'a pas été, comme il pouvait valablement l'être, prononcé à l'audience le 5 mars. L'appelant l'a d'ailleurs reconnu par l'allégation suivante apparaissant à sa motion faite le 15 octobre 1963:

WHEREAS in order that Defendant-Appellant's case be properly presented before the Supreme Court of Canada it is essential that an affidavit of the Honourable Mr. Justice Prévost establishing that the judgment in the Superior Court had not been rendered in open Court, form part of the said Joint Record.

On peut ajouter que rien au dossier ne suggère, qu'assumant que cet affidavit eut été décisif de la question, on ne pouvait avec une diligence raisonnable l'obtenir et le produire en Cour d'appel lors de l'audition de la motion pour faire déclarer la déchéance du droit d'appel. Il serait contraire aux principes régissant les appels de donner maintenant effet à cet affidavit ou à d'autres pièces offertes dans pareilles circonstances.

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Enfin, l'attestation du greffier, exhibit A-2, se lit comme suit:

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La Présente est pour certifier que le jugement dans la présente cause a été rendu par l'honorable juge PRÉVOST, le six mars 1963 et apparaît dans le livre des délibérés comme tel.

(signé) Ovide Mercure
OVIDE MERCURE, D.P.C.S.
Greffier en chef.

P.S. Le jugement ci-haut porte la date du 5 mars 1963
(signé) OM, D.P.C.S.

Il n'est évidemment pas de la compétence du greffier de décider si un jugement a été prononcé à une date différente de celle qu'il porte. Au surplus, cet exhibit A-2 a été irrégulièrement produit au dossier, comme d'ailleurs l'exhibit A-1, ainsi qu'il est démontré aux raisons de jugement de M. le juge en chef Tremblay. Dossier conjoint, page 43. Ajoutons, enfin, qu'à l'audition devant nous, l'intimé a déposé un affidavit en date du 3 octobre 1963, signé par le même greffier, dans lequel celui-ci déclare:

1°. Le 16 avril 1963, j'ai signé une lettre à la demande des procureurs de monsieur Javitch, lettre qu'ils avaient eux-mêmes rédigés (sic) sur du papier à lettre du protonotaire.

2°. Dans cette lettre, il était dit que le jugement de la Cour Supérieure rendu dans cette cause l'avait été le 6 mars 1963 et que cela apparaissait dans le livre des délibérés.

3°. J'ai depuis examiné le dossier, l'original du jugement et le plumitif du protonotaire et, après avoir vérifié le tout, je réalise que cette mention du 6 mars 1963 dans le livre des délibérés, mention que j'y ai moi-même écrite, est erronée parce que l'original du jugement est daté du 5 mars 1963 et parce qu'il n'y a rien ni au dossier ni dans les livres du protonotaire pouvant indiquer qu'il a été rendu à une autre date que celle qu'il porte.

Et j'ai signé.
(signé) Ovide Mercure

La référence à cet affidavit est faite exclusivement pour démontrer le danger qu'il y a de tenir compte de pièces irrégulièrement produites.

En somme, la Cour d'appel n'avait pas devant elle une preuve adéquate pour lui permettre de conclure que le jugement de M. le juge Prévost avait été rendu à une date ultérieure à celle qu'il porte. Il s'en suit que la computation du délai d'appel devait se faire à compter de cette date et

que l'inscription fut signifiée après l'expiration de ce délai.

Je renverrais l'appel avec dépens.

Appel rejeté avec dépens.

Procureurs du défendeur, appelant: Phillips, Bloomfield, Vineberg & Goodman, Montréal.

Procureurs du demandeur, intimé: Lacroix, Viau, Hébert & Thivierge, Montréal.

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Feb. 1

JURIS BENJAMINS (*Defendant*) .....APPELLANT;

AND

CHARTERED TRUST COMPANY, Administrator with the Will annexed of the Estate of Antons Benjamins (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Husband and wife domiciled in Latvia—Joint will—Bank accounts in Switzerland and England—Whether separate property of wife and thus available for distribution amongst her heirs or whether joint property of herself and her husband so as to entitle his heirs to a one-half interest therein.

A B and his wife E B, who were separate as to property in accordance with a contract made at or before the time of their marriage, executed a joint will in 1937. By para. II of the will it was provided that, apart from certain specified property, all property should be the joint property of the spouses. Both testators were domiciled in Latvia where A B died in 1939 and from whence his wife was transported to Russia where she was presumed to have died in 1941. In 1926 E B had adopted her sister's son, the defendant in this case. A B, who had three children of a previous marriage, did not join in this adoption. In 1933 A B and E B deposited certain funds in a joint account in a bank in Zurich, Switzerland, and in 1939, some time before the death of her husband, E B alone opened an account in London, England. In 1948 the defendant obtained payment of the funds from the bank account in Zurich and in 1950, on probate of the will of E B, he obtained, as her executor, payment of the funds from the account in London.

The defendant came to Canada in 1952. On February 18, 1960, the Surrogate Court of the County of York granted letters of administration with the will annexed of the estate of A B to the plaintiff trust company. In an action for an accounting and payment of moneys received by the defendant, the plaintiff claimed that one half of the proceeds of the bank accounts should have been paid to those entitled under the will of A B. The action was allowed and the Court of Appeal dismissed an

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

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appeal from the trial judgment, subject to a minor variation in the method of taking the accounts thereby directed. The defendant further appealed to this Court.

The appeal was argued on the assumption that under the law of Latvia an item of property which was owned jointly by the testator and testatrix would on the death of either of them belong one half to the survivor and one half to the estate of the deceased, and it was accepted by both the Courts below that the terms of a marriage contract providing that the husband and wife should be separate as to property could be validly revoked under Latvian law so as to make the property of each the joint property of both.

Held (Cartwright J. dissenting in part): The appeal should be dismissed.

Per Martland, Judson, Ritchie and Spence JJ.: The moneys deposited in Zurich were placed in a joint account, and, notwithstanding the provisions of the "Contract Respecting a Joint Account Held Jointly and Severally" entered into between the depositors and the bank, these moneys were to be treated as belonging to the testator and testatrix in equal shares.

On the death of A B *his* will became effective to control the disposition of a one-half interest in any property which was at that time jointly held by himself and his wife. *In the Goods of Raine* (1858), 1 Sw. & Tr. 144; *Re Duddell, Roundway v. Roundway,* [1932] 1 Ch. 582; *Re Creelman, McIntyre v. Gushue et al.,* [1956] 2 D.L.R. 494; *Re Kerr,* [1948] O.R. 543, referred to.

The question of whether the London bank account was so jointly held depended upon the construction to be placed on the second paragraph of the will. This paragraph was not only descriptive of the understanding existing between husband and wife at the time of preparing the will as to joint ownership of certain property therein referred to, but it also manifested the intention of both of them that on the death of each his or her will was to be treated as an effective disposition of one half of such property. The words "as regards our estate . . ." which occurred at the beginning of the paragraph were to be construed as meaning "as regards the estate hereinafter disposed of" and the words "all other property except of course purely personal property such as clothes, jewellery, etc. is the joint property of both of us . . ." were sufficiently broad to include moneys on deposit in a bank in the names of either the testator or the testatrix or both of them.

In the absence of evidence of any Latvian law to the contrary the will was to be construed in accordance with the provisions of s. 26(1) of *The Wills Act,* R.S.O. 1960, c. 433. The contention that the second paragraph of the will was concerned with the recital of facts rather than the disposition of property and that it should be construed without reference to the provisions of s. 26(1) of *The Wills Act* failed. The said paragraph was descriptive of the understanding of the husband and wife as to the nature of the interest of each of them in "the real and personal estate comprised in" the dispositions which were the subject of the succeeding paragraphs, and unless a contrary intention could be found in the language of the will it was to be construed as though it had been executed immediately before the death of A B.

Likewise, the contention that the second paragraph was to be treated as referable only to property owned at the date of the will because the provisions declaring the estate to be "the joint property of both of us" were phrased in the present tense and that there were no words which

expressly included the after-acquired property of either of the parties also failed. The employment of the present tense in conjunction with a general description of property did not of itself constitute evidence of a "contrary intention" within the meaning of s. 26(1) of *The Wills Act,* and no language could be found in the will which limited the joint estate created by the second paragraph to personal property owned by the testator and testatrix at the date when the will was made.

Re Ingram (1918), 42 O.L.R. 95, referred to.

Per Cartwright J., *dissenting in part*: With regard to the moneys deposited with the bank in Zurich the conclusion arrived at in the Courts below was correct.

As to the ownership of the moneys in the bank account in London, E B had the sole legal title to this chose in action and the onus of proving that A B was entitled to any interest in it lay upon the plaintiff. The latter's claim was based upon the terms of para. II of the will. However, construed in the manner most favourable to the plaintiff which its words would bear para. II was an acknowledgement by each of the spouses that all property then standing in the names of either or both of them (with the exception of the property expressly excluded) was the joint property of both. No contract between the spouses as to the ownership of property acquired after the date of the will was established and there was no ground for holding that A B was entitled to any equitable interest in the London account. There was no room for the suggestion that the will of E B bequeathed any interest in this fund to A B.

At the date of the death of A B and at the date of the death of E B the latter was the person solely entitled both at law and in equity to the moneys in the London bank account.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Schatz J., subject to a minor variation in the method of taking accounts thereby directed. Appeal dismissed, Cartwright J. dissenting in part.

J. T. Weir, Q.C., and *B. H. Kellock,* for the defendant, appellant.

R. S. Joy, Q.C., and *W. D. Lessmann,* for the plaintiff, respondent.

CARTWRIGHT J. (*dissenting in part*):—This is an appeal from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from a judgment of Schatz J., subject to a minor variation in the method of taking the accounts thereby directed.

The questions raised on this appeal are as to the ownership of sums of money on deposit in two bank accounts, one of 743,000 Swiss francs which stood to the credit of

[1] [1964] 1 O.R. 47, 41 D.L.R. (2d) 98.

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Antons Benjamins and Emilija Benjamins in the Swiss Bank Corporation in Zurich, Switzerland, and the other of $110,000, U.S. funds, which stood to the credit of Emilija Benjamins in the Swiss Bank Corporation in London, England.

By the judgment in appeal it was declared that the respondent is entitled to one half of the amount in each of these bank accounts and the appellant was ordered to account accordingly.

Antons Benjamins was born in 1861 in Latvia. He had three children of a first marriage, Marta, Anna and Janis. Janis died in Russia in 1942. Marta and Anna are living. Antons and his second wife, Emilija, were married in 1922. At that time both of them were domiciled in Latvia and they continued to be domiciled there until their deaths. At or before the time of their marriage public notice was given pursuant to the civil laws of Latvia that the parties had entered into a mutual marriage contract by which community of property was repealed. In consequence of this each spouse would be entitled to his or her separate property.

At the time of the marriage Antons Benjamins was an undischarged bankrupt and was employed by Emilija in a publishing business owned by her.

In 1926 Emilija Benjamins adopted the appellant who was the son of her sister and who was then eight years old. Antons Benjamins did not join in this adoption. Emilija Benjamins had no other children.

The business enterprises in which Antons and Emilija were engaged prospered and prior to the outbreak of war in 1939 they appear to have been possessed of considerable wealth.

On January 23, 1933, Antons and Emilija Benjamins executed a contract with the Swiss Bank Corporation in Zurich. This document is headed "Contract respecting a joint account held jointly and severally". It is signed by Antons Benjamins, Emilija Benjamins and the bank. The evidence is silent as to the source of the money deposited in this account. The contract provides *inter alia* that:

2. Each of the aforementioned joint and several depositors and joint and several creditors is entitled to dispose, solely and without restriction, of the securities deposited and of the existing credit balances; the signature of one of the entitled parties is sufficient to give to the depository legally

valid full and final discharge. In the event of the decease of one of the entitled parties, the disposal right of the deceased is extinguished: it does not, therefore, pass to his heirs or to his testamentary executors. The surviving entitled party/parties is/are exclusively empowered forthwith to dispose of the deposit and the accounts mentioned in the manner as aforedescribed and to give to the depository legally valid full and final discharge.

On May 5, 1937, Antons and Emilija signed a will contained in one notarial document. The document was executed in Riga, in the Latvian language. A translation into English accepted by the parties was marked as Exhibit 2 at the trial. The following statement is contained in this document:

Emilija Benjamins acted without the assistance of her husband Antons Benjamins on the basis of the marriage contract regarding the separation of property, presented to me in the original, executed between the said married couple Benjamins at the office of A. Meike, Notary of Riga.

It will be necessary to refer to other provisions of this document hereafter.

On April 6, 1939, Emilija Benjamins deposited in the Swiss Bank Corporation in London, England, the sum of 110,000 United States dollars in her name alone.

On June 14, 1939, Antons Benjamins died. His will was not admitted to probate because of a contest between his surviving wife and the children of his first wife. In 1941 Emilija Benjamins was arrested during the occupation of Latvia by Russia and was deported to Russia. She is assumed to have died in a U.S.S.R. prison camp shortly thereafter.

In 1944 the appellant escaped from Latvia. He proceeded to England in 1947. In 1948 the appellant obtained payment of 743,000 Swiss francs out of the account in the Swiss Bank Corporation in Zurich, Switzerland. On January 16, 1950, probate of the will of Emilija Benjamins was granted to the appellant by the High Court of Justice (Probate Division) in England and as her executor he obtained payment of the sum of $110,000 in American funds from the account with the Swiss Bank Corporation in London, England. It has not been suggested that the Bank was not entitled to make payment of these amounts to the appellant.

The estate of Emilija has been administered by paying one third of the net proceeds of the two bank accounts to

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the appellant's mother and two thirds to himself in his personal capacity. The respondent claims that one half of the proceeds of the bank accounts should have been paid to those entitled under the will of Antons Benjamins.

The appellant came to Canada in 1952. On February 18, 1960, the Surrogate Court of the County of York granted letters of administration with the will annexed of the estate of Antons Benjamins to the respondent. On April 17, 1961, the respondent commenced this action.

The judgments below are based largely on the effect of the wills contained in one notarial document executed by Antons Benjamins and Emilija Benjamins on May 5, 1937.

Following the opening recitals this document commences with the words:

> We, the married couple Antons Benjamins and Emilija Benjamins, nee Simsons, hereby express our Last Will in the form of the following Testament. I, The life work of both of us is the publication of the daily newspaper "Jaunakas zinas" and the weekly journal "Atputa". Working jointly we have developed and equipped these publications so as to form large press establishments with many branch offices. It is our express wish that this our life's work shall be continued in the same manner and spirit as hitherto and also that it shall continue to be an undivided and united enterprise.

There follow elaborate provisions for the carrying on of this publishing enterprise during the life of the surviving spouse and thereafter, which do not appear to have any direct bearing on the questions raised on this appeal.

The next paragraph reads as follows:

> II. As regards our estate, we hereby verify that only the two villas which are situate at No. 15 Juras iela, Majori, in the town of Regas Jurmala, namely the original villa and the villa now added to it, bought from Elizabete Rozite, which form one unit for mortgage purposes, are the separate property of Emilija Benjamins nee Simsons. On the other hand, all other property, except of course purely personal property such as clothes, jewellery, etc. is the joint property of both of us, irrespective of whether this property is registered in the name of one or both of us, and irrespective of whether our various publishing undertakings, enterprises and subsidiary branches should have hitherto been managed, concessioned and registered in the name of one or both of us. This appears, inter alia, from the 4 agreements executed between us in 1922 before the Notary Meike, namely a) the agreement relating to the immovable property No. 29.L Kaleju iela, Riga, and the immovable property No. 12 Audeju iela, Riga; b) the agreement relating to the printing works and book-binding plant, situated at No. 29.L Kaleju iela, Riga; c) the agreement relating to the "Jaunakas zinas" publishing undertaking and d) the agreement relating to the business premises at No. 12 Audeju iela, Riga,

but we consider it expedient to state here the said facts in case the agreements should be lost, and to elucidate that the same applies to all our subsequent undertakings, that is to say, that each of us owns an undivided half of all the undertakings.

Paragraph III, which follows, reads:

III. I, Antons Benjamins, appoint as my heirs to my entire present and future estate immovable and movable, wheresoever the same be situated and of whatsoever it may consist; 1) My wife Emilija Benjamins nee Simsons, to whom upon my death pass a) the undivided half share belonging to me in the immovable property known as "Valdeki" situated in the Kandava commune, together with the entire livestock and inventory, installations, equipments and all appurtenances, including the new farms acquired from various persons, parcelled off from the Aizdzire estate, which have not so far been registered in our—Antons and Emilija Benjamins—names, as well as my undivided half share in the furnishings and other movable property existing at "Valdeki", with the request that after my death, when Emilija Benjamins shall become the sole owner of "Valdeki" the economic condition and form of "Valdeki" shall be maintained as hitherto as a model agricultural farm; b) the undivided half share of the furnishings, works of art and household utensils in our joint flat at No. 12 Krisjana Barona iela, Riga, and generally all other movable property existing at the premises No. 12 Kr. Barona iela, Riga, and in additional all private motor cars; c) one undivided fourth share of the remaining property, movable and immovable, also including all our publishing undertaking, enterprises, etc. but subject to the reservation that this one undivided fourth share shall, upon the death of my wife Emilija Benjamins, nee Simsons, pass into the possession of the children of my own flesh namely in the first instance into the possession of my two daughters Anna Kuplais nee Benjamins, and Marta Cakste, nee Benjamins, but only if Anna Kuplais and Marta Cakste, or either of them separately, have by then resumed and maintained amicably polite relations with my wife Emilija Benjamins; in the opposite case, the said undivided one fourth share, or as the case may be, one undivided eighth share shall in their place devolve on my son Janis Benjamins.

There follow provisions for determining whether "amicably polite relations" have been established and the paragraph continues:

2) My son Janis Benjamins, to whom after my death passes a further two quarters share (See III, Section 1, clause c) of all my residuary estate after deduction of the bequests to Emilija Benjamins under III, Section 1, clauses a and b, and 3) my daughters Anna Kuplais, nee Benjamins, and Marta Cakste nee Benjamins, to whom passes after my death the last one quarter share (See III, Section 1, clause c and III, Section 2), namely to each fifty per cent of such one quarter share, that is, to each a one eighth share. Consequently on my death the children of my own flesh shall inherit a three quarter share in my entire estate after previous deduction of those objects which according to the aforesaid are bequeathed directly and unconditionally to my wife Emilija Benjamins, besides which in respect of this share I substitute the legal heirs of my children in accordance with the legal provisions regarding inheritance, . . .

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Paragraph IV opens with the words:

IV. I, Emilija Benjamins, nee Simsons, appoint as my heirs in respect of my entire estate, both present and future, immovable and movable, wherever it may be situated and of whatever it my consist: 1) My adopted son Georgs, alias Juris Benjamins, to whom, upon my death passes: a) the immovable property known as "Valdeki" . . .

This clause continues in words similar to those in cl. III (1)(a) but has added at the end the sentence:

And if I, Emilija Benjamins, should predecease my husband Antons Benjamins then this inheritance would be reduced to a half of what has been enumerated above.

The paragraph continues:

b) The whole of the furnishings, works of art and household utensils of our joint flat at No. 12, Krisjana Barona iela, Riga, and, generally, all other movable property existing at the premises No. 12 Kr. Barona iela, Riga; and c) two thirds of the whole of my residuary estate, and 2) my sister Anna Aichers, nee Simsons, and her minor son Peteris Aichers, to whom upon my death passes jointly the remaining one third share of the whole of my estate, with the exception of the property mentioned under IV Section I clauses a and b, but subject to the following provisions:

There follow in this paragraph and in para. V directions as to the administration of the one-third share given to Anna and Peteris Aichers which are not relevant.

Paragraph VI deals with the appointment of guardians and the revocation of earlier wills and contains the statement, quoted earlier in these reasons, as to the marriage contract regarding the separation of property.

It is common ground that as both Antons and Emilija Benjamins were at all times domiciled in Latvia, where Exhibit 2 was executed, the law of Latvia should govern the construction of this document.

The statement of claim contains no allegations as to what is the law of Latvia. The statement of defence makes reference to Latvian law in paras. 9, 11 and 13 which read as follows:

9. From time to time, including the time of the opening of the abovementioned account or accounts and depository, Emilija Benjamins transferred thereto monies from her deposit in Berlin and from her property in Latvia left to her separate control by her marriage agreement and the property reserved to her by Latvian law as the proceeds of her work.

11. The creation and maintenance of the said accounts and depository in Switzerland and England and the addition of monies thereto were prohibited by Latvian law and no lawful transfer or assignment or disposition by will or otherwise in respect thereof was permitted by law either in Latvia or by Latvian citizens and the parties so doing subjected themselves

to fines, imprisonment or in the alternative to loss of civil rights. Both Emilija and Antons Benjamins were Latvian citizens and therefore they did not intend the joint will referred to in paragraph 12 infra to embrace the Swiss bank accounts or depository or any other foreign property because a disclosure of their existence either to the Notary, by publication of the will or by the acts relating to probate required on the death of each testator, would subject the survivor or the estate of the deceased testator to the penalties mentioned above.

13. The said will did not include within its terms the monies and securities of Emilija Benjamins outside Latvia, nor did it cause the transfer of any property of the wife to the husband because he predeceased her, nor did it include the account and depository in the Swiss Bank Corporation because it was regulated by its own special contract, nor did it cause any transfer inter vivos of the property abroad because it was the wife's separate property inalienable under Latvian law in favour of her consort by a declaration in the manner of this will.

On this state of the pleadings three experts, two called by the plaintiff and one by the defendant, were examined and cross-examined as to the law of Latvia and in both Courts below findings were made with regard to that law. The findings made in the Court of Appeal were stated by Aylesworth J.A. as follows:

Much evidence was given at trial in respect of the Latvian law relating to the questions in issue between the parties. I shall state in my own words the following propositions which would appear to emerge from that evidence:

(1) Joint property is held in equal shares by the owners with no right in law by survivorship.

(2) No evidence is admissible to alter or explain, the meaning of a will or the intention of the parties unless the will is ambiguous.

(3) All dispositions which do not contradict law or common sense shall be interpreted in a manner so as to keep to the extent possible the testament in force.

(4) Capacity of persons to contract is regulated by the law of the domicile. If as the result of a marriage contract the parties had separate property this could be altered by a later agreement or by a will.

(5) Under the old Latvian code in force prior to January 1st, 1938, in the absence of an anti-nuptial contract to the contrary there was community of property between two married people.

(6) Unless there was an agreement to the contrary the coming into force of the new code on January 1, 1938, did not alter the status of married people and the regime of separate property or community of property, whichever was the case, continued.

(7) If as a result of marriage contract or otherwise, spouses have separate property, it may become joint by a term in the will to that effect.

(8) The right of ownership of Antons Benjamins or Emilija Benjamins and their respective heirs to the moneys and assets deposited in the Swiss Bank Corporation in Zurich, Switzerland, and the Swiss Bank Corporation in London, England, did not depend upon the contracts entered into by the depositors with the banks and could be made the subject of contract between Antons and Emilija without the bank being a party thereto.

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I find it somewhat difficult to discover any sufficient basis in the pleadings to warrant the making of these findings; however, I did not understand either counsel to question the first of them and the appeal was argued on the assumption that under the law of Latvia an item of property which was owned jointly by Antons Benjamins and Emilija Benjamins would on the death of either of them belong one half to the survivor and one half to the estate of the deceased; in other words, that the result would be the same as if in Ontario the item of property had been owned by the spouses as tenants in common. For the purposes of this appeal I accept that assumption.

With regard to the moneys deposited with the bank in Zurich I agree with the conclusion arrived at in the Courts below. Those moneys were deposited in the joint names of the spouses. There is no evidence as to the source of the moneys and *prima facie* they would belong equally to both. I agree with the view of the learned trial judge that the document, Exhibit 4, quoted in part above, defines the rights of the depositors or the survivor of them to withdraw the funds deposited and the right of the bank to make payment and that it does not deal with the ownership of those funds as between the depositors. I agree with the learned trial judge that the decision of this Court in *Niles v. Lake*[1] is applicable. I base my judgment in this regard not on the terms of the will, Exhibit 2, but on the absence of evidence to rebut the presumption that the moneys belonged to the two depositors in equal shares. In my opinion the appeal in regard to this account fails.

Turning now to the question of the ownership of the moneys in the bank account in London, as has already been stated, this account was opened in the name of Emilija Benjamins alone. The relationship between her and the bank was that of creditor and debtor. The bank knew no one else in the transaction and clearly it could pay the moneys on deposit to no one other than Emilija; she had the sole legal title to this chose in action and the onus of proving that Antons Benjamins was entitled to any interest in it lay upon the respondent.

In answer to a question put by the bench in the course of the argument in this Court counsel for the respondent stated that the plaintiff's claim was based upon the terms

[1] [1947] S.C.R. 291, 2 D.L.R. 248.

of para. II of the joint last will executed on May 5, 1937, which has already been quoted.

The learned trial judge held, on the evidence of the experts as to the law of Latvia, that the will contained no agreement express or implied that it should be irrevocable by either spouse. This finding was not challenged before us. It is in accordance with the law of Ontario, the applicable principles of which are clearly stated in the reasons of Schroeder J., as he then was, in *Re Kerr*[1].

The learned trial judge went on to hold that there was no ambiguity in the language of the will and that it was agreed "that the word 'joint' as used in connection with 'property' means 'equally', that is that each owns an individual half and with no right of survivorship".

The learned trial judge construed the words in para II, "all other property, except of course purely personal property such as clothes, jewellery, etc. is the joint property of both of us irrespective of whether this property is registered in the name of one or both of us" as meaning "all the property of the parties of whatsoever kind and wheresoever situate".

The reasons of the learned trial judge dealing with the bank account in London conclude as follows:

> I am therefore finding that the intention of the testators was that the Will should refer to and dispose of all their property as it is described in paragraph III and IV of the Will in the following words:
>
> . . . my entire present and future estate immovable and movable, wheresoever the same be situated and of whatsoever it may consist.
>
> Having reached this conclusion it is then necessary to determine whether the expression in this Will of such an intention is capable of overriding and revoking the separate property provisions of the marriage contract. The plaintiff's expert witness Liepins expressed the opinion that this word had "constitutive" effect, that is, that it created rights, but he was unable to support this opinion by reference to any specific section of the Latvian Civil Code. However the evidence of the defence expert Rusis indicating that a verbal agreement when reduced to writing can create rights and that if the parties signed a written statement indicating their agreement as to ownership of property, it would create rights.
>
> From 1922, the date of the marriage contract, to 1937, the date of the Will, it is clear there had grown up a large and prosperous business enterprise, bringing a substantial improvement in the financial position of the parties. In 1933 a deposit account in *both names* was opened in a Swiss Bank. From these facts and the general intention throughout the Will, I

[1] [1948] O.R. 543.

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conclude that there was an agreement between the husband and wife, reduced to writing in the Will, and that this was sufficient to and did override and revoke the marriage contract.

I should refer to a submission by Mr. Weir that the issues here must be considered as of June, 1939, the date of the death of Antons Benjamins, this being the date when his Will took effect. I do not accept this view. The funds in question are those in existence after the death of both parties and are subject to a disposition according to a document signed by the wife (as well as the husband) taking effect on her death. From the conclusions above mentioned, it therefore follows that the bank account in London, England is property to be disposed of according to the Will, namely equally between the testator's estates.

The effect of the evidence of the witness Rusis which the learned trial judge accepted is simply that if two parties make a binding oral contract and later sign a written acknowledgment or declaration that they have made such a contract the contract can be enforced. This does not appear to me to differ from the law of Ontario.

Aylesworth J. A., who gave the reasons of the Court of Appeal, was in substantial agreement with the learned trial judge. He construes para. II of the will, "coupled with the mutual intention to be derived from the whole contents of the will in respect of the estate and property embraced therein" as indicating that there was a prior oral agreement between the spouses that, with the exception of the properties referred to in para. II as being the separate property of Emilija, all property owned by either of them should become the joint property of both and that this agreement applied not only to all property owned at the date of the will but to all property acquired by either thereafter.

Aylesworth J. A. agreed with the view of the learned trial judge that the words of the will were free from ambiguity and that extrinsic evidence of the intention of the parties was rightly excluded.

In rejecting the argument of counsel for the appellant that para. II contains no words of promise and that none should be implied, Aylesworth J.A. says:

However, if it be necessary to read into clause II words of promise to make it effective by Latvian law to carry out the intention of the parties then I would not hesitate to do so and would give to the clause the same effect as though it had included an express promise on the part of each of the parties to transfer to the other an equal right, title and interest in all property then possessed or any time thereafter possessed by them or either of them with the exception only of property expressly excluded in the clause.

With the greatest respect, I find myself unable to agree with this or with the effect which the Courts below have ascribed to para. II, on which alone is founded the respondent's claim to a share in the London account.

I have already quoted, perhaps at undue length, from the provisions of the will.

In considering para. II it will first be observed that it is not of testamentary character, it contains no words of gift of anything to anyone. It is a recital of facts, and, in my view, of presently existing facts, as to the extent and ownership of items of property.

The first sentence states that two villas *are* the separate property of Emilija. The next sentence states that "all other property except of course purely personal property such as clothes, jewellery, etc. *is* the joint property of both" irrespective of the name or names in which any particular item is registered. The third sentence states that the facts set out in the second sentence appear, *inter alia,* from four notarial agreements executed by the spouses in 1922, which are itemized, and concludes:

> but we consider it expedient to state here the said facts in case the agreements should be lost and to elucidate that the same applies to all our subsequent undertakings, that is to say, that each of us *owns* an undivided half of all the undertakings.

Were it not for the presence in the second sentence of para. II of the words "except of course purely personal property such as clothes, jewellery, etc." I would have inclined to agree with the submission of counsel for the appellant that the second and third sentences have reference only to undertakings of a business nature and I am far from satisfied that this submission should be rejected, but, for the purposes of this appeal, I am prepared to accept the view of the Courts below that the meaning of the word "property" as used in para. II is not so limited. I cannot however accept the view that the paragraph refers to property to be acquired after the date of the will.

The words which I have italicized in the above summary of the provisions of para. II are all in the present tense. It is argued that this is of little significance because by the law of Ontario (and there was neither plea nor proof that the law of Latvia differs on this point) the will is to be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it

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had been executed immediately before the death of the testator, unless a contrary intention appears by the will. With respect, it appears to me that this rule of construction is irrelevant to the question which we have to decide. The rule finds its usual application in determining whether a will disposes of property owned by the testator at the date of his death which he did not own at the date of the will. It does not assist in deciding whether the testator or some other person was the owner of a particular item of property. The question is not whether Antons' will disposed of his interest in the London account, it is, rather, whether Antons had any interest in that account to dispose of. The following observation in *Hawkins on Wills,* 2nd ed., at p. 22, is supported by the authorities:

> The words "with reference to the real and personal estate comprised in it" mean "so far as the will comprises dispositions of real and personal estate".

There are no words of disposition in para. II; those used elsewhere in the will must be considered in due course.

Argument was directed to the use of the word "subsequent" in the final sentence of the paragraph. It is used only in connection with the word "undertakings". This adjective means "later in time than" and, in my view, the "subsequent undertakings" referred to are those entered into by the spouses since the agreements of 1922 up to the time of the signing of the will. To hold, as the Courts below appear to have done, that these words include all future undertakings would seem to require the insertion of the words, italicized below, so that the clause would read:

> and to elucidate that the same applies *and shall apply* to all our subsequent *and future* undertakings, that is to say, that each of us owns *and shall own* an undivided half of all the undertakings.

The absence of any words of futurity in para. II has added significance when it is observed that in the opening words of para. III, which follows immediately, future property is expressly referred to. The words are:

> I, Antons Benjamins, appoint as my heirs to my entire present and future estate

The opening words of para. IV are similar. When the testator and testatrix intended to deal with future property they said so.

I am unable to find in para. II of the will, either standing alone or read as it must be in the context of the whole will, any words of promise as to property to be acquired thereafter by either of the spouses. The will was obviously prepared by a skilful draftsman and I find it difficult to suppose that if the parties had intended it to operate as a contract whereby each agreed to settle all property thereafter acquired by either of them upon both of them jointly plain words would not have been used to effect this result.

Construed in the manner most favourable to the respondent which its words will bear para. II is, in my opinion, an acknowledgement by each of the spouses that all property then standing in the names of either or both of them (except the two villas and "purely personal property") is the joint property of both. Proceeding on the assumption (which I make for the purposes of this appeal) that this is the correct construction of para. II, the facts from which the ownership of the bank account in London must be determined are the following : (i) in 1922 when the spouses were married the husband was an undischarged bankrupt and the wife was possessed of substantial property; (ii) on May 5, 1937, the spouses were possessed of numerous business enterprises, the farms making up "Valdeki" and, no doubt, other properties including the moneys in the bank account in Switzerland and, subject to the exceptions mentioned above, acknowledged that all the property of either of them was the joint property of both; (iii) the terms of the will recognized, and proceeded on the basis, that the spouses were separate as to property, although at the date of the will the separate property of Emilija consisted only of the two villas and "purely personal property"; (iv) on April 6, 1939, Emilija deposited $110,000 in the bank account in London in her name alone and that sum was standing to her credit when Antons died on June 14, 1939; (v) there is no evidence as to the source of the $110,000.

I have used above the form of expression that Emilija Benjamins deposited the $110,000 in the bank in London. The evidence is silent as to how or by whom this deposit was made but the combined effect of para. 11 of the statement of claim and para. 10 of the statement of defence is to state that it was made by Emilija. I regard this fact as unimportant. Improper conduct is not presumed and there is nothing in the record to suggest that Emilija would

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or did take any money which belonged in whole or in part to Antons without his knowledge and consent. The evidence of Anna Aichers tendered at the trial on behalf of the appellant was to the effect that Antons had stated in her presence and that of Emilija that this account was to belong to Emilija but this evidence was rejected by the learned trial judge as inadmissible. Because of the view I take, upon the evidence that was admitted, as to the ownership of this fund, I do not find it necessary to decide whether this evidence of Anna Aichers was rightly rejected and I disregard it.

Neither in the pleadings nor in the evidence is there anything to suggest that the answer to the question as to the ownership of the money in the London bank account would be different under the law of Latvia from that which should be given under the law of Ontario, which does not differ, in this regard, from the law of England.

The situation then is that Emilija, at the date of Antons' death, had the sole legal ownership of these moneys. There is no evidence that any of the moneys deposited belonged to Antons or were supplied by him or that they were the joint moneys of the spouses; but even had there been such evidence the presumption of a resulting trust, which, but for the relationship between them, would then have arisen from the fact that moneys belonging in whole or in part to Antons had been deposited in the name of Emilija, would be rebutted by the circumstance that the latter was the wife of the former; in the absence of further evidence the law would presume a gift by the husband to the wife. This presumption of gift would in turn be capable of being rebutted by evidence but there is no evidence in the record to rebut it. I have already given my reasons for holding that no contract between the spouses as to the ownership of property acquired after the date of the will was established and I can find no ground for holding that Antons was entitled to any equitable interest in this fund.

In the passage from his reasons, quoted above, the learned trial judge mentions as one of the grounds supporting the conclusion at which he arrived that the account opened in Switzerland in 1933 was in both names. With respect, this circumstance seems to me to point in the opposite direction as indicating that when the parties wanted an account to belong to them jointly they opened it in the names of both and not of one only.

There is no room for the suggestion that the will of Emilija bequeathed any interest in the London bank account to Antons. Had it done so the benefit conferred would have lapsed on his death. In the clearest terms her will leaves her entire estate to the appellant and to Anna and Peteris Aichers.

Since Emilija was the sole legal owner of the London bank account the onus of proving that Antons had some equitable interest in it lay upon him, or his personal representative, and it may be observed in passing that there is nothing in the record to shew that the money deposited in the account did not consist of the proceeds of the sale of the villas or of the jewellery, which in any view of the case, were the separate property of Emilija.

I conclude that at the date of the death of Antons Benjamins and at the date of the death of Emilija Benjamins the latter was the person solely entitled both at law and in equity to the moneys in the London bank account.

During the argument in this Court counsel for the appellant submitted that, if the respondent should be held entitled to a share in either bank account on the ground that Emilija in her lifetime and after her death the appellant were bound to pay the same to Antons or to his estate as a matter of contract, the appellant should be allowed to plead the Statute of Limitations, and asked leave to amend the statement of defence accordingly.

Since in my view the respondent's action fails as to the London account it is necessary for me to consider this application in regard to the bank account in Switzerland only.

As appears from what I have said above, it is my view that Antons in his lifetime and after his death his estate were entitled to one half of the money in the bank account in Switzerland because Antons and Emilija were joint owners of it without any right of survivorship. When the whole fund came into the hands of the appellant he held one half of it as a constructive trustee for the estate of Antons and it is on that basis that he is liable to account. On this view the statute would not assist the appellant as he still retains or has converted to his own use the half of the fund which should have gone to Antons' estate. I would refuse the application to amend the statement of defence. I think it only fair to the appellant to add that the

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record indicates that he acted throughout in the *bona fide* belief, which turns out to have been mistaken, that on the death of Antons this account became the sole property of Emilija.

It remains to consider one further matter raised by counsel for the appellant. He submits that in taking the account directed by the judgment the Master should take into consideration any amounts which the appellant has been called upon to pay to any taxing authority in respect of the income received by him on that part of the fund which should have been paid over to the estate of Antons. In my opinion there is not sufficient evidence in the record to enable us to deal with this question and it should be left to be dealt with by the Master when the relevant facts and figures are before him.

In the result, I would dismiss the appeal as to the bank account in Switzerland and allow the appeal as to the bank account in London. I would direct that the formal judgment at the trial, as amended by the judgment of the Court of Appeal, be further amended so that para. I thereof shall read:

1. This Court doth declare that the plaintiff is entitled to one-half of the amount standing to the credit of Antons Benjamins and Emilija Benjamins in an account in the Swiss Bank Corporation in Zurich, Switzerland, as of the date of the receipt of such moneys by the defendant, and doth order and adjudge the same accordingly.

and so that cl. (*a*) of para. 2 thereof shall read:

(*a*) The amount of the one-half share of the plaintiff in all moneys and assets received by the defendant in respect to the account referred to in paragraph 1 hereof, after deducting therefrom one-half of such amount as the Master may find to have been reasonably incurred by the defendant in getting into his hands all such moneys and assets, the resulting net amount of the one-half share of the plaintiff to be hereinafter referred to in this paragraph as the "net amount".

As my view as to the ownership of the London bank account is not shared by the other members of the Court, nothing would be gained by my stating what order as to costs I would have proposed had my view been accepted.

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

RITCHIE J.:—The circumstances giving rise to this litigation have been fully described in the reasons for judgment

of my brother Cartwright which I have had the benefit of reading and I will endeavour not to repeat them to any greater extent than is necessary to make my meaning clear.

The late Antons Benjamins and his wife, Emilija, who were separate as to property in accordance with a contract made at or before the time of their marriage, executed a joint will on May 5, 1937, para. II of which reads in part as follows:

> As regards our estate, we hereby verify that only the two villas which are situate at No. 15 Juras iela, Majori, in the town of Rigas Jurmala, namely the original villa and the villa now added to it . . . which form one unit for mortgage purposes, are the separate property of Emilija Benjamins nee Simsons. On the other hand, all other property, except of course purely personal property such as clothes, jewellery, etc. is the joint property of both of us, irrespective of whether this property is registered in the name of one or both of us, and irrespective of whether our various publishing undertakings, enterprises and subsidiary branches should have hitherto been managed, concessioned and registered in the name of one or both of us. This appears, inter alia, from the 4 agreements executed between us in 1922 . . . .

There follows a description of the property to which these 4 agreements relate and the paragraph then concludes by saying:

> . . . but we consider it expedient to state here the said facts in case the agreements should be lost, and to elucidate that the same applies to all our subsequent undertakings, that is to say, that each of us owns an undivided half of all the undertakings.

Both testators were domiciled in Latvia where Antons Benjamins died on June 14, 1939, and from whence his wife was transported to Russia where she is presumed to have died in 1941.

The question at issue in this appeal is whether certain moneys deposited in bank accounts in Zurich, Switzerland and London, England were the separate property of Emilija Benjamins and thus available for distribution amongst her heirs or whether they were the joint property of herself and her husband so as to entitle his heirs to a one-half interest therein.

The funds deposited in Zurich were placed in a joint account with the Swiss Bank Corporation on January 23, 1933, more than four years before the will was drawn, and for the reasons stated by the Court of Appeal for Ontario

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as well as those stated by my brother Cartwright, I am of opinion that, notwithstanding the provisions of the "Contract Respecting a Joint Account Held Jointly and Severally" entered into between the depositers and the bank, these moneys are to be treated as belonging to the testator and testatrix in equal shares.

The London account was opened in the name of the wife alone three months before the death of the husband and two years after the will was drawn and the question of whether or not the heirs of Antons Benjamins became entitled to a one-half interest in these funds in my opinion depends almost entirely upon the construction to be placed on the second paragraph of the will.

As has been pointed out by my brother Cartwright, this appeal was argued on the assumption that under the law of Latvia an item of property which was owned jointly by the testator and testatrix would on the death of either of them belong one half to the survivor and one half to the estate of the deceased, and it has been accepted by both the Courts below that the terms of a marriage contract providing that the husband and wife should be separate as to property could be validly revoked under Latvian law so as to make the property of each the joint property of both. The question to be determined is whether under the true construction of the present will the testator and the testatrix intended to achieve and did achieve this end with respect to the funds of unknown origin deposited in the wife's name in the London account.

In the course of the reasons for judgment which he delivered on behalf of the Court of Appeal, Alyesworth J. A. stated the issues in the following terms:

> The rights of the respondent as administrator with the will annexed to the estate of Antons Benjamins depend primarily on the interpretation and effect in law of the will of the late Antons Benjamins and Emilija Benjamins made in 1937 *and from that standpoint it is necessary for the Court initially to determine the rights of the late Antons Benjamins immediately following his death.* Nevertheless the action brought by the respondent in form and in substance is for an accounting by the appellant of all assets of the estate of the late Antons Benjamins had and received by the appellant and for all profits derived by the appellant from the use of any and all such assets. Disposition of the issues thus raised is the realistic and far from simple task with which the court must concern itself.

The italics are my own.

The effect to be given to such a will as this is described in Halsbury's Laws of England, 3rd ed., vol. 39 at p. 846 where it is said:

> A joint will is a will made by two, or more, testators contained in a single document, duly executed by each testator and disposing either of their separate properties or of their joint property. It is not, however, recognized in English law as a single will. *It is in effect two or more wills; it operates on the death of each testator as his will disposing of his own separate property; on the death of the first to die it is admitted to probate as his own will and* on the death of the survivor, if no fresh will has been made, it is admitted to probate as the disposition of the property of the survivor.

The italics are my own.

These observations are based on such authorities as *In the Goods of Raine*[1]; *Re Duddell, Roundway v. Roundway*[2]; they received the express approval of Doull J. in *Re Creelman, McIntyre v. Gushue et al.*[3], and the acceptance of the principle so stated is implicit in the decision of Schroeder J. in *Re Kerr*[4].

Having regard to all the above and in the absence of any evidence of a contrary rule prevailing under Latvian law, I think it is to be accepted that on the death of Antons Benjamins *his* will became effective to control the disposition of a one-half interest in any property which was at that time jointly held by himself and his wife.

The question of whether the London bank account was so jointly held depends as I have indicated upon the construction to be placed on the second paragraph of the will. In my view this paragraph is not only descriptive of the understanding existing between husband and wife at the time of preparing the will as to joint ownership of certain property therein referred to, but it also manifests the intention of both of them that on the death of each his or her will is to be treated as an effective disposition of one half of such property.

In this regard I adopt the following passage from the reasons for judgment of Mr. Justice Aylesworth:

> The facts that the parties had knowledge of the existence and effect of the marriage contract and the terms thereof at the time the will was made, and that they made the declaration appearing in clause II, coupled

[1] (1858), 1 Sw. & Tr. 144.
[2] [1932] 1 Ch. 585 at 592.
[3] [1956] 2 D.L.R. 494 at 499.
[4] [1948] O.R. 543.

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with the mutual intention to be derived from the whole contents of the will in respect of the estate and property embraced therein—all these considerations afford sufficient evidence to infer that there was a prior oral agreement between the spouses; in other words it was understood and agreed between them that their respective estates including "all other property" save as expressly excepted in clause II of the will, should be the joint property of both from and after the date of the will.

I am of opinion also that the words "as regards our estate . . ." which occur at the beginning of the second paragraph are to be construed as meaning "as regards the estate hereinafter disposed of" and that the words "all other property except of course purely personal property such as clothes, jewellery, etc. is the joint property of both of us . . ." are sufficiently broad to include moneys on deposit in a bank in the names of either the testator or testatrix or both of them.

The only question remaining to be determined is whether the language of the second paragraph is to be treated as relating only to the property owned by the Benjamins at the time when the will was made, or whether it is to be so construed as to include property thereafter acquired by either of them.

I agree with my brother Cartwright that in the absence of evidence of any Latvian law to the contrary the will is to be construed in accordance with the provisions of s. 26(1) of *The Wills Act,* R.S.O. 1960, c. 433 which read as follows:

> 26(1) Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

This section has been interpreted as applying only "in so far as the will comprises dispositions of real and personal estate" (see Hawkins on Wills, 2nd ed., p. 22, *Re Karch*[1], *per* Middleton J. at 511 and 512, *In Re Chapman, Perkins v. Chapman*[2], *per* Vaughan Williams L.J. at 435), and it is contended that the second paragraph of the present will is concerned with the recital of facts rather than the disposition of property and that it should accordingly be construed without reference to the statute. In my view, however, the paragraph in question is descriptive of the understanding of the husband and wife as to the nature of the interest

[1] (1921), 50 O.L.R. 509. [2] [1904] 1 Ch. 431.

of each of them in "the real and personal estate comprised in" the dispositions which are the subject of the succeeding paragraphs, and unless a contrary intention can be found in the language of the will it is to be construed as though it had been executed immediately before the death of Antons Benjamins.

It is also contended on behalf of the appellant that the second paragraph is to be treated as referable only to property owned at the date of the will because the provisions declaring the estate to be "the joint property of both of us" are phrased in the present tense and that there are no words which expressly include the after-acquired property of either of the parties, but the reference to "all other property except of course purely personal property . . ." is general rather than specific and the principle to be applied appears to me to be well summarized in the decision of Middleton J. in *Re Ingram*[1], at p. 97 where it is said:

> The true principle is happily stated by Spragge, C.J.O. in *Vansickle v. Vansickle* (1884), 9 A.R. 352, 354: "I take the proper course to be, to read the will assuming that the testator had read it immediately (using that word as meaning very shortly) before his death, and that, seeing nothing in it that he desired to change, and knowing that it would be read as the then expression of his will and intention, he had chosen to leave it as it was, although, if the rule of construction had been otherwise, and his will was to be read as expressing his intention at its date, he would, when reading it shortly before his death, have made alterations which—the rule being as it is—he judged not to be necessary. This of course can only be where a contrary intention does not appear by the will itself".
>
> From all the cases two other general principles can be deduced. *First, when the words used to describe either real or personal property given are general, they will pass all property which falls within the words used, looking at the will as though executed immediately before death.* Second, when the property given is specifically described, the specific description is not enlarged by the statutory rule of construction.

The italics are my own.

In my opinion, the employment of the present tense in conjunction with a general description of property does not of itself constitute evidence of "a contrary intention" within the meaning of s. 26(1) of *The Wills Act,* and with the greatest respect for those who may hold a different view, I am unable to find any language in the will which limits the joint estate created by the second paragraph to personal

[1] (1918), 42 O.L.R. 95.

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property owned by the testator and testatrix at the date when the will was made.

For these reasons as well as for those contained in the reasons for judgment of Aylesworth J.A. I agree with the conclusion which he expressed in the following language:

> I conclude that at the time of the death of Antons Benjamins he had the right to one-half of the moneys and securities on deposit in the Swiss Bank Corporation in Zurich, Switzerland and to one-half of the moneys on deposit in the name of Emilija Benjamins in the Swiss Bank Corporation in London, England. It is not suggested that subsequent to his death his rights changed in any way up to the date of the receipt by the appellant of all the moneys and securities in both bank accounts.

When the funds in both bank accounts came into the hands of the appellant he held one half of them as constructive trustee for the estate of Antons Benjamins and I adopt the reasoning of my brother Cartwright with respect to the *Statute of Limitations* in this regard. It is on this basis that the appellant is liable to account, and I agree with Aylesworth J.A. that the accounts and inquiries should be taken in accordance with the directions given in the order granted by Mr. Justice Schatz subject to the amendment made by order of the Court of Appeal for Ontario. I agree also with Mr. Justice Cartwright that, in taking the accounts, the question of whether consideration should be given to any amounts which the appellant has been called upon to pay to any taxing authority in respect of the income received by him on the fund, is one which should be left to be dealt with by the master when the relevant facts and figures are before him.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs, CARTWRIGHT J. *dissenting in part.*

Solicitors for the defendant, appellant: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.

Solicitors for the plaintiff, respondent: Taylor, Joy & Baker, Toronto.

HER MAJESTY THE QUEEN .....APPELLANT;

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*Nov. 24
Dec. 21

AND

RITA TOUPIN .....RESPONDENT.

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

Criminal law—Common gaming house—Slot machine—Conviction quashed by Court of Appeal—Whether player has control over operation—Whether dissent in Court of Appeal on question of law—Criminal Code, 1953-54 (Can.), c. 51, ss. 170(2)(b)(i), 176.

The respondent's premises contained an automatic machine whereby a person, on the insertion of a coin in the machine, obtained five small balls which the person could by activating a device, propel one at a time on an inclined table. These balls would strike obstructions of all kinds which would direct them in various directions. When the balls struck these obstructions, lights would flash on, points would be registered and a player who reached one thousand points with the five balls would get to play an additional game free. The respondent was convicted of keeping a common betting house by having in her premises a slot machine called "Spot-A-Card", contrary to s. 176 of the *Criminal Code*. Her conviction was set aside by a majority judgment in the Court of Appeal on the ground that the prosecution had not discharged the burden of proof that "the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator". The Crown appealed to this Court.

Held (Cartwright J. dissenting): The appeal should be allowed and the conviction restored.

Per Taschereau C.J. and Abbott J.: The machine in question served for vending services and the result of one of any number of operations was a question of chance and uncertainty for the player. Even if the balls could be controlled to an appreciable extent, as found by the Court of Appeal, there would be an element of mixed skill and chance rendering the machine illegal. It was not a question of knowing whether the operation of the machine depended on the skill of the player, it must be determined whether the operation depended on chance and was therefore a question of uncertainty.

Per Fauteux and Hall JJ.: The machine was "a slot machine" within the meaning of s. 170(2)(*b*)(i) of the Code. The finding by the majority that "the ball could be controlled to an appreciable extent" was a finding of fact and was consistent with the finding of fact made by the dissenting judge that the results were a matter of chance or uncertainty. The dissent was on the question of law as to whether the prosecution had discharged its burden of proof. This burden is met even when the proof establishes some measures of control, but there remain elements of "chance or uncertainty". Once it is accepted that the player has only partial control over the ball, then all elements of the offence have been met.

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*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott and Hall JJ.

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Per Cartwright J., *dissenting*: The Crown had no right of appeal in this case under s. 598(1)(*a*) of the *Criminal Code,* because the dissent in the Court below was not on a question of pure law. The majority judgment reached the conclusion on the evidence that a player could control the operation to an appreciable extent. Whereby the dissenting judge would have sustained the conviction on the finding of fact that the evidence showed that any effective control by the player of the operation of the machine was impossible. This was a dissent as to the facts.

Droit criminel—Maison de jeu—Appareil à sous—Verdict de culpabilité renversé par la Cour d'appel—Question de savoir si le joueur a un contrôle sur l'opération—Question de savoir si la dissidence en Cour d'appel porte sur une question de droit—Droit criminel, 1953-54 (Can.), c. 51, arts. 170(2)(b)(i), 176.

Un local occupé par l'intimée était muni d'un appareil automatique qui permettait à une personne, moyennant une somme de cinq sous que la personne plaçait à l'intérieur de la machine, d'obtenir cinq boules, qu'au moyen d'un éjecteur activé par un ressort elle dirigeait sur une table ayant un plan incliné. Ces boules frappaient des obstructions de toutes sortes et étaient projetées dans des directions différentes et variables. Quand elles frappaient ces obstructions, des lumières s'allumaient, des points s'enregistraient, et le joueur qui avait compté mille points avec cinq boules avait droit à une partie additionnelle gratis. L'intimée fut trouvée coupable d'avoir tenu une maison de jeu en ayant dans son local un appareil à sous appelé «Spot-A-Card», contrairement à l'art. 176 du *Code criminel.* Le verdict de culpabilité fut cassé par un jugement majoritaire de la Cour d'appel pour le motif que la Couronne n'avait pas rencontré le fardeau de la preuve que «le résultat de l'une de n'importe quel nombre d'opérations de la machine est une affaire de hasard ou d'incertitude pour l'opérateur. La Couronne en appela devant cette Cour.

Arrêt (Le juge Cartwright étant dissident): L'appel doit être maintenu et le verdict de culpabilité rétabli.

Le juge en chef Taschereau et le juge Abbott: La machine en question était utilisée pour la vente de services et le résultat de l'un ou de n'importe lequel nombre d'opérations était une affaire de hasard et d'incertitude pour l'opérateur. Même si le joueur pouvait avoir un certain contrôle, comme la Cour d'appel l'a décidé, il y aurait quand même un élément mixte de science et de hasard qui rendrait la machine illégale. Il ne s'agit pas de savoir si l'une des opérations de la machine dépend de l'habileté du joueur, mais bien de déterminer si l'une des opérations dépend du hasard et est en conséquence une affaire d'incertitude.

Les juges Fauteux et Hall: L'appareil en question était un «appareil à sous» selon l'expression de l'art. 170(2)(*b*)(i) du Code. La conclusion de la majorité à l'effet que la boule pouvait être contrôlée jusqu'à un certain point était une conclusion sur les faits et était compatible avec la conclusion du juge dissident que le résultat de l'opération était une affaire de chance ou d'incertitude. La dissidence portait sur la question de droit de savoir si la Couronne avait rencontré le fardeau de la preuve. Ce fardeau est rencontré même si la preuve établit une certaine mesure de contrôle, s'il demeure des éléments de chance ou d'incertitude. Une fois qu'il est admis que le joueur a seulement un contrôle partiel sur la boule, tous les éléments de l'offense sont alors présents.

Le juge Cartwright, *dissident*: La Couronne n'avait pas un droit d'appel en vertu de l'art. 598(1)(*a*) du *Code criminel,* parce que la dissidence enregistrée à la Cour d'appel ne portait pas sur une question de droit pur. Le jugement de la majorité en vint à la conclusion sur la preuve qu'un joueur pouvait contrôler l'opération jusqu'à un certain point. Par contre, le juge dissident aurait maintenu le verdict de culpabilité en concluant sur les faits que la preuve démontrait qu'un contrôle effectif par le joueur était impossible. Ceci était une dissidence sur les faits.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], setting aside the respondent's conviction of having kept a common gaming house. Appeal allowed, Cartwright J. dissenting.

Raymond Julien, Q.C., and *C. Goulet,* for the appellant.

Lawrence Diner and *Pierre Bernier,* for the respondent.

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

LE JUGE EN CHEF:—L'intimée a été accusée d'avoir commis l'offense suivante:

Avoir tenu le quatorzième jour de décembre 1962 une maison de jeu dans un local situé au numéro civique 503, rue St-Clément, à Montréal, contrairement à l'article 176, paragraphe 1, du Code Criminel.

M. le Juge René Hébert, de la Cour municipale de la Cité de Montréal, a déclaré l'intimée coupable de l'offense reprochée et l'a condamnée au paiement d'une amende de $200 ou, à défaut de paiement de ladite amende, à trente jours de prison.

La cause a été portée en appel et la Cour[1] a cassé et annulé le jugement de culpabilité prononcé par la Cour municipale et a acquitté Rita Toupin, M. le Juge Rivard ayant enregistré sa dissidence.

L'article du *Code criminel* qui nous intéresse pour la détermination de la présente cause est le suivant:

170. (1) Aux fins des procédures prévues par la présente Partie, un local que l'on trouve muni d'un appareil à sous est de façon concluante présumé une maison de jeu.

(2) Au présent article, l'expression «appareil à sous» signifie toute machine automatique ou appareil à sous

(*a*) employé ou destiné à être employé pour toute fin autre que la vente de marchandises ou services; ou

[1] [1964] Que. Q.B. 249.

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(*b*) utilisé ou destiné à être utilisé pour la vente de marchandises ou services

(i) si le résultat de l'une de n'importe quel nombre d'opérations de la machine est une affaire de hasard ou d'incertitude pour l'opérateur;

(ii) si, en conséquence d'un nombre donné d'opérations successives par l'opérateur, l'appareil produit des résultats différents; ou

(iii) si, lors d'une opération quelconque de l'appareil, celui-ci émet ou laisse échapper des piécettes ou jetons.

C'est, dans cet article 170, le paragraphe 2(*b*)(i) qui nous intéresse particulièrement.

Le mécanisme de cet appareil est assez compliqué. Moyennant une somme de cinq sous, que le joueur place à l'intérieur de la machine, il obtient cinq boules, qu'au moyen d'un éjecteur activé par un ressort, il dirige sur une table qui est sur un plan incliné. Ces boules frappent des obstructions de toutes sortes, sont projetées à gauche ou à droite, dans des directions évidemment différentes et variables. Quand elles frappent ces obstructions, des lumières s'allument, des points s'enregistrent, et le joueur qui a compté 1,000 points avec cinq boules a droit à une partie additionnelle gratis.

Je suis d'opinion que cette machine est destinée à être utilisée et est en effet utilisée pour la vente de *services* et que le résultat de l'un ou de n'importe lequel nombre d'opérations est une affaire de hasard et d'incertitude pour l'opérateur. *La Reine v. Topechka*[1].

Le joueur ne contrôle pas la partie, et je ne puis m'accorder avec Casey J. qui dit que «the ball can be controlled to an *appreciable extent*». Dans ce cas, il y aurait un élément mixte de science et de hasard, ce qui rendrait la machine illégale.

Il y a bien des jeux où le succès dépend en partie du hasard, comme le hockey, le football, etc., mais, quand le résultat, bon ou mauvais, ne dépend pas du joueur, mais du mécanisme de la machine sur lequel le joueur n'a pas de contrôle, il y a violation de la loi.

Dans le cas qui nous occupe, contrairement à ce qui s'est présenté dans d'autres causes déjà entendues par cette Cour, il ne s'agit pas de savoir si l'une des opérations de la machine dépend de l'habileté du joueur, mais bien de déter-

[1] [1960] R.C.S. 898, 34 C.R. 148, 34 W.W.R. 97, 128 C.C.C. 404.

miner si l'une des opérations dépend du *hasard* et est en conséquence une affaire d'*incertitude*. M. le Juge Owen soutient le premier point de vue, et M. le Juge Badeaux réaffirme la même chose en référant à la cause de *Côté v. La Reine*[1]. M. le Juge Rivard est d'opinion contraire et conformément aux dispositions du Code (art. 170) croit que la machine est illégale si le résultat d'une seule opération est une affaire de hasard ou d'incertitude. Je crois devoir accepter les vues de M. le Juge Rivard et l'appel doit donc être maintenu et le jugement du juge au procès doit être rétabli.

CARTWRIGHT J. (*dissenting*):—The circumstances out of which this appeal arises, the description of the machine seized on the premises of the respondent and the course of the proceedings in the courts below are set out in the reasons of my brother Hall.

I have reached the conclusion that the Crown has no right of appeal in this case.

Leave to appeal was not sought and the right of appeal, if it exists, must be found in s. 598(1)(*a*) of the *Criminal Code*. The Attorney General may appeal to this Court "on any question of law on which a Judge of the Court of Appeal dissents". Authority need not be quoted for the well settled rule that the question raised in the dissenting judgment must be one of law in the strict sense and not merely one of mixed fact and law.

In the case at bar Casey J. reached the conclusion on the evidence that a player of the seized machine could control its operation to an appreciable extent by the manual operation of "flippers" and by tilting the machine. Badeaux J. reached the conclusion that the evidence showed the machine in question to be the same as that which was the subject matter of the decision in *Côté v. Her Majesty the Queen*[2]. In that case the Court of Appeal found on the unanimous evidence of all the witnesses that an experienced player could and did control the play. Taking these views of the facts Casey J. and Badeaux J. decided that the appeal should be allowed.

Rivard J., who dissented, did not differ from the view of either of the Judges who formed the majority as to the

[1] [1963] B.R. 567. [2] [1963] Que. Q.B. 567.

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applicable law. He disagreed with them as to the effect of the evidence. He said in part:

> La question qui se pose est donc de savoir si le résultat de quelqu'une des opérations de cet appareil sous examen est l'affaire de hasard ou d'incertitude.
>
> * * *
>
> L'on a tenté de prouver en défense que pendant que la boule est ainsi en mouvement, en secouant l'appareil, en le «brassant», suivant l'expression des témoins, on peut exercer un contrôle sur cette bille en l'empêchant de descendre directement vers le bas où elle se perd, en la projetant contre d'autres obstacles et en courant ainsi la chance que dans son trajet, elle accumule des points additionnels.
>
> Je dois dire que les témoins tant de la Couronne que de la défense ont complètement failli dans les expériences qu'ils ont tenté d'établir ce contrôle.
>
> * * *
>
> Il faut distinguer cette cause de celle de CÔTÉ v. LA REINE rapportée à 1963 B.R. p. 567, où la preuve a certainement été différente de celle qui nous a été soumise. Dans ses notes, M. le Juge Hyde écrit:
>
> > A new feature, however, has been introduced into the evidence in this case in that all the witnesses, both for the prosecution and for the defence, state that an experienced operator can and does exercise considerable control over the course of the ball by striking the machine with his hand while in play and that the ability of the player in this way has a distinct effect upon the score which he will achieve.
>
> Plus loin, il ajoute:
>
> > All the witnesses, as I have indicated, are unanimous in agreeing that an experienced player can and does control the play in this way.
>
> Dans la cause présente, les témoins ne sont pas unanimes pour dire qu'il est possible de contrôler cette boule, une fois que l'éjecteur l'a mise en mouvement. Au contraire, il est prouvé hors de tout doute que tout contrôle efficace est impossible. C'est une machine spécifique que nous avons à juger, non pas un genre d'appareil.

From these excerpts and from the reasons of the learned Justice of Appeal read as a whole it is apparent that he based his decision on the ground that the evidence showed that any effective control by the player of the operation of the machine was impossible. It was on this finding of fact that he based his decision to dismiss the appeal and sustain the conviction. I am unable to find in the reasons of Rivard J. either an expression or an implication of the view that had he agreed with the findings of fact made by either Casey J. or Badeaux J. he would have disagreed with their

conclusion as to how the appeal should be decided. In my view, he disagreed with the majority only as to the facts and, certainly, did not differ from them on a question of pure law.

For these reasons I would quash the appeal.

The judgment of Fauteux and Hall JJ. was delivered by

HALL J.:—The respondent was convicted on a charge which read:

> . . . le 14ième jour de décembre 1962 en ladite cité, tenait illégalement une maison de jeu, située rue St-Clément, numéro 503, et ses dépendances. En contravention au statut adopté à cet effet.

The prosecution was under s. 176(1) of the *Criminal Code,* keeping a common gaming house. Section 170(2) (*b*)(i) was invoked to establish the charge because there was found on the premises a machine which the Crown alleges was a "slot machine".

The machine and its operation are described by Rivard J. in his dissenting judgment in the Court of Queen's Bench as follows:

> Il s'agit d'une machine qui porte le nom de «Spot-A-Card» fabriquée par Gotliet Manufacturing de Chicago, portant le numéro de série 42,004. C'est de cet appareil seul dont il peut être question dans cette cause. . . .
>
> L'appareil en question ne livre pas de marchandise, de jeton, de piécette ou d'argent. Si le joueur réussit à atteindre un certain nombre de points, à allumer certaines cartes qui sont disposées dans l'appareil, ou à obtenir un chiffre déterminé, il a droit à une, deux ou trois parties gratis. La partie consiste à mettre en mouvement 5 boules. Il s'agit donc d'une machine automatique destinée à être employée pour l'amusement seulement. . . .
>
> La preuve très longue versée au dossier nous indique que l'opération de cette machine est compliquée. Pour la mettre en mouvement, il faut que le joueur y place d'abord une pièce de $0.05: la machine s'illumine, 5 billes viennent à la surface. En tirant l'éjecteur, c'est-à-dire une tige mue par un ressort, l'une des boules vient se placer au bout de la tige et le joueur le met en mouvement en laissant aller cette tige avec plus ou moins de force, selon qu'il la retient ou la laisse aller avec toute la puissance du ressort tendu.
>
> Cet appareil qui est en somme une table à plan incliné vers le joueur, reçoit la bille qui est lancée vers le sommet de l'appareil. Elle frappe alors des pare-chocs, des coussinets, des obstacles qui se la renvoient dans des directions inattendues. C'est en exécutant ces carambolages provoqués par des ressorts ou des mécanismes électriques cachés derrière les obstacles que la boule frappe, que des points s'enregistrent. Au bas de l'appareil, de chaque côté du centre, c'est-à-dire en face du joueur, se trouvent deux

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ailerons qui sont également électrifiés et que l'on peut mettre en mouvement en pressant sur un bouton, de façon à ce que si la bille par hasard vient dans leur direction, on peut la renvoyer soit au centre, soit au sommet de l'appareil pour qu'elle recommence ses carambolages et accumule ainsi des points.

Le joueur qui, avec les 5 billes, a réalisé 1,000 points, a droit à une partie gratis, s'il a réalisé 1,100 points il a droit à une autre partie, et 1,300 points à une troisième.

The question to be determined is whether this machine is a "slot machine" within the meaning of s. 170(2)(*b*)(i) of the *Criminal Code* which reads as follows:

170. (2) In this section "slot machine" means any automatic machine or slot machine

* * *

(*b*) that is used or intended to be used for the purpose of vending merchandise or services if

(i) the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator . . .

The word "services" in this section includes amusement: *Isseman v. The Queen*[1].

Rivard J. held that the results here were a matter of chance or uncertainty. Casey J. said:

There is evidence that discloses that the mechanism of the machine seized was electro-magnetically operated and that the ball could be controlled to an *appreciable extent* by the manual operation of baffles or "flippers" and by tilting the machine itself. This satisfies me that the prosecution has not discharged its burden of proof. (The italics are mine.)

In my view this finding that "the ball could be controlled to an appreciable extent" was a finding of fact and is consistent with Rivard J.'s finding of fact on the same issue. The dissent, implicit in the opposite conclusions reached by Casey J. and Rivard J., is that on this finding the prosecution had not discharged the burden of proof which rested on it to establish that:

(i) the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator, . . .

The section does not require the prosecution to establish beyond a reasonable doubt that the player cannot control

[1] [1956] S.C.R. 798, 24 C.R. 346.

the ball at all. The burden is met even when the proof establishes some measure of control, but there remain elements of "chance or uncertainty".

Under s. 597(1)(*a*) of the *Criminal Code* this Court is incompetent to entertain an appeal if the ground of appeal raises only a question of mixed law and fact. The ground of appeal must raise a question of law in the strict sense and in respect to which there is a disagreement, expressed or implied, between the minority and the majority in the Court of Appeal: *Demenoff v. Her Majesty the Queen*[1].

The finding that the ball could be controlled to an appreciable extent by the player was a finding which Casey J. erroneously held as negativing proof of the commission of the offence and resulted in his finding that the prosecution had not discharged its burden of proof. Once it is accepted that the player has only partial control over the ball, then all elements of the offence have been met.

I agree with Rivard J. and would allow the appeal and sustain the conviction.

Appeal allowed and conviction restored, CARTWRIGHT J. *dissenting.*

Attorney for the appellant: A. Tessier, Montreal.

Attorneys for the respondent: L. Diner and P. Bernier, Montreal.

[1] [1964] S.C.R. 79, 41 C.R. 407, 2 C.C.C. 305.

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Dec. 21

MICRO CHEMICALS LIMITED, GRYPHON LABORATORIES LIMITED AND PAUL MANEY LABORATORIES CANADA LIMITED (*Defendants*) ..... APPELLANTS;

AND

RHONE-POULENC, S.A. (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Compulsory licence—Restricted to sale "to be used in Canada"—Infringement—Sale by licensee to related Canadian company—Sale by purchaser to third related Canadian company with resale to customer outside Canada—Whether infringement—Patent Act, R.S.C. 1952, c. 203, ss. 41(3), 46.

The plaintiff, a French corporation, was the owner of a Canadian patent relating, *inter alia,* to a process for producing chlorpromazine, a medical substance. The defendant company Micro was the non-exclusive licensee in Canada under a compulsory licence issued by the Commissioner of Patents pursuant to s. 41(3) of the *Patent Act,* R.S.C. 1952, c. 203. The licence allowed Micro to use the invention to prepare medicine in its own establishment and then to sell the medicine so prepared "to be used in Canada". Micro manufactured chlorpromazine in bulk, sold it to the defendant company Gryphon which used it to make chlorpromazine hydrochloride tablets which it then sold to the defendant company Maney, which in turn sold the tablets to the New Zealand government. The three defendant companies had the same offices and had officers and personnel in common, and all three had clear notice of the scope and limitations of the licence. The trial judge found that the sale of the tablets to the New Zealand government infringed the terms of the licence and maintained the action for infringement.

Held: The appeal should be dismissed.

The rights of the defendants to manufacture, use and sell were contained in the compulsory licence. Their justification for making, using or selling in Canada rested squarely on the compulsory licence and that licence restricted the licensee to use the patented invention in Canada and to sell the medicine so prepared or produced "to be used in Canada". The trial judge was right in his finding that the evidence clearly established that the three defendants with full knowledge of the restrictions in the compulsory licence did not operate within its ambit and that they thereby infringed the patentee's rights.

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

Brevets—Licence forcée, limitée à la vente au Canada—Contrefaçon—Vente par le porteur de licence à une compagnie canadienne apparentée—Vente par l'acheteur à une autre compagnie canadienne apparentée avec revente à un client en dehors du Canada—Y a-t-il eu violation—Loi sur les brevets, S.R.C. 1952, c. 203, arts. 41(3), 46.

La compagnie demanderesse, une corporation française, était le titulaire d'un brevet canadien se rapportant, entre autres, à un procédé pour la production de «chlorpromazine», une substance médicale. La compagnie défenderesse Micro était le porteur d'une licence non exclusive au Canada sous le régime d'une licence forcée émise par le Commissaire des brevets en vertu de l'art. 41(3) de la *Loi sur les brevets,* S.R.C. 1952, c. 203. La licence permettait à Micro de se servir de l'invention pour préparer des médicaments dans son propre établissement et de les vendre tels que préparés pour servir au Canada. Micro a fabriqué de la «chlorpromazine» en gros, l'a vendue à la défenderesse Gryphon qui s'en est servie pour faire des comprimés chlorhydrate de «chlorpromazine» lesquels elle a vendus à la compagnie Maney, qui à son tour a vendu ces comprimés au gouvernement de la Nouvelle-Zélande. Les trois compagnies défenderesses avaient les mêmes bureaux et avaient des officiers et du personnel en commun, et toutes trois étaient clairement au courant de la portée et des limites de la licence. Le juge au procès trouva que la vente des tablettes au gouvernement de la Nouvelle-Zélande avait violé les termes de la licence et maintint l'action pour contrefaçon.

Arrêt: L'appel doit être rejeté.

Les droits des défendeurs de fabriquer, d'utiliser et de vendre étaient contenus dans la licence forcée. Leur justification pour fabriquer, utiliser ou vendre au Canada reposait carrément sur la licence forcée et cette licence limitait son porteur à l'usage de l'invention brevetée au Canada et à la vente des médicaments ainsi préparés ou produits pour servir au Canada. Le juge au procès a eu raison dans sa conclusion que la preuve établissait clairement que les trois défendeurs, avec pleine connaissance des restrictions dans la licence forcée, n'ont pas agi dans les bornes de cette licence et que par conséquent ils ont violé les droits du titulaire.

APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier[1], maintenant une action pour contrefaçon d'une licence forcée obtenue de son titulaire. Appel rejeté.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1], maintaining an action for infringement of a compulsory licence obtained from a patentee. Appeal dismissed.

[1] [1964] Ex. C.R. 819.

1964

MICRO CHEMICALS LTD. *et al.* *v.* RHONE-POULENC, S.A.

G. F. Henderson, Q.C., and *C. W. Robinson, Q.C.,* for the defendants, appellants.

Christopher Robinson, Q.C., and *Russell S. Smart,* for the plaintiff, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from a judgment of Noël J. of the Exchequer Court[1] dated January 6, 1964, in an action brought by the respondent against the appellants in which the respondent claimed that the appellants had infringed Patent No. 519,525 issued to it on December 12, 1955, as the assignee of Paul Charpentier, the inventor of the invention covered by the patent.

Patent No. 519,525, the patent in question, relates to new phenthiazine derivatives having valuable therapeutic properties and to processes for their preparation and is confined for the purpose of the present action to claim 5 which reads as follows:

> 5. A process according to claim 1, 2 or 3 wherein X is a chlorine atom in the 3-position, A is a $—CH_2—CH_2—CH_2—$ group and R_1 and R_2 are methyl groups.

This is a process for producing a chemical product called chlorpromazine and relates to a medical substance.

The validity of the patent is not in question nor is there any dispute that what the appellants are charged with making, using or selling is chlorpromazine covered by the patent. The only matter which fell to be determined in the action was whether what the appellants did was or was not within the scope of a compulsory licence obtained from the patentee by Micro Chemicals Limited.

Micro Chemicals Limited had, under s. 41(3) of the *Patent Act,* R.S.C. 1952, c. 203, applied to the Commissioner of Patents for what is called a "compulsory licence". The Commissioner granted a licence under said s. 41(3). The licence so granted was subsequently amended by Noël J. in

[1] [1964] Ex. C.R. 819.

the Exchequer Court of Canada. The relevant portions of the licence as amended read as follows:

NOW THEREFORE be it known that pursuant to the powers vested in me by the Patent Act and particularly by sections 4 and 41 of the said Act, I do order the grant to the applicant, MICRO CHEMICALS LIMITED of a non-exclusive licence under Canadian Patent Number 519,525, for the unexpired term thereof, to use the patented invention in Canada in its own establishment only for the purpose of the preparation or production of medicine but not otherwise and to sell the medicine so prepared or produced by it to be used in Canada, with notice of such restriction, the whole under the following terms and conditions:

1. MICRO CHEMICALS LIMITED shall apply to every container of medicine prepared or produced by it and sold pursuant to this licence, a notice reading "Licensed under Canadian Patent No. 519,525 but not for export".

1A. MICRO CHEMICALS LIMITED shall pay to RHONE-POULENC a royalty of 15% (fifteen per cent) on its net selling price to others of the active product in its crude form prepared or produced pursuant to this licence and sold by it.

* * *

8. Nothing herein contained shall preclude purchasers of the medicine prepared or produced by Micro Chemicals Limited pursuant to this licence from using the medicine in any way they choose for their own personal consumption.

* * *

10. The word "medicine" when used herein shall include medicine in bulk form.

The grant clause above quoted indicates that the compulsory licence imposed on the patentee and given to Micro Chemicals Limited as licensee allows that company to use the invention to prepare medicine in its own establishment and then to sell the medicine so prepared to be used in Canada.

The infringement alleged against the three appellant companies consists in a sale of 450,000 tablets to the Government of New Zealand made possible by means of appellants' joint action which the respondent alleges infringes the non-exclusive licence which as stated allows the sale of the product to be used in Canada only.

The three appellants, hereinafter called "Micro", "Gryphon" and "Maney" have the same offices and they have

officers and personnel in common. Mr. Miller and Mr. John M. Cook are common officers to all the appellants. A Mr. I. D. Heintzman is vice-president of both Micro and Gryphon and Micro's purchasing agent acts as such for all three appellant companies. As explained by Mr. Cook, who is president and general manager of Micro and secretary-treasurer of Gryphon and Maney and is active in the three companies, day to day co-operation between the latter would be a very close one. His position as secretary-treasurer of Gryphon and Maney is more of a financial type of administration and covers office routine, and in the case of Gryphon, he did sign some documents as manager of the company.

Micro is a company that makes chemicals used in many cases as the basis for pharmaceutical preparations. Gryphon is a company which makes up pharmaceutical preparations from chemicals it buys, sometimes from Micro and sometimes from elsewhere. In the present case, Gryphon made up into tablets the substance called chlorpromazine with other ingredients and only a small part of its weight is chlorpromazine.

Mr. Cook admits that in the case of a product marketed by Maney originally manufactured by Micro and made up into tablets by Gryphon, the information required by the Food and Drugs administrator for approval purposes would have come from all three companies.

When Gryphon sells its finished products it can be in the form of tablets such as we have here, or in liquids and suppositories packed in bottles or containers with sometimes the customer's label on, but normally its products are shipped in bulk containers in accordance with whatever packaging instructions the customer has given.

The third company, Paul Maney Laboratories Canada Limited, is a supplier. It markets pharmaceutical preparations which it gets either from Gryphon or elsewhere.

On or about December 4, 1962, Maney contracted to sell to the New Zealand Government 450,000 tablets of Chlorpromazine hydrochloride which bulk substance had been

manufactured by Micro and then sold to Gryphon and held in stock by Gryphon until the need to make the order arose. Mr. Cook admitted that these 450,000 tablets were manufactured by Gryphon and packaged to the specification of Maney after which they were delivered to Maney and by it to agents of the New Zealand Government. Maney not only sold to the New Zealand Government but acted as its agent in Canada in shipping the tablets to New Zealand.

Section 46 of the *Patent Act* which reads as follows:

> Every patent granted under this Act shall contain the title or name of the invention, with a reference to the specification, and shall, subject to the conditions in this Act prescribed, grant to the patentee and his legal representatives for the term therein mentioned, from the granting of the same, the exclusive right, privilege and liberty of making, constructing, using and vending to others to be used the said invention subject to adjudication in respect thereof before any court of competent jurisdiction.

spells out the exclusive rights and privileges of the holder of the patent.

The rights of the appellants to manufacture, use and sell are contained in the compulsory licence previously mentioned. If it were not for the compulsory licence and the terms thereof the appellants would have had no right at all to make, use or sell the substance covered by the patent. Their justification for making, using or selling in Canada rests squarely on the compulsory licence and that licence restricts the licensee to use the patented invention in Canada and to sell the medicine so prepared or produced "to be used in Canada".

The sale of the 450,000 tablets to the Government of New Zealand was clearly in breach of the terms of the compulsory licence. All three appellants had clear notice of the scope and limitations of the licence.

I agree fully with the learned trial judge in his finding that the evidence clearly establishes that the three appellants with full knowledge of the restrictions in the compulsory licence did not operate within the ambit of the licence and that they thereby infringed the patentee's rights.

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MICRO CHEMICALS LTD. *et al.* *v.* RHONE-POULENC, S.A.

Hall J.

The appeal should accordingly be dismissed with costs and the judgment of Noël J. sustained including his directions as to the assessment of damages.

Appeal dismissed with costs.

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

Solicitors for the plaintiff, respondent: Smart & Biggar, Ottawa.

EDITOR'S NOTE: An appeal by Micro Chemicals Ltd. against the judgment of the Exchequer Court, reported at [1964] Ex. C.R. 834, and which was an appeal to that Court from a decision of the Commissioner of Patents, dated May 31, 1962, settling the terms of the compulsory licence granted to Micro on December 12, 1955, was heard by this Court at the same time as the above reported appeal. The following judgment was delivered:

"We are all of opinion that the Commissioner of Patents had jurisdiction to settle the terms of the licence as he did.

We are further of opinion that the terms of the licence as finally settled by the order of Noël J. are in accordance with the terms of the *Patent Act* and should not be disturbed.

The appeal is accordingly dismissed with costs."

HARGAL OILS LIMITED .....APPELLANT;

AND

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

1964 *Nov. 2 1965 Jan. 26

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Oil company—Deductions—Drilling and exploration expenses—Whether deductible by the "predecessor corporation" for same taxation year in which it sold its assets to a "successor corporation"—Income Tax Act, R.S.C. 1952, c. 148, s. 83A(3), (8a).

The business of the appellant was the production of petroleum and the exploring for petroleum and natural gas. During its 1958 fiscal year, it sold its assets to a "successor corporation" within the meaning of s. 83A (8*a*) of the *Income Tax Act,* R.S.C. 1952, c. 148. In its income tax return for that year, the appellant claimed a deduction in respect of its drilling and exploration expenses as it would be normally entitled to do under s. 83A (3) of the Act. The Minister ruled that because of that sale, which brought into operation the provisions of subs. (8*a*), the deduction was not permissible. Both the Income Tax Appeal Board and the Exchequer Court upheld the Minister. The taxpayer appealed to this Court.

Held: The appeal should be dismissed.

When subparagraphs (iii) and (iv) of paragraph (*e*) of subsection (8*a*) are read together the aggregate which is defined in paragraph (*e*) is to consist of expenses not deductible by the "predecessor corporation" in the taxation year in which the property was acquired by the "successor corporation", but which would have been deductible by the "predecessor corporation" in that taxation year but for the provisions of the subsection. In the present case the appellant, pursuant to subs. (3), would have been entitled to deduct the expenses in question had it not been for the words contained in the last paragraph of subs. (8*a*). Reading para. (8*a*) as a whole, it contemplates that only the "successor corporation" was entitled to claim a deduction in respect of the expenses in question, for the taxation year in which the transfer of assets occurred.

Revenu—Impôt sur le revenu—Compagnie de pétrole—Déductions—Dépenses de forage et d'exploration sont-elles déductibles par la «corporation remplacée» pour la même année d'imposition durant laquelle elle

*PRESENT: Cartwright, Fauteux, Abbott, Martland and Ritchie JJ.

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a vendu ses biens à une «corporation remplaçante»—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, s. 83A(3), (8a).

La compagnie appelante s'occupait principalement de la production du pétrole et de l'exploration pour la découverte du pétrole et du gas naturel. Durant son année fiscale de 1958, elle a vendu ses biens à une «corporation remplaçante» selon l'expression de l'art. 83A(8*a*) de la *Loi de l'impôt sur le revenu,* S.R.C. 1952, c. 148. Dans son rapport d'impôt pour 1958, la compagnie réclama une déduction pour ses dépenses de forage et d'exploration comme elle avait normalement le droit de le faire en vertu de l'art. 83A(3) de la loi. Le ministre décida que vu cette vente, qui avait fait jouer le paragraphe (8*a*), cette déduction n'était pas permise. La décision du ministre fut confirmée par la Commission d'appel de l'impôt sur le revenu et par la Cour de l'Échiquier.

Arrêt: L'appel doit être rejeté.

Lorsque les sous-paragraphes (iii) et (iv) de l'alinéa (*e*) du paragraphe (8*a*) sont considérés, l'ensemble dont la définition apparaît à l'alinéa (*e*) doit consister dans les dépenses non déductibles de la «corporation remplacée» pour l'année d'imposition durant laquelle les biens ont été acquis par la «corporatioin remplaçante», mais qui auraient été déductibles par la «corporation remplacée» durant cette année d'imposition si ce n'avait été des termes du paragraphe (8*a*). Dans l'espèce, la compagnie appelante aurait eu droit de déduire ses dépenses, en vertu du paragraphe (3), si ce n'avait été des mots que l'on retrouve dans la dernière partie du paragraphe (8*a*). En lisant le paragraphe (8*a*) en entier, il envisage que seule la «corporation remplaçante» avait le droit de réclamer une déduction au sujet de ces dépenses pour l'année d'imposition durant laquelle la cession des biens a eu lieu.

APPEL d'un jugement du juge Dumoulin de la Cour de l'Échiquier[1], confirmant une décision de la Commission d'appel de l'impôt sur le revenu. Appel rejeté.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], affirming the decision of the Income Tax Appeal Board. Appeal dismissed.

Kenneth E. Meredith, for the appellant.

E. S. MacLatchy, Q.C., for the respondent.

[1] [1963] Ex. C.R. 27, [1962] C.T.C. 534, 62 D.T.C. 1336.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Exchequer Court of Canada[1], which confirmed the decision of the Income Tax Appeal Board that, for the taxation year 1958, the appellant was not entitled to deduct from its income the amount of $29,136 which it had claimed the right to deduct under the provisions of subs. (3) of s. 83A of the *Income Tax Act*.

The appellant is a public company incorporated in the Province of British Columbia. Its business, during the taxation year which ended on June 30, 1958, was the production of petroleum and the exploring for petroleum and natural gas. Prior to that date and after the calendar year 1952, it had incurred drilling and exploration expenses that were not deductible from its income in previous years in the amount of $95,614.57.

During the fiscal year which ended on June 30, 1958, and prior to that date, the appellant sold its assets to Freehold Gas & Oil Ltd. (N.P.L.), hereinafter referred to as "Freehold". The appellant, in its income tax return for that fiscal year, claimed as a deduction $29,136, the equivalent of its net profit for that year, and relied upon subs. (3) of s. 83A of the *Income Tax Act* to justify such deduction.

The effect of subs. (3) is to enable an oil company to deduct, from its income for the taxation year, exploration and drilling expenses, incurred after the calendar year 1952, to the extent that they were not deductible in computing income for a previous taxation year, in an amount not exceeding its income for the taxation year in question.

It is conceded by the respondent that the appellant's claim for a deduction from income under this subsection would have been valid had it not been for the sale of its assets to Freehold in the taxation year involved. The respondent contends, however, that because of that sale, which brings into operation the provisions of subs. (8a), the deduction was not permissible.

[1] [1963] Ex. C.R. 27, [1962] C.T.C. 534, 62 D.T.C. 1336.

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Martland J.

The portions of subs. (8*a*), as it existed at the times material to these proceedings and which are relevant to this appeal, are as follows:

(8a) Notwithstanding subsection (8), where a corporation (hereinafter in this subsection referred to as the "successor 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,

has, at any time after 1954, acquired from a corporation (hereinafter in this subsection referred to as the "predecessor corporation") whose principal business was production, refining or marketing of petroleum, petroleum products or natural gas, exploring or drilling for petroleum or natural gas, or mining or exploring for minerals, all or substantially all of the property of the predecessor corporation used by it in carrying on that business in Canada,

(Paragraphs (*c*) and (*d*) not material.)

there may be deducted by the successor corporation, in computing its income under this Part for a taxation year, the lesser of

(*e*) the aggregate of

(i) the drilling and exploration expenses, including all general geological and geophysical expenses, incurred by the predecessor corporation 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 the predecessor corporation in searching for minerals in Canada,

to the extent that such expenses

(iii) were not deductible by the successor corporation in computing its income for a previous taxation year, and were not deductible by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for a previous taxation year, and

(iv) would, but for the provisions of paragraph (*b*) of subsection (1), paragraph (*b*) of subsection (2), paragraph (*d*) of subsection (3) and paragraph (*d*) of subsection (8) or of any of those paragraphs or this subsection, have been deductible by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation, or

(Paragraph (*f*) not material.)

and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for any subsequent taxation year.

The submission of the appellant is that subpara. (iii) of para. (*e*) of this subsection clearly contemplates the deduction by the appellant of drilling and exploration expenses in the taxation year in which it sold its assets to Freehold because, in defining the "aggregate" which the successor corporation may deduct, it refers to expenses "not deductible by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation." The appellant contends, on the basis of this wording, that the subsection contemplates that the successor corporation cannot include in its aggregate those expenses which the predecessor corporation may itself deduct in respect of its income for the taxation year in which the property was acquired by the successor corporation.

The respondent relies upon the words which follow para. (*f*) of the subsection: "and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation." The respondent contends that these are the governing words to which meaning must be attributed. As was pointed out in the reasons for the decision of the Income Tax Appeal Board, the words quoted immediately above would have no effect if the contention made by the appellant were to be adopted.

The wording of subs. (8*a*) is complicated and its meaning is far from clear. I have, however, reached the conclusion that the contention of the appellant fails because, while relying on the wording of subpara. (iii) of para. (*e*), it does not take into account the wording of subpara. (iv). When the two subparagraphs are read together, it appears to me that the "aggregate" which is defined in para. (*e*) is to con-

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Martland J.

sist of expenses not deductible by the predecessor corporation in the taxation year in which the property was acquired by the successor corporation, but which would have been deductible by the predecessor corporation in that taxation year, "but for the provisions of . . . this subsection."

In the present case the appellant, pursuant to subs. (3), would have been entitled to deduct the expenses in question in the taxation year in question had it not been for the words contained in the last paragraph of subs. (8*a*). They are, therefore, to be included in the aggregate in respect of which Freehold may claim a deduction for the taxation year in question and they may not be deducted by the appellant in computing its income for that year.

In my opinion, therefore, the appellant's argument, based upon the wording of subpara. (iii), fails and, reading subpara. (8a) as a whole, it is my view that it contemplates that only the successor corporation was entitled to claim a deduction, in respect of the expenses in question, for the taxation year in which the transfer of assets occurred. The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Meredith & Company, Vancouver.

Solicitor for the respondent: E. S. Maclatchy, Ottawa.

VICTOR M. GASKIN (*Plaintiff*) .....APPELLANT;

AND

RETAIL CREDIT CO., JOHN HERBERT AND T. J. KELLY (*Defendants*) } RESPONDENTS.

1964 *Dec. 18 1965 Mar. 1

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Libel—Credit reports on plaintiff requested by clients of defendant company—Reports prepared and sent out to clients—No evidence of letters having been mailed or received—Whether burden of proving publication discharged—Question for jury's determination.

The defendant company was in the business of furnishing credit reports to its clients. Three of those clients requested credit reports concerning the plaintiff and such reports were "sent" by the defendant. The plaintiff brought an action for libel, claiming that the reports were defamatory. The trial judge upon motion made by counsel for the defendant for nonsuit withdrew the case from the jury and dismissed the action. The plaintiff's appeal to the Court of Appeal was dismissed by a majority of that Court. Both the trial judge and the majority of the Court of Appeal held that there was no evidence of publication fit for submission to the jury. A further appeal by the plaintiff was brought to this Court.

Held (Judson J. dissenting): The appeal should be allowed; new trial directed.

Per Cartwright, Martland, Ritchie and Spence JJ.: The question of whether or not the burden of proving publication had been discharged was one which should be left for the jury to determine, if there was any evidence from which it might reasonably be concluded to be more probable than not that a defamatory statement concerning the plaintiff had been made known to a third party or parties.

The defendant's contention that the authorities had established an exhaustive and closed category of circumstances from which publication could be inferred was not accepted. If the plaintiff proved facts from which it could reasonably be inferred that the words complained of were brought to the knowledge of some third person, a *prima facie* case was established.

In the present case there was no evidence of letters having been posted, or of their having been received by the addressees, but this did not mean that the jury should be deprived of the opportunity of drawing the inference, if they should see fit to do so, that credit reports sent by the defendant company to its customers were likely to have been received and read by them.

Per Judson J., *dissenting*: As held by the trial judge and the majority of the Court of Appeal, the evidence of publication in this case was not enough. The plaintiff, in an action of this kind, had the advantage of the two presumptions of falsity and damage but not of a third presumption of publication.

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

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et al.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Kelly J. Appeal allowed and new trial directed, Judson J. dissenting.

C. L. Dubin, Q.C., and *P. J. Brunner,* for the plaintiff, appellant.

Hon. D. J. Walker, Q.C., and *J. W. Burridge, Q.C.,* for the defendants, respondents.

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

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for the Province of Ontario[1] whereby the majority of that Court, with MacKay J.A. dissenting, dismissed the appellant's appeal from an order made by Mr. Justice Kelly, who had directed that the case be taken from the jury and the action dismissed, pursuant to the granting of a motion for nonsuit made by counsel for the present respondent which was based on the contention that no evidence had been adduced by the plaintiff in proof of the publication of the libels alleged in the pleadings, or of the identity of the present appellant as the person defamed.

The members of the Court of Appeal were unanimously of the opinion, which I share, that the appellant had been shown to be the person defamed, but McGillivray J.A., with whose reasons for judgment Porter C.J.O. agreed, took the view that evidence of credit reports having been sent out by the respondent at the request of its clients did not constitute evidence of publication of the contents of those reports.

There can be no doubt that proof of publication is an essential element in an action for libel and that the burden of proving this element lies upon the plaintiff. The question of whether or not that burden has been discharged is, in my opinion, one which should be left for the jury to determine, if there is any evidence from which it might reasonably be concluded to be more probable than not that a defamatory statement concerning the plaintiff has been

[1] [1964] 1 O.R. 530, 43 D.L.R. (2d) 120.

made known to a third party or parties. In this regard, I adopt the summary of the authorities, which is given in Halsbury's Laws of England, vol. 24, p. 39, where it is stated:

> If publication is disputed by the defendant and there is any evidence of publication by him, it must be left to the jury to decide whether there was in fact publication of the libel by him.

The reasons for judgment, which were delivered by McGillivray J.A., on behalf of the Court of Appeal appear to me to be founded in large measure on a quotation from Button on Libel and Slander at p. 68 which reads in part as follows:

> In the case of libel publication must be proved, as a rule by calling a witness to say that the libel was read; but in certain cases of libel the plaintiff is assisted by certain presumptions which are made in his favour, which it is for the defendant to rebut if he can.

The learned author goes on to cite certain circumstances which have been held by the Courts in England to give rise to a "presumption" that a statement has been published and he concludes by saying:

> In all other cases the plaintiff must establish affirmatively that there was publication to a third person. Where publication is denied, it is generally easily proved by means of interrogatories.

From the language of this passage McGillivray J.A. concluded:

> The exceptions to the rule that publication must be affirmatively established as they appear in the above abstract are the same or similar to those referred to in the other standard texts where similar statements of the law are made. The exceptions appear to fall into two groups—the first is where it is established that a letter to the addressee has been properly posted and the second is when a communication has been sent by telegram or through the mail in open form or has remained posted on a wall or elsewhere where some members of the public may see it. The evidence in the present instance does not fall into either category and all affirmative evidence is lacking. Evidence that reports went, or were made, sent or forwarded (in the case of one witness he was not sure whether the reports had been sent to his office in London or forwarded to the parties for whom they were made) does not come within the exceptions mentioned and by no stretch of the imagination is it evidence of receipt by the parties concerned. The objection taken as to weight to be given this evidence may be called technical but it is by no means unimportant for if this requirement as to publication, which could have been readily satisfied by proper questions upon the examination for discovery or by calling the alleged

recipient of the document or its representative, is not insisted upon in this case one is driven to inquire how far the principle is to be extended in other cases upon other sets of facts.

It was strongly contended by counsel for the respondent that the English cases referred to in Button on Libel and Slander and in other text-books established an exhaustive and closed category of circumstances from which publication could be inferred and it appears that McGillivray J.A. subscribed to this view.

In my opinion, however, the general principle is correctly stated in Gatley on Libel and Slander, at p. 89, where it is said:

> It is not necessary for the plaintiff in every case to prove directly that the words complained of were brought to the actual knowledge of some third person. If he proves facts from which it can reasonably be inferred that the words were brought to the knowledge of some third person, he will establish a prima facie case.

As has been indicated, there is evidence in the present case to the effect that the respondent was in the business of furnishing credit reports to its clients, that some of those clients requested credit reports concerning the appellant and that such reports were "sent" by the respondent.

It is true that there is no evidence of letters having been posted, or of their having been received by the addressees, but this does not, in my opinion, mean that the jury should be deprived of the opportunity of drawing the inference, if they should see fit to do so, that credit reports sent by Retail Credit Company to its customers are likely to have been received and read by them.

I agree with MacKay J.A., when he says in the course of his dissenting judgment:

> . . . I think it would have been open to the jury to draw the inference of publication or to reject the evidence as being insufficient to prove publication, but I think it should have been left to the jury.

The appellant contends that when respondent's counsel moved for a nonsuit, he elected to call no evidence and that he is now precluded from doing so, with the result that judgment should be entered in the plaintiff's favour and a new trial directed for the purpose of assessing the damages only.

In this latter regard the leading cases in Ontario are summarized in the decision of Harvey C.J.A. in *Hayhurst v. Innisfail Motors Ltd.*[1], at p. 277, where he says:

> ... we see no reason why we should not apply the same rule of practice as that of Ontario. It is to be understood therefore that for the future when a defendant applies for a dismissal at the close of the plaintiff's case he does so at the risk of not having the right to give any evidence on his own behalf for if the trial Judge grants his application and the Appellate Court comes to the conclusion that it was wrong it will feel itself at liberty to finally dispose of the case on the evidence already given and will do so unless in its own discretion it considers that in the interests of justice some other course should be taken.

This statement was cited with approval in this Court in *Modern Construction Ltd. v. Maritime Rock Products Ltd.*[2]

In my view, under the somewhat peculiar circumstances of this case, and having regard to the fact that the trial took place before a jury which was never given the opportunity of determining the issue of publication, I think there should be a new trial of the whole issue. I am, however, of opinion that the respondent should bear the costs of the first trial.

For these reasons, as well as for those stated in the dissenting opinion of MacKay J.A., I would allow this appeal and direct that there be a new trial. The appellant will also have his costs in this Court and in the Court of Appeal.

JUDSON J. (*dissenting*):—Both the learned trial judge and the majority of the Court of Appeal have held that there was in this case no evidence of publication fit for submission to the jury. The evidence on this subject was scanty in the extreme and consisted only of extracts from three examinations for discovery read into the record. It was set out in full in the majority reasons delivered in the Court of Appeal. I agree with the trial judge and the majority of the Court of Appeal that it was not enough.

It amounts to no more than this—that the reports were ordered, prepared and sent out to three companies. It does not appear who sent them or when they were sent or to what address they were sent. There is no evidence that any particular third person read them at all. The plaintiff,

[1] [1935] 2 D.L.R. 272.

[2] [1963] S.C.R. 347 at 356.

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in an action of this kind, has the advantage of the two presumptions of falsity and damage but not of a third presumption of publication.

I would dismiss the appeal with costs.

Appeal allowed with costs, new trial directed, JUDSON J. *dissenting.*

Solicitors for the plaintiff, appellant: Young & Hutchinson, Woodstock.

Solicitors for the defendants, respondents: Nesbitt & Burridge, Woodstock.

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*Dec. 14, 15, 16, 17
1965
Mar. 1

SUN LIFE ASSURANCE COMPANY OF CANADA, W. G. ATTRIDGE, A. G. DENNIS AND BLYTHE MOORE (*Defendants*) ..... APPELLANTS;

AND

KENNETH C. DALRYMPLE (*Plaintiff*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Slander—Qualified privilege—Whether sufficient evidence of malice to warrant the question of malice or the absence of malice being put before the jury.

The plaintiff, a local manager of the defendant company, brought action against the company and three employees thereof for damages for alleged slander uttered by the three employees in the course of their duties for their employer. The plaintiff had been engaged in a dispute for some time with his head office concerning decisions made there in connection with the management of his district. Eventually the plaintiff submitted his resignation and at the same time told the company that he expected that a number of agents would be resigning with him. Subsequently the company sent men to persuade the agents not to resign.

At the close of the plaintiff's evidence at the trial, the defendants moved to dismiss the action on the ground that the alleged slanders were uttered on an occasion of privelege and that there was no evidence of express malice. The trial judge held that the alleged slanders were uttered on occasions of qualified privilege and that the plaintiff had failed to adduce sufficient evidence of express malice to justify sending the case to the jury. On an appeal by the plaintiff, the Court of Appeal

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PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

in its judgment presumed without deciding that the trial judge had been correct in holding that the occasions were occasions of qualified privilege but differed with the trial judge in holding that there was both extrinsic and intrinsic evidence of express malice giving a sufficient probability to warrant the question of malice or not being put to the jury. The defendants appealed to this Court.

Held (Judson J. dissenting): The appeal should be dismissed.

Per Cartwright and Ritchie JJ.: The trial judge was justified in concluding that the words complained of were spoken on occasions of qualified privilege, but he erred in holding that there was no evidence upon which a properly instructed jury could find that they were spoken maliciously. Whether the words were in fact spoken maliciously was a different question and one upon which the plaintiff was entitled to the verdict of a jury based upon evidence to be adduced at a new trial.

Per Martland J.: There was sufficient evidence of malice to warrant the question of malice or the absence of malice being put before the jury. Consequently, even assuming, in favour of the defendants, that the occasions in question were occasions of qualified privilege, a new trial should be directed.

Per Spence J.: On the question of whether the alleged slanders were or were not spoken on occasions of qualified privilege, the occasion advanced by counsel for the defendants was that the individual defendants as company officers were concerned with what they believed to be a wholesale resignation of agents in the local area. That situation was one with which they could validly be concerned. Statements which were fairly made by a person in the conduct of his own affairs in matters where his own interest was concerned were *prima facie* privileged. The plaintiff's contention that the occasion of privilege had been lost could not, on the evidence, be accepted.

There was the further question whether the statements made by the individual defendants were so irrelevant to the proper protection of their employer's interest that the privilege was lost. The comments could be described as being an attempt to show to the agents that their loyalty to the plaintiff was not justified in their own interests. It might well be said that these comments, if they were justified in evidence given by the defendants, or reasonable grounds for them found, would not be irrelevant to the attempt to retain the agents in the service of the company.

The alleged slanders, therefore, were all uttered on occasions of qualified privilege. However, there was both extrinsic and intrinsic evidence of express malice on the part of each of the individual defendants. Although upon an occasion held to be one of qualified privilege the court, in determining whether there is any evidence of malice fit to be left to the jury, will not look too narrowly on the language used in the alleged slander, the slander if utterly beyond and disproportionate to the facts may provide evidence of excess malice. Moreover, one piece of evidence tending to establish malice was sufficient evidence on which a jury could find for the plaintiff and therefore if more than a mere scintilla, it should be submitted to the jury for its finding of fact.

Toogood v. Spyring (1834), 1 Cr. M. & R. 181; *Halls v. Mitchell,* [1928] S.C.R. 125; *Adam v. Ward,* [1917] A.C. 309; *Jerome v. Anderson,* [1964] S.C.R. 291; *Taylor et al. v. Despard et al.,* [1956] O.R. 963;

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Turner v. M-G-M Pictures, Ltd., [1950] 1 All E.R. 449; *Spill v. Maule* (1869), L.R. 4, Exch. 232; *Egger v. Viscount Chelmsford et al.*, [1964] 3 All E.R. 406, referred to.

Per Judson J., *dissenting*: There was no evidence of malice in this case fit to be considered by the jury. There was nothing in the evidence to indicate that the individual defendants did not believe in any of the statements that they made or that in the circumstances known to them, it would have been unreasonable to believe in these statements. Nor were the statements so disproportionate to the occasion as to provide evidence in themselves that they were using the occasion for an improper purpose.

In order to have the question of malice submitted to the jury, it was necessary that the evidence should raise a probability of malice and be more consistent with its existence than its non-existence. The problem did not arise here at all. It was a case of reasonable, honest persuasion in the protection of a clearly established reciprocal interest.

Arnott v. College of Physicians and Surgeons of Saskatchewan, [1954] S.C.R. 538; *Adam v. Ward, supra; Taylor et al. v. Despard et al., supra*, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario allowing an appeal from a judgment of Richardson J. and directing a new trial of the plaintiff's action for slander. Appeal dismissed, Judson J. dissenting.

C. L. Dubin, Q.C., and *P. J. Brunner*, for the defendants, appellants.

R. N. Starr, Q.C., for the plaintiff, respondent.

The judgment of Cartwright and Ritchie JJ. was delivered by

RITCHIE J.:—I agree that this appeal should be disposed of in the manner proposed by my brother Spence.

On the evidence before him the learned trial judge was in my view justified in concluding that the words complained of were spoken on occasions of qualified privilege, but he erred in holding that there was no evidence upon which a properly instructed jury could find that they were spoken maliciously. Whether the words were in fact spoken maliciously is a different question and one upon which the respondent is entitled to the verdict of a jury based upon evidence to be adduced at a new trial.

MARTLAND J.:—I am in agreement with the conclusion reached by my brother Spence and by the Court of Appeal of Ontario that there was, in this case, sufficient evidence of malice to warrant the question of malice or the absence of malice being put before the jury. Consequently, even

assuming, in favour of the appellants, that the occasions in question were occasions of qualified privilege, I am of the opinion that a new trial should be directed. That being so, I prefer not to express any opinion as to whether or not the occasions in question were, in fact, occasions of qualified privilege.

I would, therefore, dismiss the appeal with costs.

JUDSON J. (*dissenting*):—I agree with the learned trial judge that there was no evidence of malice in this case fit to be considered by the jury. The Court of Appeal directed a new trial on the ground that the evidence adduced by the plaintiff raised a sufficient probability of malice to warrant this question being put before the jury.

The plaintiff, a local manager of the defendant company at Peterborough, had been engaged in a dispute for some time with his head office concerning decisions made there in connection with the management of his district. The rights and wrongs of the dispute do not in any way determine the issues in this action. The plaintiff had one view, which he did not hesitate to express, and the company another. Eventually the plaintiff submitted his resignation and at the same time told the company that he expected that a number of agents would be resigning with him. This was a serious threatened disruption of the company's business in this district. They were justified in treating it seriously and they sent men to persuade the agents not to resign but to stay with the company.

There is nothing in the evidence to indicate that the individual defendants, who were head office employees of the company, did not believe in any of the statements that they made or that in the circumstances known to them, it would have been unreasonable to believe in these statements. Nor were the statements so disproportionate to the occasion as to provide evidence in themselves that they were using the occasion for an improper purpose.

In order to have the question of malice submitted to the jury, it is necessary that the evidence should raise a probability of malice and be more consistent with its existence than its non-existence. I cannot see that this problem arises here at all. My opinion at the end of four days' argument in this Court was that this was a case of

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reasonable, honest persuasion in the protection of a clearly established reciprocal interest.

The learned trial judge showed by his ruling that he was of the same opinion. He was in the best position to judge. He had watched and heard from start to finish the unfolding of this case with all its emphasis on the spoken word and its exaggeration of the trivialities of discussion on both sides. I think that he ruled correctly in accordance with the judgment of Kerwin C.J., and Estey J., in *Arnott v. College of Physicians and Surgeons of Saskatchewan*[1], and its foundation in *Adam v. Ward*[2], and the judgment of the Ontario Court of Appeal in *Taylor et al. v. Despard et al.*[3].

I would allow the appeal with costs both here and in the Court of Appeal and restore the judgment at trial.

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on November 5, 1964, on an appeal from the judgment of Richardson J. at trial dismissing the plaintiff's action.

This is an action against the Sun Life Assurance Company of Canada and three employees thereof, W. G. Attridge, the director of agencies, and A. G. Dennis and Blythe Moore, two supervisors of agencies, for damages for alleged slander uttered by the three employees on the 13th, 14th and 15th of January 1960 in the course of their duties for their employer.

At the close of the plaintiff's evidence at the trial, the defendant moved to dismiss the action on the ground that the alleged slanders were uttered on an occasion of privilege and that there was no evidence of express malice. After a very lengthy argument, the trial judge held that the alleged slanders were uttered on occasions of qualified privilege and that the plaintiff had failed to adduce sufficient evidence of express malice to justify sending the case to the jury.

The Court of Appeal for Ontario in an oral judgment given at the close of the argument, presumed without deciding that the trial judge had been correct in holding that the occasions were occasions of qualified privilege but differed with the trial judge in holding that there was both extrinsic and intrinsic evidence of express malice giving

[1] [1954] S.C.R. 538. [2] [1917] A.C. 309.
[3] [1956] O.R. 963.

a sufficient probability to warrant the question of malice or not being put to the jury. The defendants appealed to this Court.

Considerable argument in this Court was concerned with the question of whether the alleged slanders were or were not spoken on occasions of qualified privilege. The occasion advanced by counsel for the appellant was that the individual defendants as company officers were concerned with what they believed to be a wholesale resignation of agents in the Peterborough branch territory including the district offices in Peterborough, Trenton and Oshawa. That situation was one with which they could validly be concerned as it was said in evidence that a very large sum of money must be expended to establish a branch agency of the company and train the agents. Statements which are fairly made by a person in the conduct of his own affairs in matters where his own interest is concerned are *prima facie* privileged: *Toogood v. Spyring*[1], at p. 193; *Halls v. Mitchell*[2], *per* Duff J. at p. 132; Gatley on Libel and Slander, 5th ed., p. 253.

The respondent's submission was that almost immediately upon the arrival of Messrs. Dennis and Moore at the branch office in Peterborough and the district office in Oshawa, respectively, they were re-assured upon the topic of the feared resignation of the agents and that therefore they knew the occasion for privilege did not exist in fact, yet they continued to utter and to repeat the alleged slanders. I am of the opinion that this is too cursory a view of the evidence.

The plaintiff in telephone conversation with the defendant Attridge on January 13 had informed Attridge that he, Dalrymple, was resigning and that others would follow, perhaps as many as 8 or 9. The plaintiff in conference with the defendant Dennis on the morning of January 14 in Peterborough had answered when the defendant Dennis read out a list of the names of the agents that a similar number might well resign. The individual defendants were surely justified in taking the view that these agents when purporting to disavow to them, the defendants, their intentions to resign were not altogether frank and that such intention to resign did exist, despite their declarations. There was considerable justification for this belief shown, *inter*

[1] (1834), 1 Cr. M. & R. 181. [2] [1928] S.C.R. 125.

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alia, in two pieces of evidence. Firstly, Moore, in Oshawa, had attempted to have the various agents there "make a commitment", *i.e.,* undertake that they would not resign, and failed to obtain this undertaking. Secondly, on January 15, when the agents met in Cobourg, and invited the defendants Dennis and Moore to attend this meeting, which invitation the defendants had refused, the agents passed a resolution the second part of which was a declaration that if the plaintiff were not reinstated they would all resign. It is true that the plaintiff insisted that this second part of the resolution should be eliminated as it might have been interpreted as a threat, but the incident does indicate that there was a real possibility of wholesale resignations continuing up to as late as January 15. On this evidence, I could not accept the view that the occasion of privilege had been lost.

There is a further grave question whether the statements made by the three individual defendants were so irrelevant to the proper protection of their employer's interest that the privilege was lost. Certainly, statements irrelevant to protecting the interests will result in loss of privilege: *Adam v. Ward*[1], *per* Lord Loreburn, at pp. 320-1, Lord Dunedin, pp. 326-7, and Gatley, *op. cit.,* pp. 267ff.

Were the comments irrelevant? The comments may be generally described as being an attempt to show to the agents that their loyalty to the plaintiff was one not justified in their own interests. The defendants Dennis and Moore attempted this by saying to the agents that this man whom they admired so much was one who had previously made a threat to resign and that then he had waited until his pension had vested so that he would suffer no financial loss upon his resignation, while they, on the other hand, having had much shorter employment, would, if they resigned, have no benefit from vested pensions and that in addition the plaintiff was a troublemaker not only within the company but in dealing with others outside the company. It might well be that if these comments were justified in evidence given by the defendants, or reasonable grounds for them found, these comments would not be irrelevant to the attempt to retain the agents in the service of the company. The agents' loyalty to the plaintiff was certainly a very moving factor. It was not the sole factor. The

[1] [1917] A.C. 309.

loyalty was inspired in a very material fashion by the plaintiff's resolute insistence of non-interference with the opportunity for profit in the Peterborough branch and that, of course, was to the pecuniary advantage of the agents as well as the plaintiff. It was argued that these defendants coming to the Peterborough branch territory with the purpose of retaining in the organization the agents then on staff, could have carried out that purpose by assuring the staff proper co-operation of head office and the appointment of a new manager who would work for the interest of the company and of those agents. This argument, however, is not convincing. As I say, it was the loyalty of the agents to the manager who had just resigned which was the matter of prime importance and unless that loyalty were broken it would seem of little use to make rosy prophesies of what his successor would do.

I am, in summary, of the view that the alleged slanders were all uttered on occasions of qualified privilege. However, it would seem that the Court of Appeal were, with respect, correct in their view that there was both extrinsic and intrinsic evidence of malice.

"Malice" of course does not necessarily mean personal spite or ill-will; it may consist of some indirect motive not connected with the privilege: *Jerome v. Anderson*[1], *per* Cartwright J. at p. 299; *Dickson v. Wilton (Earl)*[2], *per* Lord Campbell at p. 427.

Firstly, it must be determined what evidence of malice is sufficient to go to the jury. Whether the defendant was actuated by malice is, of course, a question of fact for the jury but whether there is any evidence of malice fit to be left to the jury is a question of law for the judge to determine: Gatley, *op. cit.* p. 272; *Adam v. Ward, supra, per* Lord Finlay L.C. at p. 318.

Roach J.A. in *Taylor et al. v. Despard et al.*[3], at p. 978 said:

> The law is well settled that in order to enable a plaintiff to have the question of malice submitted to the jury—and I am of course dealing only with occasions of qualified privilege—it is necessary that the evidence should raise a probability of malice and be more consistent with its existence than with its non-existence and that there must be more than a mere scintilla of evidence.

This would seem to be supported by other authorities.

[1] [1964] S.C.R. 291. [2] (1859), 1 F. & F. 419.
[3] [1956] O.R. 963.

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In *Turner v. M-G-M Pictures, Ltd.*[1], Lord Oaksey said at p. 470:

> Did the appellant prove that it was more probable than not that the respondents were actuated by malice?

And Lord Porter said at p. 455:

> No doubt, the evidence must be more consistent with malice than with an honest mind, but this does not mean that all the evidence adduced of malice towards the plaintiff on the part of the defendant must be set against such evidence of a favourable attitude towards him as has been given and the question left to, or withdrawn from, the jury by ascertaining which way the scale is tipped when they are weighed in the balance one against the other. On the contrary, each piece of evidence must be regarded separately, and, even if there are a number of instances where a favourable attitude is shown, one case tending to establish malice would be sufficient evidence on which a jury could find for the plaintiff.

Although upon an occasion held to be one of qualified privilege the court will not look too narrowly on the language used in the alleged slander, *Spill v. Maule*[2]; *Adam v. Ward, supra,* at p. 334; *Taylor et al. v. Despard, et al., supra,* the slander if utterly beyond and disproportionate to the facts may provide evidence of excess malice: *Spill v. Maule, supra,* p. 236.

Moreover, as Lord Porter pointed out in the judgment quoted and adopted by Cartwright J. in *Jerome v. Anderson, supra,* at p. 299, one piece of evidence tending to establish malice is sufficient evidence on which a jury could find for the plaintiff and therefore if more than a mere scintilla, it should be submitted to the jury for its finding of fact.

Express malice must be found against each one of the three defendants: *Egger v. Viscount Chelmsford et al.*[3], *per* Lord Denning M.R., at p. 412:

> It is a mistake to suppose that, on a joint publication, the malice of one defendant infects his co-defendant. Each defendant is answerable severally, as well as jointly, for the joint publication: and each is entitled to his several defence, whether he be sued jointly or separately from the others. If the plaintiff seeks to rely on malice to aggravate damages, or to rebut a defence of qualified privilege, or to cause a comment, otherwise fair, to become unfair, then he must prove malice against each person whom he charges with it. A defendant is only affected by express malice if he himself was actuated by it: or if his servant or agent concerned in the publication was actuated by malice in the course of his employment.

Of course, the express malice which actuated any of the three individual defendants will make the corporate defendant liable since the statement was made by the employee in the course of his employer's business.

[1] [1950] 1 All E.R. 449. [2] (1869), L.R. 4 Exch. 232.
[3] [1964] 3 All E.R. 406.

The Court of Appeal for Ontario in its judgment said, in part:

> Because as a result of this unanimous view, there must, in the opinion of this Court, be a new trial, we refrain from more specific comment on the evidence so that the matter may in fairness to both parties be left at large for disposition in the new trial.

I have come to the conclusion, with respect, that such a course is a proper one under the circumstances and, therefore, I shall only state that I am convinced that there is both extrinsic and intrinsic evidence of express malice on the part of each of the three individual defendants. In coming to this conclusion, I have not considered the many references to what would seem to be minor matters indicating express malice such as a certain occurrence during the course of the trial. The trial seems to have been a rather acrimonious contest between counsel and if the evidence of express malice were limited to such slight matters it might well be said that there was only a scintilla of evidence. I have preferred to rely on items of evidence which are not of such limited character having considered them in the manner outlined by Lord Porter, *supra,* and as approved by Cartwright J. in this Court in *Jerome v. Anderson, supra,* at p. 300.

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

Appeal dismissed with costs, JUDSON J. *dissenting.*

Solicitors for the defendants, appellants: Kimber & Dubin, Toronto.

Solicitors for the plaintiff, respondent: Starr, Allen & Weekes, Toronto.

1964
*Dec. 10, 11, 14
1965
Jan. 26

DOUGLAS GORDON ..... APPELLANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Habitual criminal—Notice of application to have accused given preventive detention "in addition to" sentence for substantive offence—Whether notice defective to the extent of nullity—Criminal Code, 1953-54 (Can.), c. 51, ss. 660(1), 662(1)(a), 667.

Criminal law—Habitual criminal—Procedure—County Court Judges' Criminal Court—Application for sentence of preventive detention—Application traversed to next sittings of Court in January—Application finally heard in June—No adjournments meanwhile—Whether proceedings had come to an end because of postponements and delay—Whether County Court Judges' Criminal Court a continuing Court.

The appellant was convicted in February 1962 on a charge of trafficking in drugs and was sentenced to ten years imprisonment. While his appeal was pending he was served in May 1962 with an application asking the Court to impose a sentence of preventive detention "in addition to" the sentence imposed on the ground that he was a habitual criminal. His appeal on the substantive offence was dismissed and this Court refused to grant leave to appeal in October 1962. In December 1962, the Crown's request to have the application for preventive detention traversed to the next Court of competent jurisdiction was granted. Because of lack of accommodation at the Court house, the application was not heard until June 1963 despite repeated efforts of Crown counsel to have it heard sooner. The application was quashed by a judge of the County Court Judges' Criminal Court on the grounds that the notice was defective to the extent of nullity and that the application had expired when it was not dealt with in January. The Court of Appeal held that the application could be amended and that the County Court Judges' Criminal Court was a continuing Court and adjournments from time to time were not necessary to keep the application alive. The application was ordered remitted to a judge of the County Court Judges' Criminal Court. The accused was granted leave to appeal to this Court.

Held (Cartwright J. dissenting): The appeal should be dismissed.

Per Taschereau C.J. and Fauteux, Judson and Spence JJ.: Section 660(1) of the *Criminal Code,* as amended by 1960-61 (Can.), c. 43, s. 33(1), leaves no room for doubt that the only sentence of preventive detention which could be imposed is "in lieu of" any other sentence, not "in addition to". The essence of the notice is that a sentence of preventive detention would be sought. This could only be under the existing law. The error in the notice was contained in something that was superfluous. The nullity was to be found in the error and not in the essential function of the notice. There was no need to amend the notice. The contention that the notice was given under a repealed section of the Code could not be accepted.

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Judson and Spence JJ.

The application had not come to an end because of repeated postponements and delay. The delays were justified in this case. The County Court Judges' Criminal Court is a continuing Court before which the application was pending until it was heard.

The fact that an accused may have unsuccessfully appealed against the sentence imposed upon him for a substantive offence could not operate as a bar to proceeding against him as a habitual criminal.

Although the Court of Appeal had power under s. 667(2)(*b*) of the Code to impose a sentence of preventive detention, it could not take such action because the application had not been heard. It could, in these circumstances, only say that the quashing of the notice was erroneous.

Per Cartwright J., *dissenting:* The notice served upon the appellant was fatally defective. The argument that the notice was sufficient and that the words "in addition to" were mere surplusage, could not be accepted. A notice that the Court will be asked to do something which is clearly illegal and beyond its powers could not form a valid foundation for a criminal proceeding of the most serious sort, in which it is sought to deprive a man of his liberty for the rest of his life. The amendment ordered by the Court of Appeal was ineffective as it was not made until long after the period of three months fixed by the s. 662 had expired. It has long been the settled policy of English criminal law that as against a prisoner every rule in his favour must be observed.

Droit criminel—Repris de justice—Avis de demande pour imposer à l'accusé une sentence de détention préventive «en plus de» la sentence imposée pour l'offense originale—L'avis était-il défectueux jusqu'au point de nullité—Code criminel, 1953-54 (Can.), c. 51, arts. 660(1), 662(1)(a), 667.

Droit criminel—Repris de justice—Procédure—County Court Judges' Criminal Court—Demande pour imposer une sentence de détention préventive—Demande remise à la session suivante de la Cour en janvier—Demande finalement entendue en juin—Aucun ajournement durant cette période—Est-ce que les procédures avaient pris fin à cause de ces retards et délais—Est-ce que la County Court Judges' Criminal Court est une Cour continuelle.

L'appelant fut trouvé coupable en février 1962 d'avoir fait le trafic de stupéfiants et a été condamné à dix ans d'emprisonnement. Alors que son appel était devant la Cour d'Appel, il reçut signification en mai 1962 d'une demande demandant à la Cour d'imposer une sentence de détention préventive «en plus de» la sentence déjà imposée pour le motif qu'il était un repris de justice. Son appel contre le verdict pour l'offense originale fut rejeté et cette Cour refusa permission d'appeler en octobre 1962. La Couronne fit application en décembre 1962 pour remettre la demande de détention préventive à la prochaine Cour de juridiction compétente. Cette demande fut accordée. Dû à un manque d'aménagement au palais de justice, la demande ne fut pas entendue avant le 6 de juin 1963 malgré les efforts du procureur de la Couronne pour qu'elle soit entendue plus tôt. La demande fut rejetée par le juge de la *County Court Judges' Criminal Court* pour le motif que l'avis était défectueux jusqu'au point de nullité et que la demande avait

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expiré lorsqu'elle n'avait pas été entendue au mois de janvier. La Cour d'Appel jugea que la demande pouvait être amendée et que la *County Court Judges' Criminal Court* était une Cour continuelle et que des ajournements de temps à autre n'étaient pas nécessaires pour que la demande demeure active. Il fut alors ordonné que la demande soit retournée à un juge de la *County Court Judges' Criminal Court.* L'appelant obtint permission d'appeler devant cette Cour.

Arrêt: L'appel doit être rejeté, le Juge Cartwright étant dissident.

Le Juge en Chef Taschereau et les Juges Fauteux, Judson et Spence: L'article 660(1) du *Code criminel,* tel qu'amendé par 1960-61 (Can.), c. 43, art. 33(1), ne laisse aucun doute que la seule sentence de détention préventive qui peut être imposée est une «au lieu de» toute autre sentence, et non «en plus de». Qu'une sentence de détention préventive serait recherchée, telle était la qualité substantielle de l'avis. Ceci ne pouvait avoir lieu que sous le régime de la loi alors existante. L'erreur dans l'avis était contenue dans quelque chose qui était superflu. La nullité portait sur l'erreur et non sur la fonction essentielle de l'avis. L'avis n'avait pas besoin d'être amendé. La proposition que l'avis avait été donné sous un article du Code abrogé ne peut pas être acceptée.

Les retards et délais n'avaient pas mis fin à la demande; les délais étaient justifiés dans l'espèce. La *County Court Judges' Criminal Court* est une Cour continuelle devant laquelle la demande était en souffrance jusqu'à ce qu'elle soit entendue. Le fait que l'accusé pouvait avoir appelé sans succès de la sentence imposée pour l'offense originale ne pouvait servir en fin de non-recevoir contre la poursuite prise contre lui comme repris de justice.

Quoique la Cour d'Appel avait le pouvoir en vertu de l'art. 667(2)(*b*) du Code d'imposer une sentence de détention préventive, elle ne pouvait le faire parce que la demande n'avait pas été entendue. Tout ce que la Cour pouvait faire, dans les circonstances, était de déclarer que le rejet de l'avis était erroné.

Le Juge Cartwright, dissident: L'avis qui a été signifié à l'appelant était fatalement défectueux. L'argument que l'avis était suffisant et que les mots «en plus de» étaient simplement du surplus, ne peut pas être accepté. Un avis que la Cour sera requise de faire quelque chose qui est clairement illégal et au-delà de ses pouvoirs ne peut pas former un fondement valide pour une poursuite criminelle de la plus sérieuse nature, dans laquelle on cherche à supprimer la liberté d'un homme pour le reste de sa vie. L'amendement ordonné par la Cour d'Appel est inefficace parce qu'il n'a été fait que longtemps après l'expiration de la période de trois mois fixée par l'art. 662. Dans le droit criminel anglais la ligne de conduite qui est établie depuis longtemps est à l'effet que toutes les règles en faveur du prisonnier doivent être observées.

APPEL d'un jugement de la Cour d'Appel de l'Ontario, renversant une décision du Juge de comté Rogers qui avait rejeté une demande pour sentence de détention préventive sous l'art. 660 du *Code criminel.* Appel rejeté, le Juge Cartwright étant dissident.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing an order of Rogers, Co. Ct. J., quashing an application for sentence of preventive detention under s. 660 of the *Criminal Code*. Appeal dismissed, Cartwright J. dissenting.

Miss Vera L. Parsons, Q.C., for the appellant.

D. H. Christie, Q.C., and *J. H. Buntain*, for the respondent.

The judgement of Taschereau C.J. and Fauteux, Judson and Spence JJ. was delivered by

JUDSON J.:—After the accused had been found guilty of trafficking in drugs contrary to s. 4(3)(*a*) of the *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201, the Crown took proceedings against him as an habitual criminal. This application was quashed by a Judge of the County Court Judges' Criminal Court for the County of York for two reasons: first, that the notice was defective to the extent of nullity, and second, that the proceedings had come to an end because of delay. On appeal to the Court of Appeal[1] both these reasons were rejected and the matter was remitted to a Judge of the same Court for enquiry and disposal. Leave to appeal was granted to this Court. In my opinion the appeal fails.

The grounds of appeal make it necessary to set out in some detail the proceedings that were taken against the accused. He was convicted on February 14, 1962, on the charge of trafficking and sentenced to ten years' imprisonment. His appeal against conviction and sentence was heard and dismissed on June 20, 1962. An application for leave to appeal to this Court was dismissed on October 2, 1962. This ended the proceedings for the offence itself.

In the meantime, on May 8, 1962, the Crown served the appellant with notice of intention to seek a sentence of preventive detention against him as an habitual criminal. On June 5, 1963, the appellant filed a notice of motion to quash the application. It was this motion which was granted on June 20, 1963.

On July 17, 1963, the Crown prepared a notice of appeal to the Ontario Court of Appeal from the order quashing

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the application. Time for service of this notice was extended by ex parte order made by Mr. Justice Hughes on July 24, 1963. It was served and filed on July 25, 1963. This appeal was heard in February, 1964, and judgment was given in March, 1964, referring the matter back to the County Court Judges' Criminal Court. Leave to appeal was granted to this Court in April 1964.

The main ground of appeal is that the notice of application, dated May 8, 1962, to have the appellant declared an habitual criminal, was a nullity because it asked for a sentence of preventive detention in addition to the sentence of 10 years. By s. 660(1) of the *Criminal Code,* enacted by 1960-61 (Can.), c. 43, s. 33(1), the only sentence of preventive detention which could be imposed in the circumstances of this case was one in lieu of the sentence that had been imposed. The statute leaves no room for doubt on this point. It reads:

> 660. (1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention 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.

The former law embodied in the 1953-1954 statute was that the sentence of preventive detention would be in addition to any sentence that had been imposed. From this it is argued that the notice of application was given under a repealed statute and was therefore a nullity.

I agree with the Court of Appeal that the essence of the notice is that a sentence of preventive detention will be sought. This could only be under the existing law. The error in the notice is contained in something that is superfluous. The nullity is to be found in the error not in the essential function of the notice. I do not think there was any need to amend by substituting "in lieu of" for "in addition to".

These proceedings were authorized by the Attorney General in these terms:

> Pursuant to section 662(1)(*a*)(1) of the Criminal Code, I consent to an application being made to have a sentence of preventive detention imposed upon Douglas Gordon.

The consent itself is attacked on the ground that it cannot be applicable to a notice given under a repealed section of the *Criminal Code*. This objection presupposes the correctness of the first submission. What the Attorney General was consenting to was an application under the Code as it stood at the date of the consent.

All that the Crown's notice needed to say was that a sentence of preventive detention would be sought against the appellant. The Code would then have spoken. The appellant's sentence had not expired. Therefore, the sentence of preventive detention could only be imposed in lieu of the 10 year sentence that he was already serving. There could be no ambiguity or doubt about the situation. The words "in addition to the sentence of 10 years" which appear in the notice are, on the face of them, erroneous. But this does not mean that the Crown was seeking this sentence under the provisions of a repealed section of the Code or that the notice was given pursuant to a repealed section.

The other ground on which the application was quashed in the County Court Judges' Criminal Court was that because of the repeated postponements and delay, the application, even if it were ever a valid one, had come to an end.

First of all, nothing could be done with this application until this Court had dismissed on October 2, 1962, the application for leave to appeal from the original conviction. The notice had been served on May 8, 1962. On December 10, 1962, counsel for the Attorney General of Canada asked that the application for preventive detention be traversed to the next Court of competent jurisdiction. This request was granted, counsel for the accused neither objecting nor consenting. Because of lack of accommodation at the Courthouse, the application was not heard in the spring of 1963 despite repeated efforts of Crown counsel to have it heard. It finally came on on June 20, 1963, when it was quashed. The second of the reasons given by the learned trial judge was that he was deprived of jurisdiction because the matter had not been dealt with by the County Court Judges' Criminal Court for the County of York in January, 1963, and that consequently, the application had expired. I agree with the Court of Appeal that the County Court Judges'

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Criminal Court is a continuing Court before which this application was pending until it was heard and that any reference to this Court in an unofficial guide as holding weekly sittings does not affect the question.

Up to this point I have dealt with the first four grounds on which leave to appeal was sought. The fifth ground is that there could not be an application for preventive detention because the original conviction and sentence had been appealed to the Court of Appeal and confirmed by that Court. Therefore, no County Court Judge sitting in the County Court Judges' Criminal Court could do anything which would in any way modify what the Court of Appeal had done. This argument is contrary to the express provisions of s. 660. The fact that an accused may have unsuccessfully appealed against the sentence imposed upon him for the substantive offence cannot operate as a bar to proceeding against him as an habitual criminal.

The sixth ground of appeal has to do with the powers of the Court of Appeal under Part XXI dealing with preventive detention. Section 667 provides:

667. (1) A person who is sentenced to preventive detention under this Part may appeal to the court of appeal against that sentence on any ground of law or fact or mixed law and fact.

(2) The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part on any ground of law.

(2*a*) On an appeal against a sentence of preventive detention the court of appeal may

(*a*) quash such sentence and impose any sentence that might have been imposed in respect of the offence for which the appellant was convicted, or

(*b*) dismiss the appeal.

(2*b*) On an appeal against the dismissal of an application for an order under this Part the court of appeal may

(*a*) allow the appeal, set aside any sentence imposed in respect of the offence for which the respondent was convicted and impose a sentence of preventive detention, or

(*b*) dismiss the appeal.

In this case the County Court Judge quashed the notice of application. He took no evidence and did not embark upon any enquiry under s. 660. The Court of Appeal, although it has power under s. 667(2)(*b*) to impose a sentence of preventive detention, could not take any such action because the case had not been heard. It could, in the circumstances, only say that the quashing of the notice

was erroneous. The consequence was that there was still an application pending before the County Court Judges' Criminal Court. The order of the Court of Appeal simply tells this Court to proceed with the hearing.

The remaining grounds of appeal are concerned with technicalities. They were fully argued and I repeat them merely for the purpose of stating that I have considered and rejected them as having no merit. The remission of the matter to the County Court does not result in a new application which is out of time under s. 662(1)(*a*)(ii). The notice of application signed by the Special Crown Prosecutor was in order. It was addressed to the appellant and its validity is not affected by the fact that it is not headed "Her Majesty The Queen, Applicant and Douglas Gordon, Respondent." Mr. Justice Hughes had jurisdiction to make the order of July 24, 1963, extending the time for service of the notice of appeal to the Court of Appeal.

I would dismiss the appeal.

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Ontario[1] which allowed an appeal by the Attorney General of Canada from an order of His Honour Judge Rogers quashing an application for the imposition of a sentence of preventive detention upon the present appellant. The Court of Appeal ordered that the notice which had been served upon the appellant be amended and that the application for the imposition of a sentence of preventive detention be remitted to a Judge of the County Court Judges Criminal Court of the County of York for inquiry and disposal.

There is no dispute as to the facts which are relevant to the determination of this appeal.

The appellant was convicted at Toronto on February 14, 1962, before His Honour Judge Forsyth and a jury on a charge of trafficking in drugs contrary to s. 4(3) (*a*) of the *Opium and Narcotic Drug Act,* R.S.C. 1952, c. 201. On February 16, 1962, he was sentenced to 10 years' imprisonment. By Notice of Appeal dated March 7, 1962, he appealed against his conviction and sentence to the Court of Appeal.

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This appeal was heard and dismissed on June 20, 1962. An application for leave to appeal to this Court was dismissed on October 2, 1962.

On May 8, 1962, the appellant was served with a notice of intention to ask that a sentence of preventive detention be imposed upon him on the ground that he is a habitual criminal. On June 5, 1963, the appellant filed a notice of motion to quash the application. This motion was allowed by His Honour Judge Rogers on June 20, 1963.

On July 17, 1963, the Attorney General for Canada prepared a notice of appeal to the Court of Appeal from the order of His Honour Judge Rogers. On July 24, 1963, Hughes J., on an *ex parte* application, extended the time for serving and filing the notice until July 29, 1963. The notice was served and filed on July 25, 1963. The appeal came on for hearing before the Court of Appeal on February 24 and 25, 1964. Judgment was reserved until March 10, 1964, when the appeal was allowed. Leave to appeal to this Court was granted pursuant to s. 41 of the *Supreme Court Act,* on April 28, 1964.

A number of grounds in support of the appeal to this Court were fully argued but I find it necessary to deal with only one of them, which is that the notice, dated May 8, 1962, served upon the appellant was fatally defective.

The notice, dated and served May 8, 1962, recited the conviction of the appellant before His Honour Judge Forsyth, his sentence to ten years' imprisonment and the giving of consent by the Attorney General of Ontario to the making of the application for the imposition of a sentence of preventive detention and continued:

> TAKE NOTICE, THEREFORE, that having been convicted on the aforesaid charge under Section 4(3)(*a*) of *The Opium and Narcotic Drug Act,* Revised Statutes of Canada 1952, Chapter 201 and amendments thereto, of unlawfully trafficking in a drug, to wit Diacetylmorphine, that an application will be made on June 11, 1962, before the Presiding Judge in the County Court Judge's Criminal Court for the County of York, at the City Hall, Toronto, at 10.00 o'clock in the forenoon to impose upon you a sentence of preventive detention, in addition to the sentence of ten years imposed by His Honour Judge Forsyth on February 16, 1962, on the ground that you are an habitual criminal and that because you are an habitual criminal it is expedient for the protection of the public to sentence you to such preventive detention.

The relevant provisions of the *Criminal Code* conferring jurisdiction on the County Court Judge to hear and determine the application and prescribing the procedure to be followed are s.660(1) and s.662(1) (*a*). These 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 detention 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.

662(1) The following provisions apply with respect to applications under this Part, namely,

(*a*) an application under subsection (1) of section 660 shall not be heard unless

(i) the Attorney General of the province in which the accused is to be tried consents,

(ii) seven clear days' notice has been given to the accused by the prosecutor, either before or after conviction or sentence but within three months after the passing of sentence and before the sentence has expired, specifying the previous convictions and the other circumstances, if any, upon which it is intended to found the application, and

(iii) a copy of the notice has been filed with the clerk of the court or the magistrate, as the case may be;

Section 660(1) in its present form was enacted by Statutes of Canada 1960-1961, c.43 and came into force on September 1, 1961. Prior thereto that part of the subsection preceding paragraph (*a*) had read as follows:

660(1) Where an accused is convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in addition to any sentence that is imposed for the offence of which he is convicted if

The amendment made in 1961 brought about a substantial change in the law. Prior thereto a sentence of preventive detention commenced immediately upon the determination of the sentence imposed for the substantive offence; since the amendment it takes the place of the last mentioned sentence.

It appears therefore that the notice served upon the appellant stated that the Judge before whom the application would come was to be asked to do something which

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he had no power to do and which was contrary to law. It is argued for the appellant that this is a defect in substance and is fatal to the Attorney General's application.

It is clear from the wording of s. 662(1)(*a*), quoted above, that the giving of a sufficient notice within three months after the passing of sentence is a condition precedent to the hearing of the application. This is not disputed; but counsel for the respondent argues that the notice given was sufficient and that the words "in addition to the sentence of ten years imposed by His Honour Judge Forsyth on February 16, 1962" can and should be regarded as mere surplusage. This argument found favour with the Court of Appeal but I am unable to accept it.

The question is whether the notice, when it was served, constituted a sufficient compliance with the statutory condition precedent prescribed by s. 662. If it did not the amendment ordered by the Court of Appeal would be ineffective as it was not made until long after the period of three months fixed by the section had expired.

No special form of notice is required by the section but I have reached the conclusion that a notice that the Court will be asked to do that which is clearly illegal and beyond its powers cannot form a valid foundation for a criminal proceeding of the most serious sort, in which it is sought to deprive a man of his liberty for the rest of his life.

It is said, on behalf of the respondent, that no real prejudice has been caused to the appellant but it has long been the settled policy of English criminal law that as against the prisoner every rule in his favour is observed.

In *R. v. Triffitt*[1], the Court of Criminal Appeal quashed a finding that the appellant was a habitual criminal because of an irregularity of procedure although, in the words of Humphreys J. who gave the unanimous judgment of the Court, "the appeal has otherwise no merits whatsoever".

In *Parkes v. The Queen*[2], this Court set aside a finding that the appellant was a habitual criminal. At pages 773 and 774, Rand J. said:

> There seems to be a tendency to treat a proceeding under the section as one in which strict compliance with the express requirements of the Code is not to be insisted on. That is altogether a mistake. Under such a determination a person can be detained in prison for the rest of his life with

[1] (1938), 26 Cr. App. Rep. 169, 2 All E.R. 818.
[2] [1956] S.C.R. 768, 24 C.R. 279, 116 C.C.C. 86, 6 D.L.R. (2d) 449.

his liberty dependent on the favourable discretion of a minister of the Crown. The adjudication is a most serious step in the administration of the criminal law in relation to which it is well to recall the words of the Lord Chief Justice of England in *Martin v. Mackonochie* (1878) 3 Q.B.D. 730 at 775-6.

> It seems to me, I must say, a strange argument in a court of justice, to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by dealing summarily with a defendant, the proceeding should be upheld. In a court of law such an argument à convenienti is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in poenam are it need scarcely be observed, strictissimi juris; nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist upon them as a matter of right, of which he cannot be deprived against his will; and the judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the legislature to amend. The judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself.

Having reached the conclusion, for the reasons stated above, that the notice served upon the accused was fatally defective, it becomes unnecessary for me to examine the other grounds in support of the appeal which were argued before us.

I would allow the appeal, set aside the judgment of the Court of Appeal and restore that of His Honour Judge Rogers quashing the application for the imposition of a sentence of preventive detention.

Appeal dismissed, CARTWRIGHT J. *dissenting.*

Solicitors for the appellant: Graham, Parsons & Liscombe, Toronto.

Solicitor for the respondent: T.D. MacDonald, Ottawa.

1964
*Mar. 9, 10
Nov. 4

STERLING TRUSTS CORPORATION, Executor of the last will and testament of Dorothy Margaret Brown, Deceased, and WILLIAM JOHN BROWN (*Plaintiffs*) ..... APPELLANTS;

AND

HENRY POSTMA, FRED A. LITTLE and FREDERICK H. LITTLE (*Defendants*) ..... RESPONDENTS.

STERLING TRUSTS CORPORATION, Executor of the last will and testament of Dorothy Margaret Brown, Deceased, and WILLIAM JOHN BROWN (*Plaintiffs*) ..... APPELLANTS;

AND

HENRY POSTMA, OLIVE RUSSELL LITTLE, Executrix of the estate of Fred A. Little, and FREDERICK H. LITTLE (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Negligence—Truck involved in collision between two automobiles—Owner and driver of truck found jointly and severally liable with driver of one of the automobiles—Driver of automobile alone held liable on appeal—New trial ordered by Supreme Court on certain questions.

As a result of a collision between an automobile owned and operated by the defendant P and an automobile owned and operated by the plaintiff B, the plaintiff's wife was killed and B suffered grave and permanent injuries. P had veered to the left in order to avoid hitting a truck which was proceeding in front of him and as a consequence he collided with B's automobile which was approaching in the opposite direction. The trial judge found L Jr. as owner and L Sr. as driver of the truck jointly and severally liable with P for the damages sustained by the plaintiffs. As between the defendants, the trial judge attributed one third to the negligence of L Sr. and two thirds to that of P. An appeal by O L, as executrix of the estate of L Sr., and L Jr. was allowed and

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

so, in the result, P was held alone liable for the damages as fixed by the trial judgment. P did not appear upon the appeal to the Court of Appeal nor upon the further appeal to this Court.

The grounds on which it was argued that negligence should be imputed to the L's were (i) that the tail-light of the truck was not lighted, (ii) that there was not on the rear of the truck a reflector as required by s. 40(2) of the Ontario *Highway Traffic Act,* and (iii) that the driver of the truck was negligent in slowing down and attempting to make a left hand turn without adequate warning and without ascertaining that this movement could be made in safety. As to the second ground, the trial judge found as a fact that there was no reflector on the L truck but, having found that the tail-light was not lighted and that this was an effective cause of the collision, he did not deal with the question whether the lack of a reflector was also an effective cause.

As to the first ground, three questions were raised for decision, (i) was the tail-light on the L truck lighted?, (ii) if not, was the failure to have it lighted an effective cause of the collision? and, (iii) if the second question was answered in the affirmative did the result follow that the respondents were liable for the damages caused to the appellants.

The trial judge answered each of these questions in favour of the appellants. It was conceded that in answering the first question the trial judge misdirected himself as to the incidence of the burden of proof, holding that it was for the L's to show that the tail-light was lighted. The Court of Appeal held that the first question should be answered in the affirmative, but, in so doing mistakenly proceeded on the assumption that certain answers made by L Jr. on his examination for discovery had been admitted in evidence and were evidence against the appellants.

Held (Judson and Ritchie JJ., dissenting): The appeal should be allowed and the judgments of the Courts below set aside except in so far as they found P liable to the appellants, and a new trial should be had of the questions, (i) whether the respondents were liable to the appellants, (ii) if the respondents were found liable to the appellants, the degrees of fault as between the respondents and P, and (iii) the quantum of the appellants' damages.

Per Cartwright, Hall and Spence JJ. The question whether the tail-light on the L truck was lighted at the relevant time could not be answered from a perusal of the written record. A new trial was necessary, and if it should be found as a fact that the tail-light was not lighted it would be for the judge on the evidence adduced before him to decide whether or not that failure was an effective cause of the collision.

The respondents had further argued that even if, contrary to their submission, it should be found that the tail-light was not lighted and that the failure to have it lighted was an effective cause of the collision, they were not to be found liable in the absence of evidence that the driver of the truck knew or ought to have known that the tail-light was out. This argument was rejected. Once it was found (i) that the respondents committed a breach of the statutory duty to have the tail-light lighted, and (ii) that that breach was an effective cause of the appellant's injuries, the respondents were *prima facie* liable for the damages suffered by the appellants.

It was not necessary in this case to decide whether the statutory duty to have the tail-light lighted was an absolute one or, if not absolute, to

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attempt to define the extent of the burden cast upon a person who had committed the breach because in the case at bar it could not be said that the respondents had discharged it. The position of the respondents was not that there was a sufficient explanation to account for and excuse the fact that the light was not lighted; their position was that the light was in fact lighted at all relevant times.

Per Judson and Ritchie JJ., *dissenting*: The provisions of s. 51 of *The Highway Traffic Act* were no more effective than the decision in *Kuhnle v. Ottawa Electric Railway Co. and Green,* [1946] 3 D.L.R. 681, to relieve the appellants from the burden which they assumed on the pleading of proving that the negligence of L Sr. combined with that of P to cause the collision and resulting damage. The only evidence given on behalf of the appellants as to the absence of a tail-light on the L truck was that given by P, and as this only served to raise a doubt in the trial judge's mind, the Court of Appeal was right in concluding that the onus cast upon the appellants to prove this allegation was not satisfied. The only other allegation of negligence which appeared to find any support in the evidence was that L "was in the process of making an unusual manoeuvre without first ascertaining that it could be done in safety". However, the evidence did not establish that any negligent manoeuvre by L caused or contributed to the accident. Thus the case could be disposed of as it was by the Court of Appeal on the ground that the appellants failed to discharge the burden of proving that the tail-light on the truck was either not operating or defective, and that this constituted negligence which contributed to the accident.

The Court of Appeal was right in its reversal of the trial judge on the grounds: (i) that he was in error in putting the burden of proof on the respondents, and (ii) in his failure to find that P's negligence was the sole effective cause of the accident.

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from a judgment of Moorhouse J. Appeal allowed and a new trial directed on certain questions, Judson and Ritchie JJ. dissenting.

B. J. Thomson, Q.C., for the plaintiffs, appellants.

J. J. Robinette, Q.C., and *R. E. Nourse, Q.C.*, for the defendant, respondent, Olive Russell Little.

W. B. Williston, Q.C., and *J. Sopinka*, for the defendant, respondent, Frederick H. Little.

CARTWRIGHT J.:—The facts out of which this appeal arises and the course of the proceedings in the Courts below are set out in the reasons of my brother Ritchie and in those of my brother Spence.

The following findings made in both Courts below are not now challenged, (i) that the collision, in which Mrs. Brown was fatally injured and William John Brown suffered grave and permanent injuries, was caused by negligence on the

part of Postma and (ii) that Brown was not guilty of any negligence. The question of difficulty is whether there was negligence in the maintenance or operation of the truck owned by Frederick H. Little and driven by his father, the late Frederick A. Little, which was also an effective cause of the collision.

The grounds on which it was argued before us that negligence should be imputed to the Littles were (i) that the tail-light of the truck was not lighted, (ii) that there was not on the rear of the truck a reflector as required by s. 40(2) of *The Highway Traffic Act,* R.S.O. 1950, c. 167 [now R.S.O. 1960, c. 172, s. 51(2)], and (iii) that the driver of the truck was negligent in slowing down and attempting to make a left hand turn without adequate warning and without ascertaining that this movement could be made in safety.

The first and third of these grounds were pleaded in the statement of claim as originally delivered; the second was pleaded in an amendment permitted by the learned trial judge at the opening of the trial.

As to the third ground, I agree with Mr. Thomson's submission that the circumstance that in giving evidence Postma limited his complaints to the lack of tail-light and reflector does not prevent the appellants taking the position that the late Fred A. Little was otherwise negligent, if the evidence taken as a whole supports that position.

As to the second ground, the learned trial judge found as a fact that there was no reflector on the Little truck but, having found that the tail-light was not lighted and that this was an effective cause of the collision, he did not deal with the question whether the lack of a reflector was also an effective cause.

As to the first ground, three questions were raised for decision, (i) was the tail-light on the Little truck lighted?, (ii) if not, was the failure to have it lighted an effective cause of the collision? and, (iii) if the second question is answered in the affirmative does the result follow that the respondents are liable for the damages caused to the appellants?

The learned trial judge answered each of these three questions in favour of the appellants. It is conceded that in answering the first question the learned trial judge mis-

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directed himself as to the incidence of the burden of proof, holding that it was for the Littles to shew that the tail-light was lighted.

The Court of Appeal held that the first question should be answered in the affirmative, but, in so doing, mistakenly proceeded on the assumption that certain answers made by Frederick H. Little on his examination for discovery had been admitted in evidence and were evidence against the appellants.

After an anxious perusal of all the admissible evidence bearing on the question whether the tail-light on the Little truck was lighted at the relevant time, I have been forced to the conclusion that this question cannot be answered from a perusal of the written record. The learned trial judge has found that Postma, though confused, was honest and when all his evidence is read it is plain that on two points he did not waver; he reiterates that the tail-light was not lighted and that if it had been lighted he would have seen the truck in sufficient time to have avoided the fatal collision. But for the misdirection as to onus I do not think that an appellate court could have interfered with the finding of fact that the tail-light was not lighted. My difficulty is that I cannot be certain that the learned trial judge would have made this finding if he had not ruled wrongly as to the burden of proof. There is in the written record evidence on which it might be found that the tail-light was lighted and there is also evidence on which the contrary could be found.

In my respectful view, it would be mere guess-work to make either finding from the written record; the only tribunal by which such a finding can safely be made is one that has seen and heard the witnesses. For this reason I have reluctantly reached the conclusion that a new trial should be directed, unless a further argument of the respondents to be dealt with hereafter is entitled to prevail.

If it were established that the tail-light was not lighted, it would be my opinion that there was evidence to support the finding of the learned trial judge that this failure was an effective cause of the collision. If at the new trial it is found as a fact that the tail-light was not lighted it will be for the judge on the evidence adduced before him to decide whether or not that failure was an effective cause of the collision.

The further argument of counsel for the respondents referred to above is that even if, contrary to their submission, it should be found that the tail-light was not lighted and that the failure to have it lighted was an effective cause of the collision the respondents are not to be found liable in the absence of evidence that the driver of the truck knew or ought to have known that the tail-light was out. In my opinion this argument is not entitled to prevail.

The decision of the House of Lords in *London Passenger Transport Board v. Upson*[1] appears to me to proceed on the basis that the breach by the driver of a motor vehicle of a statutory provision which is designed for the protection of other users of the highway gives a right of action to a user of the highway who is injured as a direct result of that breach. The statutory provision requiring a motor vehicle to have a lighted tail-light when it is travelling on a highway after dark is designed for the protection of other users of the highway, particularly the drivers of overtaking vehicles. Its primary purpose is to prevent the occurrence of such a disaster as that out of which this case arises.

In my opinion, the law on this question is so well settled that it is unnecessary to multiply citations of authority. There have been differences of opinion as to whether an action for breach of a statutory duty which involves the notion of taking precautions to prevent injury is more accurately described as an action for negligence or in the manner suggested by Lord Wright in *Upson's* case, at p. 168, in the following words:

> A claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction. It is not a claim in negligence in the strict or ordinary sense...

I do not find it necessary in this case to attempt to choose between these two views as to how this cause of action should be described. I think it plain that once it has been found (i) that the respondents committed a breach of the statutory duty to have the tail-light lighted, and (ii) that that breach was an effective cause of the

[1] [1949] A.C. 155.

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appellant's injuries, the respondents are *prima facie* liable for the damages suffered by the appellants. I wish to adopt two observations made in the House of Lords in *Lochgelly Iron and Coal Co. Ltd. v. M'Mullan*[1] as applicable to the case at bar.

At p. 23, Lord Wright said:

> In such a case as the present the liability is something which goes beyond and is on a different plane from the liability for breach of a duty under the ordinary law, apart from the statute, because not only is the duty one which cannot be delegated but, whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute...

At p. 9, Lord Atkin said:

> I cannot think that the true position is, as appears to be suggested, that in such cases negligence only exists where the tribunal of fact agrees with the Legislature that the precaution is one that ought to be taken. The very object of the legislation is to put that particular precaution beyond controversy.

I have used above the expression that once it is found that the breach of the statute was committed and was an effective cause of the collision the respondents are *prima facie* liable to the appellants. The question then arises whether the respondents can absolve themselves from liability by showing that they had done everything that a reasonable man could have done under the circumstances to prevent the occurrence of the breach. A passage in the judgment of Lord Uthwatt in *Upson's* case, at p. 173, seems to suggest that this can be done by showing that under the circumstances it was impossible for the defendants to avoid committing the breach so that the maxim *lex non cogit ad impossibilia* takes effect. On the other hand in *Galashiels Gas Co. Ltd. v. O'Donnell or Millar*[2] the House of Lords held the statutory duty there under consideration to be absolute.

I do not find it necessary in this case to decide whether the statutory duty to have the tail-light lighted was an absolute one or, if it be not absolute, to attempt to define the extent of the burden cast upon a person who has committed the breach because, even if it is not so heavy as Lord Uthwatt seems to suggest, I do not think it can be said that in the case at bar the respondents have discharged it. The position of the respondents is not that

[1] [1934] A.C. 1. [2] [1949] A.C. 275.

there was a sufficient explanation to account for and excuse the fact that the light was not lighted, their position is that the light was in fact lighted at all relevant times. If the burden could be discharged simply by showing that the person upon whom it lay neither intended nor knew of the breach, the protection which it is the purpose of the statute to afford would in most cases prove illusory.

Before parting with this phase of the matter I think it desirable to refer to the three cases which were chiefly relied on by counsel for the respondents. These are *Falsetto v. Brown*[1]; *Grubbe v. Grubbe*[2], and *Fuller v. Nickel*[3].

In *Falsetto v. Brown* an automobile had run into the rear of a stationary truck in darkness. Kingstone J., the trial judge, found that the tail-light of the truck was not lighted. He found that the driver of the automobile was negligent in driving too fast under the weather conditions and in not keeping a proper look-out. He found both parties equally to blame. He stated his reasons for imposing liability on the driver and the owner of the truck as follows:

> Notwithstanding the fact that the driver may not have been aware that his light was out...the driver of the truck and the truck owner are still responsible to any person who, by reason of the failure of the rear light under such circumstances, collides with a vehicle ahead of it, whether stationary or in motion.

An appeal by the owner and driver of the truck was allowed by the Court of Appeal, composed of Latchford C.J. and Riddell and Davis JJ.A., Riddell J.A., dissenting in part. The complete reasons of Latchford C.J. are as follows:

> I agree with the result reached by my brother Davis on the ground that the efficient cause of the accident, the causing cause, was the negligence of the driver of the sedan.

Davis J.A. examined the evidence in considerable detail and reached the following conclusion, at p. 658 of the report:

> I am satisfied that the negligence of the driver of the sedan was solely responsible for the accident which gave rise to the damages sued for in these actions. He was driving, without having regard to the conditions existing at the time, at such a rate of speed and in such a manner as to be unable to control his car within the range of visibility. On his own evidence he did not see the truck when he should have seen it had he been looking, and when he did see it was unable to control his car and crashed into the truck.

[1] [1933] O.R. 645. [2] [1953] O.W.N. 626.
[3] [1949] S.C.R. 601.

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Davis J.A. had opened the preceding paragraph of his reasons, on the same page, with the words:

> But assuming that there was negligence, the plaintiffs in order to succeed must show that the negligence had a causal connection with the loss or damage that arose out of the accident.

No one would quarrel with this result on the view of the facts taken by the learned Justice of Appeal. It is not suggested that the breach of a statutory duty, any more than the breach of a duty owed under the ordinary law, gives a right of action to a plaintiff unless the breach has been a cause of the damage which he has suffered.

However, Davis J.A. gave an additional reason for allowing the appeal which is summarized in the following sentence at p. 656:

> The statutory duty to have a red tail lamp burning at certain times imposed by the statute is a public duty only to be enforced by the penalty imposed for a breach of it, and it was not the intention of the Legislature that everyone injured through a breach of any statutory requirement should have a right of civil action against the owner for damages.

While this statement was not necessary for the decision of the appeal, it was a ground on which Davis J.A. based his decision and cannot be regarded as having been said *obiter*. It was not, however, the judgment of the Court. It has already been shewn that Latchford C.J. refrained from agreeing with it and proceeded on the other ground on which Davis J.A. founded his judgment; Riddell J.A. disagreed with it, holding that the owner and driver of the truck were liable to the passengers in the sedan but not to the driver of the sedan because, in his view, the latter was guilty of ultimate negligence.

Later in the same year a similar question came before the Court of Appeal in *Irvine v. Metropolitan Transport Co. Ltd.*[1] The breach of statutory duty committed by the defendant was leaving its truck parked on the travelled portion of the highway contrary to s. 35*a* of *The Highway Traffic Act* then in force. The plaintiff's vehicle ran into the parked truck from behind. The trial judge found both parties at fault and apportioned the blame 75 per cent to the defendant and 25 per cent to the plaintiff.

The Court of Appeal was composed of Mulock C.J.O. and Riddell and Masten JJ.A. The defendant's appeal was dismissed, Riddell J.A. dissenting. In dealing with the

[1] [1933] O.R. 823.

question whether the defendant's breach of the statutory provision gave the plaintiff a right of action, Masten J.A. said at p. 833:

> In considering this phase of the appeal I have not overlooked subsec. 4 of sec. 35 (*a*) which imposes a penalty for violation of any of the provisions of the section.
>
> Upon a consideration of the whole section, I think that, notwithstanding that it prescribes a penalty for breach of the duty imposed, it also creates a cause of action in favour of a particular class of persons, namely, those who are travelling on the highway and suffer damage from breach of the statute. My reasons are (1) that the legislation is for the protection of one particular class of the community; (2) that the penalty is not payable to the party injured; (3) that a penalty of $5.00 up to $50.00 would in most cases be a wholly inadequate compensation for the damages suffered.

The learned Justice of Appeal then referred to a number of authorities and continued at pp. 833 and 834:

> I am therefore of opinion that sec. 35 (*a*) of the Traffic Act applies against the defendant, and that its breach of statutory duty was a wrong which continued down to the moment when plaintiff's car ran into the rear of the truck... Thus this defendant is liable unless the plaintiff was the sole cause of his own injury...

Mulock C.J.O. concluded his reasons as follows at p. 827:

> If I had tried this case I think I would not have found the plaintiff guilty of any negligence, but I am not prepared to overrule the learned trial Judge's finding and, therefore, I approve of the judgment of my brother Masten.

In his dissenting judgment, Riddell J.A. makes no criticism of the propositions of law enunciated by Masten J.A. but takes the view that on the facts the sole *causa causans* of the accident was the ultimate negligence of the plaintiff. *Falsetto v. Brown* was referred to in argument by counsel for the appellant in *Irvine's case* and also in the reasons for judgment of Riddell J.A. I think it clear that the majority of the Court must have disagreed with the proposition of law on the point now under consideration stated by Davis J.A. in *Falsetto v. Brown.* In my respectful view the reasoning of Masten J.A. on this point in *Irvine* is to be preferred to that of Davis J.A. in *Falsetto.*

In *Grubbe v. Grubbe, supra,* the plaintiff had run into the rear of the defendant's motor vehicle which had stopped on the highway without a lighted tail-light. The trial judge found the defendant solely to blame. The Court of Appeal reversed this judgment and held that the negligence of the plaintiff in driving too fast and not having his motor vehicle under proper control was "the sole cause of the

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damages suffered by the parties". The following passage in the reasons of Laidlaw J.A., who delivered the unanimous judgment of the Court, appears to lend some support to the view expressed by Davis J.A. in *Falsetto*. At p. 627, Laidlaw J.A. says:

> With much respect for the judgment of the learned trial Judge, I express the view that he has not approached the determination of the issues in this case in a proper manner. I accept his finding of fact that the rear light of the defendant's vehicle was not lighted when the vehicles stopped on the highway. But it appears to me that the learned judge was improperly influenced to the conclusion that there was negligence on the part of the defendant merely because the rear light of his vehicle was out. That fact alone does not impose liability on the defendant: *Falsetto v. Brown et al.* [1933] O.R. 645.

The note of the case does not shew whether the judgment was delivered at the conclusion of the argument. The reasons refer to no authority other than *Falsetto*. Reading the reasons as a whole I think that it appears that the *ratio* of the decision was that on the facts the absence of a tail-light was not a *causa causans* of the collision. I cannot think that the Court intended to depart from the principles enunciated in *Irvine's* case, *supra,* and in *London Passenger Transport Board v. Upson, supra,* when the reasons make no reference to either of these decisions.

The case of *Fuller v. Nickel, supra,* does not assist the respondents. The following sentence, from the judgment of Estey J., who gave the judgment of the majority, was referred to:

> The appellant's infractions of the *Vehicles and Highway Traffic Act,* both in failing to display clearance lights and having upon his truck a rack 3½ inches too wide, may justify the imposition of penalties, but in fixing the responsibility for a collision in an action between parties they are important only if they constitute a direct cause of that collision.

There is nothing in any of the judgments delivered in that case to suggest that the infractions of the statute would not have rendered the appellant liable if they had been an effective cause of the collision.

It is always unfortunate when a new trial has to be ordered. It is particularly so in this case where so long a time has elapsed since the collision out of which it arises. I can, however, find no escape from the conclusion that the vital question whether or not the tail-light was lighted at the relevant time cannot be safely answered from a perusal of the writen record. At the new trial it will be

taken as decided that Postma was negligent and that Brown was not negligent. The question of the quantum of damages was fully argued before us but I do not think we should deal with it. If the appellants fail at the new trial it will be unnecessary; if they succeed the damages should be assessed in the light of the evidence as to the condition of the appellant William John Brown existing at the time of the new trial.

I would allow the appeal, set aside the judgment of the Court of Appeal and the judgment at the trial except in so far as they find Postma liable to the appellants and direct that a new trial be had of the questions, (i) whether the respondents are liable to the appellants, (ii) if the respondents are found liable to the appellants, the degrees of fault as between the respondents and Postma, and (iii) the quantum of the appellants' damages. It was necessary for the respondents to appeal to the Court of Appeal and the order of that Court as to the costs of the appeal should stand. The appellants shall recover their costs of the appeal to this Court from the respondents. The costs of the former trial as between the appellants and the respondents shall be disposed of by the judge presiding at the new trial hereby directed.

The judgment of Judson and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario allowing the appeal of the executrix of Fred A. Little and Frederick H. Little personally from a judgment of Moorhouse J. whereby he had found Frederick H. Little as owner and Fred A. Little as driver of a Dodge truck, jointly and severally liable with the defendant, Henry Postma, for damages in the amount of $166,720, which he found to have been sustained by the plaintiffs as a result of a collision between a 1953 Meteor sedan, owned and operated by Henry Postma and a 1956 Volkswagen, owned and operated by the plaintiff, William Brown, as a result of which Mrs. Brown was killed and Mr. Brown sustained very extensive permanent injuries.

As between the defendants, the learned trial judge attributed one third to the negligence of Fred A. Little and two thirds to that of Postma. The effect of the judgment of the Court of Appeal is to dismiss the action as against the

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Littles. The defendant Postma did not appeal to the Court of Appeal and has not appealed to this Court.

The accident giving rise to this litigation occurred after dark (*i.e.*, between 5.20 and 5.30 p.m.) on the evening of December 19, 1959, at a point about two miles west of Trenton, Ontario, on highway No. 2 which runs generally east and west. The night was clear and the highway, which has a paved surface 20 feet in width and 10-foot gravel shoulders, was dry and straight so that from the crest of a knoll more than 420 feet to the east of the estimated point of collision there was clear visibility looking west for a half-a-mile to one mile. On the evening in question, Henry Postma was proceeding in a westerly direction on his way from Trenton to Brighton at a speed of "at least 50 to 55 miles per hour" when, after breasting the knoll above referred to, and having been momentarily blinded by the headlights of an on-coming car, he saw "a flicker of a light" ahead of him and then noticed for the first time the presence of what turned out to be the westbound Little truck proceeding slowly and only three or four car lengths ahead. He applied his brakes and his car skidded a distance of 122 to 124 feet on his own side of the road when, fearful of hitting the truck, he veered to the left and skidded a further 14 to 16 feet before colliding with the Brown vehicle which was proceeding in an easterly direction on its own side of the highway and the lights of which, according to Postma, had not been seen by him until he turned into the eastbound lane.

The usual difficulties in attempting to reconstruct the events immediately before and at the time of an automobile accident are magnified in the present case by the fact that of the drivers of the three vehicles concerned, Brown has no recollection of the accident, Fred A. Little died before trial and Postma was described by the learned trial judge as " a very confused young man". The task is not made easier by the fact that the distances given by the investigating policeman are in terms of estimate rather than measurement.

There has, however, never been any appeal by the plaintiff or Henry Postma from the finding of the trial judge that Postma was chiefly to blame for the collision, and the only question raised by this appeal is whether or not any degree of fault should attach to the Little vehicle.

Mr. and Mrs. Little had been shopping in Trenton on the afternoon of the accident and were returning to their farm, the entrance to which opens off the south side of highway No. 2 at a point estimated to be 50 or 60 feet to the eastward of the point of collision. There is no doubt that it was as Fred A. Little was slowing down preparatory to turning across the main road into his own driveway, that Postma applied his brakes and started his skid, but there are conflicting accounts of the movements of the truck immediately before and after the collision, of which the trial judge has accepted that given to Constable Graham of the Provincial Police two days after the accident. In so doing the learned judge makes the following finding:

> Fred A. Little's statement to the police some two days after the accident is of importance, and I take this from the evidence of Police Constable Graham;
>
> > I was proceeding west on No. 2 about to make a left turn and at the same time saw the vehicle . . .
>
> he did not say, but I put in there that it was the Postma vehicle I assumed, and I revert now again to his statement,
>
> > . . . coming from the rear at a high rate of speed. I pumped my brake light to show the car I was stopping. After oncoming vehicle passed I made turn and was in the driveway when I heard collision.
>
> Mrs. Olive Little, his widow, is an elderly woman appearing, perhaps, more than her actual years. Her memory was not good. I prefer the above version of what transpired. It is confirmed, in part, by Postma when he referred to the "flickering light".

Under all the circumstances I find it difficult to understand how, after the Brown vehicle had passed him travelling to the east, Little could have turned his truck to the left, driven it across 20 feet of highway and a 10-foot shoulder and attained his own driveway before Brown had travelled 50 or 60 feet to collide with the oncoming, skidding Postma Meteor sedan.

The version accepted by the trial judge was an account given by Constable Graham of a conversation which had taken place two years previously. It could not be tested by cross-examination of Little and it conflicted with the story told by him at a subsequent hearing of a charge against Postma under *The Highway Traffic Act*. I am bound to say that the story told by Mrs. Little of her husband's actions appears to me to be more consistent with the circumstances. She said:

> We drove up on the north hand side of the road and as he got near home he said something about a car, and then he slowed down to make the turn into Lafferty's driveway, which is across from us,

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and he put out his arm and he put on his brakes and we drove... Into Lafferty's driveway across from ours, and then I heard the screeching of tires and glass being broken, and then we drove over to our own driveway which is across on a slant, and then I went around—he left the lights on and I went around to the back and got my bag of groceries out, and he left the lights on for me to get part way up the driveway, and then he turned them off and he said, " I am going back, there is an accident".

In the course of her evidence, Mrs. Little also testified that it was her husband's custom to make the turn into his own driveway from the north shoulder of the highway; and as to the condition of the rear light on the truck she said:

Q. When you went around to get your groceries, did you notice anything in particular? A. Yes, I noticed the light was on.

Q. What light? A. Well, what do you call them, spot—no, dash light, or spot light.

Q. What colour was the light? A. It was a bright red, a red light.

Q. Where was it located? A. On the left hand side.

Q. Where, in relation to the licence plate, was it located? A. It was just above it.

Mrs. Little was subjected to searching cross-examination by two counsel and from the record it does not appear that she was shaken in any vital particular of her story. I am, however, conscious of the advantage which was enjoyed by the trial judge in seeing and hearing this witness and of the fact that the frailty of her memory, to which he refers, would not necessarily appear from a reading of the record. While her story of how and why the turn was made into the Little driveway appears to me as the most likely one, I do not base my decision on this construction of the evidence.

Postma, who was the only eye-witness to the accident called by the plaintiffs, made the following answers on cross-examination:

Q. Mr. Postma, am I right in thinking that the only thing, the thing you suggest that the truck driver did wrong, or might have done otherwise, was the failure to have a rear light on the vehicle, is that correct? A. Yes.

Q. Is that correct? A. Yes, it is.

Q. And so far as you are concerned, that is the only thing that you suggest was something done, or not done on the part of the truck driver which had anything to do with the causing of the accident? A. No, sir, I think it was just the light.

Q. It was the lack of the light? A. Yes.

Q. It was the only thing that you suggest against the truck driver, isn't that right? A. Yes.

In its passage through two Courts, the case against the Littles has been treated as being dependent on whether or not the plaintiffs have discharged, or indeed were required to discharge, the burden of proving that the negligent operation of the Little truck contributed to the accident.

In this latter regard the learned trial Judge made the following finding:

> In the instant case the defendants, Little, made it part of their case to prove the tail-light was on. The burden of proving that then, in my opinion, in this case was transferred to them. Postma's evidence cast doubt upon that fact and the Littles then assumed the burden of proving it. In that I must find they have not succeeded. I refer to the case of *Kuhnle v. Ottawa Electric Railway,* [1946] 3 D.L.R. 681.

In commenting on this passage in the factum, counsel for the appellants says:

> The trial judge clearly concluded that the defendants Little had not satisfied the onus of proving that the tail-light was on and expressly found that their truck was not equipped with a reflector as required by *the Highway Traffic Act. It is conceded that the learned trial judge misapplied the case of Kuhnle v. Ottawa Electric Railway* as an authority for his finding that the defendants Little had not satisfied the onus, but it is submitted that as the evidence of the defendant Little left him in doubt as to 'the nature and effectiveness of the rear light' he should properly have reached the same result by properly applying section 51 of *The Highway Traffic Act* and the case of *Foster v. Registrar of Motor Vehicles,* [1961] O.R. 551.

The well-known provisions of s. 51 read as follows:

> 51(1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.
>
> (2) This section shall not apply in case of a collision between motor vehicles on the highway nor to an action brought by a passenger in a motor vehicle in respect of any injuries sustained by him while a passenger.

The appellants state their argument in regard to this section in their factum in the following terms:

> The plaintiff William John Brown and his wife sustained loss or damage by reason of the Little and Postma motor vehicles on a highway. There was no collision between the Brown and Little vehicles: the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner (Frederick H. Little) and the driver (the late Fred A. Little) was accordingly upon the said owner and driver.

This proposition involves construing s. 51 (1) so that its provisions apply not only to the motor vehicle which is alleged to have inflicted the loss or damage, but also to

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any and all other motor vehicles which were present on the highway, and which might have contributed to the damage having been sustained.

This was "a collision between motor vehicles on a highway" and in order to invoke the provisions of s. 51 at all in the present case it is necessary to construe subs. (2) of that section as only applying to the two motor vehicles which actually collided so that the words "This section shall not apply in case of a collision between motor vehicles on the highway" are to be read as meaning that the section shall not apply to the owners and drivers of two motor vehicles so colliding, but that it shall apply in respect of other motor vehicles which, although not directly involved, are alleged, by reason of their presence on the highway, to have contributed to the collision. It appears to me that if such a construction were placed on the statute it would mean that whenever a driver on the highways of Ontario was involved in an accident as a result of having pulled out to pass a car ahead of him in the face of oncoming traffic, the owner or driver of the car which he passed could become involved by a mere allegation of negligence in a lawsuit in which he would be required to assume the burden of disproving his own negligence.

I cannot believe that the legislature intended any such meaning to be attached to the provisions of s. 51 of *The Highway Traffic Act,* nor do I think that the case of *Foster v. Registrar of Motor Vehicles, supra,* affords any authority for such a proposition as that case did not involve "a collision between motor vehicles on a highway".

It will be seen that I do not consider the provisions of s. 51 of *The Highway Traffic Act* to be any more effective than the decision in *Kuhnle v. Ottawa Electric Railway Co. and Green, supra,* to relieve the plaintiffs from the burden which they assumed on the pleading of proving that the negligence of Fred A. Little, combined with that of Postma to cause the collision and resulting damage.

As I have indicated, the only evidence given on behalf of the plaintiffs as to the absence of a tail-light on the truck was that given by Postma, and as this only served to raise a doubt in the learned trial judge's mind, I agree with the conclusion reached by Schroeder J.A., speaking on behalf of the Court of Appeal, when he said that:

> The onus cast upon them to prove this allegation was not satisfied.

The only other allegation of negligence contained in the statement of claim which appears to me to find any support in the evidence is that Little "was in the process of making an unusual manoeuvre without first ascertaining that it could be done in safety". It is, however, apparent that the learned trial judge did not place this construction on the movements of the Little truck. In dealing with this branch of the case, Moorhouse J. said:

> It is alleged that Little was negligent in making an unusual movement on the highway without first seeing such movement could be made in safety. I cannot make such a finding in the face of Postma's evidence that the only thing Little did wrong was his failure to have illuminated a rear light.

This view of the matter was not disturbed by the Court of Appeal and the evidence does not satisfy me that any negligent manoeuvre by Little caused or contributed to the accident so that the case can be disposed of as it was by the Court of Appeal on the ground that the plaintiffs failed to discharge the burden of proving that the tail-light on the Little truck was either not operating or defective, and that this constituted negligence which contributed to the accident.

My opinion is that the Court of Appeal was right in its reversal of the learned trial judge on both grounds: First, that he was in error in putting the burden of proof on the Littles and, second, in his failure to find that Postma's negligence was the sole effective cause of the accident.

In the view I take of this appeal, it is unnecessary to consider the effect of a breach of the statutory duty for which provision is made in s. 40(2) of *The Highway Traffic Act*. If it were necessary, I would adopt the analysis of the conflicting decisions in *Falsetto v. Brown*[1] and *Irvine v. Metropolitan Transport Co. Ltd*[2]., contained in the reasons of Cartwright J., and hold that once it is found that the tail-light was unlit, the problem then is one of causation.

I agree with my brothers Cartwright, Hall and Spence that the ordering of a new trial is particularly unfortunate in the present case, but unlike the majority of the Court, I am not persuaded that such a course is necessary.

It appears to me that the decision of the learned trial judge was founded on his having wrongly imposed the burden of proof on the Littles with respect to the condition

[1] [1933] O.R. 645. [2] [1933] O.R. 823.

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of the tail-light on their truck and that he did not consider the evidence of Postma to be sufficiently strong to do more than "cast a doubt upon that fact" and was therefore not prepared to base his judgment on an acceptance of that evidence. Postma's was the only evidence to the effect that the tail-light was out. This evidence, having been considered and found wanting by the learned trial judge as a basis for making a finding in this regard, I am, with the greatest respect for those who take a different view, unable to see that a new trial is likely to accomplish anything more than the obtaining of a further opinion from another judge, sitting three years later and five years after the accident, as to the weight which is to be attached to the evidence of a witness who was characterized as "a very confused young man" at the time of the last trial. In my view the effect of such a new trial insofar as the Littles are concerned would be to require them to re-litigate an issue the determination of which is dependent upon a reassessment of evidence which has already been passed upon and found insufficient to fix them with liability.

For these reasons I would dismiss this appeal with costs.

HALL J.:—I agree with the reasons and conclusions of my brother Cartwright. I do, however, wish to add a few words on the necessity for a new trial.

On December 19, 1959, William John Brown was driving his motor vehicle accompanied by his wife, the late Dorothy Margaret Brown, when he was crippled for life and his wife killed in a highway collision for which he was in no way responsible. The Browns just happened to be passing on their own side of the road when, through the negligence of the respondent Postma or through the combined negligence of the respondent Postma and of Frederick A. Little, deceased, the driver of the Fred H. Little truck, the Brown vehicle was struck by the Postma vehicle.

The learned trial judge found negligence on the part of Postma and the deceased Frederick A. Little, whose death prior to the trial was not related to the accident, but in so doing, he erred in holding that there was a burden on the Littles to establish that the tail-light was lighted.

In the Court of Appeal an equally serious error arose when, in dealing with the question as to whether the tail-light was lighted or not, the Court proceeded on the as-

sumption that certain answers made by Frederick A. Little on his examination for discovery had been admitted in evidence and were in fact evidence against the appellants.

There are many cogent reasons why a new trial after such a long delay should not ordinarily be ordered, but all of these are negatived by the dominant fact here that the merits of the appellants' cause have not been tried according to law.

SPENCE J.:—This is an appeal by the Sterling Trusts Corporation, executor of Dorothy Margaret Brown, deceased, and William John Brown, from the judgment of the Court of Appeal for Ontario dated December 12, 1962. In that judgment the Court of Appeal had allowed an appeal from the judgment of Moorhouse J. dated December 1, 1961, in which he had found that the accident which resulted in the action had been caused by the negligence of both the defendant Henry Postma and the late Fred A. Little for whose negligence the defendant Frederick H. Little was responsible in law.

By the judgment of the Court of Appeal for Ontario, the appeal of the defendants Olive Russell Little, as executrix of the estate of the late Fred A. Little, and Frederick H. Little was allowed and so, in the result, the defendant Henry Postma was held alone liable for the damages as fixed by the judgment of Moorhouse J.

Notice of this appeal to the Court of Appeal for Ontario was given to the defendant Henry Postma but he did not appear upon the appeal nor has he appeared on the further appeal to this Court although again notice of appeal to this Court was served upon him by the appellants, the Sterling Trusts Corporation and William John Brown.

I have had the opportunity of reading the reasons of my brother Ritchie and, to avoid repetition, I shall adopt the statement of facts set out therein referring only to such matters as I desire to deal with in more detail.

The appellant, in the argument before this Court, sought to assess liability against the respondents, Olive Little, as executrix of the estate of the late Fred A. Little, and Frederick H. Little, upon several acts of negligence, arguing that the appellants were not limited to the single act of negligence alleged by the defendant, here respondent, Postma. It is, of course, true that the appellants are not

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so limited but that is a proposition of law and it must be considered in the view of the circumstances. The appellant William John Brown suffered injuries which resulted in his failure to remember anything for some time before the impact and, therefore, could give no evidence of negligence of any party.

The only person who could give evidence as to any conduct of the late Fred A. Little which in any way affected him and thereby caused or contributed to the accident is the respondent Postma. Therefore, on that basis, the only evidence upon negligence before the Court to consider is the evidence of Postma complaining of the fact that the tail-light on the truck driven by the late Fred A. Little was not illuminated. That is the only conduct which he swore affected him in any way. This view is reflected in the judgment of the learned trial judge when he said:

> It is alleged that Little was negligent in making an unusual movement on the highway without first seeing such movement could be made in safety. I cannot make such a finding in the face of Postma's evidence that the only thing Little did wrong was his failure to have illuminated a rear light. I must find too that the Little vehicle had no reflector, as required by the Highway Traffic Act.

Moreover, the late Fred A. Little, on any evidence given at the trial, whether it be his story as recounted to the constable and recounted by the constable at trial, his evidence in the Police Court during the trial of Postma upon a charge under *The Highway Traffic Act* of Ontario, or taken from Mrs. Olive Little's evidence at trial, showed no other actionable negligence than failure to have the tail-light illuminated. He was making a left turn into his driveway and for the purpose of doing so was approaching the point where the driveway left highway no. 2 driving slowly just to the right of the centre line of the road. This would appear to be in accordance with the provisions of *The Highway Traffic Act*. No conduct of the late Fred A. Little, which renders him liable in law, caused or contributed to the accident apart from his possible liability due to failure to have the tail-light on the truck illuminated.

Another ground of negligence of the late Fred A. Little alleged by the plaintiffs was that there was not upon the truck driven by him a reflector as required by s. 40(2) of *The Highway Traffic Act*. At trial, Moorhouse J. found as a fact that there was no reflector on the Little truck and, of course, as a necessary part of that finding that such a

condition was known to Little Sr., and Little Jr. but, having found that the tail-light was not lighted and that this was an effective cause of the collision, Moorhouse J. did not deal further with any liability which could result from the failure to have the said reflector in proper position on the said truck. There remains, therefore, the third and main ground upon which the appellants submit that the defendants Olive Little and Frederick H. Little are liable to the plaintiff, *i.e.,* their allegation that the tail-light on the truck was not lighted at the time of the accident. This allegation raises three questions. Firstly, was the tail-light on the Little truck lighted or not; secondly, if not, was the failure to have it lighted an effective cause of the collision, and thirdly, if the tail-light was not lighted and the failure to have it lighted was an effective cause of the collision, are the respondents liable for the damages caused to the appellants.

Moorhouse J., at trial, put the onus of proving that the tail-light was illuminated upon the defendants, here respondents, Olive Little and Frederick H. Little. The learned trial judge did so because of his interpretation of the decision in *Kuhnle v. Ottawa Electric Railway Co. and Green*[1]. I am in agreement with the view expressed by Schroeder J.A. giving the unanimous judgment of the Court of Appeal when he said:

> The judgment relied upon by the learned judge does not support that proposition, and this was readily conceded by respondents' counsel.

The Court of Appeal for Ontario found that the appellants here (respondents in that Court) had failed to discharge the onus of proof which the Court put upon them to prove that the tail-light had not been lit at the time of the accident. In doing so, the Court considered as evidence part of the examination for discovery of the defendant, here respondent, Frederick H. Little, as follows:

> 194 Q. Did he ask you at that time to check his lights? A. No.
>
> 195 Q. Did you subsequently check to see whether or not his tail-lights were operating? A. Yes.
>
> 196 Q. When? A. Next morning.
>
> 197 Q. Why? MR. CASS: Don't answer the question.
>
> 198 Q. Did you have some conversation with your father as to the accident after the conversation you have told me about before you checked the lights on the truck? A. No.

[1] [1946] 3 D.L.R. 681.

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199 Q. Did you have any conversation with your father the next morning, prior to checking the truck? A. No.

200 Q. Did you have any conversation with your father after checking the truck before the accident? A. Well different times.

201 Q. How soon after checking the lights in the truck? A. I don't recall off hand.

202 Q. Did your father ask you to check the lights of your truck? A. No.

* * *

208 Q. Then you have told us you checked the lights, did you? That is what you have told us didn't you? A. The next morning I did check the lights.

209 Q. And what lights did you check the next morning? A. The head-lights and tail-lights.

210 Q. Did you check any other lights? A. No.

211 Q. And how did you check them? A. Well I turned them on, looked to see if they were going.

212 Q. What time in the morning did you check them? A. Oh perhaps around eight.

213 Q. Was it before breakfast or after breakfast? A. It would be after.

214 Q. And what lights were there on the truck? A. They were working.

215 Q. That wasn't my question Mr. Little, what lights were on the truck? A. Two head lights and one tail light.

What had occurred was this: The plaintiff as part of his case read into the evidence questions numbered 194 to 197 in the examination for discovery of the said respondent Frederick H. Little.

At the close of the plaintiff's case, Mr. Cass, as counsel for the said Frederick H. Little, moved to dismiss the action on the ground that the plaintiffs had not proved that the truck in question was owned by the said Frederick H. Little. That motion was dismissed and Mr. Cass declared his intention not to call any evidence. Mr. Nourse acting as counsel for the respondent, Olive Russell Little, as executrix of the estate of Fred A. Little, deceased, adduced evidence and then read the examination for discovery of the defendant Postma. I find that course rather startling in view of the fact that Postma had given evidence and been cross-examined for a very lengthy period by the same Mr. Nourse. I am of the opinion that such a course is not permitted in the practice in the Province of Ontario. With that the production of evidence ended, counsel addressed the Court, and the Court was adjourned until the next morning for judgment.

On the opening of the Court the next morning, Mr. Nourse as counsel for Olive Little, executrix of the estate of the late Fred A. Little, pointed out that Mr. Haines, as counsel for the plaintiffs, had criticized the failure of Frederick H. Little to give evidence, and had inferred that Mr. Cass's refusal to permit his client to answer question 197 in the examination for discovery as aforesaid was because the answer, if given, would be unfavourable to his cause. Mr. Nourse, therefore, requested the right to read other questions in the said examination for discovery of the said Frederick H. Little, advancing R. 329 as being the basis for such application. That rule of the Ontario Rules of Practice permits any party to read, in whole or in part, the examination of an *opposite* party. I cannot imagine how the interest of Mr. Nourse's client, the executrix of the estate of the driver, could be considered as opposite to that of the owner and it was the owner's examination which he sought to read.

The trial judge then permitted questions 198 to 215 of the said examination for discovery to be read, subject to the objection, but in his reasons for judgment, said:

> The defendant Frederick H. Little examined this light the next morning about eight o'clock. The vehicle belonged to him. This question was of vital interest to him yet there is no evidence before me as to the result of the examination.

I am of the opinion that in this statement the learned trial judge expressed the view that the reading of questions and answers 198 to 215 by the counsel for the executrix of Frederick A. Little after the close of the case and after the opportunity to cross-examine or to adduce evidence *contra* had passed was the production of inadmissible evidence to which he did not intend to pay any attention in coming to his conclusion. I am in accord with that view.

The situation, therefore, before this Court is this: The trial judge, with respect, in error, found that the tail-light had not been lit by putting the onus on the defendants Olive Little and Frederick H. Little and again, with respect, the Court of Appeal in error, although putting the onus correctly on the appellants here, found that the tail-light had been lighted on the basis of inadmissible evidence.

I have made an exhaustive analysis of all the admissible evidence upon the question of whether the tail-light of the

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Little truck was illuminated at the time of the accident, and I have come to the reluctant conclusion that I am unable, from a perusal of the record, to make such a finding of fact and that a new trial is necessary.

I have come to this conclusion with the utmost reluctance, realizing that the accident occurred on December 19, 1959, and that Fred A. Little died even before the trial of the action took place, that William John Brown, the plaintiff, is unable to give any evidence whatsoever as to what caused the accident, and that Henry Postma was characterized by the learned trial judge in his reasons for judgment as a "very confused young man". Giving weight, however, to all of these factors, I can see no other alternative for the sound determination of the most important question as to whether or not the tail-light was illuminated at the relevant time than to have a new trial upon that issue.

The new trial will be concerned with the three issues as to the said tail-light to which I have referred above, *i.e.*, was the said tail-light lit or unlit at the time of the accident and if it were unlit was such a condition an effective cause of the collision? I agree with my brother Cartwright, whose reasons I have had the privilege of reading, that if the Court upon the retrial were to find that the tail-light were unlit and that such unlit condition was an effective cause of the collision, there is a *prima facie* liability upon the defendants Olive Russell Little and Frederick H. Little. I am not prepared to say that that liability is an absolute one and that the said defendants would be unable to discharge it by showing that such condition occurred without negligence for which they are in law responsible as all of the evidence which I have perused in reference to the tail-light was not addressed to the question of whether it was unlit because of negligence but to the question of whether it was lit or unlit. I agree with my brother Cartwright that such evidence is not even relevant upon the issue of whether the tail-light, if unlit, was unlit due to any negligence.

I therefore agree that there must be a new trial upon the questions as outlined by my brother Cartwright in his reasons for judgment, including the contribution, if any, between the defendant Henry Postma on the one hand, and the defendants Olive Russell Little and Frederick H. Little

on the other hand, and further including the quantum of the appellants' damages. I also agree with my brother Cartwright's disposition of the costs.

Appeal allowed and new trial ordered, JUDSON *and* RITCHIE JJ. *dissenting.*

Solicitors for the plaintiffs, appellants: Haines, Thomson, Rogers, Howie & Freeman, Toronto.

Solicitors for the defendants, respondents: Fasken, Calvin, Mackenzie, Williston & Swackhamer, Toronto.

ACHIL MARTEL (*Demandeur*) .....APPELANT;

ET

ARTHUR FILION (*Défendeur*) .....INTIMÉ.

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APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Sociétés—Requête en annulation de l'enregistrement d'une raison sociale—Qui a droit au recours de l'art. 13 de la Loi des déclarations des compagnies et des sociétés, S.R.Q. 1941, c. 277—Code Civil, art. 1834.

Le défendeur exploite un service de transport entre Montréal et St-Hyacinthe sous la raison sociale de «Acton Vale Transport» et a enregistré cette raison sociale au district de St-Hyacinthe en 1939. Le demandeur exploite un service de transport similaire à Montréal et St-Hyacinthe et, en dépit du fait qu'il savait depuis 1940 que le défendeur faisait usage de cette raison sociale, enregistra cette même raison sociale au district de Montréal en 1953. Le défendeur n'enregistra à Montréal qu'en 1958. Le demandeur produisit une requête suivant les dispositions de l'art. 13 de la *Loi des déclarations des compagnies et des sociétés,* S.R.Q. 1941, c. 277, pour faire annuler la déclaration produite par le défendeur en 1958 à Montréal. La Cour supérieure a accueilli la requête, mais cette décision a été infirmée par un jugement majoritaire de la Cour d'appel. Le demandeur appelle devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le seul but poursuivi par la loi en question est la protection des tiers. L'art. 13 prohibe non pas l'enregistrement d'un nom, d'un titre ou d'une raison sociale déjà enregistrée, mais l'enregistrement d'un nom, d'un titre ou d'une raison sociale «qui est la désignation d'une société existante ou d'une autre personne à qui elle ressemble tellement que le public peut être induit en erreur». C'est le demandeur qui a pris

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*CORAM: Le Juge en chef Taschereau et les Juges Fauteux, Abbott, Ritchie et Spence.

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un nom qui est la désignation d'une autre personne. Par conséquent, il ne peut avoir droit de demander en vertu de l'art. 13 l'annulation de l'enregistrement effectué par le défendeur en 1958.

APPEL d'un jugement de la Cour du banc de la reine[1], infirmant un jugement du juge Batshaw. Appel rejeté.

Pierre Cimon, c.r., pour le demandeur, appelant.

Charles-J. Gélinas, c.r., et *Jacques Biron,* pour le défendeur, intimé.

Le jugement de la Cour fut rendu par

LE JUGE ABBOTT:—Depuis 1939 l'intimé Filion exploite un service de transport entre Montréal et St-Hyacinthe et les environs, sous le nom et raison sociale de «Acton Vale Transport». Il a enregistré cette raison sociale au bureau du Protonotaire du district de St-Hyacinthe le 28 mars 1939.

L'appelant Martel exploite un service de transport similaire à celui de l'intimé à Montréal et St-Hyacinthe. Martel admet qu'il savait depuis 1940 que Filion faisait usage du nom et raison sociale de «Acton Vale Transport». En dépit de cette connaissance acquise, Martel enregistra cette même raison sociale au bureau du Protonotaire du district de Montréal le 8 avril 1953. Filion n'enregistra une semblable déclaration au bureau du Protonotaire de Montréal que le 7 juillet 1958.

L'enquête établit de plus que Filion détenait un permis de la Régie des Transports sous le nom «Acton Vale Transport» tandis que le permis de Martel est émis au nom de «Acton Vale Express» et «Acton Vale Motor Express Ltée.» Martel n'est pas enregistré dans l'annuaire téléphonique de Montréal sous le nom «Acton Vale Transport» tandis que Filion l'est.

Le litige est né par suite de la prétention de Martel qu'il avait le droit de faire annuler la déclaration produite par Filion le 7 juillet 1958 au bureau du Protonotaire de Montréal, par voie de requête suivant les dispositions de l'art. 13 de la *Loi concernant les déclarations des compagnies et des sociétés,* S.R.Q. 1941, c. 277. Martel prétend qu'il a droit de demander cette annulation d'une déclaration enregistrée postérieurement à la sienne dans le district de Montréal parce qu'il a été le premier à enregistrer dans ce district.

[1] [1964] B.R. 9.

Filion conteste cette prétention de Martel, et il soumet que la requête prévue à l'art. 13 de la loi susdite n'est ouverte qu'à la personne qui fait usage d'une raison sociale à l'encontre de toutes autres personnes qui enregistrent la même raison sociale, mais dont l'usage du nom est postérieur, indépendamment des frontières des districts judiciaires.

Le Cour supérieure a accueilli la requête de Martel et a ordonné à Filion de cesser de faire affaires dans le district de Montréal sous la raison sociale de «Acton Vale Transport» et d'annuler la déclaration et l'enregistrement du 7 juillet 1958. Cette décision a été infirmée par un jugement majoritaire de la Cour du banc de la reine[1]. Cet appel est de ce jugement.

La question à résoudre est celle-ci. Qui a droit au recours de l'art. 13 de la loi susdite? Cet article se lit:

> Aucune déclaration prescrite par la présente section ne peut être enregistrée si une personne ou une société y prend un nom, un titre ou une raison sociale qui est la désignation d'une société existante ou d'une autre personne, ou qui y ressemble tellement que le public peut être induit en erreur.
>
> Tout enregistrement fait contrairement aux dispositions du présent article peut être annulé par la Cour Supérieure du district sur requête, après avis donné aux intéressés et au protonotaire.

Je partage l'avis exprimé par monsieur le Juge en Chef Tremblay que la protection des tiers est le seul but poursuivi par cette loi et je fais mienne sa conclusion, qui suit:

> Elle stipule l'enregistrement pour permettre aux tiers de découvrir facilement les personnes, morales ou physiques, avec lesquelles ils font affaires. Toujours sous la même réserve quant à la société en commandite, je ne crois pas qu'elle ait pour effet de créer aucun droit en faveur de la personne qui effectue l'enregistrement. En effet, l'article 13 prohibe non pas l'enregistrement d'un nom, d'un titre ou d'une raison sociale déjà enregistré, mais l'enregistrement d'un nom, d'un titre ou d'une raison sociale «qui est la désignation d'une société existante ou d'une autre personne, ou qui y ressemble tellement que le public peut être induit en erreur».

La preuve établit clairement que Filion faisait affaires sous le nom «Acton Vale Transport» depuis plusieurs années quand Martel a enregistré ce même nom à Montréal en 1953, et cela à la connaissance de ce dernier. Martel a alors pris un nom qui est la désignation d'une autre personne. Par conséquent, il ne peut avoir le droit de

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demander par requête, en vertu de l'art. 13, l'annulation de l'enregistrement effectué par Filion le 7 juillet 1958 au bureau du Protonotaire du district de Montréal.

Je renverrais l'appel avec dépens.

Appel rejeté avec dépens.

Procureur du demandeur, appelant: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montréal.

Procureurs du défendeur, intimé: Lajoie, Gélinas, Lajoie, Bourque & Lalonde, Montréal.

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GEORGES FILION (*Plaintiff*) ..... APPELANT;

AND

RAYMONDE MAGNAN AND L'HOPITAL ST-JUSTINE (*Defendants*) } RESPONDENTS.

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

Actions—Peremption—Action inscribed for proof and hearing—Action placed on roll of ordinary cases—Application for jury trial granted—No further proceedings for two years—Action never struck off roll of ordinary cases—Code of Civil Procedure, arts. 232, 421, 423, 433.

The plaintiff sued the respondents for damages. On March 15, 1961, the action was inscribed for proof and hearing and was placed on the roll of ordinary cases to await its turn for hearing. It remained on the roll and in the ordinary course would have come up for hearing in the month of November 1963. Following the inscription, the plaintiff applied for a trial by jury and to have the case entered on the special roll of trials by jury. This application was granted on April 13, 1961. No further proceedings were made and in particular no application to strike a panel of jurors and fix a date for trial. On April 26, 1963, the respondents made a motion for peremption asking that the action be dismissed on the ground that no useful proceeding had been taken within two years. The motion was dismissed by the trial judge, but his judgment was reversed by a majority judgment in the Court of Appeal. The plaintiff appeals to this Court.

Held: The appeal should be allowed.

When an action has been inscribed and is awaiting its turn for hearing, the period required for peremption runs only from the day on which it is struck from the roll. The inscription for proof and hearing filed in March 1961 did not lapse when the application for

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*PRESENT: Taschereau C.J. and Fauteux, Abbott, Judson and Ritchie JJ.

a trial by jury was made in April 1961. That inscription continued in full force and effect and the delays for peremption would not commence to run until the day the case had been struck from the roll.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Ouimet J. Appeal allowed.

Gilles Godin, Q.C., for the plaintiff, appellant.

Roger Lacoste, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

ABBOTT J.:—Appellant, as tutor to his minor son Alain Filion, sued respondents for the sum of $67,055.59 as damages resulting from the amputation of the right leg of his son, then five years of age, alleging that the amputation was necessitated by reason of the fault and negligence of the respondents.

The respondent l'Hôpital Sainte-Justine pleaded to the action and issue was joined between it and the appellant ès qualité. The respondent Raymonde Magnan appeared but did not plead.

On March 15, 1961, appellant inscribed the action for proof and hearing on the merits against l'Hôpital Sainte-Justine and for proof and hearing *ex parte* against Raymonde Magnan. The inscription was filed with the Master of the Rolls of the Superior Court on March 24, 1961, and the action was placed by him on the roll of ordinary cases to await its turn for hearing. It remained on the roll and in the ordinary course would have come up for hearing in the month of November 1963.

Following this inscription appellant made option under arts. 421 *et seq.* of the *Code of Civil Procedure* for a trial by jury and applied under art. 423 C.C.P. to have the case entered on the special roll of trials by jury. That application was granted on April 13, 1961. Thereafter appellant took no further proceedings and in particular he did not apply under art. 433 C.C.P. to strike a panel of jurors and fix a date for trial.

On April 26, 1963, respondents served on appellant a motion for peremption under art. 282 C.C.P. asking that the action be dismissed on the ground that no useful pro-

[1] [1964] Que. Q.B. 772.

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ceeding had been taken within two years. That motion was dismissed by Ouimet J. but his judgment was reversed by the Court of Queen's Bench[1], Bissonnette and Owen JJ. dissenting, and appellant's action was dismissed with costs. The present appeal is from that judgment.

The jurisprudence has established beyond question that when an action has been inscribed and is awaiting its turn for hearing the period required for peremption runs only from the day on which it is struck from the roll. *Caron Signs Regd.* v. *Montreal Tramways Co.*[2]; *Commercial Acceptance Corporation v. Clark*[3].

The sole question in issue here therefore is whether the inscription for proof and hearing filed on March 24, 1961, lapsed when in April 1961 appellant made application for a trial by jury. I share the opinion expressed by Bissonnette and Owen JJ. that it did not lapse.

The right to a trial by jury in civil matters is an exceptional right and is subject to special formalities. Like any other such right it can be renounced either expressly or tacitly. It may be that in failing to make the application called for under art. 433 C.C.P. appellant lost his right to a trial by jury but I do not find it necessary to express any view as to this.

In my opinion however the inscription for proof and hearing before a judge alone filed on March 24, 1961, continued in full force and effect and the delays for peremption would not commence to run until the day the case had been struck from the roll.

I would allow the appeal and restore the judgment at trial. The appellant is entitled to his costs throughout.

Appeal allowed with costs.

Attorneys for the plaintiff, appellant: Chaussé & Godin, Montreal.

Attorneys for the defendants, respondents: Lacoste, Lacoste, Savoie & Laniel, Montreal.

[1] [1964] Que. Q.B. 772. [2] [1952] Que. R.L. 1 at 5.
[3] [1953] Que. P.R. 205.

HER MAJESTY THE QUEEN .....APPELLANT;

1964 *Nov. 27 — 1965 Jan. 26

AND

J. ALEPIN FRERES LTEE AND CLEMENT ALEPIN ..... RESPONDENTS.

(Nos. 1838-1840 C.Q.B.)

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

Labour—Criminal law—Wrongful dismissal from employment—Whether evidence to support conviction—Criminal Code, 1953-54 (Can.), c. 51, s. 367(a), 719—Supreme Court Act, R.S.C. 1952, c. 259, s. 41(3).

The respondents were convicted by a judge of the Court of the Sessions of the Peace of having, in violation of s. 367(*a*) of the *Criminal Code,* wrongfully dismissed four employees for the reason only that they were members of a lawful trade union. Prior to the date fixed for sentence, an appeal against conviction was taken by way of a new trial to a higher Court. The judge at the trial *de novo* dismissed the appeal and imposed a sentence. The conviction was quashed by the Court of Appeal on the ground that there was no evidence to sustain the conviction. The Crown was granted leave to appeal to this Court pursuant to s. 41(3) of the *Supreme Court Act.*

Held: The appeal should be dismissed.

There was, as found by the Court below, no evidence to support the conviction. There was in fact no dismissal within the meaning of s. 367(*a*) of the Code.

Travail—Droit criminel—Congédiement illégal—Preuve ne supportant pas le verdict de culpabilité—Code criminel, 1953-54 (Can.), c. 51, arts. 367(a), 719—Loi sur la Cour suprême, S.R.C. 1952, c. 259, s. 41(3).

Les intimés furent trouvés coupables par un juge de la Cour des Sessions de la Paix d'avoir, en violation de l'art. 367(*a*) du *Code criminel,* congédié illégalement quatre employés pour la seule raison qu'ils étaient membres d'un syndicat ouvrier légitime. Avant le jour fixé pour le prononcé de la sentence, les intimés en appelèrent de ce verdict devant un juge de la Cour supérieure par voie de procès nouveau. Le juge au procès *de novo* rejeta l'appel et imposa une sentence. Le verdict de culpabilité fut cassé par la Cour d'Appel pour le motif qu'il n'y avait

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pas de preuve pour le soutenir. La Couronne obtint permission d'en appeler devant cette Cour en vertu de l'art. 41(3) de la *Loi sur la Cour suprême.*

Arrêt: L'appel doit être rejeté.

Il n'y avait, comme la Cour d'Appel le jugea, aucune preuve pour soutenir le verdict. Il n'y a pas eu en fait un congédiement dans le sens de l'art. 367(*a*) du Code.

APPEL d'un jugement de la Cour du banc de le reine, province de Québec[1], cassant un verdict de culpabilité. Appel rejeté.

APPEAL by the Crown from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], quashing the conviction of the respondents. Appeal dismissed.

J. J. Spector, Q.C., and *M. N. Rosenstein,* for the appellant.

G. Beaupré and *M. Trudeau,* for the respondents.

The judgment of the Court was delivered by

FAUTEUX J.:—In May 1961, respondents were found guilty, under Part XXIV of the *Criminal Code,* by Judge T. A. Fontaine of the Court of the Sessions of the Peace for the District of Montreal, of having, in Montreal, in violation of the provisions of s.367(a) Cr.C., on or about October 14, 1960,wrongfully and without lawful authority, dismissed from their employment four employees of the respondent company, to wit, Jean-Guy Chastenais, Roméo Goulet, Armand Langlois and Jean-Pierre Cyr, for the reason only that they were members of the International Ladies Garment Workers Union, a lawful trade union.

Prior to the date eventually fixed for sentence, respondents appealed from their conviction to the Superior Court pursuant to ss. 719 *et seq.* Cr. C. Mr. Justice Roger Ouimet, who presided at the trial *de novo,* dismissed these appeals on November 26, 1962, and, on November 30, 1962, sentenced both respondents.

Respondents then sought and obtained leave to appeal to the Court of Queen's Bench (Appeal Side)[1] pursuant to

[1] [1964] Que. Q.B. 142.

s. 743 Cr.C., on the ground that there was no legal evidence supporting their conviction. The appeal of Clément Alepin and the appeal of J. Alepin Frères Ltée bear respectively No. 1838 and No. 1840 of the records of the latter Court. The Court of Queen's Bench (Hyde, Rinfret and Montgomery JJ.A.) maintained these appeals, quashed the convictions, acquitted the respondents and ordered the complainant, Geneviève Bossé, to pay each of the respondents one-quarter of the costs of the transcription of the evidence and the preparation of the joint case in appeal.

Appellant then sought and obtained leave to appeal from these judgments to this Court pursuant to s. 41(3) of the *Supreme Court Act,* on the ground that the Court of Queen's Bench (Appeal Side) concluded in error that there was no evidence to sustain the convictions.

As accurately reviewed in the reasons for judgment of Montgomery J.A., the material facts giving rise to this case can be summarized as follows. At the relevant time, respondent company was manufacturing women's clothing, respondent Clément Alepin, the company's Secretary-Treasurer, appearing to have been in sole charge of the operations. The work was carried out on two floors of the building, the larger number of employees working on the upper floor and the four above mentioned employees, on the floor below. The company's employees were not organized into a labour union before the Spring of 1960, at about which time the International Ladies Garment Workers Union established a local in the plant and was certified as bargaining agent for the employees. While conciliation and arbitration proceedings, which started in the Fall, were pending, the President of the local, one Mrs. Latour, was dismissed by respondents. This dismissal also lead to other charges against respondents which are the object of a separate appeal to this Court. On the morning following the dismissal of Mrs. Latour, Geneviève Bossé, working on the upper floor, there tried to force respondent Clément Alepin to state in front of other employees his reasons for dismissing Mrs. Latour. Upon his refusal to do so, other employees intervened and a noisy demonstration then ensued. Being unable to cope with the situation, the management called the police. Upon arrival, the police, in order to restore the order, enjoined the demonstrators to

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leave, suggesting to them to go to their union hall. A number of employees, eventually followed by the four above mentioned who had taken no part in the demonstration, then left. Members of the union started to picket the plant that afternoon.

In his reasons for judgment, Montgomery J.A., with the concurrence of Hyde J.A., found that it was clear from the evidence of the four employees alleged to have been dismissed that, while they were also enjoined by an unidentified constable to vacate the employers' premises, there was no dismissal, within the meaning of the section, by the management, either directly or indirectly, through instructions it might have given but did not actually give to the police. Rinfret J.A., who wrote separate reasons, fully agreed with these views. At the hearing before us, counsel for the appellant strongly relied on certain statements made by Camille Alepin to some of the employees, during the demonstration. Camille Alepin had been jointly charged of the same offences with the two respondents but was acquitted in first instance by Judge T.A. Fontaine. From that acquittal, there was no appeal.

Having considered all that counsel for the appellant had to say, I am unable to find error in the opinion reached in the Court below that there was no evidence to support the convictions of respondents.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Attorney for the appellant: J.J. Spector, Montreal.

Attorneys for the respondents: Beaupré & Trudeau, Montreal.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

J. ALEPIN FRERES LTEE and CLEMENT ALEPIN ..... RESPONDENTS.

1964 *Nov. 27 — 1965 Jan. 26

J. ALEPIN FRERES LTEE and CLEMENT ALEPIN ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

(Nos. 1839-1841 C.Q.B.)

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

Labour—Criminal law—Wrongful dismissal from employment—Appeal by way of trial de novo before sentence imposed—Whether judge hearing trial de novo has jurisdiction to impose sentence—Whether evidence to support conviction—Criminal Code, 1953-54 (Can.), c. 51, ss. 367(a), 367(b), 719—Supreme Court Act, R.S.C. 1952, c. 259, s. 41(1) (3).

The respondents were convicted by a judge of the Court of the Sessions of the Peace of having, in violation of s. 367 of the *Criminal Code,* wrongfully dismissed an employee for the reason only that she was a member of a lawful trade union, and of having sought by intimidation and by causing actual loss of employment to compel other employees to abstain from belonging to a trade union. Prior to the date fixed for sentence, an appeal was taken by way of a new trial to a higher Court. By agreement of the parties, only the report of the original trial was submitted as evidence. The conviction was sustained and a sentence was imposed by the judge hearing the trial *de novo.* On a further appeal to the Court of Appeal, the conviction was maintained but the sentence was quashed on the ground that the judge at the trial *de novo* had no jurisdiction to impose a sentence.

The Crown was granted leave to appeal to this Court against the finding of the Court of Appeal on the question of jurisdiction to impose a sentence; and the respondents were granted leave to appeal with respect to the conviction.

Held: The appeal of the Crown should be quashed and the appeal of the respondents should be dismissed.

It is clear from the terms of s. 41(3) of the *Supreme Court Act* that, unless the judgment sought to be appealed is a judgment "acquitting or convicting or setting aside or affirming a conviction or acquittal",

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*PRESENT: Taschereau C.J. and Fauteux, Abbott, Ritchie and Spence JJ.

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there is no jurisdiction in this Court to entertain the appeal. The judgment sought to be appealed here did not come within that description. It was related to sentence. The general proposition that matters which are not mentioned in s. 41(3) must be held to be comprised in s. 41(1) was ruled out in *Goldhar v. R.*, [1960] S.C.R. 60 and *Paul v. R.*, [1960] S.C.R. 452.

As to the appeal against conviction, the submission that there was no evidence to support it could not be accepted. The conviction was justified by the evidence. There was also no substance in the submission that the judge at the trial *de novo* was prejudiced by the reading of the reasons for judgment delivered by the trial judge.

Travail—Droit criminel—Congédiement illégal—Appel par voie de procès de novo avant le prononcé de la sentence—Juridiction du juge entendant le procès de novo d'imposer une sentence—Preuve supportant le verdict de culpabilité—Code criminel, 1953-54 (Can.), c. 51, arts. 367(a), 367(b), 719—Loi sur la Cour suprême, S.R.C. 1952, c. 259, s. 41(1), (3).

Les intimés furent trouvés coupables par un juge de la Cour des Sessions de la Paix d'avoir, en violation de l'art. 367 du *Code criminel*, congédié illégalement une employée pour la seule raison qu'elle était membre d'un syndicat ouvrier légitime, et aussi d'avoir cherché par l'intimidation et en causant la perte réelle d'un emploi à contraindre d'autres employés de s'abstenir d'être membres d'un syndicat ouvrier. Avant la date fixée pour le prononcé de la sentence, les intimés en appelèrent de ce verdict devant un juge de la Cour supérieure par voie de procès nouveau. Par une entente entre les parties, seul le dossier du procès original fut soumis comme preuve. Le verdict de culpabilité fut maintenu et le juge au procès *de novo* imposa une sentence. En appel devant la Cour d'Appel, le verdict de culpabilité fut maintenu mais la sentence fut mise de côté pour le motif que le juge au procès *de novo* n'avait pas juridiction pour imposer une sentence.

La Couronne a obtenu permission d'en appeler devant cette Cour du jugement de la Cour d'Appel sur la question de juridiction pour imposer la sentence; et les intimés ont obtenu permission d'en appeler du verdict de culpabilité.

Arrêt: L'appel de la Couronne doit être cassé et l'appel des intimés doit être rejeté.

Il est clair de par les termes de l'art. 41(3) de la *Loi sur la Cour suprême* qu'à moins que le jugement en appel ne soit un jugement «acquittant ou déclarant coupable ou annulant ou confirmant une déclaration de culpabilité ou un acquittement», cette Cour n'a pas juridiction pour entendre l'appel. En l'espèce, le jugement en appel ne tombe pas sous cette description. Il se rapporte à la sentence. La proposition que les matières qui ne sont pas mentionnées dans l'art. 41(3) doivent être comprises dans l'art. 41(1) a été mise de côté dans *Goldhar v. R.*, [1960] R.C.S. 60 et *Paul v. R.*, [1960] R.C.S. 452.

Pour ce qui est de l'appel contre le verdict de culpabilité, la proposition qu'il n'y avait pas de preuve pour le supporter ne peut pas être acceptée. Le verdict était justifié par la preuve. Le grief que le juge au procès *de novo* a été influencé par les notes de jugement du juge au procès initial n'est pas fondé.

APPEL de la Couronne et APPEL des intimés du jugement de la Cour du banc de la reine, province de Québec[1], maintenant le verdict de culpabilité mais cassant la sentence. Appel de la Couronne cassé et appel des intimés rejeté.

APPEAL by the Crown and APPEAL by the accused from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], maintaining the conviction of the accused but quashing the sentence. Appeal of the Crown quashed and appeal of the accused dismissed.

J. J. Spector, Q.C., and *M. N. Rosenstein,* for the Crown.

G. Beaupré and *M. Trudeau,* for the accused.

The judgment of the Court was delivered by

FAUTEUX J.:—In May 1961, respondents were found guilty, under Part XXIV of the *Criminal Code,* by Judge T. A. Fontaine of the Court of the Sessions of the Peace, for the District of Montreal, of having, in Montreal, on or about November 13, 1960, in violation of s.367 Cr.C., (i) dismissed from her employment with respondent company, Thérèse Latour, for the reason only that she was a member of the International Ladies Garment Workers Union, a lawful trade union, and (ii) sought by intimidation and by causing actual loss of her employment to compel other employees of the company to abstain from belonging to a trade union to which they had a lawful right to belong. Jointly charged of the same offences, Camille Alepin was acquitted.

Prior to the date eventually fixed for sentence, respondents appealed from their conviction to the Superior Court pursuant to ss. 719 *et seq.* Cr.C.; in the result, no sentence was pronounced by Judge Fontaine. The evidence submitted at the trial *de novo* was, by agreement of the parties through their respective counsel, the evidence adduced in the Court of Sessions of the Peace before Judge Fontaine. This appeal was heard by Ouimet J. who,

[1] [1964] Que. Q.B. 142.

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having considered the matter, dismissed it in November 1962 and, a few days later, imposed sentence on each of the respondents.

The latter then sought and obtained leave to enter a separate appeal to the Court of Queen's Bench[1] from the conviction as well as from the sentence. As grounds of appeal against the conviction, they contended that there was no evidence in support thereof and also that Ouimet J. had illegally read and been prejudiced by the reading of the reasons for judgment delivered in the Court of Sessions of the Peace by Judge Fontaine. As grounds of appeal against the sentence, they submitted that, in the circumstances, the jurisdiction to impose sentence was exclusively vested in the Judge of the Court of Sessions of the Peace and not in the Judge of the Superior Court hearing the trial *de novo*. On these appeals of the company and Clément Alepin, bearing respectively No. 1841 and No. 1839 of its records, the Court of Appeal (Hyde, Rinfret and Montgomery JJ. A.) rendered the following formal judgment:

DOTH MAINTAIN THE APPEAL to the extent of quashing the order for the payment of costs by the Appellant and the sentence imposed upon him by the Superior Court (Hyde, J. dissenting as to the quashing of the sentence), DOTH order that the record be referred back to the Court of Sessions of the Peace for the District of Montreal for the imposition of sentence, and DOTH otherwise dismiss the appeal without costs (Rinfret, J. dissenting, would quash the conviction and return the record to the Superior Court).

(SIGNED)

G. MILLER HYDE
G.-ED. RINFRET
G. H. MONTGOMERY
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Thus in each of the appeals:—(i) the conviction was maintained by a majority judgment (Hyde and Montgomery JJ.A.); Rinfret J.A., dissenting on the basis of the second ground of appeal, would have quashed the conviction and returned the record to the Superior Court for a fresh trial *de novo;* (ii) the sentence was quashed

[1] [1964] Qué. Q.B. 142.

by a majority judgment, Rinfret J.A. because he would have quashed the conviction and Montgomery J.A. for the reason that, in his view, the ground raised as to jurisdiction to impose sentence, was well founded. Hyde J.A., dissenting, would have maintained the sentence. In each of the appeals, the Court ordered the record to be referred back to the Court of Sessions of the Peace for the District of Montreal for the imposition of sentence.

Hence, two appeals were launched in this Court with leave thereof granted under s.41 of the *Supreme Court Act,* to wit (i) the appeal of Her Majesty the Queen against the finding of the Court of Appeal on the question of jurisdiction to impose sentence and (ii) the appeal of J. Alepin Frères Ltée and Clément Alepin, with respect to the conviction.

The recital of the material facts giving rise to these proceedings appears in my reasons for judgment delivered this day in the case of *Her Majesty the Queen v. J. Alepin Frères Ltée and Clément Alepin, Nos. 1838-1840 C.Q.B.*[1]

With respect to the appeal of Her Majesty the Queen, I have reached the opinion that this Court has no jurisdiction. Any jurisdiction this Court might have must be found in s.41 of the *Supreme Court Act,* there being, in the *Criminal Code,* no provisions permitting, in summary convictions, an appeal to this Court. The relevant provisions of s.41 to be considered are:

41. (1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

41. (3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

It is clear from the terms of subsection (3) that, unless the judgment sought to be appealed is a judgment "acquit-

[1] Ante p. 355.

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ting or convicting or setting aside or affirming a conviction or acquittal" of either an indictable offence or an offence other than an indictable offence, there is no jurisdiction in this Court under that subsection to entertain this appeal. The judgment here sought to be appealed does not come within that description. It is not a judgment related to an acquittal or a conviction of an offence and, while an important question of jurisdiction is involved therein, this question does not relate to an acquittal or a conviction within the meaning of subsection (3) but to sentence. Neither can jurisdiction of this Court be found in subsection (1). The general proposition that matters which are not mentioned in s.41(3) must be held to be comprised in s.41(1), with the consequence that this Court would have jurisdiction to entertain an appeal from a judgment of a nature similar to the one here considered, is ruled out by what was said by this Court in *Goldhar v. The Queen*[1] and *Paul v. The Queen*[2]. It may be a matter of regret that this Court has no jurisdiction to decide the important question which gave rise to conflicting opinions in the Court below, but strong as my views may be with respect to that question, I am clearly of opinion that this Court has no jurisdiction to entertain this appeal.

As to the appeal of J. Alepin Frères Ltée and Clément Alepin, two submissions made by counsel for appellants are to be considered. The first one is that there was no evidence that Mrs. Latour was dismissed for the reason only that she was a member of a lawful trade union (s. 367(*a*) Cr.C.) or that appellants wrongfully or without lawful authority sought, by intimidation and by causing actual loss of her employment, to compel other employees to abstain from belonging to the International Ladies Garment Workers Union (s. 367(*b*) Cr.C.). In none of the three Courts below was this submission accepted and, in my view, rightly so. From the evidence, it is sufficient to point to the following

[1] [1960] S.C.R. 60, 31 C.R. 374, 125 C.C.C. 209.
[2] [1960] S.C.R. 452, 34 C.R. 110, 127 C.C.C. 129.

statement made by Alepin to Mrs. Latour, in the afternoon of the 13th of October 1960:

> Je suis obligé de vous renvoyer, cela me fait de la peine; parce que vous êtes la présidente de l'union.

and to this other statement, also made by Clément Alepin, to foreman Lebeau, apparently with reference to Mrs. Latour's dismissal:

> Quand on coupe la tête du chef, le restant, les membres se placent, ça s'écroule.

The second submission is that Ouimet J., seized with the trial *de novo,* illegally read and was prejudiced by the reading of the reasons for judgment delivered by Judge Fontaine of the Court of Sessions of the Peace. The judgment of Ouimet J. clearly indicates that, while he expressed his agreement with Judge Fontaine, he did form his own conclusions both as to the facts and the law, after due consideration of the evidence submitted by agreement of the parties as well as the written arguments made by their counsel in support of their respective submissions. With deference, I fail to see any substance in this submission which, as well as the first made in support of this appeal, cannot be accepted.

I would therefore quash the appeal of Her Majesty the Queen, with costs, and dismiss the appeal of J. Alepin Frères Ltée and Clément Alepin, with costs.

Appeal by the Crown quashed with costs; and appeal by the respondents dismissed with costs.

Attorney for the Crown: J. J. Spector, Montreal.

Attorneys for the accused: Beaupré & Trudeau, Montreal.

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*Dec. 9, 10
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THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE .....APPELLANT;

AND

MacMILLAN & BLOEDEL (Alberni) LIMITED, THE ONTARIO-MINNESOTA PULP AND PAPER COMPANY LIMITED, E. B. EDDY COMPANY, DOMINION ENGINEERING WORKS LIMITED, JOHN INGLIS COMPANY LIMITED, SPRUCE FALLS PULP & PAPER COMPANY LIMITED RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Customs and Excise—Importation of high-speed newsprint machine—Whether of a class or kind made in Canada—Customs Act, R.S.C. 1952, c. 58—Customs Tariff, R.S.C. 1952, c. 60, tariff items 427, 427a.

The respondent MacMillan & Bloedel Ltd. imported a 276-inch newsprint machine made in the United States, having a rated mechanical speed of 2,500 feet per minute. The respondent stated its intent to purchase by letter dated January 25, 1955, and became committed to purchase on February 1, 1955. The formal contract was dated August 25, 1955, and the machine was shipped in a knock-down condition between November 1956 and the end of June 1957. The machine was classified by the Port Appraiser as being of a class or kind made in Canada and attracting therefore Tariff Item 427 which provides a much higher rate of duty than if it were classified under Tariff Item 427*a* as of a class or kind not made in Canada. The classification under Item 427 was upheld by the Tariff Board, but this decision was reversed by the Exchequer Court. The Crown appealed to this Court.

Held: The appeal should be allowed.

The time for determining tariff classification is at the time of entry into Canada of the goods, and having regard to the language of s. 43 of the *Customs Act,* as amended in 1955 by 3-4 Eliz. II, c. 32, there could be no justification for fixing any other date as the date upon which the duty, if any, was to be determined.

The contention that there was no evidence of newsprint machines being made in Canada prior to the period from November 1956 to the end of June 1957, was untenable. There was ample evidence to support the findings of fact made by the Tariff Board that newsprint machines had been and were being manufactured in Canada in the relevant period, and no error in law was made in arriving at those findings of fact.

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

The argument that the Tariff Board erred in law in refusing to find that design speed should be the deciding factor in arriving at a conclusion as to whether or not the machine in question was of a class or kind not made in Canada, could not be sustained. The refusal of the Board to accept design speed as the criterion or determinant of class or kind was a finding of fact, and there was ample evidence before the Board to justify that finding. There being no error in law, that finding should not have been disturbed by the Exchequer Court.

The contention that the decision of the Tariff Board was invalid on the ground that the Board at the time it made it was not properly constituted, could not be upheld. In the absence of evidence to substantiate the allegation that Mr. Leduc was not a vice-chairman at the time of the rendering of the decision, and in the absence of any suggestion that the Board was not properly constituted at the time of the hearing, it must be presumed that the Board was properly constituted throughout at all relevant times.

Revenu—Douanes et accise—Importation d'une machine à grande vitesse pour fabriquer le papier journal—Est-elle d'une classe ou espèce fabriquée au Canada—Loi sur les douanes, S.R.C. 1952, c. 58—Tarif des douanes, S.R.C. 1952, c. 60, item 427, 427a.

L'intimé MacMillan & Bloedel Ltd. importa une machine pour fabriquer le papier journal de 276 pouces faite aux États-Unis et ayant une vitesse normale de 2,500 pieds par minute. L'intimé déclara son intention d'acheter par lettre en date du 25 janvier 1955 et s'engagea définitivement le premier février 1955. Le contrat formel est daté du 25 août 1955 et la machine fut consignée par pièces entre novembre 1956 et la fin de juin 1957. L'appréciateur du port d'entrée classifia la machine comme étant d'une classe ou espèce fabriquée au Canada et tombant alors sous l'item 427 qui prévoit un taux de droits plus élevé que si elle avait été classifiée sous l'item 427*a* comme étant d'une classe ou espèce non fabriquée au Canada. Cette classification sous l'item 427 fut maintenue par la Commission du tarif, mais cette décision fut renversée par la Cour de l'Échiquier. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu.

La période pour déterminer la classification tarifaire est au moment de l'entrée des marchandises au Canada, et si l'on tient compte du langage de l'art. 43 de la *Loi sur les douanes,* telle qu'amendée en 1955 par 3-4 Eliz. II, c. 32, il n'y a aucune justification pour fixer une autre date comme étant celle durant laquelle les droits à payer doivent être déterminés.

La proposition qu'il n'y avait aucune preuve que des machines pour fabriquer le papier journal étaient fabriquées au Canada avant la période entre novembre 1956 et la fin de juin 1957, n'est pas soutenable. Il y avait d'abondantes preuves pour supporter les conclusions de fait

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de la Commission du tarif que de telles machines avaient été et étaient fabriquées au Canada durant la période pertinente, et aucune erreur de droit n'a été faite pour arriver à ces conclusions de fait.

L'argument que la Commission du tarif a erré en droit en refusant de prendre la vitesse prévue comme étant le facteur décisif pour décider la question de savoir si la machine était d'une classe ou espèce non fabriquée au Canada, ne peut pas être soutenu. Le refus de la Commission d'accepter la vitesse prévue comme le critère ou déterminant de la classe ou espèce était une conclusion de fait, et il y avait d'abondantes preuves devant la Commission pour justifier cette conclusion. Comme il n'y avait aucune erreur en droit, cette conclusion n'aurait pas dû être mise de côté par la Cour de l'Échiquier.

La proposition que la décision de la Commission du tarif était invalide pour le motif que la Commission n'était pas validement constituée lorsqu'elle rendit cette décision, ne peut pas être maintenue. En l'absence de preuve pour justifier l'allégué que monsieur Leduc n'était pas vice-président lorsque la décision fut rendue, et en l'absence de toute suggestion que la Commission n'était pas validement constituée lors de l'audition, on doit présumer que la Commission était validement constituée durant la période pertinente.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier, maintenant un appel de la décision de la Commission du tarif. Appel maintenu.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada, allowing an appeal from a decision of the Tariff Board. Appeal allowed.

R. W. McKimm and *N. A. Chalmers,* for the appellant.

G. F. Henderson, Q.C., and *J. D. Richard,* for the respondent MacMillan & Bloedel (Alberni) Ltd.

J. B. Gillespie, for the respondent Ontario-Minnesota Pulp and Paper Co. Ltd.

A. Forget, Q.C., for Dominion Engineering Works Ltd.

The judgment of the Court was delivered by

HALL J.:—This is an appeal by the Deputy Minister of National Revenue for Customs and Excise from the judgment of the Honourable Mr. Justice Dumoulin of the Exchequer Court of Canada dated January 18, 1963, allowing

an appeal from a declaration made by the Tariff Board and dated April 29, 1959.

The appeal relates to a Beloit 276 inch newsprint machine made by Beloit Iron Works of Beloit, Wisconsin, having a rated mechanical speed of 2,500 feet per minute. The respondent MacMillan & Bloedel stated its intent to purchase the newspaper machine from Beloit Iron Works by letter dated January 25, 1955. The said respondent became committed to purchase the newsprint machine on February 1, 1955. The formal contract was dated August 25, 1955. The newsprint machine was shipped to the said respondent in Canada from Beloit Iron Works in a knocked-down condition during the period from November 26, 1956 to June 24, 1957.

The Port Appraiser classified the newsprint machine as being of a class or kind made in Canada and applied Tariff Item 427 which provided for a rate of duty of 22½%. The said respondent requested that the newsprint machine be classified as of a class or kind not made in Canada and that Tariff Item 427*a* be applied. Tariff Item 427*a* provides for a rate of duty of 7½%. The classification of the Port Appraiser was affirmed by the Dominion Customs Appraiser. MacMillan & Bloedel requested the Deputy Minister of National Revenue for Customs and Excise to reconsider the classification made by the Dominion Customs Appraiser. The Deputy Minister on June 14, 1957 affirmed the classification made by the Dominion Customs Appraiser. It is from this decision that the said respondent appealed to the Tariff Board.

The appeal to the Exchequer Court from the declaration of the Tariff Board was upon the following grounds:

7. The imported newsprint machine was not of a class or kind made in Canada, and the imported mechanical differential drive was not of a class or kind made in Canada.

8. The Tariff Board failed to make any positive findings of fact with regard to the classification of newsprint machines for customs purposes or to make a determination as to which classes or kinds of newsprint machines were made in Canada. In the alternative, if the Tariff Board included all newsprint machines in a single class it clearly

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erred in law in failing to define the class or kind with a reasonable degree of narrowness as required by law.

9. The imported newsprint machine differed in physical characteristics in capacity and in other respects from machines made in Canada prior to the material time to such a degree that it could not be classified as a machine of a class or kind made in Canada. Only one newsprint machine has been made in Canada at any time which might, in any view of the case, be regarded as similar to the imported machine. Such machine was not made in Canada prior to any time material to these proceedings and in the alternative if it was made in Canada prior to a material time, one newsprint machine could not constitute "substantial quantities" within the meaning of section 6 of the said Customs Tariff.

10. The Tariff Board erred in law in concluding that ability to manufacture in Canada a class or kind of newsprint machine without unreasonable delay after such newsprint machine of such class or kind had been made outside Canada constitutes the making of a newsprint machine of that class or kind in Canada.

11. Willingness or ability to manufacture a newsprint machine of a particular class or kind does not constitute manufacture in Canada of a newsprint machine of that class or kind.

12. The expression class or kind as found in tariff items 427 and 427*a* must be considered with a reasonable degree of narrowness in that only similar machines must be considered in a determination that a particular machine is of the same class or kind of machine.

13. The Tariff Board erred in not classifying the imported newsprint machine under tariff item 427*a*.

14. The Tariff Board gave no reasons to justify the conclusion reached as to the classification of the imported machine.

15. That which purports to be a decision of the Tariff Board was not delivered in accordance with section 3 of the said The Tariff Board Act.

16. The Tariff Board erred in failing to separately classify calendar rolls imported by the Appellant under Tariff Item 447*a* rather than Tariff Item 427 having regard to the fact that calendar rolls are dealt with in item 447*a* and are therefore more specifically defined in that item rather than in the basket item 427, and further in respect to the calendar rolls the Tariff Board failed to make any finding of factor or give any reasons to justify the conclusion reached.

17. The mechanical differential drive imported by the Appellant constitutes machinery in its own right and accordingly the Tariff Board erred in not considering such mechanical differential drive as a class or kind of machinery not made in Canada and therefore classifiable under tariff item 427*a*.

The Tariff Items in question read as follows:

427. All machinery composed wholly or in part of iron or steel, n.o.p.; and complete parts thereof.

427*a*. All machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing.

The newsprint machine so imported is composed of iron or steel and is a large and complex piece of machinery composed of many parts. It was built to the specifications of the purchaser and cost approximately $3,000,000.

Although the Notice of Appeal to the Exchequer Court referred specifically to the calendar rolls and the differential drive (Grounds 16 and 17), these grounds were not argued in this Court nor referred to in the respondents' factum.

The respondent MacMillan & Bloedel took the position that the design speed of the newsprint machine in question should have been taken by the Tariff Board as the determining factor in arriving at a finding as to whether or not the said newsprint machine was of a class or kind not made in Canada and it argued that the Tariff Board had erred in law in not so finding.

It was also urged on behalf of the said respondent that there was in fact no evidence that newsprint machines of the size or speed of the one imported were being made in Canada at any time material to the time when MacMillan & Bloedel contracted to purchase the newsprint machine in question and on the question of the relevant time urged that the date for the determination of the rights of the parties should be taken as the date that said respondent entered into the formal contract to purchase, namely, August 25, 1955. This latter point can, I believe, be disposed of by a reference to s. 43 of the *Customs Act,* as amended by 3-4 Eliz. II, c. 32, (1955), which appears to say very clearly that the time for determining tariff classification is at the time of entry into Canada of the goods subject to duty, and having regard to the language of this section there can be no justification for fixing any other date as the date upon which the duty, if any, is to be determined.

The contention that there was no evidence of newsprint machines being made in Canada prior to the period from November 26, 1956 to June 24, 1957, is untenable. There was considerable evidence upon which the Tariff Board

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could find that newsprint machines had been and were being manufactured in Canada in the relevant period and in particular there was the evidence that Dominion Engineering Company Limited had, during the period from December 5, 1955 and November 29, 1956, made in Canada and delivered to Powell River Company Limited a newsprint machine known as Powell River No. 9 which had a design speed of 2,500 feet per minute, and there was evidence that John Inglis Company Limited in the years 1954 and 1955 had rebuilt in Canada a number of newsprint machines upgrading those machines from design speeds of 1,800 feet per minute or less to design speeds of up to 2,500 feet per minute.

There was accordingly, in my opinion, ample evidence to support the findings of fact in this regard made by the Tariff Board and no error in law was made in arriving at those findings of fact.

On the main argument that the Tariff Board erred in law in refusing to find that design speed should be the deciding factor in arriving at a conclusion as to whether or not the said newsprint machine was of a class or kind not made in Canada, the respondent MacMillan & Bloedel relied strongly on the judgment of Judson J. in *Dominion Engineering Works Limited* v. *Deputy Minister of National Revenue*[1]. In that case a company known as A. B. Wing Limited had imported into Canada a certain power shovel described as having a nominal dipper capacity of $2\frac{1}{2}$ cubic yards. It was undisputed that power shovels with a nominal dipper capacity of $2\frac{1}{2}$ cubic yards or more were not made in Canada at the date of import. Power shovels with a nominal dipper ranging from $\frac{1}{2}$ cubic yard to 2 cubic yards were being made in Canada at that time. The Tariff Board found that a classification of power shovels by nominal dipper capacities was generally understood and accepted by the trade in both Canada and the United States and was probably the most practical single standard according to which these implements could be classified. "Nominal dipper capacity" defines a class of power shovel having certain specifications which indicate the work it is capable of doing. It de-

[1] [1958] S.C.R. 652.

fines the over-all capacity and performance of the machine and implies more than a mere difference in size. The submission made by the Deputy Minister of National Revenue in the *Dominion Engineering* case was that since machines ranging in size up to a nominal dipper capacity of 2 cubic yards were made in Canada, the machine next larger in size could not, by reason only of the difference in size, be of a different class or kind. The Board held that where the capacities of machines are established in clearly defined sizes "the least arbitrary and perhaps the best line of demarcation is in accordance with those sizes which are in fact made in Canada as opposed to those sizes which are not."

Judson J. went on to point out that the Board's finding was one of fact and that the Board had heard evidence directed to the question whether these two machines were competitive, interchangeable or equivalent to such a degree as to outweigh the choice of classification by size and further that the Board did not adopt the trade classification automatically and without regard to the other evidence. Judson J. emphasized that it was not a case of a finding being made in the absence of evidence.

Items 427 and 427*a* of the *Customs Tariff* are, as Judson J. points out, plain and unambiguous. Item 427 covers all machinery composed wholly or in part of iron or steel, n.o.p. Item 427*a* covers all machinery composed wholly or in part of iron or steel, n.o.p. of a class or kind not made in Canada. The machine in question in this action must fall within one or the other of these items according to findings of fact. The Tariff Board had been asked to hold that the newsprint machine in question in these proceedings, because it had a rated mechanical speed of 2,500 feet per minute, came within Item 427*a* as being of a class or kind not made in Canada, and MacMillan & Bloedel urged that this item of design speed should be the determining factor in classifying whether the newsprint machine in question came under Item 427 or 427*a*. The Tariff Board dealt with that submission as follows:

> Evidence was presented to show, in considerable detail, the differences between machines rated at 2,000 feet per minute and more recently produced machines rated at 2,500 feet per minute. Some of

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these differences, such as the use of a vacum transfer, a longer fourdrinier, more driers, a headbox designed to withstand higher pressure, and certain differences in the frames, bearings and rolls, are associated with the increase in design speed. Others, in the opinion of one of the Department's witnesses, are improvements which make for greater efficiency or convenience at any speed.

Design speed does appear in all the detailed specifications entered as exhibits; it does define one of the important characteristics of a newsprint machine; and it does convey information with respect to the construction and, given the width, the size and mechanical capacity of the machine. There is no overlapping of design speeds, though the design speed of one very wide machine described in the evidence is midway between 2,000 feet per minute and 2,500 feet per minute. However, as appears from the evidence, design speed indicates only one of the primary determinants of the construction and mechanical capabilities of the machine and it is not universally, or even commonly, recognized as a single measure by which the whole machine may be characterized when it is being bought, sold or advertised. We do not accept design speed as the criterion or determinant of class or kind.

This is a finding of fact and, in my opinion, there was ample evidence before the Board to justify the finding it made. It is not a case of finding having been made in the absence of evidence. I adopt the language of Judson J. in the *Dominion Engineering* case where at p. 656 he says:

Where are the errors in law asserted by the appellant in this case? I have already stated that in my opinion there was ample evidence before the Board to justify the finding made. This is not a case of a finding being made in the absence of evidence. Further, I am totally unable to discover that in making this classification the Board applied the wrong principle or failed to apply a principle that it should have applied. The task of the Board was to classify a piece of machinery—to determine whether it was of a class or kind not made in Canada. This is a task involving a finding of fact and nothing more. It is not error in law to reject the classification by potential or actual competitive standards and to prefer classification according to a generally accepted trade classification based on size and capacity. I do not think there is any error in the Board's decision but if there were, it could only be one of fact.

In my view, Dumoulin J. erred in concluding that the Tariff Board was in error in not finding that the newsprint machine in question was machinery of a class or kind not made in Canada. The finding of the Tariff Board, being one of fact and there being no error in law, should not have been disturbed.

The respondent MacMillan & Bloedel, in its Notice of Appeal to the Exchequer Court, raised a question as to the validity of the decision of the Board as follows:

> That which purports to be a decision of the Tariff Board was not delivered in accordance with section 3 of the Tariff Board Act.

Subsections (1), (2) and (8) of s. 3 of the *Tariff Board Act* were amended by 4-5 Eliz. II, c. 15, to read as follows:

> 3. (1) There shall be a Board, to be called the Tariff Board, consisting of five members appointed by the Governor in Council.
>
> (2) The Governor in Council shall appoint one of the members to be Chairman and two members to be Vice-Chairmen; and at sessions of the Board the Chairman shall preside and in his absence one of the Vice-Chairmen.
>
> (8) With respect to an appeal to the Board under the provisions of the *Customs Act* or the *Excise Tax Act* three members, including the Chairman or in his absence one of the Vice-Chairmen, may exercise the powers of the Board.

and a new subsec. (9) was added reading

> (9) A vacancy on the Board does not impair the right of the remaining members to act.

It was argued before the Exchequer Court but not decided by Dumoulin J. that the decision of the Tariff Board was invalid on the ground that the Board at the time it made its decision was not properly constituted. It was alleged that there was no Vice-Chairman at the time of rendering the decision and that Mr. Leduc's appointment as Vice-Chairman had expired after the hearing but before the decision was made and that his reappointment to the Tariff Board was as a member and not as a Vice-Chairman. It was not suggested that the Board was not properly constituted at the time of the hearing. The record of the proceedings as contained in the case of appeal shows that the hearing commenced February 17, 1959, before Francois J. Leduc, Esq., Vice-Chairman, G. A. Elliott, Member, F. L. Corcoran, Member and J. C. Leslie, Secretary. The decision of the Tariff Board is contained in its declaration dated April 29, 1959, and is signed by J. C. Leslie as Secretary. There is no evidence in the case on appeal to substantiate the allegation that Mr. Francois Leduc was not a

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Vice-Chairman at the time of the rendering of the decision. In the absence of such evidence, it must be presumed that the Board was properly constituted throughout at all relevant times. See *Brunet v. The King*[1].

The appeal should accordingly be allowed with costs throughout, and it is declared that duty is payable under Tariff Item No. 427.

Appeal allowed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent, MacMillan & Bloedel (Alberni) Ltd.: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the respondent, Ontario-Minnesota Pulp & Paper Ltd.: Fraser, Beatty, Tucker, McIntosh & Stewart, Toronto.

Solicitors for Dominion Engineering Works Ltd.: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

[1] (1918), 57 S.C.R. 83 at 114, 30 C.C.C. 10, 42 D.L.R. 405.

DISTRICT OF NORTH VANCOUVER (*Defendant*) ..... APPELLANT;

1964 *Oct. 29 — 1965 Feb. 1

AND

McKENZIE BARGE & MARINE WAYS LTD. (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Municipal corporations—Drainage ditch constructed by municipality—Silt carried by ditch causing damage to plaintiff's property—Action for damages and an injunction—Statutory defence—Municipal Act, R.S.B.C. 1960, c. 255, ss. 527 and 529.

The defendant municipality, in order to drain certain highways, dug a ditch leading into a creek which in turn emptied into Burrard Inlet. The ditch, as originally constructed, caused erosion to adjoining property and in an attempt to remedy that defect the defendant by a fill and extension of the ditch, diverted it to a different arm of the creek. Material eroded by the waters of the ditch was carried along through the creek to build up a delta at its mouth extending some distance into the inlet. Silt from the delta was carried on to the plaintiff's water lot where the plaintiff operated a ship repair yard. The rails of two marine ways extended into the water and the plaintiff operated thereon a cradle on rollers to carry barges and scows above the water level. The plaintiff complained that the silt from the delta was deposited in such quantity as to interfere with the operation of the marine ways and also to decrease the depth of the water alongside the plaintiff's wharf so as to limit access thereto.

The plaintiff brought an action for damages and for an injunction, basing its claim upon both negligence and nuisance. The defendant relied upon the power granted to it by s. 527 of the *Municipal Act,* R.S.B.C 1960, c. 255, and particularly upon the provisions of s. 529 of that statute. The plaintiff was unsuccessful at trial, the judge holding that s. 529 was a bar to the action. The majority of the Court of Appeal, in allowing an appeal, founded liability on the defendant on the basis of its having created a private nuisance in respect of which the provisions of the *Municipal Act* did not provide any defence. The Court refused to grant an injunction and awarded damages to be assessed, such damages to relate only to what had transpired subsequent to January 27, 1961, when the plaintiff first gave notice to the defendant of the damage which it claimed it had sustained as a result of the defendant's actions. The defendant appealed to this Court and the plaintiff cross-appealed against the refusal of the Court of Appeal to grant the injunction and its refusal to award damages in respect of anything which had transpired prior to January 27, 1961.

Held (Spence J. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Abbott, Martland, Judson and Ritchie JJ.: In relation to the powers granted to the defendant by s. 527 of the *Municipal Act,* the principles

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

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established by such authorities as *Groat v. The City of Edmonton*, [1928] S.C.R. 522, *Manchester Corporation v. Farnworth*, [1930] A.C. 171, and *Geddis v. Proprietors of the Bann Reservoir* (1878), 3 App. Cas. 430, did not entitle the plaintiff to succeed in the present case. Statement of Jenkins L.J. in *Marriage v. East Norfolk Rivers Catchment Board*, [1950] 1 K.B. 284 at 305 and 306, approved and applied. In addition, in the present case there were the provisions contained in s. 529. That section, in terms, deprived any person, sustaining damage as a result of the exercise by a district municipality of the powers conferred upon it by s. 527, of any right to claim damages therefor by way of an action in a Court of law. This did not mean that there could never be a remedy available to a person whose land had been injuriously affected as a result of the construction, or operation, of a ditch made by a municipality under the powers conferred upon it by s. 527. A remedy for injurious affection of land necessarily resulting from the exercise of statutory powers by a district municipality was provided in s. 478(1).

Per Spence J., *dissenting*: Despite the broad words of s. 529 of the *Municipal Act*, that section was meant to apply only to those cases where damages necessarily resulted from the proper construction of a work and it could not bar the well-established action of the plaintiff for damages caused by unnecessary nuisance or by negligence. However, even if s. 529 would protect the municipality from all damage actions arising out of the construction of a work permitted by s. 527 of the *Municipal Act* the actual work here constructed was not so permitted. The defendant had diverted the course of the ditch from its earlier line off on an angle to the top of the bank of a dry gully so that the water rushed out of the mouth of the ditch into the dry gully and then 150 feet down that gully to a branch of the creek. It was a matter of interpretation whether by taking the water to the edge of the gully some 150 feet away from any branch of the creek the defendant was conveying *to* and discharging *in* the watercourse of the creek.

As to the cross-appeal, the judgment of the Court of Appeal was in error in confining the damages to the period following January 27, 1961, and should be amended to provide that the reference as to damages to which the plaintiff was entitled should cover all damage occurring as a result of the construction complained of. The plaintiff's request for an injunction should not be granted. The cross-appeal was not one for which leave had been obtained, and in the circumstances this Court, under s. 44(1) of the *Supreme Court Act*, had no jurisdiction to grant an appeal against an order made in the exercise of judicial discretion.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal by the plaintiff from the dismissal of its action at trial. Appeal allowed, Spence J. dissenting.

B. E. Emerson and *B. W. Williams*, for the defendant, appellant.

R. C. Bray and *K. S. Fawcus*, for the plaintiff, respondent.

[1] (1964), 47 W.W.R. 30, 44 D.L.R. (2d) 382.

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

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1], which, by a majority of two to one, allowed the plaintiff's appeal from the dismissal of its action at trial. The case involves the interpretation and application of the relevant sections of the *Municipal Act,* 1957 (B.C.), c. 42, now R.S.B.C. 1960, c. 255.

The facts are concisely stated in the reasons for judgment of Sheppard J. A., who dissented in the Court below, and I am substantially repeating his summary of them.

In March and April of 1958 the appellant, a district municipality, in order to drain the highways, Keith Road and Fairway Drive, dug a ditch leading into Taylor Creek, which, in turn, empties into Burrard Inlet. The waters of the ditch, as originally constructed, caused an erosion endangering adjoining property. Therefore, the appellant, in May of 1961, by a fill and extension of the ditch, directed the ditch in a northwesterly direction to a different arm of Taylor Creek. However, the water carried by the ditch, particularly during freshets, eroded the banks and bed of the ditch, and carried this material along through Taylor Creek to build up a delta at the mouth of Taylor Creek extending 300 to 400 feet into the inlet. There the ebb tides, at times, set up counter-eddies which caused silt from the delta to be carried on to the respondent's water lot situate 150 feet to the east. Occasionally a westerly wind would set up a current carrying silt from the delta on to the respondent's water lot. The respondent, on its land, was operating a ship repair yard which included two wharves, a machine shop and two marine ways. The rails of the marine ways extended into the water and the respondent operated thereon a cradle on rollers to carry barges and scows above the water level. The respondent's complaint is that the silt from this delta was deposited in such quantity as to interfere with the operation of the marine ways and also to decrease the depth of the water alongside the respondent's wharf so as to limit access thereto.

The appellant does not dispute that silt was carried down by the ditch to form the delta, and from the delta on to the respondent's land.

[1] (1964), 47 W.W.R. 30, 44 D.L.R. (2d) 382.

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Martland J.

The respondent's claim against the appellant was based on negligence in failing to take proper care in the design and construction of its ditch and also for the creation of a nuisance. The respondent sought damages and an order to compel the appellant to abate the nuisance.

The appellant, by its defence, relied upon the statutory powers which had been conferred upon it by the *Municipal Act* and in particular relied upon s. 529 of the Act.

The learned trial judge, who dismissed the respondent's action, concluded his reasons with the following findings:

> Here, in my finding the defendant is a "district municipality" (as yet undeveloped) lying at the foot of a mountain range and having frontage of some seven-eight miles on the sea, with some ten major creeks available to it into which to discharge run-off water from its highways. I find that the accretion complained of by plaintiff comes from the discharge of run-off water from Keith Road and Fairway Drive, both of which are highways; and that Taylor Creek is and was the most convenient natural waterway to which defendant could have conveyed such water and discharged it. In its manner of doing so the defendant, in my opinion and finding, fully discharged its obligation to plaintiff. As a district municipality it was and is under no obligation, I think, to construct anything in the nature of a "Highbury Street Tunnel" or other expensive artificial work for the purpose of collecting, conveying and discharging into the most convenient natural waterway, the water run-off from its highways.
>
> For these reasons I hold that the protective provisions of the *Municipal Act* above quoted constitute a bar to the plaintiff's claim, which I accordingly dismiss with costs.

The majority of the Court of Appeal, in allowing the appeal, founded liability on the appellant on the basis of its having created a private nuisance in respect of which the provisions of the *Municipal Act* did not provide any defence. The Court refused to grant a mandatory injunction for abatement of the nuisance and awarded damages to be assessed, such damages to relate only to what had transpired subsequent to January 27, 1961, when the respondent first gave notice, by letter, to the appellant of the damage which it claimed it had sustained as a result of the appellant's actions.

Sheppard J. A. was of the opinion that, while the statute did not authorize a negligent or unreasonable construction, and the onus was on the appellant to bring itself within the statute, the appellant had obtained the finding of the learned trial judge in its favour on that point and there was no reason to vary it.

The appellant has appealed from the judgment of the Court of Appeal and the respondent has cross-appealed

against the refusal of that Court to grant the mandatory injunction and its refusal to award damages in respect of anything which had transpired prior to January 27, 1961.

If the respondent was entitled to bring an action in Court in respect of the kind of damages which it has sustained, in my opinion the action should fail, on the basis of the findings made by the learned trial judge and for the reasons given by him and by Sheppard J. A. in the Court of Appeal. In this Court, however, the appellant raised, and I believe for the first time, the point that, when s. 529 of the *Municipal Act* is read in conjuction with not only s. 527, but also s. 478(1), it is to be construed as preventing any claim being made, by way of an action in a Court of law, in respect of any damage resulting from the construction, maintenance and operation of the ditch in question. It is contended that any claim to compensation for injury to land, resulting from the exercise by a district municipality of the powers given to it by s. 527, is limited to that remedy which is provided by s. 478(1).

The provisions of the *Municipal Act* which are relevant are as follows:

478. (1) The Council shall make to owners, occupiers, or other persons interested in real property entered upon, taken, expropriated, or used by the municipality in the exercise of any of its powers, or injuriously affected by the exercise of any of its powers, due compensation for any damages (including interest upon the compensation at the rate of six per centum per annum from the time the real property was entered upon, taken, or used) necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and a claim for compensation, if not mutually agreed upon, shall be decided by three arbitrators to be appointed as hereinafter mentioned, namely: The municipality shall appoint one, the owner or tenant or other person making the claim, or his agent, shall appoint another, and such two arbitrators shall appoint a third arbitrator within ten days after their appointment; but in the event of such two arbitrators not appointing a third arbitrator within the time aforesaid, one of the Judges of the Supreme Court shall, on application of either party by summons in Chambers, of which due notice shall be given to the other party, appoint such third arbitrator.

* * *

527. A district muncipality has the right, and is deemed to have had the right since its incorporation, to collect the water from any highway by means of drains or ditches, and to convey to and discharge the said water in the most convenient natural waterway or watercourse.

528. (1) A district municipality desiring to construct ditches or drains authorized by section 527 may deposit plans and specifications thereof with the Clerk and publish an advertisement once a week for four consecutive weeks in a newspaper published or circulating within the muni-

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cipality giving public notice that the municipality intends to undertake such works, that plans and specifications thereof may be inspected at the office of the Clerk, and that all claims for damages or compensation arising out of or by reason of the construction, maintenance, operation, or user thereof must be filed with the Clerk within one month from the date of the fourth advertisement.

(2) No person has any claim for damages or compensation arising out of or by reason of the construction, maintenance, operation, or user of any such ditches or drains unless he has filed a claim as aforesaid. If the municipality proceeds with the said works or portion thereof, every claim shall be determined according to the provisions of Division (4) of Part XII.

(3) If the construction of such drains or ditches is not commenced within one year from the date when the said advertisement last appeared, the construction shall not be proceeded with unless re-advertised according to subsection (1).

(4) Nothing in this section shall be deemed to restrict the powers of the municipality which it may otherwise exercise under any other provision of this Act.

529. No action arising out of, or by reason of, or in respect of, the construction, maintenance, operation, or user of any drain or ditch authorized by section 527, whether such drain or ditch now is or is hereafter constructed, shall be brought or maintained in any Court against any district municipality.

530. The provisions of sections 527 to 529 shall be in addition to all provisions made by this or any other Act, and in case of any conflict arising the provisions of sections 527 to 529 shall govern.

It is admitted that the appellant did not follow the procedures which are described in s. 528, in respect of the construction of the ditch which is involved in this case.

The judgment of the Court of Appeal in favour of the respondent is based upon the proposition that the legal powers granted to the appellant under s. 527 were permissive only, that they could have been exercised by the appellant without the creation of a private nuisance and that s. 529 did not preclude the respondent from bringing action against the appellant. Reliance was placed upon the principles established by such authorities as *Groat v. The City of Edmonton*[1], *Manchester Corporation v. Farnworth*[2], and *Geddis v. Proprietors of the Bann Reservoir*[3].

With respect, I do not agree that, in relation to the powers granted to the appellant by s. 527 of the *Municipal Act,* the principles stated in those cases entitle the respondent to succeed in the present case. In *Marriage v.*

[1] [1928] S.C.R. 522. [2] [1930] A.C. 171.
[3] (1878), 3 App. Cas. 430.

East Norfolk Rivers Catchment Board[1], Jenkins L.J., at pp. 305 and 306, after citing the principles stated in the *Geddis* and *Farnworth* cases, goes on to say:

> The general principle is thus well settled, but its application in any particular case must depend on the object and terms of the statute conferring the powers in question (including the presence or absence of a clause providing for compensation and the scope of any such clause), the nature of the act giving rise to the injury complained of, and the nature of the resulting injury. I venture to think that the questions which arise in any given case of this kind are substantially these: first, was the act which occasioned the injury complained of authorized by the statute?; secondly, did the statute contemplate that the exercise of the powers conferred would or might cause injury to others?; thirdly, if so, was the injury complained of an injury of a kind contemplated by the statute?; and, fourthly, did the statute provide for compensation in respect of any injury of the kind complained of sustained through the exercise of the powers conferred? If the answers to all these questions are in the affirmative then, I think, it must follow that the party injured is deprived of his right of action and left to his remedy in the form of compensation under the statute.

I am in agreement with this statement and, in my opinion, each of the questions propounded by him would, in the present case, have had to be answered in the affirmative. In addition, in the present case we have the provisions contained in s. 529. That section, in terms, deprived any person, sustaining damage as a result of the exercise by a district municipality of the powers conferred upon it by s. 527, of any right to claim damages therefor by way of an action in a Court of law.

I turn now to consider the relevant provisions of the *Municipal Act* previously cited. Section 527 does not merely give a permission for the construction of a specific work. It defines a statutory right of a district municipality to collect water from any highway, by means of drains or ditches, and to convey and discharge the same into the most convenient natural waterway or watercourse.

Admittedly the appellant did not comply with s. 528 and the respondent contends that ss. 527 to 530 inclusive constitute a complete code with which the appellant must comply if it is to seek whatever protection is afforded to it by s. 529. However, as was properly pointed out in the reasons of the majority in the Court of Appeal, the wording of s. 528 is permissive and I agree with the conclusion reached that failure to advertise, under s. 528, did not deprive the appellant of whatever protection was afforded by s. 529.

[1] [1950] 1 K.B. 284.

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In this connection it should be noted that, had the appellant complied with s. 528, the respondent would have had no right whatever to claim any compensation, unless it had filed a claim within one month from the date of the final advertisement; *i.e.*, before the construction of the ditch had commenced and before the impact of that construction on the respondent's lands could have been foreseen or determined.

If ss. 527 to 530 inclusive are to be regarded as a complete code, for the application of which compliance with s. 528 is essential, then there seems to be no point whatever in the inclusion in this group of sections of s. 529, because then the whole matter would be governed by subs. (2) of s. 528. Section 529 stands separate and apart from that subsection. It is linked specifically, by its terms, to the exercise of powers under s. 527. In my opinion, the appellant's failure to follow the procedures described in s. 528, while it prevented the appellant from obtaining the protection afforded by subs. (2) of s. 528, did not preclude it from relying upon s. 529.

The wording of s. 529 is not limited to preventing legal action against the appellant, in respect of the construction and operation of its ditch, only in cases where the appellant was not negligent, or could not exercise its powers without creating what, at common law, would have been a private nuisance. If it were to be so limited, the section would have no practical effect whatsoever because, in either of such cases, an action could not succeed against the appellant even if s. 529 were not there at all. In my opinion, this section, coupled with the powers granted to the appellant by s. 527, prevented anyone from making any claim in damages, in a Court of law, against the appellant, in respect of any ditch which it constructed, pursuant to the powers granted to it by s. 527.

This does not mean that there can never be a remedy available to a person whose land has been injuriously affected as a result of the construction, or operation, of a ditch made by a municipality under the powers conferred upon it by s. 527. A remedy for injurious affection of land necessarily resulting from the exercise of statutory powers by a district municipality is provided in s. 478(1). What s. 529 was intended to accomplish, and, in my opinion, does accomplish, is to provide that such an owner is limited in

his remedy to that which is provided in s. 478(1) and that he is precluded from enforcing, by action in a Court of law, any of those remedies which, apart from s. 529, would have been available to him at common law.

In my opinion, s. 529 affords a complete defence to the appellant in these proceedings and, accordingly, this appeal should be allowed and the judgment at trial should be restored. The appellant should be entitled to its costs throughout, including the costs of the cross-appeal.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for British Columbia[1] which, by a majority of two to one, allowed the plaintiff's appeal from the dismissal of his action at trial.

In the spring of 1958 the appellant, which is known in British Columbia as a district municipality, in order to drain the highways, Keith Road and Fairway Drive, dug a ditch leading toward Taylor Creek which in turn empties into Burrard Inlet. That ditch, as originally constructed, caused erosion to certain lots on a plan and in an attempt to remedy that defect the appellant, in the month of May 1961, filled in the course of the ditch and thereby diverted it by a trench in another direction leading, as was described in the evidence, to what was said to be another branch of Taylor Creek. It would appear, in fact, that the gully toward which the ditch, as constructed on this second occasion, led was of soft earth and that the force of the spring freshets coursing down this gully eroded to a very considerable extent the soils in the gully, carried them down the gully into Taylor Creek and out into the waters of Burrard Inlet where, by the force of wind and tide, they were swept against the ways of the respondent company causing the marine railway to be blocked and causing very considerable damage to the respondent. There is no dispute that the silt gathering around the marine railway of the respondent was silt carried down Taylor Creek in the freshets. Under these circumstances, the respondent took this action for damages and for an injunction. The respondent based its action upon both negligence and nuisance.

The appellant in defence relied upon the power granted to it by s. 527 of the *Municipal Act*, R.S.B.C. 1960, c. 255, and particularly upon the provisions of s. 529 of that statute.

[1] (1964), 47 W.W.R. 30, 44 D.L.R. (2d) 382.

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The trial judge held that s. 529 was a bar to the respondent's action and dismissed the action with costs.

The majority of the Court of Appeal allowed the appeal finding that the appellant had created a private nuisance in respect to which the aforesaid provisions of the *Municipal Act* did not provide a defence. The Court of Appeal, however, refused to grant an injunction and limited its damages to those which had occurred after January 27, 1961, when the respondent had first given notice to the appellant of the damage which it claimed it had sustained as a result of the appellant's actions. From that judgment, the appellant appeals to this Court, having been granted leave by the order of the Court dated May 4, 1964. The notice of appeal of the appellant is dated May 11, 1964. The respondent served notice of cross-appeal dated June 19, 1964, in which respondent requested the judgment of the Court of Appeal be varied to permit the damages to be increased and that the injunction requested be granted. No leave was given for such cross-appeal.

Under the circumstances, it becomes necessary to interpret and determine the effect of certain sections of the *Municipal Act*, R.S.B.C. 1960, c. 255, Those sections are as follows:

478. (1) The Council shall make to owners, occupiers, or other persons interested in real property entered upon, taken, expropriated, or used by the municipality in the exercise of any of its powers, or injuriously affected by the exercise of any of its powers, due compensation for any damages (including interest upon the compensation at the rate of six per centum per annum from the time the real property was entered upon, taken, or used) necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and a claim for compensation, if not mutually agreed upon, shall be decided by three arbitrators to be appointed as hereinafter mentioned, namely: The municipality shall appoint one, the owner or tenant or other person making the claim, or his agent, shall appoint another, and such two arbitrators shall appoint a third arbitrator within ten days after their appointment; but in the event of such two arbitrators not appointing a third arbitrator within the time aforesaid, one of the Judges of the Supreme Court shall, on application of either party by summons in Chambers, of which due notice shall be given to the other party, appoint such third arbitrator.

* * *

527. A district municipality has the right, and is deemed to have had the right since its incorporation, to collect the water from any highway by means of drains or ditches, and to convey to and discharge the said water in the most convenient natural waterway or watercourse.

528. (1) A district municipality desiring to construct ditches or drains authorized by section 527 may deposit plans and specifications thereof with the Clerk and publish an advertisement once a week for four consecutive weeks in a newspaper published or circulating within the municipality giving public notice that the municipality intends to undertake such works, that plans and specfications thereof may be inspected at the office of the Clerk, and that all claims for damages or compensation arising out of or by reason of the construction, maintenance, operation, or user thereof must be filed with the Clerk within one month from the date of the fourth advertisement.

(2) No person has any claim for damages or compensation arising out of or by reason of the construction, maintenance, operation, or user of any such ditches or drains unless he has filed a claim as aforesaid. If the municipality proceeds with the said works or portion thereof, every claim shall be determined according to the provisions of Division (4) of Part XII.

(3) If the construction of such drains or ditches is not commenced within one year from the date when the said advertisement last appeared, the construction shall not be proceeded with unless readvertised according to subsection (1).

(4) Nothing in this section shall be deemed to restrict the powers of the municipality which it may otherwise exercise under any other provision of this Act.

529. No action arising out of or by reason of, or in respect of, the construction, maintenance, operation, or user of any drain or ditch authorized by section 527, whether such drain or ditch now is or is hereafter constructed, shall be brought or maintained in any Court against any district municipality.

530. The provisions of sections 527 to 529 shall be in addition to all provisions made by this or any other Act, and in case of any conflict arising the provisions of section 527 to 529 shall govern.

It is the contention of the appellant that it was given power to construct the ditch by s. 527 of the *Municipal Act* and that all actions against it are barred by the provisions of s. 529. It is agreed that the appellant municipality did not deposit a plan with the Clerk and insert the adverisements required by s. 528 of the *Municipal Act*. The appellant further submits that the respondent was not deprived of its remedy as it could always have proceeded to arbitration under the provisions of s. 478 of the *Municipal Act*. It is the respondent's submission that s. 529 of the *Municipal Act* does not bar actions which are based upon either negligence or unnecessary nuisance caused in the construction of a work.

The appellant cites in support of this proposition, *inter alia, Groat v. The City of Edmonton*[1]; *Manchester Corporation v. Farnworth*[2], at p. 88; *Guelph Worsted Spinning*

[1] [1928] S.C.R. 522. [2] [1930] 99 L.J.K.B. 83.

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Co. v. City of Guelph[1], at p. 82; and *Fraser v. Vancouver*[2], at pp. 730 and 735. Those authorities are examples of the well-established principle which may be gathered from a short statement by Duff J. at p. 527 of *Groat v. The City of Edmonton*:

> That the municipality possesses authority under its charter to construct sewers and drains for carrying away water from its streets is beyond question. But it is only in respect of the authorized works and the necessary results of such works that the municipality is entitled to the protection of the statute; and that protection is not available where the nature of the specific work alleged to be authorized under the statute is not made to appear. In this case, no by-law or other instrument evidencing authority or defining the work alleged to be authorized was adduced; and there is no finding, either by the trial judge or by the Appellate Division, that the nuisance complained of was authorized, or was the necessary result of works authorized pursuant to the charter.

Middleton J. in the *Guelph Worsted* case at pp. 80 and 81 quotes from Lord Blackburn in the *Metropolitan Asylum District Managers v. Hill* et al.[3], at p. 203:

> Where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorized by the Legislature, would entitle any one to an action, the right of action is taken away... The Legislature has often interfered with the right of private persons, but in modern times it has generally given compensation to those injured; and if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others.

Surely, that the ditch was dug in both cases in a negligent fashion is established by the evidence of Douglas A. Welsh for the defendant who admitted that he did not examine the particular area from the point of view of the erosion factor of the soil at all and that he was not concerned with erosion. The nuisance is, of course, self-evident.

The submission of the appellant is that s. 529 of the *Municipal Act* requires those cases to be distinguished as in none of the aforesaid cases was there any counterpart of the present s. 529 of the *Municipal Act*.

I have examined those authorities and others and I have found that in no case where this proposition was enunciated was there a bar of action similar to that contained in s. 529. It is, therefore, necessary to examine the said s. 529 and determine whether it was meant to apply to the circumstances present in this case.

[1] (1914), 18 D.L.R. 73. [2] [1942] 3 D.L.R. 728.
[3] (1881), 6 App. Cas. 193.

It is the contention of the respondent that ss. 527 to 530 of the *Municipal Act* composed a code, the sections are inter-related and that the appellant cannot rely upon s. 529 of the statute unless the appellant has complied with the requirements of s. 528, which, of course, the appellant had not complied with in the present case. Despite the fact that s. 528 is, by its terms, permissive, there would seem to be considerable weight to the contention of the respondent. In the statute, the heading above s. 527 is "Subdivision (*c*)—Special Provision for District Municipalities", and that subdivision covers the sections from 527 to 530 inclusive. I am, however, impressed by the fact that under s. 528(2) no person had any claim for damages or compensation arising out of the construction or maintenance or operation or user of a ditch unless he had filed a claim as permitted by subs. (1), *i.e.*, within one month from the date of the fourth advertisement, while the very damage with which this action is concerned could not have been discovered within that limited time and therefore no claim could be enforced by arbitration under s. 528 even if the advertisements had been properly inserted. The appellants answer by pointing out the provisions of s. 478 and submit that the arbitration under that section was always available to the respondent. A reference to s. 478 of the *Municipal Act* shows that it requires compensation to be made for injurious affection by the exercise of the corporation's powers for damages *necessarily resulting* from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work. It is here the contention of the respondent and it would seem to be confirmed by the evidence that the damage did not *necessarily* result from the construction of the ditch but only resulted from the improper construction of the ditch and that therefore the respondents would not have had a right to claim compensation under s. 478 of the *Municipal Act*.

I am, therefore, of the opinion that despite the broad words of s. 529 of the *Municipal Act*, it was meant to apply only to those cases where damages necessarily resulted from the proper construction of a work and it cannot bar the well-established action of the respondent for damages caused by unnecessary nuisance or by negligence. It matters not under which head the cause of action be put.

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I, therefore, wish to adopt the words of Whittaker J. A. in his judgment of the Court of Appeal for British Columbia when he said:

> In my opinion sections 527 to 529 inclusive may be read together. Section 529 is a bar to any action for damage inevitably resulting from the carrying out of the authorized work. The Legislature did not, I think, intend to relieve the Municipality from liability for negligence or for the unjustifiable creation of a nuisance. That result could only be achieved by the use of explicit language, or by necessary implication.

I have up until this point considered the appeal upon the basis that the work performed by the appellant corporation was work authorized by s. 527 of the *Municipal Act*. That section gave the district municipality the right "to collect the water from any highway by means of drains or ditches and to convey it to and discharge the said water in the most convenient natural waterway or watercourse". The evidence established that what the appellant corporation did was to divert the course of the ditch from its earlier line off on an angle to the top of the bank of a dry gully so that the water rushed out of the mouth of this ditch into the dry gully and then 150 feet down that gully to a branch of the Taylor Creek. It is the contention of the respondent that that was not conveying the water *to* and discharging the said water *in* the most convenient natural waterway or watercourse but was only conveying the water to a point where by the action of gravity it would eventually flow into the Taylor Creek. The appellant submits that the respondent is here met with concurrent findings of fact by the trial judge and the Court of Appeal. I am of the opinion, on examining the record, that this cannot be substantiated.

Sullivan J., at trial, said:

> I find that the accretion complained of by plaintiff comes from the discharge of run-off water from Keith Road and Fairway Drive, both of which are highways; and that Taylor Creek is and was the most convenient natural waterway to which defendant could have conveyed such water and discharged it. In its manner of doing so the defendant, in my opinion and finding, fully discharged its obligation to plaintiff.

Sheppard J.A., giving the minority judgment in the Court of Appeal, said:

> In March and April of 1958 the defendant, a District Municipality, in order to drain the highways, Keith Road and Fairway Drive, dug a ditch leading into Taylor Creek which in turn empties into Burrard Inlet.

Whittaker J.A., giving judgment for the majority in the Court of Appeal for British Columbia, said:

> It is conceded that Taylor Creek is the most convenient natural waterway or watercourse in which to discharge the water from this particular drainage area. The appellant contended that respondent, by bringing the ditch to the edge of the gully rather than to the creek bed, did not discharge the water into the Taylor Creek "waterway or watercourse". I think the learned trial judge was right in refusing to give effect to this contention.

I am of the opinion that in so far as those findings were findings that Taylor Creek was the most convenient watercourse they are findings of fact. I have no quarrel with such findings nor did the respondent in its argument in this Court. In so far as the findings are that the appellant conveyed *to* and discharged the water *into* Taylor Creek they are surely subject to the evidence which is only to the effect I have outlined above and it is a matter of interpretation whether by taking the water to the edge of the gully some 150 feet away from any branch of Taylor Creek it is conveying *to* and discharging *in* the watercourse of Taylor Creek. I am not ready to so interpret the statute and I am of the conclusion that even if s. 529 would protect the municipality from all damage actions arising out of the construction of a work permitted by s. 527 of the *Municipal Act* the actual work here constructed was not so permitted. For these reasons, I would dismiss the appeal of the appellant municipal corporation.

I now turn to the cross-appeal and, firstly, deal with the cross-appeal as to the limitation of the plaintiff's right to damages to those which occurred in the period after January 27, 1961.

Whittaker J.A., in coming to the conclusion that the respondent's damages should be so limited quoted a passage from Salmond on Torts, 13th ed., at p. 200, and remarked that the words "as when it is caused by a secret and unobservable operation of nature" did not exist in the said passage in the 5th edition which had been approved by Lord Maugham and Lord Wright in *Sedleigh-Denfield v.*

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O'Callaghan et al.[1] That such a statement should not be taken to exclude the liability of the actual creator of the nuisance for any damage which occurred after the commencement of the nuisance is, in my opinion, confirmed by reference to the same learned author who, in the 13th edition at p. 204, states:

> He who by himself or by his servants by a positive act of misfeasance (as opposed to a mere nonfeasance, such as an omission to repair) creates a nuisance is always liable for it, and for any continuance of it, whether he be the owner, the occupier or a stranger, and notwithstanding the fact that it exists on land which is not in his occupation, and that he has therefore no power to put an end to it.

I am of the opinion that the learned justice in appeal was in error in confining the damages to the period following January 27, 1961, and I would amend the judgment of the Court of Appeal to provide that the reference as to damages to which the respondent is entitled should cover all damage occurring as a result of the construction complained of.

As to the respondent's cross-appeal in which it requests that the injunction prayed for in the original action should be granted, as was observed in the course of the argument, the provisions of s. 44(1) of the *Supreme Court Act* provide:

> No appeal lies to the Supreme Court from a judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceedings in equity originating elsewhere than in the Province of Quebec and except in *mandamus* proceedings.

It is provided in subs. (2) that subs. (1) should not apply to an appeal under s. 41. The appeal in this case by the appellant municipality was an appeal under s. 41, *i.e.*, with leave to appeal. The cross-appeal, however, was not one for which any leave had been obtained, the respondent as cross-appellant merely relying on its right under R. 100. Under such circumstances, I am of the opinion that this Court has no jurisdiction to grant an appeal against an order made in the exercise of judicial discretion and I would not provide that the injunction should issue.

In the result, the appeal of the appellant municipality is dismissed, the cross-appeal of the respondent is allowed

[1] [1940] A.C. 880.

only as to the aforesaid variation in the reference as to damages. The respondent is entitled to its costs throughout.

Appeal allowed and judgment at trial restored with costs throughout to the appellant, Spence J. dissenting.

Solicitors for the defendant, appellant: Andrews, Swinton, Emerson and Williams, Vancouver.

Solicitors for the plaintiff, respondent: Clark, Wilson, White, Clark and Maguire, Vancouver.

AMÉDÉE GIGUÈRE (*Défendeur*) .....APPELLANT;

ET

DAME ARNOLDA GLAZIER (*Demanderesse*) ..... INTIMÉE.

1964
*Nov. 24, 25
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APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Tutelle—Mère nommée tutrice à ses enfants—Action intentée à la suite du décès de son mari—Convol de la tutrice durant l'instance en Cour supérieure—Convention des procureurs que le dossier serait régularisé plus tard—Reprise d'instance par l'épouse mais omission de pourvoir à la tutelle—Épouse finalement nommée tutrice conjointement avec son mari durant l'instance en appel—Requête à la Cour d'Appel pour régulariser le dossier—Gérant d'affaires—Contrat judiciaire—Code civil, art. 283—Code de procédure civile, arts. 269, 270.

Automobiles—Collision fatale—Responsabilité—Question de fait—Accord des deux Cours—Quantum des dommages-intérêts—Perte de soutien—Convol de la veuve durant l'instance—Code civil, arts. 1053, 1056.

A la suite du décès de son mari lors d'une collision entre deux automobiles, la demanderesse se fit nommer tutrice à ses enfants mineurs et, en cette qualité aussi bien que personnellement, comme légataire universelle et exécutrice testamentaire, poursuivit le défendeur en dommages. Advenant le jour fixé pour le procès, la demanderesse révéla à la Cour et aux procureurs que subséquemment à l'inscription de la cause pour enquête et audition au mérite, elle s'était remariée. Il fut alors convenu par le juge et les procureurs des parties que la cause procéderait quand même et avec le même effet que si le dossier était régulier et dans l'ordre, et qu'une requête en reprise d'instance pour régulariser le dossier serait produite et accordée du consentement des procureurs. Une requête permettant à la

*CORAM: Le Juge en chef Taschereau et les Juges Cartwright, Fauteux, Abbott et Hall.

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demanderesse de reprendre l'instance en sa qualité d'épouse fut accordée subséquemment. Mais par suite d'un oubli commun à tous on omit de pourvoir à la tutelle des mineurs. Le juge de première instance accueillit l'action. Durant l'instance en Cour d'Appel, la demanderesse et son époux furent nommés tuteurs conjoints et autorisés à continuer les procédures tant en Cour supérieure qu'en Cour d'Appel. Le défendeur contesta la requête de la demanderesse demandant permission de produire au dossier ce dernier jugement de la Cour supérieure la nommant conjointement tutrice avec son mari. La Cour d'Appel accueillit cette requête et maintint l'action quant à la responsabilité et au quantum des dommages. Le défendeur en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

Il ressort des dispositions de l'art. 283 du *Code civil* que la demanderesse et son mari avaient au jour du procès, à l'égard des mineurs, la responsabilité de gérant d'affaires. A ce titre, ils pouvaient validement faire la convention en question. Les dispositions des arts. 269 et 270 du *Code de procédure civile* ne pouvaient faire obstacle à cette entente. La nullité décrétée par l'art. 269 n'est pas une nullité absolue mais une nullité relative qui ne peut être invoquée que par ceux dont les intérêts ne sont pas représentés. Ce contrat judiciaire que les deux parties à l'entente pouvaient, par un consentement mutuel motivé par leurs obligations ou leurs intérêts, validement former vis-à-vis la Cour avait pour cause et objet véritables d'écarter toute objection basée sur le remariage de la demanderesse. Maîtres du litige, les parties ont manifestement voulu faire porter le débat uniquement sur le mérite de la réclamation de la demanderesse et de celle des mineurs. Elles sont maintenant liées par la méthode qu'elles ont mutuellement adoptée pour la conduite du procès. En somme, le défendeur aurait pu validement consentir à la requête de la demanderesse devant la Cour d'Appel et, la Cour d'Appel ne pouvait faire droit à son objection sans mettre de côté le contrat judiciaire auquel il avait donné son consentement.

Sur le mérite, la défendeur n'a pas démontré qu'il y avait lieu de faire exception à la règle de non intervention de cette Cour dans les cas où, comme en l'espèce, la question de responsabilité en est une de fait sur laquelle la Cour d'Appel et la Cour supérieure ont formé une même opinion.

Sur le quantum des dommages, tenant compte des circonstances de cette cause et des principes guidant cette Cour dans la considération d'une demande de revision du quantum, il n'y a pas lieu d'intervenir. *Voir Fognan v. Ure et al.,* [1958] R.C.S. 377.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Corriveau. Appel rejeté.

Gérard Deslandes, c.r., pour le défendeur, appelant.

François Veilleux, c.r., pour la demanderesse, intimée.

[1] [1964] B.R. 301.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Le 29 mars 1959, Louis-Philippe Leblanc, son épouse Dame Arnolda Glazier et leurs enfants mineurs, Jacques, Lise, Claire et Pierre, revenaient à Montréal d'un voyage en automobile lorsque, à quelques milles de Drummondville, district d'Arthabaska, la voiture, alors conduite par Louis-Philippe Leblanc, vint en collision avec une automobile conduite par l'appelant, sur la même route, mais en direction opposée. Louis-Philippe Leblanc fut tué sur-le-champ; Claire Leblanc fut mortellement blessée et décéda quelques jours après son admission à l'hôpital; les autres passagers subirent de graves blessures et l'automobile dans laquelle ils voyageaient fut virtuellement démolie.

Dans l'année qui suivit ce malheureux accident, la veuve de Leblanc, Dame Glazier, se fit nommer tutrice à ses enfants mineurs, Jacques, Lise et Pierre, respectivement âgés de quatorze, douze et neuf ans, et autoriser, en cette qualité, à poursuivre l'appelant pour obtenir réparation du dommage causé à ces derniers. Agissant en cette qualité aussi bien que personnellement, comme légataire universelle et exécutrice testamentaire, elle institua, dans le même délai, la présente action contre l'appelant, lui réclamant en totalité la somme de $184,133.95. Cette action fut contestée et fut inscrite pour enquête et audition au mérite le 29 octobre 1960. Advenant le jour fixé pour le procès devant la Cour supérieure à Drummondville, soit le 28 novembre 1961, l'intimée révéla à la Cour, présidée par M. le Juge Corriveau, ainsi qu'aux procureurs des parties, le fait que le 19 août 1961, par conséquent après l'inscription de la cause, elle s'était remariée à Raymond Chabot. Comme de nombreux témoins, dont plusieurs venus des cités de Québec et de Montréal, étaient présents en Cour aux fins de ce procès résultant d'un accident remontant déjà à plus de deux ans et demi, il fut convenu par le Juge et les procureurs des parties que la cause procéderait quand même et avec le même effet que si le dossier était régulier et dans l'ordre, ainsi qu'il appert de l'inscription suivante au procès-verbal:

> Une requête en reprise d'instance pour régulariser le dossier vu que le témoin est remariée sera produite et accordée du consentement des procureurs, frais à suivre. Les procureurs consentent à ce que la cause continue aujourd'hui et cela au même effet que si le dossier était régulier et dans l'ordre.

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Après enquête sur tous les points contestés, y compris celui du quantum des dommages subis par les mineurs, le tout sans objection mais du consentement du procureur de l'appelant, la cause fut prise en délibéré. Subséquemment et pour faire suite à la convention ci-dessus, une requête permettant à l'intimée de reprendre l'instance «en sa qualité d'épouse de Raymond Chabot, dûment autorisée par ce dernier, et de la continuer, frais à suivre,» fut présentée et éventuellement accordée de consentement, le 26 janvier 1962, par M. le Juge Corriveau. Cependant, et par suite d'un oubli commun à tous, on omit de pourvoir à la tutelle des mineurs, ce qui était nécessaire pour rendre le dossier «régulier et dans l'ordre», vu que, par suite de son mariage à Chabot, l'intimée, jusqu'alors tutrice, était, depuis le jour de ce mariage, privée de cette charge. C'est ainsi que la convention faite au début de l'enquête, n'étant que partiellement exécutée, M. le Juge Corriveau accueillait, le 22 mars 1963, l'action de l'intimée, condamnait l'appelant à lui payer, tant personnellement qu'en sa qualité de tutrice à ses enfants mineurs, différentes sommes se totalisant à $50,393.95, et décrétait en plus la suspension du permis de conduire de l'appelant jusqu'à satisfaction du jugement, le tout avec dépens.

Giguère interjeta appel de ce jugement. En revisant le dossier pour préparer son factum, le procureur de Giguère constata que le dossier n'avait pas été régularisé relativement à la tutelle des mineurs et invoqua cette omission au soutien de son appel. Ce que voyant, l'intimée et son époux Raymond Chabot, agissant tant personnellement que pour autoriser son épouse, s'adressèrent à la Cour supérieure et, par jugement du 21 novembre 1963, furent nommés tuteurs conjoints aux mineurs et autorisés

> à continuer les procédures tant en Cour Supérieure qu'en Cour d'Appel sur les poursuites en dommages intérêts instituées contre AMÉDÉE GIGUÈRE, de Drummondville, en conséquence d'un accident d'automobiles survenu le 29 mars 1959, près de Drummondville, à recevoir paiement des dommages intérêts dus aux dits enfants mineurs et résultant du dit accident et des dites poursuites et des jugements rendus et à intervenir tant en Cour Supérieure qu'en Cour d'Appel, et à donner quittance pour et au nom des dits mineurs.

En ce qui a trait particulièrement aux procédures en Cour supérieure, cette autorisation est, dans ses termes, conforme et propre à donner effet à l'accord intervenu au début du

procès. Par la suite, l'intimée demanda à la Cour d'Appel permission de produire au dossier ce jugement de la Cour supérieure et l'autorisation de continuer les procédures. Contestée par l'appelant, cette requête fut discutée et prise en délibéré en même temps que l'appel.

La Cour du Banc de la reine[1], par un jugement majoritaire, (Taschereau et Rivard JJ. A.), accueillit la requête et, adjugeant au mérite, déclara partager entièrement les vues et conclusions du Juge de première instance tant sur la question de responsabilité que sur celle de quantum des dommages. Dissident, le Juge Bissonnette, dans des notes très brèves où rien n'est exprimé sur le mérite de la requête, déclara que la preuve sur la responsabilité était contradictoire et que, pour cette raison, le Juge de première instance aurait dû rejeter l'action. L'appel fut donc rejeté avec dépens. D'où le présent pourvoi à cette Cour.

A l'audition, la Cour, après avoir entendu l'appelant, indiqua que l'intimée n'avait pas à plaider sur la question de responsabilité. C'est qu'il n'avait pas été démontré de la part de l'appelant qu'il y avait lieu de faire exception à la règle de non intervention de cette Cour dans les cas où, comme en celui-ci, la question de responsabilité en est une de fait et non de droit sur laquelle la Cour d'Appel et la Cour supérieure ont formé une même opinion. Le procureur de l'intimée fut invité à limiter sa plaidoirie au quantum des dommages accordés à l'intimée par les deux Cours pour perte de soutien et à l'objection de l'appelant relativement à la position des mineurs. Il n'y a donc que ces deux points qui doivent maintenant retenir notre attention.

Sans doute, si l'on considère que l'intimée s'est remariée, faut-il admettre que le montant qui lui est accordé pour perte de soutien est généreux. Tenant compte, cependant, du fait que le revenu annuel de Chabot est bien inférieur à celui que faisait Leblanc, et des principes guidant cette Cour dans la considération d'une demande de revision du quantum de dommages accordés, nous sommes tous d'avis qu'il n'y a pas lieu d'intervenir. Voir *Fagnan v. Ure et al*[2] et autorités citées en cette cause.

La détermination du second point requiert la considération de faits juridiques propres à l'espèce.

[1] [1964] B.R. 301.

[2] [1958] R.C.S. 377, 13 D.L.R. 273.

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L'action de l'intimée a été régulièrement intentée et poursuivie par elle en sa qualité de tutrice jusqu'après inscription de la cause pour enquête et audition au mérite. Ce n'est que quelque dix mois après la date de cette inscription que l'intimée s'est remariée sous le régime de la séparation de biens et que, juridiquement, le fait de son mariage produisit des conséquences relatives, d'une part, à la tutelle qui lui avait été déférée et, d'autre part, aux procédures sur l'action validement intentée par elle en sa qualité de tutrice.

Le fait du mariage a, de plein droit, privé l'intimée de la tutelle; mais de ce jour à celui où elle et son mari furent nommés tuteurs conjoints, elle et son mari demeuraient responsables de la gestion des biens des mineurs et ce, à titre de gérants d'affaires. Voilà ce qui ressort des dispositions de l'art. 283 du *Code Civil,* telles qu'elles se lisaient avant l'amendement de 1964, 13 Eliz. II, bill 16, art. 5—, et de la doctrine sur le point.

Art. 283. La femme qui a été nommée tutrice est privée de cette charge le jour où elle se marie ou se remarie, et le mari de la tutrice demeure responsable de la gestion des biens des mineurs pendant ce mariage, même au cas où il n'y aurait pas de communauté, jusqu'à ce qu'un nouveau tuteur soit nommé.

Trudel, Traité de Droit Civil du Québec, vol. 2, p. 274:

Le défaut de remplacer la tutrice ou de lui adjoindre son mari entraîne une sanction qui frappe particulièrement ce dernier. Le mari, par le seul fait du mariage, devient responsable de la gestion de la tutelle qui était confiée à son épouse. Non pas qu'il soit tuteur ou qu'il ait le droit d'administrer le patrimoine du mineur; cette sanction est édictée pour que le mari s'occupe au plus tôt de faire nommer un tuteur régulier. La responsabilité du mari s'étend non seulement aux actes d'administration que son épouse continuerait à faire, mais encore aux dommages que pourrait subir le mineur, dont les biens resteraient sans administrateur si l'épouse ne s'occupait plus de la tutelle.

Cette responsabilité du mari n'exclut pas celle de son épouse. Le mariage lui a fait perdre la tutelle, mais ne l'a pas déchargée de ses devoirs. Elle et son mari sont considérés comme des gérants d'affaires des biens du mineur. Leur responsabilité est donc égale.

Sirois, Tutelles et Curatelles, p. 108, n° 155:

155.—On demande si la mère et son mari, dans les cas de la dernière partie de l'article 283, sont tuteurs? La réponse est facile: ils ne sont pas tuteurs, puisque la première partie de l'article dit formellement que la mère qui se marie est privée de la tutelle. Si la mère n'est pas tutrice, son mari ne peut l'être. L'un et l'autre sont des gérants d'affaires, et nous verrons dans la suite qu'ils ne sont pas soumis aux lois qui régissent la tutelle.

Dans la Revue Trimestrielle de Droit Civil, 1903, vol. 2, p. 781, se trouve une étude de la jurisprudence en France sur la tutelle de fait. Entre autres hypothèses, on envisage celle où la mère, tutrice légale, se marie sans se faire maintenir dans la tutelle par le conseil de famille. On précise qu'alors privée de la tutelle de droit, elle devient, avec son mari, tutrice de fait, et peut, en cette qualité, valablement faire certains actes conservatoires que commande la protection des intérêts du mineur. La raison de cette substitution de la tutelle de fait à la tutelle de droit est clairement exposée au considérant suivant d'un arrêt de la Cour de Cassation du 15 décembre 1825 rapporté dans *Devilleneuve et Carette, Arrêts, vol. 8 1825-1827, 239, à la page 240:*

> Considérant que . . .
> que cette substitution s'opère nécessairement et par la seule force des choses, puisque, s'il en était autrement, il y aurait un temps plus ou moins long pendant lequel la loi ne veillerait ni sur la personne, ni sur les biens du mineur, ce qui formerait, dans notre législation, une lacune qu'il est impossible de supposer; . . .

Aux fins de cette cause, il suffit de retenir que, suivant le Droit Civil du Québec, l'intimée et son mari avaient, à l'égard des mineurs, au jour du procès, la responsabilité de gérants d'affaires. Si, à ce titre, ils ne pouvaient plaider au nom des mineurs, ils pouvaient et devaient, en tenant compte que l'intérêt de ceux-ci pouvait être sérieusement compromis par la remise à une date plus éloignée de ce procès fondé sur des faits remontant déjà à plus de deux ans et demi, validement convenir, comme mesure conservatoire, à ce que la cause procède «au même effet que si le dossier était régulier et dans l'ordre», la situation devant être régularisée par la suite par une reprise d'instance ayant cet effet, c'est-à-dire couvrant le changement d'état et la cessation de la tutelle de la demanderesse. Les dispositions des arts. 269 et 270 du *Code de Procédure Civile* ne pouvaient faire obstacle à cette entente. Ces articles prescrivent que toute procédure faite subséquemment à la notification de la cessation des fonctions dans lesquelles procède une des parties est nulle et que l'instance est suspendue jusqu'à ce qu'elle soit reprise par une personne habilitée à ce faire. Mais la nullité décrétée par l'art. 269 C.P.C. n'est pas une nullité absolue mais une nullité relative qui ne peut être invoquée que par ceux dont les intérêts ne sont pas représentés. M. Boncenne et Bourbeau,

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Procédure Civile, tome 5, p. 193; *Lowrey et al. v. Routh*[1]. Aussi bien, les parties à l'entente—l'intimée, agissant à titre de gérant d'affaires pour protéger les intérêts des mineurs, et l'appelant agissant personnellement—pouvaient, par un consentement mutuel motivé par leurs obligations ou leurs intérêts, validement former vis-à-vis la Cour ce contrat judiciaire.

Dans le cas qui nous occupe, ce contrat judiciaire est, à mon avis, le fait juridique dominant. Sans doute était-il implicite qu'en exécution de cette entente, la régularisation du dossier se ferait avant que jugement ne soit rendu. En fait, on a procédé à ce faire, mais d'une façon incomplète et ce par suite d'un oubli qui a été subséquemment réparé. Cet oubli commun à tous n'entraîne pas, cependant, la disparition de l'entente et de ses conséquences. Dans son essence, ce contrat judiciaire avait pour cause et objet véritables d'écarter toute objection basée sur le remariage de l'intimée et de procéder avec la cause au même effet que si les parties étaient régulièrement devant le tribunal. *Domini litis,* les parties au litige ont manifestement voulu faire porter le débat uniquement sur le mérite de la réclamation de l'intimée et de celle des mineurs. Elles sont maintenant liées par la méthode qu'elles ont mutuellement adoptée pour la conduite du procès. *The Century Indemnity Company v. Rogers*[2]; *Sullivan v. McGillis et al.*[3] et *City of Verdun v. Sun Oil Company Limited*[4].

En somme, je ne verrais aucun obstacle à tenir comme valide et conforme au contrat judiciaire un consentement que l'appelant aurait pu donner en appel à la requête de l'intimée; et, également, je suis d'avis que la Cour d'Appel ne pouvait faire droit à l'objection qu'il fit à cette requête sans mettre de côté le contrat judiciaire consenti par l'appelant. Comme la Cour d'Appel, je rejetterais cette objection.

Avant de clore sur cette question, je dois ajouter que la décision du Conseil Privé dans *Levine v. Serling*[5], citée par l'appelant, n'est d'aucune assistance en l'espèce. Les circonstances en cette affaire sont fondamentalement différentes de celles prévalant en la présente cause. Il s'agissait

[1] [1887] M.L.R., 3 Q.B. 364.
[2] [1932] R.C.S. 529, 2 D.L.R. 582.
[3] [1949] R.C.S. 201, 93 C.C.C. 175, 2 D.L.R. 305.
[4] [1952] 1 R.C.S. 222, I D.L.R. 529.
[5] [1914] A.C. 659, 23 B.R. 289, 16 R.P.Q. 73.

là d'une action dirigée contre un mineur dont l'incapacité de plaider avait été soulevée aux plaidoiries et l'action fut déclarée nulle *ab initio*.

Pour ces raisons, je rejetterais l'appel avec dépens.

Appel rejeté avec dépens.

Procureurs du défendeur, appelant: Deslandes, Brodeur et Déry, St-Hyacinthe.

Procureurs de la demanderesse, intimée: Bédard, Veilleux et Choquette, Québec.

THE CORPORATION OF THE TOWNSHIP OF NORTH YORK (*Plaintiff*) APPELLANT;

AND

THE MUNICIPALITY OF METROPOLITAN TORONTO (*Defendant*) RESPONDENT.

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*Feb. 5, 8
Mar. 4

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Supplementary estimate certified to Metropolitan Council by Executive Committee—Estimates for the year already adopted—Whether by-law levying the additional sum upon area municipalities validly enacted—The Municipal Act, R.S.O. 1960, c. 249, s. 206(1)(a) and (2)—The Municipality of Metropolitan Toronto Act, R.S.O. 1960, c. 260, ss. 229(1), 230(1), (2) and (10).

Pursuant to the power conferred by subs. (2) of s. 116a of *The Municipality of Metropolitan Toronto Act*, R.S.O. 1960, c. 260, as enacted by 1961-62, c. 88, s. 10 and amended by 1962-63, c. 89, s. 8, the Council of the defendant adopted the recommendation of its Executive Committee that a subsidy of $2,500,000 be paid to the Toronto Transit Commission. For this expenditure a supplementary estimate was certified to the Council by the Executive Committee. The Metropolitan Council enacted by-law 1890 levying the additional sum of $2,500,000 upon the area municipalities, including the plaintiff, and requiring the treasurer of each municipality to pay to the treasurer of the defendant the amounts thereby levied. Prior to the passing of by-law 1890 the plaintiff had enacted a rating by-law and pursuant thereto had commenced sending out tax bills.

The plaintiff contended that by-law 1890 was invalid on the ground that since the Council had previously adopted its estimates for the year, enacted its rating by-law 1869 and set in motion the tax collecting procedures for the year its statutory power was exhausted and it was not competent thereafter to make a further tax levy for the same year. The plaintiff's action for a declaration that by-law 1890

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

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was *ultra vires* and void and claiming consequential relief was dismissed by the trial judge. The trial judgment having been affirmed, on appeal, by the Court of Appeal, the plaintiff further appealed to this Court.

Held: The appeal should be dismissed.

Upon the enactment of subs. (2) of s. 116a followed by the decision of the Metropolitan Council to contribute the sum of $2,500,000 to the cost of operating the transportation system during the year 1963 that amount became a sum "required during the year for the purposes of the Metropolitan Corporation" within the meaning of s. 229(1) of the *Metropolitan Act* and part of the "proposed expenditure of the year" within the meaning of s. 206(1)(*a*) of *The Municipal Act.* There could be no doubt of the duty of the Executive Committee to include this sum in the estimates for the year 1963 or of the power of the Metropolitan Council to include it in the levy made upon the area municipalities pursuant to s. 230(1) of the *Metropolitan Act* were it not for the fact that estimates for the year had already been adopted and a levying by-law passed. The trial judge in rejecting the plaintiff's argument that once by-law 1869 had been passed the power of the Metropolitan Council to make a levy was exhausted for that year relied on cl. (*j*) of s. 27 of *The Interpretation Act,* R.S.O. 1960, c. 191. Here it was held, even without having recourse to that clause, that the Courts below were correct in the unanimous view that on their true interpretation s. 206(1)(*a*) and (2) of *The Municipal Act* and ss. 229(1), 230(1), (2) and (10) of the *Metropolitan Act* empowered the Executive Committee to certify the supplementary estimate calling for the payment of $2,500,000 and empowered the Metropolitan Council to adopt that estimate and to pass by-law 1890.

Robertson v. City of Toronto (1930), 66 O.L.R. 38, applied; *In re Hogg v. Rogers* (1865), 15 U.C.C.P. 417, explained.

APPEAL from a judgment of the Court of Appeal for Ontario affirming a judgment of Hughes J. dismissing an action for a declaration that a certain by-law was *ultra vires* and void and claiming consequential relief. Appeal dismissed.

H. E. Manning, Q.C., and *W. S. Rogers, Q.C.,* for the plaintiff, appellant.

Hon. R. L. Kellock, Q.C., and *A. P. G. Joy, Q.C.,* for the defendant, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario affirming a judgment of Hughes J. dismissing an action brought by the appellant asking for a declaration that by-law no. 1890 passed by the

respondent on May 7, 1963, is *ultra vires* and void and claiming consequential relief.

The matter was dealt with by Hughes J. on a motion for judgment based on the pleadings and on an agreement by the parties as to the facts.

The agreement as to the facts is set out in full in the reasons for judgment of Hughes J.[1]. The Township of Etobicoke which was also a plaintiff has not appealed to this Court and the appellant abandoned in the Court of Appeal the grounds of attack on the by-law based on alleged errors in procedure, consequently a comparatively brief statement of the facts will be sufficient to make clear the question raised for decision.

The ground on which the appellant argues that by-law 1890 is invalid is that since the Council of the respondent had on April 5, 1963, adopted its estimates for the year, enacted its rating by-law no. 1869 and set in motion the tax collecting procedures for the year its statutory power was exhausted and it was not competent thereafter to make a further tax levy in the same year.

The appellant is one of thirteen area municipalities which constitute the Municipality of Metropolitan Toronto.

Under *The Municipality of Metropolitan Toronto Act*, R.S.O. 1960, c. 260, hereinafter referred to as "the *Metropolitan Act*", the Council in each year fixes a metropolitan rate apportioned among the area municipalities. Upon the Metropolitan Clerk certifying to each of the area municipalities the particulars of the levy made against it, it becomes the duty of the area municipality to take the appropriate measures to see that the metropolitan levy and the levies within the control of the area municipality are put in hand for collection and collected. The metropolitan levy when properly made becomes a debt of the area municipality.

The assessment rolls upon which these levies are made are rolls of the area municipalities but are prepared by the Metropolitan Assessment Commissioner, who is also the assessment commissioner *ex officio* of each area municipality. The levy in each area municipality, based on the assessment roll of the year, is made by the council of that

[1] [1964] 1 O.L.R. 507 at pp. 508 to 512.

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municipality by its own rating by-law (or by-laws) which form the basis upon which the proper officer of the area municipality prepares the collector's roll for the year, sends out the tax bills and looks after the collection of the taxes.

On April 26, 1963, subsequent to the passing of by-law 1869 but prior to the passing of by-law 1890, s. 116*a* of the *Metropolitan Act,* as enacted by s. 10 of 1961-62 (Ont.), c. 88, was amended by 1962-63, c. 89, s. 8, adding thereto the following subsection:

> (2) The Metropolitan Corporation may contribute to the cost of operating the transportation system operated by the Commission.

(*i.e.* The Toronto Transit Commission).

Pursuant to the power conferred by this subsection, the Council of the respondent on May 3, 1963, adopted the recommendation of its Executive Committee that a subsidy of $2,500,000 be paid in 1963 to the Toronto Transit Commission, such payment to be conditional upon the revocation of an increase in fares recently instituted by the Commission. For this expenditure a supplementary estimate was certified to the Council on the same date by the Executive Committee.

On May 7, 1963, the Metropolitan Council enacted by-law 1890 levying the additional sum of $2,500,000 upon the area municipalities, including the appellant, and requiring the treasurer of each municipality to pay to the treasurer of the respondent the amounts thereby levied. Prior to the passing of by-law 1890 the appellant had enacted a rating by-law and pursuant thereto had commenced sending out tax bills.

In my opinion by-law 1890 was validly enacted.

It is provided by subss. (1) and (2) of s. 12 of the *Metropolitan Act* that the Metropolitan Council may by by-law provide for the appointment of an Executive Committee and authorize it to exercise with respect to the Metropolitan Corporation any or all of the powers of a board of control under subs. (1) of s. 206 of *The Municipal Act* and that in such case subss. (2) to (15) and (17) to (19) of that section apply *mutatis mutandis.* By by-law enacted on October 30, 1962, the respondent constituted an Executive Committee and authorized it to execute the powers so conferred.

Subsections (1) and (2) of s. 206 of *The Municipal Act* so far as relevant are as follows:

206. (1) It is the duty of the board of control,

(*a*) to prepare estimates of the proposed expenditure of the year and certify them to the council for its consideration;

* * *

(2) The council shall not appropriate or expend, nor shall any officer thereof expend or direct the expenditure of any sum not provided for by the estimates or by a special or supplementary estimate certified by the board to the council, without a two-thirds vote of the council authorizing such appropriation or expenditure, but this prohibition does not extend to the payment of any debenture or other debt or liability of the corporation.

Section 229(1) of the *Metropolitan Act* is as follows:

(1) The Metropolitan Council shall in each year prepare and adopt estimates of all sums required during the year for the purposes of the Metropolitan Corporation, including the sums required by law to be provided by the Metropolitan Council for school purposes and for any local board of the Metropolitan Corporation, and such estimates shall set forth the estimated revenues and expenditures in such detail and according to such form as the Department may from time to time prescribe.

Subsections (1) and (2) of s. 230 of the same Act are as follows:

(1) The Metropolitan Council shall in each year levy against the area municipalities a sum sufficient

(*a*) for payment of the estimated current annual expenditures as adopted;

(*b*) for payment of all debts of the Metropolitan Corporation falling due within the year as well as amounts required to be raised for sinking funds and principal and interest payments or sinking fund requirements in respect of debenture debt of area municipalities for the payment of which the Metropolitan Corporation is liable under this Act.

(2) The Metropolitan Council shall ascertain and by by-law direct what portion of the sum mentioned in subsection 1 shall be levied against and in each area municipality.

Subsection (10) of s. 230 is as follows:

(10) One by-law or several by-laws for making the levies may be passed as the Metropolitan Council may deem expedient.

Upon the enactment of subs. (2) of s. 116*a* followed by the decision of the Metropolitan Council to contribute the sum of $2,500,000 to the cost of operating the transportation system during the year 1963 that amount became a sum "required during the year for the purposes of the Metropolitan Corporation" within the meaning of s. 229 (1) of the *Metropolitan Act* and part of the "proposed expenditure of the year" within the meaning of s. 206(1)

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(*a*) of *The Municipal Act*. There could be no doubt of the duty of the Executive Committee to include this sum in the estimates for the year 1963 or of the power of the Metropolitan Council to include it in the levy made upon the area municipalities pursuant to s. 230(1) of the *Metropolitan Act* were it not for the fact that estimates for the year had already been adopted and a levying by-law passed. The appellant argues that once by-law 1869 had been passed the power of the Metropolitan Council to make a levy was exhausted for that year. Hughes J., in rejecting this argument, relied on cl. (j) of s. 27 of *The Interpretation Act*, R.S.O. 1960, c. 191, which reads as follows:

> 27. In every Act, unless the contrary intention appears,
>
> * * *
>
> (*j*) words importing the singular number or the masculine gender only include more persons, parties or things of the same kind than one, and females as well as males and the converse;

Even without having recourse to that clause, I would agree with the unanimous view of the Courts below that on their true construction the sections which I have quoted above empowered the Executive Committee to certify the supplementary estimate calling for the payment of the $2,500,000 and empowered the Metropolitan Council to adopt that estimate and to pass by-law 1890.

Whether or not it was strictly necessary to the decision of that case, I rely, as did Hughes J., on the following passage in the unanimous judgment of the Court of Appeal delivered by Middleton J. A. in *Robertson v. City of Toronto*[1], at pp. 44 and 45:

> In cities where there is a board of control, sec. 221 governs, and it casts upon the board the duty of preparing estimates of the proposed expenditure for the year, and certifying these estimates to the council for consideration. It also contains a very important provision, found in subsec. 2, that the council shall not appropriate or expend any sum not provided for by the estimates 'or by a special or supplementary estimate certified by the board to the council, without a two-thirds vote of the council authorising such appropriation or expenditure.'
>
> This indicates that there is not a finality in the first estimates passed by the municipality, and this is emphasized by the provision of sec. 307(2), that 'one by-law or several by-laws for assessing and levying the rates may be passed as the council may deem expedient.'

The sections under consideration in that case did not differ in any material particular from those with which we are concerned.

[1] [1930], 66 O.L.R. 38.

For the appellant reliance was placed upon the following passage in the unanimous judgment of the Court of Common Pleas of Upper Canada delivered by J. Wilson J. in *In re Hogg v. Rogers*[1], at p. 419:

> The general principle is, that levies for municipal purposes shall be made upon the revised assessment of the year in which they are made. *It is true that one rate for the year is only struck by the municipal authorities;* but suppose a sheriff got an execution either at a suit of the Crown or of a municipality in the month of January, would he be justified in delaying to levy until the revised assessment roll of that year was completed and a certified copy given to the municipality?

What was actually decided in that case was that school trustees were not restricted by the applicable legislation to making one levy during a year but might levy at any time as need required it. The words which I have italicized in the passage quoted were, I think, a statement as to the prevailing practice rather than a decision as to the powers of the municipal authorities. It seems clear that the Court assumed that the answer to the rhetorical question with which the passage concludes would be in the negative.

I share the view of the Court of Appeal that it is unnecessary to determine whether the decision of the Metropolitan Council to pay the sum of $2,500,000 created a "debt" of the corporation within the meaning of that word as used in s. 206(2) of *The Municipal Act* or in s. 230(1) (*b*) of the *Metropolitan Act;* subject to this, I am in substantial agreement with the reasons of Hughes J. dealing with the construction and effect of the statutory provisions which I have quoted above and I agree with the conclusion at which he arrived.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Manning, Bruce, Paterson & Ridout, Toronto.

Solicitors for the defendant, respondent: Blake, Cassels & Graydon, Toronto.

[1] (1865), 15 U.C.C.P. 417.

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*Feb. 16, 17
Mar. 18

THE CORPORATION OF THE CITY OF OTTAWA and MICHAEL C. INSTANCE, Acting Building Inspector for the said City of Ottawa and MAXWELL C. TAYLOR, Building Inspector for the said City of Ottawa (*Respondents*) ..... APPELLANTS;

AND

BOYD BUILDERS LIMITED (*Applicant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Application for building permit refused—Prima facie right to have permit granted—Municipality seeking to defeat prima facie right by enactment of rezoning by-law—Application for mandamus—Municipality failing to manifest that it was proceeding on a pre-existing clear intention to restrict lands in question and was acting in good faith in so doing.

The respondent company having been assured by officers of the appellant municipality that certain lands were zoned to permit apartment houses purchased the said lands and then immediately instructed its architects to draft plans for an apartment house and by the agency of the architects submitted an application for a building permit. The property had stood unaffected by building restrictions from July 1936 until March 1963, when, as a result of the enactment of a general zoning by-law, the lands were zoned in a category permitting the erection of apartments. Apart from certain minor modifications, the plans submitted were such as would justify the granting of a building permit and the acting building inspector admitted that if he had not been instructed by the Board of Control to refuse the permit he would have granted one.

Upon it becoming known that an application had been made a clamour was raised by surrounding residents. The Ottawa Planning Area Board met on September 18, 1963, considered the objections of the surrounding residents and recommended that the lands in question be rezoned so as to prohibit the building of apartment houses. At a meeting of Council on the following day the report of the Planning Board was considered and approved and a by-law (No. 311/63) making the recommended variations in zoning was passed. The respondent was given no notice of either the meeting of the Planning Board or of Council.

The city applied to the Ontario Municipal Board for approval of by-law 311/63 and shortly thereafter the respondent made application for a mandatory order requiring the issue of a building permit. That application was adjourned pending the hearing of the city's application to the Municipal Board. On appeal, the Court of Appeal held that the application for the mandatory order should not have been adjourned and that upon the facts the respondent had a *prima facie* right to be granted a building permit and that the municipality was

*PRESENT: Cartwright, Abbott, Martland, Judson and Spence JJ.

not acting in good faith and impartially when it enacted by-law 311/63 thus defeating the respondent's *prima facie* right. The appellants appealed to this Court.

Held: The appeal should be dismissed.

Under the provisions of s. 30(9) of *The Planning Act,* R.S.O. 1960, c. 296, by-law 311/63 was not in effect unless and until approved by the Municipal Board. Therefore, when the respondent made application for a building permit and later when refused made application for a mandatory order that a building permit be issued, there was no valid by-law in existence prohibiting the grant of such permit. Therefore, the respondent had a *prima facie* right to the permit and upon its refusal a *prima facie* right to a mandatory order that it should be granted. This *prima facie* right might only be defeated if the municipality demonstrated that it had in existence a clear plan for zoning the neighbourhood with which it was proceeding in good faith and with dispatch.

The argument that the Courts in Ontario lacked power to grant the mandatory order on the ground that there was an alternative legal remedy, *i.e.,* the right to move to quash the by-law, or to be heard before the Board, was not accepted. Despite the provisions of s. 277(1) of *The Municipal Act,* R.S.O. 1960, c. 249, which provided a procedure for an application by way of originating motion to quash a by-law, and s. 30(9) of *The Planning Act,* the respondent having, at the date when it filed its application for a building permit, the *prima facie* right to have that permit granted, could insist upon the hearing of the application for *mandamus* that the municipality manifest that it had a clear zoning plan upon which it was proceeding in good faith and with dispatch. In the circumstances, the appellant had failed to manifest that it was proceeding on a pre-existing clear intention to restrict the lands in question and was acting in good faith in so doing.

Hammond v. City of Hamilton, [1954] O.R. 209; *Sun Oil Co. Ltd. v. Town of Whitby,* [1957] O.W.N. 362; *Re Markham Developments Ltd. and Township of Scarborough,* [1954] O.W.N. 81; *Bolton v. Munro et al.,* [1953] O.W.N. 53, referred to. *Kuchma v. Rural Municipality of Tache,* [1945] S.C.R. 234; *Re Howard and City of Toronto* (1928), 61 O.L.R. 563, distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from an order of Schatz J. adjourning respondent's application for a mandatory order requiring the issue of a building permit.

R. D. Jennings, Q.C., for the appellants.

G. F. Henderson, Q.C., and *K. Radnoff,* 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 Ontario[1] dated April 23, 1964, which allowed an appeal from the order of Mr. Justice Schatz. By

[1] [1964] 2 O.R. 269, 45 D.L.R. (2d) 211.

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that latter order, Mr. Justice Schatz had adjourned, pending the hearing of the appellants' application for approval by the Ontario Municipal Board, an application by Boyd Builders Limited for a mandatory order requiring the City of Ottawa and its building inspector to issue a building permit as to certain lands on Sherwood Drive in the city upon which it was proposed to erect an apartment house.

Roach J.A., giving judgment in the Court of Appeal, upon recital of the facts some of which will be referred to hereafter, held that the application for the mandatory order should not have been adjourned and that upon the facts the applicant Boyd Builders Limited had a *prima facie* right to be granted a building permit and that the municipality was not acting in good faith and impartially when it enacted by-law 311/63 thus defeating the applicant's *prima facie* right.

An owner has a *prima facie* right to utilize his own property in whatever manner he deems fit subject only to the rights of surrounding owners, *e.g.*, nuisance, etc. This *prima facie* right may be defeated or superseded by rezoning if three prerequisites are established by the municipality, (a) a clear intent to restrict or zone existing before the application by the owner for a building permit, (b) that council has proceeded in good faith, and (c) that council has proceeded with dispatch.

Counsel for the appellants in this Court advanced a proposition which he states was fully argued in the Court of Appeal but which is not reflected in any way in the reasons of Roach J.A. giving the judgment of that Court. This argument is that the Courts in Ontario lack power to grant the mandatory order and for the following reasons. The *Municipal Act,* in s. 277(1) provided a definite procedure for an application by way of originating motion to quash a by-law. The *Planning Act* in s. 30 provides in subs. (9) for approval of a zoning by-law by the Municipal Board and that the by-law would only be effective upon such approval. Mr. Jennings argued that the by-law was not illegal on its face and it could only be quashed because of bad faith or discrimination *established in an application to quash.* Mr. Jennings further submitted that the applicant had two courses available to it. It could make an application to the Court to quash or it could allow the application for approval required by s. 30(9) of *The Planning Act* to go before the

Municipal Board and there appear to oppose. Counsel pointed out the provisions of *The Ontario Municipal Board Act,* particularly ss. 33 to 37, 53, 56, and 92 to 95, submitted that the Legislature had selected the Municipal Board to determine exclusively whether the by-law should be brought into effect and, *inter alia,* to decide all questions of fact including good faith.

I am of the opinion that the approach of the Court of Appeal for Ontario is a sound one. Under the provisions of s. 30(9) of *The Planning Act* the by-law is not in effect unless and until approved by the Municipal Board. Therefore, when Boyd Builders Limited made application for a building permit and later when refused made application for a mandatory order that a building permit be issued, there was no valid by-law in existence prohibiting the grant of such permit. Therefore, Boyd Builders Limited had a *prima facie* right to the permit and upon its refusal a *prima facie* right to a mandatory order that it should be granted. This *prima facie* right may only be defeated if the municipality demonstrates that it has in existence a clear plan for zoning the neighbourhood with which it is proceeding in good faith and with dispatch.

I see no necessity for the applicant for the permit taking on itself the task of proceeding to quash the by-law. It may well be that the by-law applies to a very large area and, of course, the building permit would apply to only a part thereof. It may be that in so far as the balance of the area is concerned, there is a valid plan of rezoning and that so far as the owners of such balance of the area are concerned council is proceeding in good faith and with dispatch.

What the applicant seeks in these proceedings is the enforcement of his common law right, and that common law right should be viewed as of the date of the filing of its application for a permit subject to the common law right being superseded in the fashion I have outlined by events which may occur even after the date of the filing of the application for a permit and before the application for a mandatory order.

The series of cases in Ontario included examples both where the by-law, although non-existent at the time of the application for the permit was in existence at the time of the hearing of the application for a *mandamus,* and others where the by-laws were not in existence at such later date.

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Some of the applications for *mandamus* had been granted and some have been refused. Some have been refused and the matter adjourned even when no by-law existed at the time of the hearing of the application for *mandamus: Re Marckity et al. and the Town of Fort Erie and Burger*[1]. There are other cases and frequent cases where the by-law had been enacted between the date of the application for a building permit and the date of the hearing of the application for *mandamus* which followed the refusal of the permit, and where the *mandamus* had been granted. It is true that most of these cases are decisions of single judges, *e.g., Re Bridgman and City of Toronto et al.*[2], *Re Greene and City of Ottawa*[3], *Re Beaver Lumber Co. Ltd. and Township of London*[4], *Re Skyway Drive-In Theatres Ltd. and Township of London*[5], *Re Cooksville Co. Ltd. and Township of York et al.*[6] There were, however, several in the Court of Appeal. Although *Hammond v. City of Hamilton*[7] is a case where there had not yet been a by-law enacted at the time of hearing the application for *mandamus,* the proposition there enunciated and particularly that set out by Roach J. A. at p. 221, has been adopted both by single court judges and by the Court of Appeal in cases where a by-law was enacted during the intervening period: *Sun Oil Co. Ltd. v. Town of Whitby*[8], *Re Markham Developments Ltd. and Township of Scarborough*[9]. These are cases where the *prima facie* right of the applicant to have a building permit has been held by the Court not to have been superseded because the municipality has not fulfilled the three requirements outlined by Roach J. A. in *Hammond v. Hamilton, supra.*

I, therefore, am of the opinion that despite the provisions of *The Municipal Act* and *The Planning Act,* the applicant Boyd Builders Limited having, at the date when it filed its application for a building permit, the *prima facie* right to have that permit granted, could insist upon the hearing of the application for *mandamus* that the municipality manifest that it had a clear zoning plan upon which it was proceeding in good faith and with dispatch. In so far as the previous sentence puts the onus upon the municipality, I agree with counsel for the respondent that such is the effect

[1] [1951] O.W.N. 836.
[2] [1951] O.R. 489.
[3] [1951] O.W.N. 674.
[4] [1951] O.W.N. 23.
[5] [1947] O.W.N. 489.
[6] [1953] O.W.N. 849.
[7] [1954] O.R. 209.
[8] [1957] O.W.N. 362.
[9] [1954] O.W.N. 81.

of *Sun Oil v. Whitby, supra,* and the judgment of LeBel J. in *Bolton v. Munro et al.*[1] The judgment of this Court in *Kuchma v. Rural Municipality of Tache*[2], and that of the Appellate Division in *Re Howard and City of Toronto*[3], fixing the onus upon the applicant should be confined to the situation where the applicant seeks to quash a by-law. There, the applicant is in a position of a plaintiff and has the onus, and particularly has the onus of proving bad faith. On the other hand, where the applicant seeks a *mandamus* to which he has a *prima facie* right and the municipality seeking to defeat that *prima facie* right, alleges, *inter alia,* its good faith the onus should be on it to establish such good faith. However, in the particular case, I am of the opinion that onus is quite unimportant. The facts are not in dispute. For 26 years, these lands stood without building restrictions. They had been restricted by by-law 8214 passed in 1936 and then that restriction was removed by amending by-law 8255 of the same year. The property stood unaffected by building restrictions from July 1936 to March 1963. A general zoning by-law, No. 68/63, was then enacted which provided that the lands in question here should be zoned R-5, a zoning category permitting the erection of apartments. Section 112 of that by-law provided that notwithstanding its enactment, when areas were covered by other by-laws set out in the schedule, the zoning provided by such other by-laws should remain in effect. The aforesaid by-law 8214 was set out in the schedule. That by-law, of course, must be considered in its amended form, *i.e.,* that the lands here in question were excepted therefrom by 8255, so that the result of the general zoning by-law was to zone these lands as R-5. There was produced upon the hearing of the appeal, one of the zoning maps which formed part of the said by-law 68/63 which map indicated in heavy dark print the zoning designation R-5 immediately over the lands in question.

In these circumstances, Boyd Builders Limited inquired carefully as to the restrictions covering the property and were correctly assured by municipal officers that the lands were zoned to permit apartment houses. Acting on that assurance, Boyd Builders Limited took options and have since completed the purchase of two pieces of land at a

[1] [1953] O.W.N. 53. [2] [1945] S.C.R. 234.
[3] (1928), 61 O.L.R. 563.

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total cost of about $60,000 then immediately instructed its architects to draft plans for an apartment house and by the agency of the architects, on Sepember 9, 1963, submitted an application for a building permit. Apart from certain minor modifications, these plans were such as would justify the granting of a building permit and the acting building inspector, the appellant Instance, admitted that if he had not been instructed to refuse the permit he would have granted one on September 19, 1963. He did not do so, however, because upon it becoming known that the application had been made for such permit surrounding residents raised a clamour, the Ottawa Planning Board met on September 18, 1963, considered the objections of these surrounding property owners, and recommended that the lands in question be rezoned in such a fashion as to prohibit the building of apartment houses. No notice of this meeting of the Ottawa Planning Board was given to any representative of Boyd Builders Limited and no officer of that company had knowledge of it.

At the meeting of council on the very next day, September 19, 1963, the report of this Planning Board was considered and approved and by-law 311/63 making the recommended variations in the zoning was given three readings. The meeting took place in the evening and again no notice whatsoever was given to Boyd Builders Limited of the intention to consider and rezone at such meeting, nor did any officer of Boyd Builders have any knowledge of it.

Immediately thereafter, again, on the next day, September 20, 1963, an application was forwarded to the Municipal Board for the approval of the hastily enacted by-law, 311/63. Although the City Clerk swears that he forwarded notice of such application for approval to "all owners of property in the City of Ottawa within the area affected by by-law 311/63, and within 300 feet of such area", no such notice was received by the officers of Boyd Builders Limited. An officer of Boyd Builders Limited, however, heard of the enactment of this by-law and attending the municipal offices confirmed that fact. Boyd Builders Limited, therefore, prepared its application for the issue of *mandamus*. The application is dated September 30, 1963, and is supported by the affidavits of Joseph Liff sworn on September 27, 1963, and various affidavits of Ernest B. Colbert, the president, some sworn also on that date. On October 2, 1963, both

H. M. MacFarland, an officer in the City Clerk's department, Mr. Hastey, the City Clerk, and W. J. Robertson, the secretary of the Ottawa Planning Board, refused to permit the applicant's representative to scrutinize or take copies of the minutes of either the meeting of the Planning Board or of council.

In my view, a most telling circumstance occurred on September 19, 1963, when Mr. Colbert, the president of the respondent, conferred with the City Solicitor, Mr. Hambling, and delivered to him a letter of that date composed by his solicitor. Mr. Hambling conferred with Mr. McLean of the Building Inspector's office, and advised Mr. McLean that in his opinion a building permit could be issued. Nevertheless, Mr. McLean and Mr. Instance, the acting building inspector, refused to issue a permit because they had been instructed not to do so. Mr. Instance in the course of the cross-examination upon his affidavit, admitted that if by-law 311/63 had not been enacted on September 19th and he had not received instructions from the Board of Control to withhold issuing a building permit he would have done so on that latter date.

The relevant cases may be summarized by stating the most important *indicia* of good faith in these matters are frankness and impartiality.

With respect, upon the circumstances outlined above, I adopt the conclusion of Roach J.A. in the Court of Appeal when he said:

> When on March 22, 1963, the City passed its zoning By-law 68/63 it did not thereby prohibit the erection of an apartment building thereon; indeed it expressly permitted it. Accordingly when the appellant filed its application for the building permit it had a *prima facie* right to it. Up until then the Municipal Council had not manifested any intention of varying the then existing restrictions. In passing By-law 311/63 the Council was not acting in good faith. It passed that by-law for the express purpose of defeating appellant's *prima facie* right to the permit. It yielded to the protests of some of the other owners in the immediate neighbourhood for whom the Planning Board was "sympathetic". It passed that by-law without any opportunity having been given to the appellant, which was so vitally interested, to make any representations concerning it. Everything that was done to defeat the appellant's *prima facie* right was done behind its back for the obvious purpose of avoiding embarrassment that the appellant's protestations on its own behalf might cause. *It is difficult to think of any stronger evidence of bad faith.* (The italicizing is my own.)

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I am, therefore, of the opinion that the appellant failed to manifest that it was proceeding on a pre-existing clear intention to restrict the lands in question and was acting in good faith in so doing.

One further matter should be referred to. The interesting question was proposed that if this appeal were dismissed and therefore the building inspector, in accordance with the judgment of the Court of Appeal, were required to and did issue the necessary building permit, and if hereafter the Ontario Municipal Board approved the by-law, No. 311/63, then such approval would date back to the date of the by-law, *i.e.*, September 19, 1963, and the result would be that the building inspector had been required by the court order to grant a building permit contrary to the provisions of the city by-law and moreover such permit might well be vain as the by-law, by virtue of s. 30(1)(ii) of *The Planning Act,* R.S.O. 1960, c. 296, as amended, would not only prohibit the erection of the building but its use. There are two answers to such a submission. Firstly, it would not be expected that the Ontario Municipal Board would take such a course in light of the fact that on November 8, 1963, that board made an order directing that no further step should be taken in respect to the application for approval of the said by-law pending the final determination of Boyd Builders Limited application for a mandatory order. Therefore, one would expect the said Ontario Municipal Board to make no order approving the by-law in respect of the lands in question after the mandatory order requiring the issue of the building permit had been made by the Court of Appeal and confirmed by this Court. Secondly, the respondent here expresses willingness to stand by the position that once that mandatory order has become final its position is protected by the provisions of s. 30(7)(*b*) of *The Planning Act.*

For these reasons, and for those given by Roach J.A., I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: D. V. Hambling, Ottawa.

Solicitors for the respondent: Soloway, Wright, Houston, Galligan & McKimm, Ottawa.

JAMES T. PEPPER (*Plaintiff*) .....APPELLANT;

1964 *Nov. 5, 6 — 1965 Mar. 15

AND

PRUDENTIAL TRUST COMPANY LIMITED and CANADIAN WILLISTON MINERALS LTD. (*Defendants*) ..... RESPONDENTS;

AND

EDWARD P. LAMAR and BUENO OILS LTD. ..... THIRD PARTIES.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Transfer of petroleum and natural gas interest—Non est factum—Second transfer with full knowledge and by way of compromise—Claim by mistaken party to have transactions set aside—Alternative Claim for deceit.

In 1949, the plaintiff, as owner of two quarter sections, had granted a lease of all petroleum, natural gas and related hydrocarbons to R, subject to the payment of a royalty. This lease was still subsisting at the time of the hearing of the present appeal and during its term oil was discovered and production obtained. In 1951, one M, representing himself as an agent of the defendant company P, approached the plaintiff to discuss an option for another lease if the first lease should fall in. The plaintiff was induced to sign certain documents which he had not read. One was an agreement by which, *inter alia,* he purported to assign to P an undivided half interest in the petroleum, natural gas and related hydrocarbons in and under the lands, and further agreed to execute and deliver to the said company a registrable transfer of the said interest. Another document was a transfer under *The Land Titles Act,* R.S.S. 1953, c. 108, of an undivided half interest in all mines and minerals under the said land. The plaintiff also signed a receipt for $64. He admitted that he signed all three documents but denied any contemporaneous knowledge of the Land Titles transfer and also denied receipt of any money.

M took all the documents away but did not ask for a certificate of title, without which the transfer could not be registered under *The Land Titles Act.* This certificate was not asked for until 1953 when another agent, one E, acting for the defendant company C, an assignee of the disputed interest, visited the plaintiff. The latter immediately consulted his solicitor and discovered what he had signed. Acting on his solicitor's advice, the plaintiff in 1954 executed another transfer under *The Land Titles Act* and made available his certificate of title for the purpose of registration of this transfer of an undivided half interest in all oil and gas.

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

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PEPPER v. PRUDENTIAL TRUST CO. LTD. et al.

In 1958 the plaintiff brought an action for, *inter alia,* a declaration that everything that he had signed was null and void, and, in the alternative, for damages for deceit against the defendant P. The trial judge and a unanimous Court of Appeal held against both claims. The plaintiff appealed to this Court.

Held (Spence J. dissenting in part): The appeal should be dismissed.

Per Cartwright, Judson, Ritchie and Hall JJ.: At the time of signing the transfer in 1954 the plaintiff had full knowledge of what he had signed in 1951 and what he was then signing and why. As held by the Courts below, the second transfer, which was untainted by any fraud and was executed with full knowledge and by way of compromise of a real dispute, ruled out any declaration of nullity, rescission or any claim for damages.

Per Spence J., *dissenting*: In so far as the action for rescission was concerned, the judgment of the Court of Appeal refusing such remedy was correct. It was unnecessary to determine whether the 1951 agreement was altogether void or simply voidable. Since the agreement could only be attacked by the plaintiff and unless so attacked always bound the defendant P, it would appear to have been voidable, although once the plaintiff established his plea of *non est factum* thereto, the contract was avoided as of its inception. Therefore, the plaintiff upon having been fully informed of the fraudulent representation which caused his execution of that contract, and fully advised by his solicitor of his rights when he chose to affirm the agreement rather than void it, was bound by that election and could not now obtain rescission. On the other hand, if the 1951 agreement were altogether void and not merely voidable, the plaintiff made a new agreement, for which there was consideration, in 1954 when all of the information as to the fraud and as to his rights had been furnished him by his solicitor.

However, the right to take action for damages for deceit may still exist despite the loss of the right to take action for rescission. The issues upon which it was to be determined whether the plaintiff had lost this right were whether in executing the conveyance in 1954 and delivering the same to the defendant C he had entered into a compromise of that right or whether his conduct had estopped him from asserting it. On the evidence, it could not be concluded that any transaction between the plaintiff and the defendant C as represented by E and by its solicitors in 1953 and 1954 could have any effect as a compromise of a claim against P which arose in 1951 at the time the original documents were executed by the plaintiff.

The defendant P, when it permitted M to be armed with documents such as the assignment that he produced to the plaintiff, and when it undertook to have the titles to the petroleum and natural gas interest put in its name and caveats filed in its name, constituted M its agent for the purpose of obtaining such conveyances of petroleum and natural gas interests. Therefore, the defendant P was liable for the fraud or deceit of its agent.

[*Prudential Trust Co. Ltd. et al. v. Cugnet,* [1956] S.C.R. 914; *Clough v. London and North Western Railway Co.* (1871), L.R. 7 Ex. 26; *Barron v. Kelly* (1918), 56 S.C.R. 455, referred to.]

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming the judgment of Thomson J. Appeal dismissed, Spence J. dissenting in part.

D. G. McLeod, Q.C., for the plaintiff, appellant.

A. M. Nicol, Q.C., for the defendant, respondent, Prudential Trust.

J. L. McDougall, Q.C., for the defendant, respondent, Canadian Williston.

J. Stein, for the third parties.

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

JUDSON J.:—The plaintiff-appellant, James T. Pepper, seeks in this litigation to set aside certain transactions entered into in 1951 and 1954 the result of which was that he parted with an undivided one-half interest in all petroleum and natural gas under his farm. There is an alternative claim for damages for deceit against Prudential Trust Company Limited. The trial judge and a unanimous Court of Appeal have held against both claims.

In 1949, Pepper, as the owner of two quarter sections, had granted a lease of all petroleum, natural gas and related hydrocarbons to Rio Bravo Oil Company Limited, subject to payment of a royalty. This lease is still subsisting and during its term, oil was discovered and production obtained on the land.

In 1951, one Macdonald came to Pepper to discuss an option for another lease if the first lease should fall in. According to Pepper this was the only subject-matter of any discussion at any time with Macdonald. On the second visit, however, Macdonald came back with certain documents ready for signature. This time Pepper signed the following documents:

(1) A document headed "Assignment". This document purported to

(*a*) give an immediate assignment to Prudential Trust Company Limited of an undivided half interest in all petroleum, natural gas and related hydrocarbons in and under the lands;

[1] (1963), 45 W.W.R. 275, 41 D.L.R. (2d) 583.

(b) promise that Pepper would execute a registrable transfer of this interest;

(c) give an option for a new lease if the first lease should fall in.

(2) A transfer under *The Land Titles Act* of an undivided half interest in all mines and minerals under the said land.

(3) A receipt for $64.

Pepper admits that he signed all three documents but denies any contemporaneous knowledge of the Land Titles Transfer and also denies the receipt of any money. Macdonald took all the documents away but did not ask for a certificate of title, without which the transfer could not be registered under the Saskatchewan *Land Titles Act*.

This certificate was not asked for until 1953 when another agent, acting for Canadian Williston Minerals Ltd., an assignee of the disputed interest, visited Pepper. Pepper immediately consulted his solicitor and discovered what he had signed. On instructions from his solicitor, he searched his private papers at home and found that the first agent, Macdonald, had sent him back an executed copy of the assignment. It had been lying unopened among his papers for some time. After some discussion with his solicitor, and some delay, he executed in 1954 another transfer under *The Land Titles Act* and made available his certificate of title for the purpose of registration of this transfer of an undivided half interest in all oil and gas. It did not include "related hydrocarbons" and it departed from the terminology of "all mines and minerals" contained in the first transfer that he had signed for Macdonald. Pepper made this compromise on the advice of his solicitor, who did not think that the dispute was worth the risk of litigation.

At that time he had full knowledge of what he had signed in 1951 and what he was then signing and why. I wish it to be understood that I am not in any way criticising the solicitor. His client had signed a lot of documents and it is clear that at this time the oil and natural gas were not regarded as being of any significant value. The discovery of oil came later.

It should also be remembered that the case of *Prudential Trust Co. Ltd. et al. v. Cugnet*[1], had not been decided at that

[1] [1956] S.C.R. 914, 5 D.L.R. (2d) 1.

time. What the result would have been if Pepper had stood his ground in 1953 and resisted any further claim for the transfer, it is difficult to say. The transfer that he had first executed was not in accordance with the assignment. It was for an undivided half interest in mines and minerals. What he had apparently agreed to transfer was an undivided half interest in oil, gas and related hydrocarbons. Such a transfer would not be registrable under the practice of the Saskatchewan Land Titles Office. But he had agreed to execute a registrable transfer.

Pepper brought an action for a declaration that everything that he had signed was null and void. The trial judge would have held in his favour had it not been for his execution of the second transfer on his solicitor's advice. He held that this was an affirmance of the transaction and that it precluded him both from setting it aside and claiming damages.

The Court of Appeal dismissed the appeal. They thought that the original documents were not a nullity, as found by the trial judge, but voidable on the ground of fraud. They were, however, in complete agreement with the trial judge that the second transfer ruled out any declaration of nullity, rescission or any claim for damages. With this I agree and I think that the appeal fails for the reasons given in both Courts on this aspect of the case.

The learned trial judge found that Pepper had established a plea of *non est factum*. The difference between the trial judge and the Court of Appeal concerned the consequences of such a successful plea—the trial judge held that the transaction was a nullity whereas the Court of Appeal said that it was voidable at the option of plaintiff. I cannot see that this distinction governs the decision of this case. Both Courts held that the deciding factor was the second transfer, which was untainted by any fraud and was executed with full knowledge and by way of compromise of a real dispute. To them this was a complete settlement of every item of dispute. Pepper cannot now assert that notwithstanding the unimpeachable second transfer, he somehow held back a claim for damages if oil and gas should be subsequently discovered. As the Court of Appeal made clear, the claim for damages is precisely the same as the value of the property which he transferred by way of settlement.

I would dismiss the appeal with costs.

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SPENCE J. (*dissenting in part*):—This is an appeal from the judgment of the Court of Appeal for Saskatchewan[1] affirming the judgment of Thomson J. at trial.

The plaintiff was the registered owner in fee simple of all mines and minerals within, upon and under a certain quarter section of land. By a petroleum and natural gas lease dated October 28, 1949, he had granted all petroleum, natural gas and related hydrocarbons to Rio Bravo Oil Company Limited subject to the payment of a gross royalty of one-eighth of the oil produced and saved from the said lands, one-eighth of the market value at the sale of gas sold or used off the premises and one-tenth in kind or value at the well on all other materials mined and marketed. This grant was for an indefinite term and was to continue for so long as production continued. Production of oil and gas was obtained in late 1957 and continued up to the time of the hearing of this appeal. By the provisions of the said petroleum and natural gas lease, either party had the right to assign his interest under the said lease.

In May of 1951, the plaintiff was approached by one Claude Macdonald. The plaintiff swore that Claude Macdonald stated to him that he represented the Prudential Trust Company, oil developers, and explained that the company he represented desired a first chance to obtain from the plaintiff a lease of his petroleum and natural gas on the same terms as those existing under the Rio Bravo Oils lease above mentioned except that the rental would be 25 cents per acre instead of 10 cents per acre and, of course, the proposed lease should only come into effect when the existing lease should lapse or expire.

The plaintiff testified that he agreed to give to Macdonald's principal such first chance and after further conversations he signed two documents, without reading the documents because, as he alleged, he trusted the said Macdonald who "seemed to be a very nice man". The documents so produced and signed by the plaintiff were, however, of a totally different kind and character from those which he testified he had agreed to sign. One was an agreement by which, *inter alia,* he purported to assign to Prudential Trust Company Limited an undivided one-half interest in the petroleum, natural gas and related hydrocarbons upon the

[1] (1963), 45 W.W.R. 275, 41 D.L.R. (2d) 583.

lands, and further agreed to execute and deliver to the said company a registrable transfer of the said interest, and the other document was a transfer to the said company of an undivided one-half interest in all the mines and minerals within or upon the said lands except coal.

The trial judge found, as a fact, as follows:

> I am not overlooking his evidence, but after carefully reviewing all of the evidence I am convinced that when the plaintiff signed the documents which Mr. Macdonald produced to him for execution he had absolutely no idea that they were an agreement to sell or assign an interest in his petroleum, natural gas and related hydrocarbons and a transfer of an interest in his mines and minerals.

I agree with the learned trial judge that if the matter had rested there the plaintiff's plea of *non est factum* would have been a good plea and the plaintiff would have been entitled to claim rescission of the agreement and transfer on the basis that the same were invalid as not having been his act and deed. I need quote no further authority for that proposition than the decision of this Court in *Prudential Trust Co. Ltd. et al. v. Cugnet*[1]. However, in 1953, one Marty Erickson who stated himself to be, and who evidently was, a representative of the defendant Canadian Williston Minerals Ltd., attended the plaintiff and demanded from him delivery of the duplicate certificate of title to his land so that the aforesaid transfer of the one-half interest could be registered. The plaintiff then took the position that he had never entered into any agreement doing more than granting to the Prudential Trust Company a right to lease the lands upon the Rio Bravo lease lapsing. The plaintiff told Mr. Erickson that he wished to confer with his solicitor, a Mr. N. R. McDonald, Q.C., of Weyburn, and obtain his advice as to what he should do. The plaintiff immediately attended Mr. McDonald, Q.C., and on his arrival at the latter's office found Mr. Erickson there ahead of him.

The learned trial judge has found that the situation was then fully explained to Mr. McDonald by Mr. Erickson and that the plaintiff in turn was fully advised as to the nature and effect of the documents which he had delivered to Claude Macdonald, purporting to represent the Prudential Trust Company Ltd. in 1951.

Mr. N. R. McDonald, Q.C., then advised the plaintiff, and he has so admitted, that he, the plaintiff, would save

[1] [1956] S.C.R. 914, 5 D.L.R. (2d) 1.

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trouble and expense if he complied with the demand that was made upon him. Mr. N. R. McDonald, Q.C., however, pointed out that the assignment dated May 2, 1951, purported to assign a one-half interest in all oil and gas and *related hydrocarbons,* and that it was then the prevailing legal opinion in Saskatchewan that a document referring to "related hydrocarbons" could not be registered under the Land Titles System. Mr. N. R. McDonald, Q.C., further pointed out that the transfer executed in 1951 by the plaintiff was of an interest in all mines and minerals except coal, and that therefore it did not comply with the agreement to assign in the assignment dated May 2, 1951, and last referred to. After a considerable interval of time and some correspondence between Mr. N. R. McDonald, Q.C., and the legal representatives of the defendant Canadian Williston Minerals Ltd., Mr. N. R. McDonald, Q.C., caused the plaintiff to execute a transfer dated August 4, 1954, which transfer purported to convey an undivided one-half interest in all petroleum and natural gas on the said lands. This transfer Mr. McDonald, Q.C., delivered to the defendant Canadian Williston Company.

The affidavit of value attached to the said transfer sets out the sum of $80 but it is admitted by the defendant Canadian Williston Minerals Ltd. that no such payment was made and that this amount of $80 was one and the same amount that they were advised had been paid to the plaintiff on the original transaction. The plaintiff had testified that he received no money whatsoever from Claude Macdonald at the time he executed the documents in 1951. A receipt produced at trial as Exhibit D-1 was shown to him and he acknowledged that the signature in pencil thereon appeared to be his signature but he swore that he had never used a pencil to sign a document. Mr. Claude Macdonald, however, in giving his evidence, had sworn that he did make in cash the payment evidenced by such receipt.

The plaintiff commenced this action in May of 1958, claiming therein, *inter alia,* a declaration that the transfer was void and for an order vesting the petroleum and natural gas in the name of the plaintiff, an order removing the caveat filed against the lands by the defendant Prudential Trust Company, and in the alternative, for damages for deceit against the defendant Prudential Trust Company Limited.

In so far as the action for rescission is concerned, I am of the opinion, with respect, that the judgment of the Court of Appeal for Saskatchewan refusing such remedy is correct. It would appear that it is unnecessary to determine whether the original agreement of May 2, 1951, was altogether void or simply voidable. Since the agreement could only be attacked by the plaintiff and unless so attacked always bound the defendant Prudential Trust Company, it would appear to have been voidable, although once the plaintiff established his plea of *non est factum* thereto, the contract was avoided as of its inception. Therefore, the plaintiff upon having been fully informed of the fraudulent representation which caused his execution of that contract, and fully advised by his solicitor of his rights when he chose to affirm the agreement rather than void it, is bound by that election and cannot now obtain rescission: *Clough v. London and North Western Railway Company*[1], at p. 34, and *Barron v. Kelly*[2], *per* Anglin J. at pp. 478-9, and Brodeur J. at p. 487.

On the other hand, if the agreement of May 2, 1951, were altogether void and not merely voidable, the plaintiff made a new agreement in 1954 when all of the information as to the fraud and as to his rights had been furnished him by his solicitor. The consideration for that new agreement may be found in the forbearance of the defendant Canadian Williston from engaging the plaintiff in litigation and further in the result of the new agreement that the plaintiff retained the related hydrocarbons and all mines and minerals except oil and natural gas. In so far as the mines and minerals except natural gas are concerned, it is probable that the transfer delivered in May 1951 not being in accordance with the assignment would have been subject to rectification but that in itself would have entailed litigation. The omission, however, of "related hydrocarbons" is a variation from the original alleged invalid assignment of May 1951 and even if a document containing those words had not been subject to registration under *The Land Titles Act,* the agreement, if valid, would have bound the parties thereto. We were informed during argument in this Court that there may well have been a value in such related hydrocarbons.

There is no doubt, however, that the right to take action for damages for deceit may still exist despite the loss of

[1] (1871), L.R. 7 Ex. 26. [2] (1918), 56 S.C.R. 455.

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the right to take action for rescission: *Barron v. Kelly, supra.* The issues upon which it must be determined whether the plaintiff has lost this right are whether in executing the conveyance of August 1954 and delivering the same to the defendant Canadian Williston Company he has entered into a compromise of that right or whether his conduct has estopped him from asserting it. In *Barron v. Kelly,* the plaintiff's solicitor, in forwarding further payments to the defendant after the plaintiff had discovered the fraud, wrote:

> I have further to advise you that although Mr. Barron is completing his purchase rather than lose the money already paid on the purchase price before he learned of the false and fraudulent representations made to induce him to purchase, he does not waive his right to insist on reparation for the deceit practised upon him, and proposes to bring an action on account thereof.

It may be argued that the plaintiff represented as he was by his solicitor, Mr. N. R. McDonald, Q.C., in 1953 and 1954, upon executing the transfer of August 1954 and causing it to be forwarded to the defendant Canadian Williston Company, should have had his solicitor advise the defendant in terms to the same effect as those used above. It may, of course, also be argued that the defendant Canadian Williston was effectively represented by legal advisers and had it been intended that the plaintiff upon executing the transfer should release all his claims of any kind, it was quite within that defendant's power to require the execution of a release in proper form.

Not only did the defendant Canadian Williston Company not require such release but the defendant Canadian Williston did not deliver to the plaintiff or to his solicitor the assignment of May 2, 1951, which had been acquired by the original alleged fraud. This document was produced by the defendant upon the examination *de bene esse* of the agent Claude Macdonald held in Toronto. It should be noted that that document had, in addition to the covenants granting a transfer of the mineral rights, *i.e.,* the covenants which were alleged to have been fraudulently inserted, an option to the defendant Prudential Trust Company of a 99-year petroleum and natural gas lease upon the plaintiff's lands when the existing lease should lapse, *i.e.,* the only covenant which the plaintiff has testified he thought he was executing. Although neither defendant has since 1954

asserted any right under that agreement of May 2, 1951, there has been no occasion to do so. I am of the opinion that counsel for the appellant (plaintiff) in this Court rightly argued that the failure to deliver that document to his client in August 1954 is evidence of considerable weight that no compromise was intended.

The evidence of Mr. N. R. McDonald, Q.C., on the question of a possible compromise or release of claims is enlightening. Mr. McDonald, Q.C., testified that the only reason for the variation in the form of the transfer between that executed by the plaintiff in 1951 and the one executed in 1954, was because he had pointed out to the plaintiff that the term "mines and minerals" included more than the term "petroleum and natural gas" and that his purpose was to make the transfer conform with the original agreement to that extent. This question was put to him:

> Q. Well, specifically, was there any discussion of a release for any claim that Pepper might have against the companies or either of them?

And Mr. McDonald replied: "Oh no." And to a further question:

> As I understand you then, Mr. McDonald, the sole purpose in executing and delivering a new transfer was to bring the transfer, the document of conveyance, in conformity with the original agreement, Exhibit P.2?

Mr. McDonald replied:

> That is right, to enable Canadian Williston to effect registration.

The plaintiff testified in cross-examination that when he executed the document in 1954 he was not thinking about claiming damages and did not consider that subject until he found that many other persons were similarly involved. It would appear that the plaintiff came to this opinion in November 1956 when he joined an association known as the Mineral Owners' Protective Association.

These questions and answers are relevant:

> *By Mr. Nicol:*
>
> Q. For better than two years you were sure that you had settled your own case? A. Yes, I knew I had settled that, I knew that, but then I wasn't satisfied with it after I had found out so many were in it.
>
> Q. When you talked to your friends in the Mineral Owners Protective Association, then you decided that the settlement you had made was no good, is that it? A. No, I didn't figure it was no good, but I didn't see that these men should go around through the country points and take what us old people had made during our lifetime.

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Upon the whole of the evidence, I am of the view that even as between the plaintiff and the defendant Canadian Williston there was no discussion of any compromise or mutual release and no intention by either that this transaction should constitute a compromise or mutual release. Moreover, although Claude Macdonald in 1951 had represented himself as being the agent of the defendant Prudential Trust Company Limited, Mr. Erickson in 1954 only represented himself as agent for the defendant Canadian Williston. Mr. N. R. McDonald, Q.C.'s dealings were with Canadian Williston alone and the Prudential Trust Company did not know of the existence of either the 1951 assignment and transfer or the 1954 transfer until it was called upon to execute a transfer of all petroleum and natural gas rights which it held as trustee for the defendant Canadian Williston. This document was dated September 22, 1955. Mr. George Douglas Ash, the manager of the defendant Prudential Trust Company, Calgary Branch, in cross-examination, was asked:

> Q. Yes. And was there any suggestion made to you that in some fashion there had been some kind of a settlement made on behalf of the Prudential Trust Company by somebody? A. Not to my knowledge, no.
>
> Q. No. So that as far as your Company is concerned, you have never had—you had no knowledge of the matters in dispute in this action until the action was commenced? A. That's right.

I, therefore, am unable to conclude that any transaction between the plaintiff and the defendant Canadian Williston as represented by Mr. Erickson and by its solicitors in 1953 and 1954 could have any effect as a compromise of a claim against the defendant Prudential Trust Company which arose in May 1951 at the time the original documents were executed by the plaintiff.

The alternative claim for the damages for deceit is made against the defendant Prudential Trust Company Limited alone. One of the defences against such claim as submitted by counsel for the defendant Prudential Trust Company was that Claude Macdonald was never its employee or agent. It would appear that a group of persons and probably the third parties Edward P. Lamar and Bueno Oils Ltd. had entered into a plan for acquiring interests in lands which might have in or under them oil or natural gas, and that for that purpose it sent around the countryside various agents including the said Claude Macdonald. Edward P. Lamar

and the defendant Prudential Trust Company had entered into an agreement entitled Deed of Indemnity on November 1, 1950. This agreement was produced at trial as Exhibit D-3. Under that agreement the Prudential Trust Company covenanted to act as trustee for Lamar's interest and on Lamar's instructions and at his expense to file caveats in the name of a trustee to protect Lamar's interest and to take any and all proceedings necessary to protect or enforce his interests. Lamar covenanted in the said agreement to indemnify the Prudential Trust Company from all liability incurred by reason of its having acted on his behalf which might result from the filing of the caveats or accepting any registrable title or "by reason of all actions, suits, proceedings whatsoever". On September 22, 1955, when the Prudential Trust Company conveyed to Canadian Williston all the interests it had held as base trustee it obtained a similar covenant of indemnification from the latter. Although the Prudential Trust Company did not print the form of assignment which was tendered to the plaintiff for execution in May of 1951 by Claude Macdonald, it knew of the existence of that most deceptive form of document. It had had complaints prior to that date and in fact prior to that date had insisted on the drafting of a new form entitled not merely "Assignment" but "Assignment of an undivided one-half interest in mines and minerals". The form presented in May 1951, and produced at trial as Exhibit P-2, purports in the printed words to be an assignment to the "Prudential Trust Company Limited of the City of Calgary in the Province of Alberta (hereinafter called the "Assignee")".

The plaintiff swore that when Claude Macdonald came to him he said "I am representing the Prudential Trust Company, Prudential Trust Oil Company . . .". Claude Macdonald was examined *de bene esse* and testified that he would purchase petroleum and natural gas rights in the name of the Prudential Trust Company and that the documents were always taken in the name of the Prudential Trust Company.

I am ready to hold that the defendant Prudential Trust Company Limited, when it permitted Claude Macdonald to be armed with documents such as the assignment, Exhibit P-2, in form which I have outlined, and when it undertook to have the titles to the petroleum and natural gas interest

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put in its name and caveats filed in its name, constituted Claude Macdonald its agent for the purpose of obtaining such conveyances of petroleum and natural gas interests. Therefore, the defendant Prudential Trust Company is liable for the fraud or deceit of its agent.

Kerr on Fraud and Mistake, 7th ed., at p. 492, said:

> A principal is liable to third persons for frauds, deceits, concealments, torts, and omissions of duty of his agent, when acting in the course of his employment, although the principal did not authorise or justify or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them.

I have therefore come to the conclusion that despite the fact that the plaintiff's action for rescission is barred, he is entitled to recover damages against the defendant Prudential Trust Company Limited for deceit.

Turning to the quantum of such damages, there is a sparsity of evidence in the record of the trial. A witness, Robert S. Blackett, was called by the plaintiff to give expert evidence as to the quantum of damages, and the defendant Prudential Trust Company Limited called another expert, Peter B. Watkins, for such purpose. It would appear from an examination of the evidence of each of them that they did not differ greatly in their estimate of the damages which, of course, must be the present value of the undivided one-half interest in the royalties payable under the Rio Bravo lease.

Taking the evidence of Mr. Watkins, which cannot be viewed as being unfavourable to the defendant who called him, that sum would appear to be $140,100. Such amount includes the royalties which were payable from the commencement of the drilling by Rio Bravo Oil Company in 1957 up to the date of the trial. It does not appear in the record whether the plaintiff received the full 12½ per cent of the royalties during the whole or any part of that period, or whether he received only one-half, *i.e.*, 6¼ per cent.

I therefore am of the opinion that there should be judgment for the plaintiff for the sum of $140,100 but subject to the proviso that the defendant Prudential Trust Company may, at its option to be exercised within two months from the date of this judgment, proceed to a reference before the proper officer of the Court of Queen's Bench for the Province of Saskatchewan, the costs of such reference to be paid by

such defendant if it should result in an assessment of damages at or above the said sum of $140,100 but otherwise by the plaintiff.

Appeal dismissed with costs, SPENCE J. *dissenting in part.*

Solicitors for the plaintiff, appellant: Pedersen, Norman, McLeod, Miller & Bertram, Regina.

Solicitors for the defendant, respondent, Prudential Trust: Nicol, Keith, Armstrong, MacDonald and Cruickshank, Regina.

Solicitors for the defendant, respondent, Canadian Williston: McDougall, Ready & Hodges, Regina.

Solicitors for the third parties: MacPherson, Leslie & Tyerman, Regina.

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*Mar. 18, 19
Apr. 6

ERVIN ROBBINS, GEORGE SEBOK, WILLIAM BRODA AND JAMES PUSKAS (*Plaintiffs*) ..... APPELLANTS;

AND

ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD (*Defendant*) ..... RESPONDENT.

GLEN ATKINS, WILLIAM BRODA, RICHARD GLAHS, JONAS KARTAVICIUS, JAMES PUSKAS, ERVIN ROBBINS, GEORGE SEBOK AND CORNELIUS VANBELOIS (*Applicants*) ..... APPELLANTS;

AND

ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law—Delegation of power by Farm Products Marketing Board to Tobacco Growers' Marketing Board to make regulations

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

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providing for refusal of licences for production of tobacco and for refusal of acreage allotments or other production quotas—Validity of regulations.

APPEALS from the judgment of the Court of Appeal for Ontario[1], dismissing appeals from a judgment of Grant J., wherein he dismissed an action brought by Robbins *et al.* against the Ontario Flue-Cured Tobacco Growers' Marketing Board and an application for *mandamus* brought by Atkins *et al.* against the same board. Appeals dismissed.

C. L. Dubin, Q.C., and *H. L. Morphy,* for the appellants.

J. J. Robinette, Q.C., and *L. S. Geiger,* for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—These two appeals, the first of which is brought pursuant to special leave granted by this Court, were argued together.

The first appeal arises out of an action in which the appellants as plaintiffs claimed in the endorsement on the writ of summons, as amended:

(*a*) A declaration that the General Regulations 1963-64 made by The Ontario Flue-Cured Tobacco Growers' Marketing Board on May 6th, 1963, exceed the powers delegated to it by the Farm Products Marketing Board by Regulation 173 of the Revised Regulations of Ontario, 1960 as amended by Ontario Regulation 107/63, Ontario Regulation 108/63, and Ontario Regulation 125/63, made pursuant to the Farm Products Marketing Act, R.S.O. 1960, Chapter 137, as amended by Statutes of Ontario, 1961-62, Chapter 41 and Statutes of Ontario 1962-63, Chapter 45,

(*b*) Alternatively for a declaration that Sections 1, 2, 3, 6, 7, 8, 9, 10 and 13, either in whole or in part of General Regulations 1963-64 made by The Ontario Flue-Cured Tobacco Growers' Marketing Board on May 6th, 1963, exceed the powers delegated to it by the Farm Products Marketing Board by regulation 173 of the Revised Regulations of Ontario 1960 as amended by Ontario Regulation 107/63, Ontario Regulation 108/63, and Ontario Regulation 125/63 made pursuant to the Farm Products Marketing Act, R.S.O. 1960, Chapter 137 as amended by Statutes of Ontario 1961-62 Chapter 41 and Statutes of Ontario, 1962-63 Chapter 45.

They also claimed consequential relief by way of interlocutory and permanent injunctions. A further claim set out in the endorsement alleging that the respondent Board was not duly constituted was abandoned.

[1] [1964] 1 O.R. 653, 43 D.L.R. (2d) 413.

The second appeal arises out of an application made by the appellants by way of originating notice for an order by way of *mandamus* directing the respondent Board to:

1. Issue a licence to produce tobacco to the applicants for the year 1963;
2. Establish and record a 1963 basic tobacco acreage to the applicants;
3. Fix and allot 1963 quotas for the marketing of tobacco to the applicants;

and for such further and other relief as may seem just under the circumstances.

An application for an interlocutory injunction made in the action came on for hearing before Grant J. at the same time as the application for a *mandamus* and, with the consent of all parties, was turned into a motion for judgment. The two applications were argued together on July 30, and August 2, 1963, and judgment was reserved. On October 9, 1963, judgment was given dismissing the action and the application for *mandamus*.

Appeals taken to the Court of Appeal for Ontario were dismissed at the conclusion of the argument on February 10, 1964[1].

The appeals to this Court from the judgments of the Court of Appeal were argued together on March 18 and 19, 1965. At the opening of the argument the question was raised whether the Court should entertain the appeals in view of the circumstances that the *mandamus* asked for could not now be effective as it related to matters to be done in the year 1963 and the regulations attacked in the action have been replaced by other regulations similarly, but not identically, worded. This preliminary question was reserved and counsel for the appellants and the respondent were heard on the merits of the appeals.

Having considered the arguments of counsel and the authorities to which they referred I find myself in agreement with the conclusion and the reasons of Grant J. and also with those of the Court of Appeal. I do not think that anything would be gained by attempting to summarize or re-state those reasons and am content to adopt them.

[1] [1964] 1 O.R. 653, 43 D.L.R. (2d) 413.

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ROBBINS *et al.* *v.* ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD

ATKINS *et al.* *v.* ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD

Cartwright J.

Having reached this conclusion it becomes unnecessary to give further consideration to the preliminary objection.

In the result I would dismiss both appeals with costs but, in view of the appeals having been argued together, would direct, as did the Court of Appeal, that only one counsel fee be allowed to cover the two appeals.

Appeals dismissed with costs.

Solicitors for the appellants: Weingust & Halman, Toronto.

Solicitors for the respondent: Fleming, Harris, Kerwin, Barr & Hildebrand, St. Catharines.

1964 *Nov. 9, 10

1965 Apr. 6

IRENE VIOLET SMITH (*Plaintiff*) .....APPELLANT;

AND

BRITISH PACIFIC LIFE INSURANCE COMPANY (*Defendant*) .. } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Insurance—Accident insurance—Insured suffering fatal heart attack while rocking car caught in snowdrift—Whether loss caused by accident as required by policy.

The widow of the deceased brought action to recover under a policy of insurance. The defendant took the position that the deceased did not die from bodily injury caused by accident within the meaning of the terms of the policy as originally issued or as subsequently extended by a rider. The deceased had suffered a heart attack in the spring of 1961 and after a period of hospitalization and recuperation had returned to work with instructions to restrict his activities. On September 29, 1961, accompanied by a friend, he went on a hunting trip in his automobile. Blowing snow and ice were encountered and the car became stuck in a snowdrift. The friend shovelled and pushed while the deceased attempted to help by rocking the car, *i.e.*, by shifting alternately from forward to reverse gear. While thus engaged, the deceased suffered a coronary thrombosis and occlusion causing his death. The trial judgment in favour of the deceased's widow was reversed by the Court of Appeal and an appeal was then brought to this Court.

Held: The appeal should be dismissed.

The exertion of driving and handling the steering wheel of the automobile and, at the last, of rocking the automobile by alternately shifting from forward to reverse gear was not an accident but deliberate and, there-

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*PRESENT: Taschereau C.J. and Cartwright, Abbott, Martland and Hall JJ.

fore, the loss was not caused by accident as required by the policy. *Columbia Cellulose Co. Ltd. et al. v. Continental Casualty Co.* (1963), 43 W.W.R. 355 [affirmed (1964), 42 D.L.R. (2d) 401] followed.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of Balfour J. Appeal dismissed.

H. C. Rees, Q.C., for the plaintiff, appellant.

J. L. Robertson, for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—By a policy of accident insurance issued October 9, 1950, the respondent insured one Daniel Wilfred Smith in the principal sum of $1,000 against, *inter alia,* loss of his life by:

loss resulting solely from Bodily Injury which is not caused by and does not arise out of nor in the course of any employment for compensation, wage, profit or gain, and which is sustained during the life of this policy through Accidental Bodily Injury (Suicide, or any attempt thereat, sane or insane, not included) . . . . .

A rider to this policy effective July 1, 1959, insured Smith in the sum of $10,000 against loss of his life from:

bodily injury caused by an accident occurring anywhere in the world while this rider and the policy to which it is attached are in force and resulting directly and independently of all other causes in death of the Insured within 90 days of the date of the accident provided the accident causing such injury of the insured is in consequence of the Insured:

A. Riding as a passenger or operator in or on, boarding or alighting from, or being struck by an automobile . . . . .

Daniel Wilfred Smith died on September 29, 1961, under the circumstances later set out. The respondent admitted that Smith's death occurred while the policy was in force and that the appellant, the widow of the deceased Smith is the beneficiary named in the policy. The respondent took the position that the deceased did not die from bodily injury caused by accident within the meaning of the terms of the policy as originally issued or as extended by the rider of July 1, 1959.

The deceased who was 47 years of age at the time of his death was a welder by trade. For about 18 months prior to his death he was employed at the University of Saskatchewan. In April or May 1961 he suffered a heart attack. His condition was then diagnosed by Dr. Lewis Brand, who had

[1] (1964), 48 W.W.R. 25, 45 D.L.R. (2d) 91.

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been his physician for some eight to nine years, as a coronary occlusion. He was hospitalized for about two weeks and treated for this condition. After being discharged from hospital, he remained at home recuperating for about a month before returning to work. When he returned to work he did so with instructions from Dr. Brand not to do any heavy work such as lifting and not to climb flights of stairs except slowly one at a time with a rest between each step.

The events of September 29, 1961, prior to the death of the deceased are set out fully in the judgment of Maguire J.A. in his judgment as follows:

On the morning of September 29, 1961, Smith, accompanied by a friend Wright, left his home in Saskatoon by automobile, on a duck shooting expedition, for the area east of Cudworth, Saskatchewan. Some blowing snow and ice were encountered on the road which became progressively heavier towards Cudworth. In that area the deceased drove eastward on a municipal road, encountering snow drifts which at first caused no particular difficulty. Near the crest of a small hill a much deeper drift was run into, which stopped the car, but without any sudden jar or shock. The deceased found he was unable to proceed through the drift or to back out of it. He remained at the wheel and after Wright had shovelled and pushed for about three-quarters of an hour, they got the car out of the drift, but in so doing found it necessary to drive off of the road into the adjoining field. There they stopped for tea. Here the car again became stuck and it took about one or one and one-half hours of manoeuvring as well as further shovelling and pushing by Wright, to get the car back on the road. When the car was back on the road, it was facing west. The deceased then suggested to Wright, who had done all the shovelling and pushing, that he should take a rest. While Wright was resting, the deceased walked some distance east to view the road conditions. On his return to the car it was agreed it was not feasible to go any further east and that they should return home.

In order to proceed west there was about forty yards to go to get clear of the snow. Wright resumed shovelling and pushing and the deceased attempted to help by rocking the car, that is, rapidly changing gears from forward to reverse. In rocking the car the deceased moved his body back and forth in union with the movement of the car. It was while engaged in this activity that the deceased suffered a coronary thrombosis and occlusion causing his death. It is to be noted that the deceased during all this time, approximately, three hours, did no heavy work such as shovelling snow or pushing the car. Apart from the walk to ascertain the road conditions, all he did was drive the car.

An autopsy was performed on November 2, 1961, 34 days after death, and the pathologist, Dr. E. J. Andres, concluded:

Death was due to repeated coronary thromboses. The terminal thrombosis was initiated by haemorrhage into an atheroma which had ruptured into the lumen of the right coronary artery. This was the immediate cause of death.

The medical testimony, based on the autopsy, was to the following effect:

(1) that the heart showed that the deceased had suffered two previous coronary thromboses with resultant myocardial infarction;

(2) that substantial recovery had been made from these earlier thromboses;

(3) that the deceased suffered from atherosclerosis;

(4) that said prior thromboses and the disease predisposed the deceased to further coronary thromboses;

(5) that the sequence of development of the fatal occlusion was,

(*a*) rupture of and haemorrhage into the atheroma;

(*b*) rupture or breaking of the roof of the atheroma and haemorrhage into the lumen or passageway of the artery;

(*c*) the forming of the thrombosis;

(*d*) occlusion of the artery and death as a result.

All the medical witnesses called by the appellant were agreed that (*b*), (*c*) and (*d*) were probably sudden, involving little lapse of time; that (*a*), in point of time, could be relatively short but might take up to three hours before (*b*) occurred and with a possibility that it might have commenced early that morning before the deceased left his home.

Other testimony by each of the three physicians was in substantial accord, and, in brief, to the following effect: the prior thromboses predisposed the deceased to further such attack or attacks and such could be produced spontaneously without apparent immediate cause or be induced by performing work; the disease of atherosclerosis was an underlying cause, the thrombosis being the end effect of the disease; that strain or stress in driving an automobile could induce the thrombosis.

The appellant's contention is that being stuck in the snow, the difficulties experienced in getting going and, finally, the rocking action in trying to free the automobile by shifting alternately from forward to reverse gear caused the deceased to become emotionally upset, resulting in a rise in his blood pressure which triggered the rupture or breaking of the roof of the atheroma and haemorrhage into the lumen or passageway of the artery; the forming of the thrombosis; occlusion of the artery and death as a result.

Assuming that the deceased did become emotionally upset with a consequent rise in blood pressure with the results just mentioned, the question is, would that constitute an accident

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resulting directly and independently of all other causes in death within the meaning of the insuring clauses in the policy and in the rider.

An "accident" is defined in Welford on Accident Insurance, 2nd ed., p. 268, as:

> The word "accident" involves the idea of something fortuitous and unexpected, as opposed to something proceeding from natural causes; and injury caused by accident is to be regarded as the antithesis to bodily infirmity caused by disease in the ordinary course of events.

A like definition is found in Murray's Oxford Dictionary, vol. 1, p. 55.

Many cases were cited by counsel, including a number of workmen's compensation cases. Workmen's compensation cases are not ordinarily applicable in the interpretation of a policy such as we have here: *Fenton v. Thorley & Co., Ltd.*[1]

In my opinion the judgment of Sheppard J.A. in *Columbia Cellulose Co. Ltd. et al. v. Continental Casualty Co.*[2], which was affirmed without written reasons by this Court[3], is conclusive against the position taken by the appellant. The facts in the *Cellulose* case were that one Eugene Bartlett, employed as plant manager by Columbia Cellulose Co. Ltd. at Prince Rupert, British Columbia and at their plant on Watson Island, British Columbia, left Prince Rupert on Friday, April 3, 1959, on an inspection tour of plants of the Cellulose Corporation of America in the vicinity of Charlotte, North Carolina, U.S.A. On Sunday, April 5, 1959, he arrived in Charlotte; on Monday, April 6, he inspected the Rockhill plant; on Tuesday, April 7, the plant at Charlotte and in the afternoon of that day he drove to the Narrows. On Wednesday, April 8, he inspected the Narrows plant, including the power house in which the temperature was as high as 120°-125°. That evening he returned to Charlotte, North Carolina. Later that evening Bartlett became ill, was taken to the hospital and at 12:30 a.m. the following morning he died. The plaintiff company, and Emerald Bartlett as executrix of the estate of the late Eugene Bartlett, brought action under a policy issued by the defendant to the plaintiff company insuring all eligible persons including Eugene Bartlett against

> bodily injury caused by an accident . . . and resulting directly and independently of all other causes.

[1] [1903] A.C. 443 at 455. [2] (1963), 43 W.W.R. 355.
[3] (1964), 42 D.L.R. (2d) 401.

After trial, the learned trial judge dismissed the action and from that judgment the plaintiffs appealed.

On appeal the principal argument was whether or not the death of Bartlett was "caused by an accident" and therefore within the policy definition of "injury". The plaintiffs contended that Bartlett, unknown to himself, was suffering from fatty deposits in the coronary artery (atherosclerosis) producing a plaque or roughened elevation of the lining of the coronary artery, and that the exercise of the trip and the inspections caused a haemorrhage of the tissues under the lining of the artery, which haemorrhage raised the plaque thereby narrowing the bore of the artery and so affected the flow of blood as to have resulted in the formation of a clot or thrombosis. That blocking of the passage of blood to a portion of the heart so affected the heart that death followed.

Having reviewed the facts, Sheppard J.A. referred to the definition of "accident" quoted above, and proceeded to say at pp. 359-360:

> The difficulty arises in applying the definition, that is, to determine whether "accident" under a particular policy relates to the cause or to the consequence. Under this policy the event insured against, namely "a bodily injury caused by an accident" consists of three parts: (1) A bodily injury; (2) An accident; and (3) That the accident cause the bodily injury. Under the policy there must be an accident which caused the bodily injury and therefore the accident must be distinct and separate from that bodily injury so as to be the cause thereof. On the literal meaning of the policy the accident must be the cause of the injury; it is not sufficient that the injury, that is the consequence, be an accident.
>
> The plaintiffs' case is that the inspection of plants amounted to an over-exertion which caused a haemorrhage resulting in the raising of the plaque, the clot, the blocking of the artery and Bartlett's death. The evidence reads:
>
> > MR WALLACE: I ask the Doctor to make that assumption that there was over-exertion.
> >
> > THE COURT: And I just point out it is a very important assumption and it must be the premise upon which all of his evidence as to medical results must depend, is that not so, Doctor? A. Yes. I would respectfully say that that is for your lordship to say.
> >
> > Q. Yes, but I mean you are basing your opinion upon an assumption that the exertion described by the witness, Cotsford, was abnormal in the case of this particular patient? A. I am, sir.
> >
> > MR. WALLACE: Q. Now I want to deal with this question of exertion, Doctor. What relationship does it bear to this phenomena that you have described? A. Unusual exertion raises the blood pressure in the coronary arteries and intimal haemorrhage or subintimal haemorrhage—in other words, bleeding of a small capillary, small blood vessel

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which branches from the coronary artery in the wall of the heart. This characteristically occurs in people who have this underlying condition, as almost all males do in our civilization.

The exertion would be deliberate and not an accident; only the injury, that is the consequence, at the most would be an accident. Hence the plaintiffs' case is that the wilful act of exertion, which was no accident, has caused an unexpected consequence which is said to be an accident, but that is the reverse of what the policy requires.

and at p. 366:

The injury complained of here is the haemorrhage and the consequences caused by the exertion, but the exertion was not an accident but deliberate and, therefore, the loss was not caused by accident as required by the policy.

In the present case the exertion of driving and handling the steering wheel of the automobile and, at the last, of rocking the automobile by alternately shifting from forward to reverse gear was deliberate and, in the words of Sheppard J.A. just quoted "the loss was not caused by accident as required by the policy".

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Rees, Shmigelsky & Angene, Saskatoon.

Solicitors for the defendant, respondent: Moxon, Schmitt, Estey, Robertson & Muzyka, Saskatoon.

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EDMONTON AIRPORT HOTEL CO. LTD. AND JAKE SUPERSTEIN (*Defendants*) ..... APPELLANTS;

AND

CREDIT FONCIER FRANCO-CANADIEN (*Plaintiff*) ..... RESPONDENT;

AND

ECONOMY PLUMBING LTD. AND IDEAL PAVING AND CONSTRUCTION CO. ALBERTA LTD. (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Mortgages—Guarantee—Mortgage on land and buildings—Collateral mortgage on chattels—Whether collateral chattel mortgage unenforceable as being an infringement of s. 34(17) of The Judicature Act, R.S.A. 1955, c. 164—Liability of guarantor—The Guarantees Acknowledgment Act, R.S.A. 1955, c. 136.

The plaintiff sued the defendant hotel company on two mortgages for foreclosure or sale. One mortgage was on the land and buildings and the other on chattels. The individual defendant S was sued as guarantor of these mortgages. The trial judge gave judgment against the corporate defendant for foreclosure or sale and against S for the full amount owing under the guarantee. The Appellate Division, by a majority, dismissed the appeal but varied the judgment against S to provide that he should only be liable for the deficiency after the security had been realized. The defendants appealed to this Court.

Held: The appeal should be dismissed.

The taking of security on chattels did not offend in any way against the restriction in s. 34(17) of *The Judicature Act,* R.S.A. 1955, c. 164, of the right of the mortgagee to the land. He was seeking to enforce his security on chattels outside the terms of s. 34(17). He was enforcing his security on the land and he was enforcing his security on the chattels. In neither case was he attempting to get a personal judgment either directly or indirectly.

The submission that S was under no liability as guarantor since, under s. 34(17)(*a*), there was no debt owing by the principal debtor failed. There was a borrowing which was neither illegal nor *ultra vires* and there was an unenforceable debt which would not disappear by the terms of s. 34(18) until a vesting order was made. As to the ground that the certificate required by s. 4 of *The Guarantees Acknowledgment Act,* R.S.A. 1955, c. 136, contained the name of the hotel company rather than that of S, the plain and unmistakable meaning of the certificate was that S knew and understood what obligations he was incurring in executing the guarantee of the recited mortgage and this was compliance

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

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with the Act. The defence that any guarantee of any mortgage indebtedness was void under the terms of s. 34(17) as an indirect method of attempting to impose personal liability under the mortgage also failed. The guarantor was liable on his guarantee and his liability in no way depended upon the fact that his guarantee contained a waiver of the provisions of s. 34(17) of *The Judicature Act*. No opinion was expressed on the question whether a person entitled to the benefit of the Act could waive its provisions. A guarantor was not so entitled.

Swan v. Bank of Scotland (1836), 10 Bli. N.S. 627, distinguished; *Macdonald v. Clarkson et al.*, [1923] 3 W.W.R. 690, discussed; *Krook et al. v. Yewchuk et al.*, [1962] S.C.R. 535, followed.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], dismissing an appeal from a judgment of Kirby J. Appeal dismissed.

Hon. C. H. Locke, Q.C., and *G. H. Steer, Q.C.*, for the defendants, appellants.

W. G. Morrow, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—Credit Foncier Franco-Canadien sued Edmonton Airport Hotel Co. Ltd., on two mortgages for foreclosure or sale. One mortgage was on the land and buildings and the other on chattels. Jake Superstein was sued as guarantor of these mortgages. Judgment was given against both defendants in accordance with the claim. The Appellate Division[1] dismissed the defendants' appeal and they now appeal to this Court. We are not concerned here with the rights of certain lienholders who were brought into the litigation.

Superstein was the owner of a parcel of land and applied to Credit Foncier for a loan to assist in the construction of a hotel. The loan was to be for $300,000 with interest at 8 per cent, and was to extend over a period of 10 years. Edmonton Airport Hotel Co. Ltd. was to be incorporated to take title to the land and 10 per cent of the shares of the company were to be given to Credit Foncier. The hotel company was to give a charge under *The Land Titles Act* on the land and buildings and a chattel mortgage on all furnishings and equipment. Superstein was to give a personal guarantee of the loan. These securities were duly delivered, together with 15 per cent of the shares of the company, the extra 5 per cent being in consideration of an immediate advance of $50,000 to release the land from a charge held by a bank.

[1] (1964), 48 W.W.R. 641, 47 D.L.R. (2d) 508.

Credit Foncier started its action after there had been default in payment of principal, interest, taxes and insurance premiums and failure to clear the property of mechanics' liens which had been filed. The company's defence was that the chattel mortgage was unenforceable as being an infringement of s. 34(17) of *The Judicature Act,* R.S.A. 1955, c. 164. Superstein set up the same defence against the enforcement of his guarantee. In addition, he said that the guarantee was a nullity because it was not correctly certified in accordance with *The Guarantees Acknowledgment Act,* R.S.A. 1955, c. 136. The trial judge gave judgment against the hotel company for foreclosure or sale and against Superstein for the full amount owing under the guarantee. The Appellate Division, by a majority, dismissed the appeal but varied the judgment against Superstein to provide that he should only be liable for the deficiency after the security had been realized. There is no appeal from this variation. The dissenting reasons of Johnson J.A., concurred in by Porter J.A., would have allowed the appeal and dismissed the action against both defendants.

Sections 34(17)(*a*) and 34(18) of *The Judicature Act* read as follows:

> 34. (17) In an action brought upon a mortgage of land whether legal or equitable, or upon an agreement for the sale of land, the right of the mortgagee or vendor thereunder is restricted to the land to which the mortgage or agreement relates and to foreclosure of the mortgage or cancellation of the agreement for sale, as the case may be, and no action lies
>
> (*a*) on a covenant for payment contained in any such mortgage or agreement for sale.
>
> 34. (18) . . . and upon the making of any such vesting order or cancellation order, every right of the mortgagee or vendor for the recovery of any money whatsoever under and by virtue of the mortgage or agreement for sale in either case ceases and determines.

The first question that arises under this legislation is the company's defence that where a mortgage of land is involved, a collateral chattel mortgage for the same indebtedness or part of it is necessarily void because in an action upon a mortgage of land, the right of the mortgagee thereunder (*i.e.,* the mortgage of land) is restricted to the land, and that to enforce the security of the chattel mortgage would be another way of enforcing personal liability on the covenant to pay. In my opinion, which coincides with that of

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Judson J.

the trial judge and the majority in the Appellate Division, this submission was rejected by this Court in *Krook et al. v. Yewchuk et al.*[1]

I cannot accept the distinction drawn in the dissenting reasons in the Appellate Division between this case and *Krook et al. v. Yewchuk et al.* It is true that *Krook et al. v. Yewchuk et al.* was a vendor and purchaser situation. The vendor was selling a hotel property comprising land and chattels and he took back security on both, the chattel mortgage being expressed to be collateral to the land mortgage for the full amount. The present transaction is one between borrower and lender, mortgagor and mortgagee. The lender will not lend unless he gets certain security both on land and chattels. I can see no possible distinction between the vendor and purchaser and mortgagor and mortgagee relationships.

It is additional security that the lender wants. He would not lend without it. He is not interested in the personal covenant but in property. It is true that if the lender took security only on the land, he could not reach the chattel property by way of execution because he could not get a personal judgment. The lender is under no obligation to go into a transaction with these limitations and takes the security as part of the loan transaction. Under this legislation, he is and can only be interested in the taking of security. The taking of security on chattels does not offend in any way against the restriction in s. 34(17) of the right of the mortgagee to the land. He is seeking to enforce his security on chattels outside the terms of s. 34(17). He is enforcing his security on the land and he is enforcing his security on the chattels. In neither case is he attempting to get a personal judgment either directly or indirectly. The company's defence fails.

As to the guarantee, Superstein submitted that he was under no liability as guarantor since there was no debt owing by the principal debtor. He said that the effect of s. 34(17)(*a*) was to render it impossible that there should be any debt owing by the hotel company. The simple answer is that the hotel borrowed money from Credit Foncier on the security of land and chattels. This borrowing was neither illegal nor *ultra vires* and gave rise to a debt. *Swan v. Bank*

[1] [1962] S.C.R. 535, 34 D.L.R. (2d) 676.

of Scotland[1] does not apply. It was a case of illegality. But here, s. 34(17) is a procedural limitation. There was a borrowing and there was an unenforceable debt which will not disappear by the terms of s. 34(18) until a vesting order is made.

The second ground on which the guarantee is disputed is *The Guarantees Acknowledgment Act*. Section 4 provides:

> 4. No guarantee executed after the first day of July, 1939, has any effect unless
>
> (*a*) the person entering into the obligation created thereby appears before a notary public and acknowledges his execution thereof, and
>
> (*b*) the notary public, being satisfied by examination of that person that the person is aware of the contents of the guarantee and understands it, issues a certificate under his hand and seal of office in the form set out in the Schedule.

There is no dispute over compliance with subs. (*a*). The dispute is over subs. (*b*). The certificate reads in full as follows:

> CANADA
> PROVINCE OF ALBERTA
>
> THIS IS TO CERTIFY THAT JAKE SUPERSTEIN of the City of Edmonton in the Province of Alberta, WHO IS KNOWN TO ME and is named as a party in a certain instrument in writing dated the 8th day of February, A.D. 1961, made between EDMONTON AIRPORT HOTEL CO. LTD. and CREDIT FONCIER FRANCO-CANADIEN this day appeared in person before me and acknowledged that he had executed the same and that I satisfied myself by examination that he was aware of and understood the contents of the said instrument.
>
> GIVEN at the City of Edmonton, in the Province of Alberta, this 8th day of February, A.D. 1961.
>
> (sgd) *E. A. D. McCuaig*
>
> A Notary Public in and for the Province of Alberta.

The certificate should have read that the instrument was made between Jake Superstein and Credit Foncier, and not between Edmonton Airport Hotel Co. Ltd. and Credit Foncier. The trial judge and the majority in the Appellate Division have held that as it stands, the certificate, in the circumstances of the case, is in compliance with the Act. As to Superstein's perfect understanding of the transaction there can be no doubt. Oral evidence of the Notary Public was admissible and relevant. If the certificate is questioned, that official is entitled to testify why he certified that he had satisfied himself by examination that he (Superstein) was aware of and understood the contents of the "said instrument".

[1] (1836), 10 Bli. N.S. 627.

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The "said instrument" was, of course, the mortgage. But the guarantee was attached to the mortgage and incorporated it by reference. It recites that in consideration of the advance of $300,000 made by the within named mortgagee (Credit Foncier) to the mortgagor (Edmonton Hotel) he, Superstein, guarantees payment of any money "that shall be payable under the terms of the within mortgage". I think that the plain and unmistakable meaning of the certificate is that Superstein knew and understood what obligations he was incurring in executing the guarantee of the recited mortgage and that this is compliance with the Act.

Superstein's third defence is that any guarantee of any mortgage indebtedness is void under the terms of s. 34(17) as an indirect method of attempting to impose personal liability under the mortgage. To me this defence cannot be distinguished from that put forward against the chattel mortgage. The guarantor is not and cannot be the mortgagor. Action is taken by the mortgagee to enforce the security. The enforcement of rights against a guarantor is another matter entirely. It is true, however, that before the decision of this Court in *Krook et al. v. Yewchuk et al.,* there were Alberta decisions, which were reviewed in the reasons of Martland J. in *Krook et al. v. Yewchuk et al.* indicating that to enforce a guarantee of mortgage indebtedness was the same thing as enforcing a personal covenant. The origin of this theory seems to be in the judgment in *Macdonald v. Clarkson et al.*[1] The legislation, as it then stood, permitted a personal judgment against a mortgagor to the extent of a deficiency after realization of the security. The actual decision was that a covenant by a mortgagee, contained in an assignment of a mortgage, to indemnify an assignee in the event of failure by the mortgagor to pay the debt, involved an infraction of the predecessor of s. 34(17). With that I do not agree. Here was a mortgagee who wanted to realize on his security. To dispose of it to advantage he had to agree with an assignee of the mortgage that he would pay the mortgage debt. How could this affect a mortgagor who, under the legislation, was not so liable but only to the extent of the deficiency after realization of the security. The assumption of the mortgage indebtedness or covenant to pay if the mortgagor did not pay was a matter entirely between the mortgagee and the proposed assignee. If the mortgagor

[1] [1923] 3 W.W.R. 690, 4 D.L.R. 898.

did not pay, the mortgagee could be compelled to take his mortgage back. His rights and those of the assignee of the mortgage against the mortgagor are throughout governed by the terms of the legislation and there could be no enlargement of these rights by the giving of this covenant between the mortgagee and assignee.

The case was a very insecure foundation for what was subsequently built upon it. It emphasizes the need for an examination of the particular facts in each case, but if the subsequent cases do say that s. 34(17) prevents a guarantee of a mortgage indebtedness, then they must be related, in turn, to *Krook et al. v. Yewchuk et al.*, the reasoning of which, in my opinion, is directly contrary to any such proposition.

I therefore think that the guarantor is liable on his guarantee and that his liability in no way depends upon the fact that his guarantee contains a waiver of the provisions of s. 34(17). I express no opinion on the question whether a person entitled to the benefit of the Act can waive its provisions. A guarantor is not so entitled.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: McLaws, McLaws, Deyell, Dinkel, Floyd and Moore, Calgary.

Solicitors for the plaintiff, respondent: McCuaig, McCuaig, Desrochers, Beckingham and McDonald, Edmonton.

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*Nov. 2, 3
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MARY EVELYN GUNDERSON as Executrix of the Estate of John George Olaf Gunderson, deceased, MARY EVELYN GUNDERSON in her personal capacity, and GLORIA ANN GUNDERSON an infant, by her next friend, MARY EVELYN GUNDERSON (*Plaintiffs*) ..... APPELLANTS;

AND

CANADIAN PACIFIC RAILWAY COMPANY, ROBERT WILLIAMSON RUSSELL, JOHN KEHOUGH and THE CITY OF CALGARY (*Defendants*) RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Railways—Level crossing—Order of Board of Transport Commissioners requiring installation of signals within 60 days after completion of street widening—Accident occurring before expiration of period—Statutory speed limit of 10 m.p.h. where order not complied with—Train travelling in excess of permitted rate—Negligence—Railway Act, R.S.C. 1952, c. 234, s. 312(1)(c).

An appeal from a judgment of the Appellate Division of the Supreme Court of Alberta dismissing the plaintiff's action and thereby reversing the judgment of the trial judge was brought to this Court. The trial judge had found the Canadian Pacific Railway Co. and its employees R and K to be solely responsible for the death of one G and the injuries sustained by his wife and daughter as the result of an accident in which the company's train, with the defendant R as its engineer and the defendant K as its conductor, struck a motor vehicle owned and operated by G while it was stationary with its front wheels on the company's railway line at a level crossing in the City of Calgary.

In July 1961 the City of Calgary applied for and obtained an order of the Board of Transport Commissioners authorizing the widening and paving of the street at the aforesaid crossing. It was provided in the order that: "Within sixty days after completion of the said work the Canadian Pacific Railway Company shall install, and shall thereafter maintain, two flashing light signals and one bell on each dual lane at the said crossing." At the time of the accident the 60 days had not elapsed and the signals had not been installed.

Held: The appeal should be allowed with variations from the trial judgment as against the defendant company and the defendant R; the appeal should be dismissed as against the defendant K and the defendant city.

It was provided by s. 312(1)(*c*) of the *Railway Act,* R.S.C. 1952, c. 234, that: "No train shall pass at a speed greater than ten miles an hour ... over any highway crossing at rail level in respect of which crossing an order of the Board has been made to provide protection for the safety and convenience of the public and which order has not been complied with." The company's contention that these provisions should be interpreted as meaning that the company was not obliged to provide the

*PRESENT: Cartwright, Abbott, Martland, Ritchie and Hall JJ.

public with the required protection against trains travelling in excess of 10 miles per hour until 60 days had elapsed after the city's work had been completed was not accepted. The combined purpose of the order of the Board and s. 312(1)(*c*) of the *Railway Act* was the protection of the safety and convenience of the users of the highway against the use of this crossing by trains travelling in excess of 10 miles per hour without the requisite lights and bells having been installed. This being the purpose of the legislation and the order, it followed that the language employed should, if possible, be interpreted so as to give effect to it. The language used was consistent with this interpretation.

The speed of the train in the present case was in excess of 30 miles an hour. Applying the standards expressed in the authorities, it could not be said that the trial judge was clearly wrong in concluding that under the circumstances the railway company was guilty of negligence which was causative of the collision in failing to comply with the provisions of s. 312(1)(*c*) of the *Railway Act*. Accordingly, this Court deferred to the trial judgment in that regard. *Prudential Trust Co. Ltd. v. Forseth*, [1960] S.C.R. 210, referred to.

However, there was no evidence to justify a finding of negligence on the part of the conductor K. As to the engineer R, although the decision as to speed was not his, he did operate the train at a speed which constituted a breach of the provision of the *Railway Act*, and therefore, in the light of s. 392 of that Act, he, as well as the company, was technically liable for the damages which resulted.

The deceased was found negligent in that he failed to appreciate the existence of the railway crossing until his front wheels were on the track. Accordingly, it was held that the collision was caused by the combined fault of G on the one hand and the railway company and its employee on the other. In accordance with the provisions of s. 2 of *The Contributory Negligence Act*, R.S.A. 1955, c. 56, the fault was apportioned equally.

For the reasons given in the Courts below, the appeal against the judgment in favour of the City of Calgary was dismissed.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], reversing a judgment of Manning J. Appeal allowed in part.

W. J. Major, for the plaintiffs, appellants.

H. M. Pickard, for the defendants, respondents, Canadian Pacific Railway Company, Russell and Kehough.

W. R. Brennan, for the defendant, respondent, City of Calgary.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1] dismissing the action of the present appellants and thereby reversing the judgment rendered by Manning J. at the trial

[1] (1964), 46 W.W.R. 129, 43 D.L.R. (2d) 654.

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of the action whereby he had found the Canadian Pacific Railway and its employees Russell and Kehough to be solely responsible for the death of George Olaf Gunderson and the injuries sustained by his wife and daughter as the result of an accident in which the railway company's train, with the respondent Russell as its engineer and the respondent Kehough as its conductor, struck a motor vehicle owned and operated by Gunderson while it was stationary with its front wheels on the company's railway line at a point where that line crosses 66th Avenue in the City of Calgary.

The accident happened on the afternoon of Sunday, October 1, 1961, when Gunderson, accompanied by his wife and family, was driving in an easterly direction on 66th Avenue and having stopped at a stop sign situate 24 feet 7 inches west of a railway crossing, he proceeded forward until his front wheels were on the western rail of the track and then saw a train approaching from the north at a speed in excess of 30 miles per hour and only about 50 feet away from him. Gunderson at once tried to reverse gears so as to get out of the way but was struck by the train before completing this operation. As has been indicated, Gunderson was killed and his wife and daughter, Gloria Ann, were injured as a result of the collision.

Until a few months before the accident, 66th Avenue W. in the vicinity of the railway crossing was a gravelled road and at the crossing itself the space between the rails was occupied by planks, but in July, 1961, the City of Calgary applied for and obtained an order of the Board of Transport Commissioners authorizing the widening and paving of the street at this crossing and by September 8, the work had been completed and the old gravel road had become a paved four-lane highway with the space between the rails no longer occupied by planks but covered with the same paved surface as the rest of the highway.

In the course of her evidence, Mrs. Gunderson described the appearance of the crossing when she and her husband had last been there and at the time of the accident in the following terms:

Q. Mrs. Gunderson, it wasn't too clear to me whether you knew whether your husband had been over this crossing or not?

A. Well, we—both he and I were over the crossing, it must have been at least a year before that and *it was all, you know, rough and weedy and everything.*

Q. It was a different type of crossing, was it?
A. Yes.
Q. It was paved at the time of the—
A. At the accident it was paved, but before it wasn't paved.
Q. But it was along 66th Avenue, though?
A. Well, yes, I remember but a long time back. I guess he expected it would be still the same thing, you know, along there.
Q. What was the condition of the crossing, do you know that, Mrs. Gunderson?
A. At the time of the accident?
Q. Yes.
A. Well, it was good, only there seemed to be kind of a little height on the road and then it went down, the tracks seemed to be hidden down there because *they just sprung out all of a sudden like they came out of the ground.*

The italics are my own.

Before the widening and paving of the crossing, the rough planks and grass would give motorists some indication that they were approaching a railway line and, under those conditions, the only additional visual warning consisted of a white post with cross arms, bearing the words "Railway Crossing", and a stop sign, erected by the City of Calgary, directly to the westward and about 11 feet distant from the cross. That this was not considered to be adequate protection for the public under the new conditions is evidenced by that part of the order of the Board of Transport Commissioners which authorized the widening and "the installation of automatic protection at the said crossing", and which provided that:

> Within sixty days after completion of the said work the Canadian Pacific Railway Company shall install, and shall thereafter maintain, two flashing light signals and one bell on each dual lane at the said crossing.

At the time when this accident occurred the 60 days had not elapsed and the new signals had not been installed, so that the users of the highway were left with less than the maximum protection which the Board deemed necessary under the new conditions. Such a situation as this appears to me to have been contemplated by Parliament in passing s. 312(1)(*c*) of the *Railway Act,* R.S.C. 1952, c. 234, which provides that:

> 312. (1) No train shall pass at a speed greater than ten miles an hour
>
> * * *
>
> (*c*) over any highway crossing at rail level in respect of which crossing an order of the Board has been made to provide protection for the safety and convenience of the public and which order has not been complied with.

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The Appellate Division agreed with the submission made on behalf of the railway company that these provisions should be interpreted as meaning that the company was not obliged to provide the public with the required protection against trains travelling in excess of 10 miles per hour until 60 days had elapsed after the city's work had been completed. With the greatest respect for the reasoning of Macdonald J.A., expressed in the decision which he rendered on behalf of the Appellate Division, it appears to me that the combined purpose of the order of the Board and s. 312(1)(*c*) of the *Railway Act* is the protection of the safety and convenience of the users of the highway against the use of this crossing by trains travelling in excess of 10 miles per hour without the requisite lights and bells having been installed. This being the purpose of the legislation and the order, it follows that the language employed should, if possible, be interpreted so as to give effect to it. In my view the language used is consistent with this interpretation and I accordingly agree with the views expressed by the learned trial judge in the following paragraphs of his judgment:

> I am unable to accept this argument of the railway company. It would mean that for a period of sixty days after work was complete at this railway crossing the public were not entitled to be safe when crossing the railroad; that the public became entitled to safety only on the sixty-first day after the work was complete.
>
> It appears to me that s. 312 was passed for the protection of people crossing railways and means that if the Board of Transport Commissioners makes an order, as it did in this case, that provides for warning signs on a railway crossing, the order is not complied with until the signs are installed. The fact that the railway company is allowed sixty days in which to comply with the order does not alter the fact that compliance had not yet taken place. I think that subs. (*c*) of s. 312 of the *Railway Act* as applied to this case means that during this sixty day period of "grace" when the railway company may continue to operate its trains without warning signs, it is required to operate them at the reduced speed of ten miles per hour.

Manning J. then proceeded to make the following finding of fact:

> The speed of the train was over 30 miles an hour or more than three times as great as the ten miles per hour provided for by the *Railway Act*. I consider that there was negligence on the part of the railway company, the engineer who drove the train at this unlawful speed and the conductor who was in charge of the train and who could have had this speed reduced.

Applying the standards expressed in the authorities which were reviewed and adopted in this Court in *Prudential Trust*

Co. Ltd. v. Forseth[1], at p. 217, I am unable to say that the learned trial judge was clearly wrong in concluding that under the circumstances the railway company was guilty of negligence which was causative of the collision in failing to comply with the provisions of s. 312(1)(*c*) of the *Railway Act* and I accordingly defer to his judgment in that regard.

I am, however, unable to find any evidence in the record to justify a finding of negligence on the part of the conductor Kehough. It is said that he was "the conductor who was in charge of the train and who could have had this speed reduced" but the only evidence in this regard is to be found in his own examination for discovery which he reaffirmed at the trial. That evidence was as follows:

Q. How fast was the train going at this time?
A. Well, up to there and about that time I would estimate the speed to be around 30 to 35 miles an hour.
Q. Have you any control over the speed of the train?
A. In what way, sir?
Q. In any way?
A. Well, we have what we call on the railroad a speed limit of 35 miles an hour on main tracks.
Q. Is the conductor in charge of the train?
A. Yes.
Q. Can the conductor advise the engineer to slow down?
A. Yes.
Q. How would you advise the engineer to slow down if you thought it necessary when the train is going?
A. Well, out of here the only way you can do that is if you were leaving Alyth, you would tell him there is a slow order here, or speed limit over so-and-so of so many miles an hour, but when the train is running the only way you are going to slow it down is to put the train into emergency, you come to a stop.
Q. You have no communication with the engineer?
A. No communication.
Q. There is no way you can signal him?
A. No.
Q. And track speed on this day in this area was 35 miles an hour?
A. Yes.
Q. Even though it was within the City of Calgary?
A. Yes.

Kehough was never asked whether or not he had told the engineer to slow down after leaving Alyth and the record is lacking in any affirmative evidence to prove that he was guilty of a breach of duty which caused or contributed to the accident. I would accordingly dismiss this appeal in so far as Kehough is concerned but without costs.

[1] [1960] S.C.R. 210.

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The position of the respondent, Russell, is different. The only fault that can be attributed to him is that he was operating the train which, as we have now held, was travelling at a speed in excess of the permitted rate under s. 312(1)(*c*) of the *Railway Act,* and the decision to travel at that speed was not his. He was operating in accordance with his instructions. There is no evidence to show that he knew of the existence of the order of the Board of Transport Commissioners respecting the crossing in question. This is not a case in which the railway company employer is being made liable in respect of the negligent conduct of its employee. In this case the decision as to speed was that of the employer.

However, notwithstanding this, Russell did operate the train at a speed which constituted a breach of the provision of the *Railway Act,* and therefore, in the light of s. 392 of that Act, he, as well as the company, is technically liable for the damages which resulted.

In reaching the conclusion that there was no contributory negligence on the part of Mr. Gunderson, Manning J. made certain assumptions based in large measure upon inferences which he drew from photographic exhibits which were before this Court as they were before him. I am unable to agree with this finding as I have formed the opinion that Mr. Gunderson was negligent in that he failed to appreciate the existence of the railway crossing until his front wheels were on the western rail. In this regard I accept the evidence of Mrs. Gunderson where she said in cross-examination:

Q. Now, how long was the car, the automobile stopped at the stop sign?

A. Oh, it just stopped and went, you know. Just enough to change it into the gears he had to change it into. You usually come to a stop, change gears and start it up.

Q. And what happened after that, Mrs. Gunderson?

A. Oh, all of a sudden the tracks just sprung up in front of me just like it came out from the ground in front of me and I said to my husband, "Isn't that a dangerous crossing, dangerous tracks?" probably I said, and he looked like that (indicating) and said, "A train".

Q. And where was the car when he looked and he said, "There is a train"?

A. I think almost on the track. By the time he got his mind set one way or the other it was on the tracks by that time. It takes a little while, you know, to get your mind working, I guess.

Q. Yes, of course. How far would the train be when you first saw it?

A. About fifty feet from me, I would say.

Q. Did you look when your husband said, "A train", did you look?
A. Yes, I looked when he said, "A train", I looked. I could see it.

This indicates to me that Mr. Gunderson having stopped at the stop sign and failed to see the railway crossing sign which was directly in front of it, moved forward into the path of the oncoming train. The learned trial judge, basing his conclusion in this regard on one photographic exhibit (ex. 14) thought that it could be assumed that while at the stop sign Gunderson's view of the train approaching from the north was blocked by a line of telegraph poles, but if this line of poles obscured the view of the tracks it was only at the one angle from which the photograph exhibited on behalf of the appellant (ex. 14) was later taken. It appears to me that even a slight movement of the driver's head would have brought his vision out of line with these poles and given him a clear view of the tracks, and in any event, the assumption that Gunderson looked at the tracks from this one position and that it was for this reason that he did not see the train, assumes also that he never looked again which he should, and no doubt would, have done if he had seen the railway crossing sign.

I am accordingly of opinion that the collision was caused by the combined fault of Mr. Gunderson on the one hand and the railway company and its employee on the other.

From the time that the front wheels of the Gunderson car touched the railway track the accident could not in my opinion have been avoided and in seeking to apportion degrees of fault, nothing is to be gained by attempting to reconstruct the actions of the people concerned during the last seconds before the impact, nor do I find it possible to establish with any reasonable degree of certainty whether one party was more to blame than the other in creating the position of danger which made the collision inevitable. In accordance with the provisions of s. 2 of *The Contributory Negligence Act,* R.S.A. 1955, c. 56, I therefore find that the fault should be apportioned equally.

As was indicated at the hearing of this appeal, the appeal against the judgment in favour of the City of Calgary should be dismissed with costs for the reasons stated by both the learned trial judge and the Appellate Division.

I see no reason to disturb the assessment of damages as awarded by the learned trial judge.

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In the result, I would allow this appeal as against the Canadian Pacific Railway Company and Robert Williamson Russell with costs in this Court to be recovered from the Canadian Pacific Railway Company, and I direct that the order of Mr. Justice Manning be varied so as to provide that Mrs. Mary Evelyn Gunderson as executrix of the estate of George Olaf Gunderson do recover from the respondents, except the City of Calgary, the sum of $40,000 to be apportioned $2,500 to Linda Darlene Gunderson, $3,000 to Gloria Ann Gunderson, and $34,500 to Mary Evelyn Gunderson; and that it be further varied to provide that Mary Evelyn Gunderson in her personal capacity do recover the further sum of $672.50, and that Gloria Ann Gunderson do recover the sum of $200.

I would not interfere with the disposition of the costs in the Courts below.

Appeal against Canadian Pacific Railway Company and Robert Williamson Russell allowed with costs in this Court to be recovered from Canadian Pacific Railway Company, and judgment at trial varied. Appeal against John Kehough dismissed without costs. Appeal against City of Calgary dismissed with costs.

Solicitor for the plaintiffs, appellants: W. J. Major, Calgary.

Solicitor for the defendants, respondents, Canadian Pacific Railway Company, Russell and Kehough: D. B. Hodges, Calgary.

Solicitors for the defendant, respondent, City of Calgary: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.

GEORGE DAVID CORRIE AND MABEL LILLIAN CORRIE (*Plaintiffs*) ..... APPELLANTS;

1965 *Mar. 2, 3 Apr. 9

AND

VERNON LETTON GILBERT (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Damages—Motor vehicle accident—Injury giving rise to phlebitis—Pre-existing disability—Both award of jury and that of Court of Appeal rejected by Supreme Court.

As a result of a motor vehicle accident the female plaintiff suffered bruises to her right hip and her left shoulder, muscle injury to her neck and an injury to her left leg from which phlebitis developed. Some years before the accident the plaintiff had suffered from phlebitis of the left foot but this condition had cleared up and although she suffered from a vascular condition in this leg through the years it had been arrested, following an operation, to a point where she was able to lead a reasonably active life without discomfort. Liability for the accident was admitted by the defendant and the parties agreed upon the amount of the special damages. The trial and appeal were exclusively concerned with the assessment of general damages. The jury's award having been reduced by the Court of Appeal, the plaintiffs appealed to this Court.

Held (Abbott and Judson JJ. dissenting): The appeal should be allowed and the judgment of the Court of Appeal varied.

Per Martland, Ritchie and Hall JJ.: The damages were to be assessed upon the basis of the injury suffered by the plaintiff as it manifested itself at the date of the trial, making due allowance for the probable future developments but excluding such matters as remained in the sphere of possibility. Upon that basis the verdict of the jury was inordinately high.

In treating the prospects of an increase in the plaintiff's pre-existing disability and the probability of her receiving such an injury as she did in any event, as matters to be considered in reduction of the damages to which she was entitled, the Court of Appeal was giving weight to factors which should have been left out of account and an award based on such considerations should not stand. Further, the Court of Appeal had fallen into the error of substituting its opinion as to the weight to be given to the evidence respecting the plaintiff's present disability for that of the jury.

It was unusual in this Court on an appeal such as this to reject both the award of the jury and that of the Court of Appeal, but there was no doubt that under s. 46 of the *Supreme Court Act* it was empowered to give the judgment that the Court whose decision was appealed against should have given. Reviewing the evidence as a whole, and having regard to the fact that the mild permanent disability from which the

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

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plaintiff suffered before the accident had, owing to the blow which she received through the fault of the defendant, become a serious permanent disability due to phlebitis, the opinion was reached that an award of $8,000 would afford a more realistic compensation than either the $20,000 awarded by the jury or the $3,000 to which the Court of Appeal reduced it.

Marcroft v. Scruttons, Ltd., [1954] 1 Lloyd's Rep. 395, referred to.

Per Abbott and Judson JJ., *dissenting:* The task of this Court was not to retry the issues but to determine whether there was any reversible error in the judgment of the Court of Appeal. No such error was found.

APPEAL from a judgment of the Court of Appeal for British Columbia allowing an appeal from a judgment rendered by Ruttan J. sitting with a jury and thereby reducing the general damages awarded by the jury in respect of injuries sustained by the appellant as a result of a motor vehicle accident. Appeal allowed and judgment of the Court of Appeal varied, Abbott and Judson JJ. dissenting.

T. O. Griffiths, for the plaintiffs, appellants.

F. U. Collier and *J. M. Miller,* for the defendant, respondent.

The judgment of Abbott and Judson JJ. was delivered by

JUDSON J. (*dissenting*):—The Court of Appeal has thought this an appropriate case for the review of a jury's award of $20,000 for damages for personal injuries. A unanimous judgment has reduced these damages to $3,000. I agree with the reasons of Sheppard J.A. in their entirety.

I wish to repeat what I said in my dissenting reasons in *Roumieu v. Osborne*[1], that our task is not to retry the issues but to determine whether there is reversible error in the judgment of the Court of Appeal. I can find none.

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 the Court of Appeal for British Columbia allowing an appeal from a judgment rendered by Ruttan J. sitting with a jury and thereby reducing from $20,000 to $3,000 the general damages which the jury had awarded in respect of injuries sustained by the appellant, Mabel Lillian Corrie, when the respondent backed his car into a stationary vehicle moving it backwards in such manner that its door struck Mrs. Corrie

[1] [1965] S.C.R. 145.

knocking her to the ground and causing bruises to her right hip and her left shoulder, muscle injury to her neck and an injury to her left leg from which phlebitis developed.

The defendant admitted liability for the accident and the parties agreed upon special damages at the sum of $543.17. The trial and appeal were exclusively concerned with the assessment of general damages.

Although the injuries to Mrs. Corrie's hip, shoulder and neck caused her pain and discomfort for some time, the matter with which this appeal is chiefly concerned is the condition of her left leg.

Some twenty years before the accident (*i.e.* in 1940) Mrs. Corrie had suffered from phlebitis of the left foot but this condition had cleared up and although she suffered from vascular disorders in this leg through the years they were confined to the superficial and communicating veins and an operation had been successfully performed in 1960 which, while not effecting a complete cure of this condition, had nevertheless arrested it to a point where Mrs. Corrie was able to lead a reasonably active life without discomfort.

Without reviewing the very lengthy medical evidence in detail, I adopt the following general description of the change in condition brought about by the accident which is contained in the reasons for judgment rendered on behalf of the Court of Appeal by Sheppard J.A. where he says:

> The general medical evidence is that prior to the accident she had a mild permanent disability; following the accident she had a serious permanent disability due to phlebitis which had affected some of the valves and created some turgidity.

Four doctors testified as to the condition of Mrs. Corrie's leg, only two of whom (Davis and Sutherland) had seen the leg before the accident, and although there is some difference between them as to the prognosis, they are all agreed that the phlebitis still present at the time of the trial was caused by the blow sustained in the accident.

In reducing the damage award, Mr. Justice Sheppard was clearly of the opinion that the jury had based its verdict in large measure upon the frightening "possibilities" attendant upon the post-traumatic phlebitis which Mrs. Corrie had developed as a result of the accident, and it was stressed on behalf of the respondent in this Court that in putting

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the case to the jury Mrs. Corrie's counsel had over-emphasized these "possibilities" and that the learned trial judge had failed to give sufficient direction as to the necessity of leaving them out of account in assessing the damages to be awarded.

In the course of his charge to the jury, Mr. Justice Ruttan, who presided at the trial, after having stated that the case was to be decided "upon the balance of probabilities" went on to say:

> For example, in this case there has been a good deal of evidence given of the possibility of this poor lady's suffering loss of nutrition in her legs due to the disturbance of the flow of blood causing ulceration and eventually necessitating an amputation of the leg. I think I am fair in saying that both Dr. McConkey and Dr. Sutherland thought that such a development was only a possibility and a remote possibility at that. I think the evidence of both these doctors is that was not a probable development—it has only a remote possibility. That is an illustration of possibility against probability. Furthermore there was another possibility that was suggested, of sudden death that might be occasioned this lady due to pulmonary embolism. I will not go through all the medical way in which pulmonary embolism develops and causes death; I think you are as well versed in that as I am now, but you will remember that was a possibility put forward and suggested by counsel, both to the doctors, and in argument to you of a possible future development of this case for this lady. Once again I think that both doctors agreed that the possibility of death from a pulmonary embolism is just that, "a possibility" and not a very reasonable possibility or a very obvious possibility at that. The probability is that the lady may continue to suffer from the embolism; indeed, the evidence is, and I think this is a probability to be drawn from the evidence, that she has suffered from embolisms this year in April and again in August, but that these were, I will not say "minor embolisms" because the doctors say no embolism is a minor difficulty, but they were not grave. They are serious, they are painful, but they are not grave.

Dealing with the possibility of embolism again a little later in the charge, the learned trial judge said:

> I just give that as another illustration of a possibility, but as I see it, not a probability in the opinion of the experts.

It is, however, noteworthy that the learned trial judge treated these "possibilities" as being a factor in increasing nervous tension and in this regard he suggested:

> Mr. Griffiths did suggest to you, very properly, as he is entitled to, that even though these may be mere possibilities—that is, the possibility of ulceration and amputation or death from a pulmonary embolism, and even though they may be remote, none the less he says they exist presently in the mind of Mrs. Corrie, with her day to day as possibilities which may happen, and to that extent, increase her present nervous tension. Well, as a factor in her continuing nervous tension, you may consider it.

In my opinion the trial judge, having correctly instructed the jury that their verdict was to be based upon "probability", sufficiently illustrated the difference between "probabilities" and "possibilities" in relation to the present case and there was no misdirection in this regard. I do not, however, think that there was any evidence in the record to warrant the instruction to the jury that they might consider the serious "possibilities" as a factor contributing to the plaintiff's nervous tension. To so direct the jury was, in my view, having regard to the evidence, to invite speculation.

It is my opinion that the damages in the present case are to be assessed upon the basis of the injury suffered by Mrs. Corrie as it manifested itself at the date of the trial, making due allowance for the probable future developments but excluding such matters as remain in the sphere of possibility, and that upon this basis the verdict of the jury was inordinately high.

It is apparent, however, that the drastic reduction made by the Court of Appeal was also based upon other considerations because Mr. Justice Sheppard, having excluded from his reasoning all the more serious developments which *might* arise as a result of the phlebitis went on to say:

> *Further, her claim for disability is reduced to the extent that her previous disability would have increased irrespective of the accident.* The blow she suffered was not severe; the car in front had backed up only two or three feet and had had no great opportunity to accelerate. The plaintiff was not knocked flat on the sidewalk and her injuries did not at any time confine her to hospital or to bed. *As the blow was so slight as not to confine her to hospital or to bed there must be estimated the probability of her receiving an equivalent injury in any event, had the accident not happened.* Also, she had suffered from a varicose condition between 1942 and 1960 and this condition ordinarily requires a lifetime of treatment, that is, that it is liable to recur, according to Dr. Sutherland; and Dr. McConkey says that condition usually produces progressive trouble and some degeneration. Dr. Davis was unable to say whether her condition after the accident would have occurred in any event.
>
> Under those circumstances the allowance of $20,000 as the difference between her disability before the accident and after is so inordinately high as to indicate an error within *Nance v. B.C. Electric Railway Co.* [1952] 1 W.W.R. 665.

The italics are my own.

It appears to me with all respect that Mr. Justice Sheppard's finding that the plaintiff's "claim for disability is reduced to the extent that her previous disability would have increased irrespective of the accident" is open to serious question. In the first place the "previous disability" while

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vascular in origin, was not at all the same thing as the disability which was caused by the accident, and in the second place, when the medical evidence is considered as a whole, the chance of her previous disability increasing is as much in the field of "possibility" as that of an embolism developing from phlebitis.

Furthermore, it appears to me that in making allowance for the "probability of her receiving an equivalent injury in any event, had the accident not happened", Mr. Justice Sheppard was giving weight to a factor which should not have been taken into consideration.

In this regard I refer to the following sentence from Mayne & McGregor on Damages, para. 102, p. 94 where it is said:

> It has never been seriously disputed that an admitted or established wrongdoer is liable for any increased injury to his victim by reason of an abnormal physical susceptibility.

The observations of Lord Justice Denning in *Marcroft v. Scruttons, Ltd.*[1], although *obiter dicta* in that case appear to me to be significant. He there said, at p. 401:

> This man was injured in an accident which was not in itself very serious. He fell about 10 ft. while working on board ship. He did not break any bones, and was not even cut as far as we know, although he may have been bruised. But at the time he had, unbeknown to him, a constitutional weakness which made it very serious for him, because the accident operating on that weakness produced in him a very severe nervous shock, trembling from head to foot. He stammered, and was quite unable to do his work. His constitutional weakness was such that, apart from the accident, any other disturbing factor might have produced a similar result. Any illness or worry, or even loss of work, might do it. None the less, in assessing damages we must, I think, disregard this factor, because a wrongdoer must take his victim as he finds him, with all his weaknesses, whether it be a thin skull or any other constitutional weakness.

In treating the prospects of an increase in the plaintiff's pre-existing disability and the probability of her receiving such an injury as she did in any event, as matters to be considered in reduction of the damages to which she is entitled, the Court of Appeal was, in my respectful opinion, giving weight to factors which should have been left out of account and an award based on such considerations should not stand.

In the course of his evidence, upon which the jury were entitled to rely, Dr. Sutherland, having stated that varicose veins is a different condition from phlebitis, went on to

[1] [1954] 1 Lloyd's Rep. 395.

describe the difference between the condition of the plaintiff's leg before and after the accident. As to her condition before the accident he said:

> Mrs. Corrie had a mild permanent disability in her leg as a result of the condition that she had and the operation that was done. After all, we did interrupt some veins which may have been partly functioning, may not have been. So that she would have a small permanent disability which would reduce her effectiveness a very small amount over a normal person who had never had either the disease or the operation.

As to her condition after the accident he said:

> The condition by the time of the second visit it was obvious that she had deep vein phlebitis . . . And this has gone from acute phlebitis now to the chronic phlebitis, so that she has pain in her leg all the time, she has tenderness all over the veins, the deep veins in her leg, she has swelling of her ankle and foot chronic now.

In the course of his reasons for judgment, Mr. Justice Sheppard described the effect on the plaintiff of her present disability in the following terms:

> Her actual disability was a limitation in walking and in her housework to the extent that she would not cause her leg to be overtired.

Dr. Sutherland describes this condition as follows:

> Yes. She has to pamper her left leg now. She can walk only so far and stand only so long until she has to get off her feet and get her foot up in the air . . . This is not what Mrs. Corrie told me. I am telling her this is what she must do. When she walks and gets pain in her leg and when she stands and gets pain in her leg she must get off it and get it elevated . . .

Later in his evidence Dr. Sutherland was asked:

> Q. . . . Would you describe it in terms of a general description?
> A. I think she has a severe disability in her left leg, yes.
> Q. Can you give us any indication as to whether or not you consider it to be permanent?
> A. It is permanent, yes.
> Q. Can you give us any indication as to whether it will improve or worsen in the future?
> A. It will get gradually worse.

Rule 36 of the British Columbia Court of Appeal Rules provides that:

> Where excessive damages have been awarded by a jury, if the Court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party instead of ordering a new trial.

And it was pointed out to us by counsel for the respondent that R. 4(1) of The Court of Appeal Rules provides that:

> All appeals to the Court shall be by way of rehearing . . .

In my opinion this does not mean that the Court of Appeal in reviewing an award of damages is at liberty to

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disregard evidence which the jury was entitled to take into account in reaching its award, and in my respectful opinion, Mr. Justice Sheppard has fallen into the error of substituting his opinion as to the weight to be given to the evidence for that of the jury.

I am, however, as I have indicated, of opinion that no jury acting judicially, could have reached the verdict of $20,000 if they had confined themselves to the existing injury and its probable future development.

It is unusual in this Court on an appeal such as this to reject both the award of the jury and that of the Court of Appeal, but there is no doubt that under s. 46 of the *Supreme Court Act* it is empowered to give the judgment that the Court whose decision is appealed against should have given, and for the reasons which I have stated, I do not think the award made by either of the Courts below should be affirmed.

After reviewing the evidence as a whole, and having regard to the fact that the mild permanent disability from which the plaintiff suffered before the accident has, owing to the blow which she received through the fault of the respondent, become a serious permanent disability due to phlebitis, I have reached the opinion that an award of $8,000 would afford a more realistic compensation than either the $20,000 awarded by the jury or the $3,000 to which the Court of Appeal reduced it.

I observe that the formal judgments rendered at trial and in the Court of Appeal constitute an award of general damages to both of the appellants. As this award is made in respect of personal injuries sustained by the female appellant, I can see no ground upon which George David Corrie is entitled to share in it.

I would allow this appeal with costs and direct that the judgment of the Court of Appeal be varied by increasing the damages awarded from $3,000 to $8,000 and awarding these damages to the female appellant, Mabel Lillian Corrie.

Appeal allowed with costs, damages increased, ABBOTT *and* JUDSON JJ. *dissenting.*

Solicitors for the plaintiffs, appellants: Griffiths, McLelland & Co., Vancouver.

Solicitor for the defendant, respondent: G. Roy Long, Vancouver.

GEORGE WILLIAM BATARY .....APPELLANT;

AND

THE ATTORNEY GENERAL FOR SASKATCHEWAN ET AL. ..... RESPONDENTS.

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ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law—Coroner's inquest—Examination of person charged with murder at inquest into the death in question—Whether compellable witness—Coroners Act, R.S.S. 1953, c. 106, ss. 8, 8a, 15, 20, as amended by 1960 (Sask.), c. 14—Canada Evidence Act, R.S.C. 1952, c. 307, ss. 2, 4, 5—Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2(d), (e)—Criminal Code, 1953-54 (Can.), c. 51, ss. 448, 488(3).

Constitutional law—Validity of legislation—Provincial legislation compelling person accused of murder to testify at coroner's inquest—Whether intra vires—Coroners Act, R.S.S. 1953, c. 106, ss. 8, 8a, 15, 20, as amended by 1960 (Sask.), c. 14—B.N.A. Act, 1867, ss. 91(27), 92(14).

On the same day that the coroner was holding an inquest into the death of one Thomas, the appellant and eight others were arrested and each of them was separately charged with the non-capital murder of Thomas. The coroner immediately closed the inquest. Subsequently, on the order of the Attorney-General, made pursuant to s. 8*a* of the *Coroners Act*, R.S.S. 1953, c. 106, as amended in 1960, the inquest was re-opened. On the fourth day of the inquest, counsel for the Crown stated his intention to call and examine as witnesses the appellant and the eight others who were present, they having been served with a subpoena. The coroner ruled that each of them was a compellable witness. The appellant applied for a writ of prohibition. The writ was refused by the trial judge, and his judgment was affirmed by the Court of Appeal. The appellant was granted leave to appeal to this Court.

Held (Fauteux J. dissenting): The appeal should be allowed.

Per Taschereau C.J. and Cartwright, Martland, Judson, Ritchie and Spence JJ.: The criminal law in force in Saskatchewan is that of England as it existed on July 15, 1870, except as altered, varied, modified or affected by the *Criminal Code* or any other Act of the Parliament of Canada. Under that law as it existed on that date, a person charged with murder and awaiting trial could not be compelled to testify at an inquest into the death of the deceased with whose murder he was charged. No alteration has been made in this state of the law by the combined effect of ss. 2, 4(1) and 5 of the *Canada Evidence Act* and ss. 448 and 488(3) of the *Criminal Code*. These sections of the *Canada Evidence Act* do not have the effect of rendering an accused a compellable witness at the coroner's inquest. It would require clear words to bring about so complete a change in the law as it existed in 1870. It would be a strange inconsistency if the law which carefully protects an accused from being compelled to make any statement at a preliminary inquiry should permit that inquiry to be adjourned in order that the prosecution be permitted to take the accused before a coroner and submit him against his will to examination and cross-examination as to his supposed guilt. In the absence of clear words in

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

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an Act of Parliament or other compelling authority, that is not the state of the law. The case of *R. v. Barnes,* 36 C.C.C. 40, not followed. By enacting s. 15 of the *Coroners Act* in its present form, the Legislature intended to change the law and to render a person charged with murder compellable to give evidence at the inquest on the body of his alleged victim. Such legislation trenches upon the rule expressed in the maxim *nemo tenetur seipsum accusare.* Any legislation purporting to make such a change in the law or to abrogate or alter the existing rules which protect a person charged with a crime from being compelled to testify against himself, is legislation in relation to the Criminal Law including the Procedure in Criminal Matters and therefore within the exclusive legislative authority of the Parliament under s. 91(27) of the *B.N.A. Act.*

Per Fauteux J., *dissenting.* The proposition that the competency and compellability of a person to be called as a witness must be determined with reference solely to the particular proceeding in which it is proposed to call the person as a witness is a rule that receives an application even in criminal trials where several persons, though jointly indicted, are proceeded against separately. In such cases, it is the settled law that neither one is regarded as an accused person or a party in the trial against the others. Under our law, there is no party, no accused in a coroner's inquest and it is only at the conclusion of the inquest that may arise the possibility of a person being alleged to have committed murder and then compelled, by a coroner's warrant, to appear in the criminal Courts. The rule *nemo tenetur seipsum accusare* has, through the years, been modified or trenched upon by statute and the privileges to which it gave rise have, in certain cases, been conditioned or abrogated. The word "charged" in s. 4(1) of the *Canada Evidence Act* makes it clear that the privilege mentioned in that section is conferred to no other than a person charged with an offence, to whom it becomes available on no occasion and time other than when the prosecution against him for that offence is actually proceeded with in the criminal Courts. The provisions of s. 5(1) and (2) of the *Canada Evidence Act* are unqualified and of general application. Subject only to some exceptions which do not apply at a coroner's inquest, no one—other than a person charged of an offence, on the occasion and at the time at which he is actually proceeded against for that offence—is excused on the ground that the answers he might give may tend to incriminate him. If a co-accused, of which the prosecution is not actually proceeded with in the criminal Courts, is a compellable and competent witness when called to testify in the prosecution of another co-accused, *a fortiori* a person, whether charged or not with an offence is a compellable and competent witness at a coroner's inquest where no one is regarded by law as an accused.

The appellant could not be excused and was bound by s. 5(1) of the *Canada Evidence Act,* but was entitled to the protection of subs. 2. He was also protected by s. 2(*d*) of the *Canadian Bill of Rights.*

Droit criminel—Enquête du coroner—Interrogatoire d'une personne accusée de meurtre à l'enquête relativement au décès en question—Témoin est-il contraignable—Coroner's Act, S.R.S. 1953, c. 106, arts. 8, 8a, 15, 20, tels qu'amendés par 1960 (Sask.), c. 14—Loi sur la preuve au Canada, S.R.C. 1952, c. 307, arts. 2, 4, 5—Loi sur la déclaration canadienne des droits, 1960 (Can.), c. 44, s. 2(d), (e)—Code criminel, 1953-54, (Can.), c. 51, arts. 448, 488(3).

Droit constitutionnel—Validité de la législation,—Statut provincial contraignant une personne accusée de meurtre de rendre témoignage à l'enquête du coroner—Statut est-il intra vires—Coroner's Act, S.R.S. 1953, c. 106, arts. 8, 8a, 15, 20, tels qu'amendés par 1960 (Sask), c. 14—Loi de l'Amérique britannique du Nord, 1867, arts. 91(27), 92(14).

Le jour même où le coroner tenait une enquête relativement au décès d'un nommé Thomas, l'appelant et huit autres personnes étaient mis sous arrêt et chacun d'eux était accusé séparément du meurtre non qualifié de Thomas. Le coroner mit fin immédiatement à l'enquête. Subséquemment, le procureur général ordonna, en vertu de l'art. 8*a* du *Coroner's Act*, S.R.S. 1953, c. 106, tel qu'amendé en 1960, la réouverture de l'enquête. Advenant le quatrième jour de l'enquête, le procureur de la Couronne déclara son intention d'assigner et d'interroger comme témoins l'appelant et les huit autres personnes qui étaient alors présents, ayant reçu signification d'un subpoena. Le coroner jugea que chacun d'eux était un témoin contraignable. L'appelant fit une requête pour l'obtention d'un bref de prohibition. Ce bref fut refusé par le juge au procès et son jugement fut confirmé par la Cour d'Appel. L'appelant a obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être maintenu, le Juge Fauteux étant dissident.

Le Juge en Chef Taschereau et les Juges Cartwright, Martland, Judson, Ritchie et Spence: Le droit criminel en force dans la Saskatchewan est celui de l'Angleterre tel qu'il existait le 15 juillet 1870, excepté tel qu'amendé, varié, modifié ou affecté par le *Code criminel* ou tout autre statut du parlement du Canada. Sous le régime de ce droit tel qu'il existait à cette date, une personne accusée de meurtre et attendant son procès ne pouvait pas être contrainte de témoigner à l'enquête relativement au décès de la personne dont elle était accusée d'avoir causé la mort. Aucun changement n'a été fait à ce droit par l'effet combiné des arts. 2, 4(1) et 5 de la *Loi sur la preuve au Canada* et des arts. 448 et 488(3) du *Code criminel*. Ces articles de la *Loi sur la preuve au Canada* n'ont pas l'effet de rendre un accusé un témoin contraignable à l'enquête du coroner. Il faudrait des mots précis pour apporter un changement aussi complet au droit tel qu'il existait en 1870. Ce serait une étrange inconsistance si la loi qui protège soigneusement un accusé contre la contrainte de faire une déclaration à l'enquête préliminaire, permettait que cette enquête soit ajournée pour que la poursuite ait l'opportunité d'amener l'accusé devant un coroner et de la soumettre contre sa volonté à un interrogatoire et contre-interrogatoire sur sa prétendue culpabilité. En l'absence de mots précis dans une loi du parlement ou autre autorité irrésistible, ceci n'est pas la loi. La cause de *R. v. Barnes*, 36 C.C.C. 40, non suivie.

En promulguant l'art. 15 du *Coroner's Act* dans son état présent, la législature avait l'intention de changer la loi et de rendre une personne accusée de meurtre contraignable à rendre témoignage à l'enquête relativement au décès de sa prétendue victime. Une telle législation empiète sur la règle exprimée dans la maxime *nemo tenetur seipsum accusare*. Toute législation dont le but est de faire un tel changement dans la loi ou d'abroger ou de modifier les règles existantes qui protègent une personne accusée d'un crime contre la contrainte de témoigner contre elle-même est une législation concernant le droit criminel, y compris la procédure en matières criminelles, et conséquemment de l'autorité législative exclusive du parlement en vertu de l'art. 91(27) de la *Loi de l'Amérique britannique du Nord*.

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Le Juge Fauteux, dissident: La proposition que la compétence et la contraignabilité d'une personne d'être assignée comme témoin doivent être déterminées en référant seulement à l'instance particulière dans laquelle on se propose d'assigner la personne comme témoin, est une règle qui reçoit son application même dans un procès criminel où plusieurs personnes, quoique accusées conjointement, subissent leur procès séparément. Dans de tels cas, il est de règle bien arrêtée qu'aucune de ces personnes n'est considérée comme une personne accusée ou une partie au procès des autres. Sous le régime de notre droit, il n'y a aucune partie, aucun accusé à l'enquête du coroner, et c'est seulement à la conclusion de l'enquête que peut survenir la possibilité qu'une personne soit accusée d'avoir commis un meurtre et alors contrainte, par mandat du coroner, de se présenter devant les Cours criminelles. Avec les années, la règle *nemo tenetur seipsum accusare* a été modifiée ou empiétée par les statuts, et les privilèges qui en découlent ont en certains cas été conditionnés ou abrogés. L'expression «accusé» dans l'art. 4(1) de la *Loi sur la preuve au Canada* démontre clairement que le privilège mentionné dans cet article est conféré à nulle autre personne que la personne accusée d'un crime, à qui il devient accessible à nulle autre occasion et temps que lorsqu'elle est actuellement poursuivie pour ce crime devant les Cours criminelles. Les dispositions de l'art. 5(1) et (2) de la *Loi sur la preuve au Canada* sont absolues et d'application générale. Sujet seulement à quelques exceptions qui n'ont pas d'application à l'enquête du coroner, aucune personne—autre qu'une personne accusée d'un crime, à l'occasion et au temps où elle est actuellement poursuivie pour ce crime—est exemptée pour le motif que les réponses qu'elle pourrait donner pourraient tendre à l'incriminer. Si un co-accusé, qui n'est pas actuellement poursuivi devant les Cours criminelles, est un témoin contraignable et compétent lorsqu'il est assigné à témoigner au procès de son co-accusé, *a fortiori* une personne, qu'elle soit accusée ou non d'un crime est un témoin contraignable et compétent à l'enquête du coroner où personne n'est considéré par la loi comme étant un accusé.

L'appelant ne pouvait pas être exempté et était lié par l'art. 5(1) de la *Loi sur la preuve au Canada,* mais avait droit à la protection de l'alinéa (2). Il était aussi protégé par l'art. 2(d) de la *Loi sur la déclaration canadienne des droits.*

APPEL d'un jugement de la Cour d'Appel de Saskatchewan[1], rejetant un appel du jugement du Juge Bence qui avait refusé un bref de prohibition. Appel maintenu, le Juge Fauteux étant dissident.

Appeal from a judgment of the Court of Appeal for Saskatchewan[1], dismissing an appeal from a judgment of Bence J. who had refused a writ of prohibition. Appeal allowed, Fauteux J. dissenting.

David W. Scott, for the appellant.

Serge Kujawa, for the Attorney General for Saskatchewan.

[1] [1964] 2 C.C.C. 211, 41 C.R. 337, 46 W.W.R. 331.

T. D. MacDonald, Q.C., for the Attorney General for Canada.

Gérald LeDain, Q.C., for the Attorney General of Quebec.

F. W. Callaghan, for the Attorney General for Ontario.

W. Henkel, for the Attorney General for Alberta.

The judgment of Taschereau C. J. and Cartwright, Martland, Judson, Ritchie and Spence JJ. was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Saskatchewan[1] dismissing an appeal from a judgment of Bence C.J.Q.B. whereby the appellant's application for an order or writ of prohibition was dismissed.

The facts are not in dispute.

One Allan Thomas died at Glaslyn, Saskatchewan, on May 12, 1963. On the same day the Coroner, J. E. Nunn, commenced the holding of an inquest into the death. Later on the same day the appellant and eight other men were arrested and each of them was separately charged with the non-capital murder of Thomas. The Coroner then discharged the jury and closed the inquest as he was required to do by the terms of s.8(*a*)(2) of *The Coroners Act*, R.S.S. 1953, c. 106, as amended by Statutes of Saskatchewan, 1960, c. 14. Subsequently, on a date not given in the record, the Attorney General for Saskatchewan directed, pursuant to the last mentioned sub-section, that the inquest be reopened. On May 18, 1963, the appellant and the eight others charged were granted bail. June 12, 1963, was set for the preliminary hearing of the charges against the appellant and the other eight persons also charged. The Coroner fixed the same date for the commencement of the reopened inquest. On June 12, 1963, at the request of the Attorney General, the preliminary hearings were adjourned until after the conclusion of the inquest.

The inquest opened on June 12, 1963, and continued on June 13 and June 14. During this time twenty-two witnesses were called and examined. The appellant and each of the other persons charged with the murder of Thomas had been served with a Coroner's subpoena requiring attendance at the inquest and all were present. On June 14, counsel

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appointed by the Attorney General to act for the Crown at the inquest stated that he intended to call the appellant and each of the other accused persons as witnesses at the inquest. Counsel for all of the accused objected that neither the Coroner nor the Crown could compel a person already charged with the murder of Thomas, whose death was being investigated, to be sworn as a witness at the inquest. After hearing argument the Coroner ruled that each of the accused was a compellable witness at the inquest and must give evidence. In his brief reasons the Coroner stated that he was bound to rule as he did by the Saskatchewan legislation. His reasons do not indicate whether the constitutional validity of that legislation had been questioned in argument before him.

Following this ruling, at the request of counsel for the appellant, the Coroner adjourned the inquest *sine die* to permit the bringing of an application for prohibition. While this application was pending Mr. Nunn, the Coroner, died and the proceedings have been continued with the Attorney General for Saskatchewan substituted as respondent.

The application for prohibition came in due couse before Bence C.J.Q.B. and was dismissed. There is nothing in the material filed in support of the application or in the reasons of the learned Chief Justice to indicate that the validity of any provision of *The Coroners Act* was questioned.

The learned Chief Justice followed the decision of the Court of Appeal for Ontario in *Rex v. Barnes*[1] in which it was held, affirming the decision of Orde J., that Barnes who was charged with manslaughter in the death of one Rossiter was a compellable witness at an inquest being held to inquire into Rossiter's death. In the Court of Appeal Meredith C.J.C.P. expressed the opinion that while Barnes was compellable to be sworn as a witness at the inquest it would not be lawful to examine him in any way regarding the charge pending against him; this view was not shared by any other member of the Court of Appeal or by Orde J.

Having quoted ss. 8(*a*) and 15 of *The Coroners Act* and s. 5 of *The Canada Evidence Act,* Bence, C.J. Q.B. said in part:

> The provisions of The Coroners Act, which I have quoted, and Section 5 of the Canada Evidence Act seem to me to be quite clear.

[1] (1921), 36 C.C.C. 40, 49 O.L.R. 374, 61 D.L.R. 623.

The applicant herein is called as a witness to give evidence as to his knowledge of what took place. Authority to call him is contained in The Coroners Act and the Canada Evidence Act stipulates that he shall not be excused.

In my view there should be no such limitations on the questions put to him as were suggested by Meredith, C.J., in the Barnes case, which I have quoted.

The appellant appealed to the Court of Appeal; paragraph 2 of the notice of appeal reads as follows:

> The Coroner's Court is a Criminal Court of Record and Sections 8*a* and 15 of The Coroners Act, R.S.S. 1953, as amended by chapter 14 of the Statutes of Saskatchewan, 1960, on which the said judgment is wholly, or partly, based, were and are ultra vires of the Province, being enactments dealing with Criminal Law and Procedure.

The unanimous judgment of the Court of Appeal[1] was delivered by Culliton C. J. S. holding (i) that the impugned sections of *The Coroners Act* are *intra vires* of the legislature as being in relation to the administration of justice in the province rather than in relation to the criminal law or the procedure in criminal matters, (ii) that, even if the impugned sections were held to be invalid, the combined effect of ss. 2 and 5(1) of the *Canada Evidence Act* would render the appellant a compellable witness at the inquest; and (iii) that the provisions of the *Canadian Bill of Rights* were not contravened, because the appellant, although compelled to testify at the inquest, would be entitled to the protection afforded by s. 5(2) of the *Canada Evidence Act.* In the result the appeal was dismissed.

It will be convenient to consider first what the position of the appellant, when called upon to take the witness stand at the inquest in Saskatchewan, would be under the existing law apart from the provisions of the impugned sections of *The Coroners Act.*

By the combined effect of s. 7, of the *Criminal Code,* 1954, 2-3- Eliz. II, c. 51, s. 16 of the *Saskatchewan Act,* Statutes of Canada, 1905, 4-5- Ed. VII, c. 42 and s. 11 of the *Northwest Territories Act,* R.S.C. 1886, c. 50, the criminal law in force in Saskatchewan is that of England as it existed on July 15, 1870, except as altered, varied, modified or affected by the *Criminal Code* or any other act of the Parliament of Canada.

In 1870 a person accused of crime and the spouse of such person were incompetent to testify at trial either for or

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against the accused. This incompetency was done away with as to some offences by s. 216 of *The Criminal Procedure Act,* R.S.C. 1886, c. 174, but as to most offences, including that of murder, it was preserved by s. 217 of that Act and continued until the coming into force of *The Canada Evidence Act,* 1893, 56 Vict., c. 31. That Act came into force on July 1, 1893, and on the same day *The Criminal Procedure Act* was repealed.

Section 4 of *The Canada Evidence Act* as originally enacted read as follows:

> 4. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person. Provided, however, that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage.
>
> 2. The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury.

In *Gosselin v. The King*[1], the majority of the Court expressed the opinion that the effect of this section, read with s. 5, was to render an accused and his spouse not merely competent but compellable. We need not pause to inquire whether this opinion was well-founded as the Act was amended by 1906, 6 Ed. VII, c. 10, s. 1, by the insertion of the words "for the defence" after the word "witness".

The present form of s. 4(1) is as follows:

> 4 (1) Every person charged with an offence, and, except as in this section otherwise provided, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

Section 5 is as follows:

> 5. (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
>
> (2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

[1] (1903), 33 S.C.R. 255, 7 C.C.C. 139.

It is now clear that a person who is being tried on a criminal charge is a competent witness if he decides to testify but that he cannot be compelled by the prosecution to enter the witness box. If he decides to testify he is subject to cross-examination and compellable to answer any relevant questions put to him on cross-examination although his answers may tend to establish his guilt of the charge on which he is being tried.

It seems equally clear that where two or more persons are, either jointly or separately, indicted for one offence and are tried separately one of those indicted who is not on trial is a compellable witness, for either the prosecution or the defence, at the trial of any of his co-accused. On this point it is sufficient to refer to the case of *Re Regan*[1] where the history and reasons of the rule are fully covered in the arguments of counsel and in the judgments.

In the case at bar, it is clear that had the preliminary hearing of the charge against the appellant proceeded he could not have been compelled to testify, and that it would have been the duty of the presiding justice to warn him, in the terms prescribed by s. 454(1) of the *Criminal Code,* that he was not bound to say anything.

We have not been referred to any case in England in which an accused awaiting trial on a charge of the murder of the person whose death was under investigation was compelled to give evidence at the inquest. It is unlikely that such a case would arise after the passing of s. 20 of the *Coroners (Amendment) Act 1926,* 16 and 17 Geo. V, c. 59; but if the power to compel such an accused person to testify existed previously it would seem strange that it was never exercised. In *Ex parte Cook*[2], an application was made to the Court of Queen's Bench at the instance of the Coroner who was conducting an inquest on the body of one Hannah Moore for a writ to bring before the Coroner and jury one Cook who was in custody in Newgate awaiting trial on a charge of having wilfully murdered her. His presence was stated to be required for two purposes, (i) to give evidence as to the deceased's state of mind, it being alleged that Cook and the deceased had entered into a suicide pact and that Cook was the only person who knew her and (ii) so that the witnesses called at the inquest could identify Cook. The

[1] (1939), 13 M.P.R. 584, 2 D.L.R. 135, 71 C.C.C. 221.
[2] (1845), 7 Q.B. 653, 115 E.R. 635.

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writ was refused. In commenting on this case it is suggested in *Jervis on Coroners,* 4th ed., (1880), at page 214 that an order of the nature sought "will generally be made if the prisoner is not the party under accusation; or, if he is accused or suspected, then when he is desirous of making a statement, and perhaps also when his presence is requisite for the purpose of identification".

In the course of the argument Patteson J, at page 658, asked counsel the question:—"Have you an instance where a writ has been granted to bring up a prisoner before a Coroner?" and the answer was "None has been found".

Earlier in the argument, Coleridge J. had said at page 657:

> I think it is usual, on a motion of this nature, to state the readiness of the party to come: at all events when he is to come as a witness.

Williams J. said at page 660:

> No case of inconvenience has existed in the Coroner's Court for centuries, by reason of no such writ having been granted.

In each of the cases of *The King v. Scorey*[1] and *Wakley v. Cooke*[2], referred to by counsel for the respondent, the Coroner was criticized for having refused to hear evidence tendered on behalf of a person suspected of being criminally responsible for the death of the person which was under investigation. In the latter case at page 518, Alderson B. said:

> Then comes the question whether the other part of the direction was correct. The direction had reference to the practice which prevailed in the examination of persons before inquests held in Middlesex, in refusing to examine parties whose conduct might afterwards become the subject of a criminal inquiry. I quite agree with what my Brother Parke has said upon the matter. I hope that the practice will be discontinued, for it is highly improper, and that persons will be permitted to make any statements they may wish, when they have any material information to communicate. The refusal to accept a person's testimony casts a gross imputation upon him. A person who comes before a coroner cannot be considered as being a party accused, and he is not so until after a verdict has been found. Such a practice is monstrous and most harassing, and I hope it will be discontinued for the future, and that people will be allowed to make statements. They are not bound to criminate themselves, and ought to be told so at the time.

There is nothing in the judgments in either of these cases to suggest that a person charged with the murder of a person into whose death an inquest was being held could be compelled to testify at such inquest.

[1] (1748), 1 Leach 43.
[2] (1849), 4 Exch. 511, 154 E.R. 1316.

In Stephen's History of the Criminal Law of England, (1883), vol. 1, at pp. 440 and 441, the learned author after pointing out that soon after the revolution of 1688 the practice of questioning the prisoner died out continues at page 441:

> . . . the statutes of Philip and Mary already referred to, repealed and re-enacted in 1826 by 7 Geo. 4, c. 64 authorized committing magistrates to "take the examination" of the person suspected. This examination (unless it was taken upon oath, which was regarded as moral compulsion) might be given in evidence against the prisoner.
>
> This state of the law continued till the year 1848, when by the 11 and 12 Vic. c. 42, the present system was established, under which the prisoner is asked whether he wishes to say anything, and is warned that if he chooses to do so what he says will be taken down and may be given in evidence on his trial. The result of the whole is that as matters stand the prisoner is absolutely protected against all judicial questioning before or at the trial, and that, on the other hand, he and his wife are prevented from giving evidence in their own behalf. He is often permitted, however, to make any statement he pleases at the very end of the trial, when it is difficult for any one to test the correctness of what is said.

On a consideration of the cases and works of text-writers referred to above and of numerous others which were referred to in the full and helpful arguments of counsel I have reached the conclusion that under the law of England as of July 15, 1870, a person charged with murder and awaiting trial could not be compelled to testify at an inquest into the death of the deceased with whose murder he was charged and it is necessary to consider whether this state of the law has been altered by any Act of the Parliament of Canada.

It has been submitted that an alteration has been made by the combined effect of ss. 2, 4(1) and 5 of the *Canada Evidence Act* and ss. 448 and 488(3) of the *Criminal Code.*

Sections 4(1) and 5 of the *Canada Evidence Act* have already been quoted. Section 2 is as follows:

> 2. This Part applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

Sections 448 and 488(3) of the *Criminal Code* are as follows:

> 448. (1) Where a person is alleged, by a verdict upon a coroner's inquisition, to have committed murder or manslaughter but he has not been charged with the offence, the coroner shall
>
> (*a*) direct, by warrant under his hand, that the person be taken into custody and be conveyed, as soon as possible before a justice, or
>
> (*b*) direct the person to enter into a recognizance before him with or without sureties, to appear before a justice.

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(2) Where a coroner makes a direction under subsection (1) he shall transmit to the justice the evidence taken before him in the matter.

488. (3) . . .

No person shall be tried upon a coroner's inquisition.

The effect of the sections of the *Canada Evidence Act*, referred to above, was to give to a person charged with crime the right to be a witness in his own defence, it was not to enable the prosecution to call him as a witness. The choice as to whether or not he would give evidence was given to the accused alone and if he chose not to testify comment by the judge or by counsel for the prosecution was forbidden. None of this is challenged; but it is said that the sections have the effect of rendering the accused a compellable witness at the inquest into the death which he is charged with having caused by his criminal act.

If I am right in the view, which I have already expressed, that in 1870 the accused would not have been a compellable witness at such an inquest, it would, in my opinion, require clear words to bring about so complete a change in the law. Section 5 does not purport to say who shall or shall not be compelled to take the witness stand. It deals with the rights and obligations of a witness who is already on the stand. It does not protect him from the use against him of the answers he makes in the proceeding in which he makes them but only in "proceedings thereafter taking place". Let it be supposed that the only evidence given before the coroner which in any way implicated the accused was that of the accused himself; such evidence would warrant the jury in bringing in a verdict alleging that the accused had committed murder or manslaughter. It is true that such a verdict would not constitute an adjudication that the accused was guilty but equally the decision of the justice presiding at the preliminary hearing that the accused should be committed for trial is not such an adjudication. It would be a strange inconsistency if the law which carefully protects an accused from being compelled to make any statement at a preliminary inquiry should permit that inquiry to be adjourned in order that the prosecution be permitted to take the accused before a coroner and submit him against his will to examination and cross-examination as to his supposed guilt. In the absence of clear words in an Act of Parliament or other compelling authority I am unable to agree that that is the state of the law.

The conclusion which I have reached necessarily involves the view that *Rex v. Barnes,* supra, was wrongly decided and ought not to be followed.

All that I have so far said is as to the applicable law apart from the provisions of the impugned sections of *The Coroners Act.* These are as follows:

8*a*. (1) Where a person has been charged with a criminal offence arising out of a death, an inquest touching the death shall be held only upon the direction of the Attorney General.

(2) Where during an inquest any person is charged with a criminal offence arising out of the death, the coroner shall discharge the jury and close the inquest, and shall then proceed as if he had determined that an inquest was unnecessary, provided that the Attorney General may direct that the inquest be reopened.

* * *

15. (1) The coroner and jury shall at the first sitting of the inquest view the body unless a view has been dispensed with under section 9 or 10, and the coroner shall examine on oath, touching the death, all persons who tender their evidence respecting the facts and all persons who in his opinion are likely to have knowledge of relevant facts.

(2) Subject to subsection (3), no person giving evidence at the inquest shall be excused from answering a question upon the ground that the answer thereto may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature, but if he objects to answering the question upon any such ground he shall be entitled to the protection afforded by section 5 of the *Canada Evidence Act* and by section 33 of the *Saskatchewan Evidence Act.*

(3) Before a person gives evidence at the inquest subsection (2) shall be read to him by the coroner.

(4) A person giving evidence at the inquest may be represented by counsel who may examine and cross-examine witnesses called at the inquest and may on behalf of his client take the objection mentioned in subsection (2).

* * *

20. Counsel appointed by the Attorney General to act for the Crown, at an inquest may attend thereat and may examine or cross-examine the witnesses called, and the coroner shall summon any witness required on behalf of the Crown.

Considered by themselves, without regard to the history of the Act, and bearing in mind the rule that the intention to legislate outside its allotted field is not lightly to be imputed to the legislature, these sections could, I think, be construed as not rendering a person charged with an offence arising out of the death compellable to give evidence at the inquest; but when s. 15 as it now reads is contrasted with its predecessor s. 15 which was repealed by Statutes of Saskatchewan, 1960, c. 14, s. 3, this construction scarcely seems possible.

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The earlier s. 15 read as follows:

> The coroner and jury shall, at the first sitting of the inquest, view the body, unless a view has been dispensed with under section 9 or 10, and the coroner shall examine on oath, touching the death, all persons who tender their evidence respecting the facts and all persons whom he thinks it expedient to examine as being likely to have knowledge of relevant facts; provided that a person who is suspected of causing the death, or who has been charged or is likely to be charged with an offence relating to the death, shall not be compellable to give evidence at the inquest, and if he does so shall not be cross-examined and provided further that before such person gives any evidence this section shall be read to him by the coroner.

I think the conclusion inescapable that by enacting s. 15 in its present form the legislature intended to change the law and to render a person charged with murder compellable to give evidence at the inquest on the body of his alleged victim. Such legislation trenches upon the rule expressed in the maxim *nemo tenetur seipsum accusare* which has been described (by Coleridge J. in *R. v. Scott*[1]) as "a maxim of our law as settled, as important and as wise as almost any other in it." This rule has long formed part of the criminal law of England and of this country. With great respect for the contrary view expressed in the Court of Appeal, I am of opinion that any legislation, purporting to make the change in the law referred to in the first sentence of this paragraph or to abrogate or alter the existing rules which protect a person charged with crime from being compelled to testify against himself, is legislation in relation to the Criminal Law including the Procedure in Criminal Matters and so within the exclusive legislative authority of the Parliament of Canada under head 27 of s. 91 of the *British North America Act*.

Questions other than those with which I have dealt above were raised in the course of the argument but I do not find it necessary to deal with them.

I would allow the appeal, set aside the judgments in the courts below and direct that an order issue prohibiting any coroner in the Province of Saskatchewan from requiring the appellant to attend as a witness or to give evidence at any inquest or at the continuation of any inquest into the death of Allan Thomas. I would make no order as to costs.

FAUTEUX J. (dissenting):—This is an appeal, with leave of this Court, from a unanimous judgment of the Court of

[1] (1856) Dears & B. 47 at 61, 169 E.R. 909.

Appeal of Saskatchewan[1] dismissing the appeal of the appellant from the judgment of Bence C.J. Q.B. denying appellant's application for a Writ of Prohibition against Coroner J. E. Nunn of Saskatchewan.

The material facts may be summarized. One Allan Thomas died at Glaslyn, Saskatchewan, on May 12, 1963 and, on the same day, Coroner Nunn opened an inquest into his death. Later in the day, appellant and eight other persons were arrested and separately charged with the non-capital murder of Thomas. The Coroner then discharged the jury and closed his inquest, as he was required by s. 8a(2) of the *Coroners Act,* R.S.S. 1953, c. 106, as amended by c. 14 of the 1960 Statutes of Saskatchewan. The following day, May 13, each of the accused was separately arraigned and remanded in custody to await Preliminary Inquiry which, contrary to s. 451(*b*) of the *Criminal Code,* was then set at a time exceeding eight clear days, to wit, to June 12, 1963. On May 18, each of the accused was admitted to bail by an order of Disbery J. On the date fixed for the Preliminary Inquiry, June 12, 1963, the Coroner's inquest was reopened by direction of the Attorney General for Saskatchewan and, on the same day, the Preliminary Inquiry was adjourned to an undetermined date, to wit, to the date following the conclusion of the inquest, which, because of the present proceedings, was and now stands adjourned *sine die.* Whether, in the circumstances, jurisdiction to proceed with the particular "information" laid against appellant on May 12, 1963, has been lost as a result of these adjournments of the Preliminary Inquiry, is a question which remains open and one which, if answered affirmatively, destroys the very basis upon which the application for Prohibition is predicated. However, and in view of the conclusion I have reached on the other aspects of the case, it is unnecessary to determine this particular question of jurisdiction.

The Coroner's inquest, reopened on June 12, 1963, had proceeded for three days during which twenty-three witnesses were examined when, on the fourth day, counsel then acting for the Crown, declared his intention to call and examine as witnesses, pursuant to s. 20 of the *Coroners Act,* appellant and the other accused who, having been summoned as witnesses, were present before the Coroner.

[1] [1964] 2 C.C.C. 211, 41 C.R. 337, 46 W.W.R. 331.

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Counsel acting for appellant and the other accused objected to the right of the Coroner or the Crown to compel appellant or any of these persons to give evidence, in view of the fact that each of them had been accused of the murder of Thomas. Having heard the argument related to the merits of this submission, the Coroner eventually ruled that each of them was a compellable witness at his inquest. Hence the application for Prohibition which, as above indicated, was dismissed by Bench C. J. Q.B., as was the appeal entered against this dismissal.

Bence C.J. Q.B. relied mainly on *Rex v. Barnes*[1]. This case being the leading case in the matter, it is pertinent to consider its circumstances and the views expressed in the various reasons for judgment.

Barnes was charged with manslaughter in the death of one Rossiter and, after Preliminary Inquiry, was committed to trial by a magistrate. Shortly thereafter,—and not prior to any committal or even the beginning of a Preliminary Inquiry, as in the present case where there was only an "information" laid against appellant—,Barnes was subpoenaed to attend a Coroner's inquest into Rossiter's death. Appearing at the inquest, he refused to give evidence or to hold himself bound by the subpoena, on the ground that he was neither a competent nor compellable witness at the inquest at the instance of the Crown, there being pending against him a charge of manslaughter upon which he had been committed to trial. He applied for an Order prohibiting the Coroner from issuing any further process or warrant to compel him to give evidence at the inquest. Orde J., to whom this application was directed in first instance, wrote a considered judgment. He noted particularly the admission made by counsel for Barnes that had the latter been called upon to give evidence before the criminal charge had been laid against him, he would have been bound by reason of the provisions of s. 5 of the *Canada Evidence Act* to answer any questions put to him, notwithstanding that his answers might tend to criminate him, the only protection afforded him being that his answers could not be used or received in evidence against him in any criminal trial or criminal procedure. Orde J. then said he could find no ground to support the submission that the fact that Barnes was not a compellable witness in the

[1] (1921), 36 C.C.C. 40, 49 O.L.R. 374, 61 D.L.R. 623.

criminal proceedings pending against him exempted him from being compelled to give evidence at the inquest of the Coroner. He said:

> The competency or the compellability of a person to be called as a witness must be governed by the nature of the proceeding in which that question arises. There is here no real connection between the proceedings before the coroner and those before the Magistrate or the Supreme Court of Ontario in the criminal proceedings.
>
> The proceedings therein are entirely distinct. If a civil action were now proceeding, in which the question of the responsibility for the accident in which Rossiter was killed was involved, Barnes could be compelled to give evidence and to answer even though his answers tended to criminate him: Re Ginsberg (1917), 38 D.L.R. 261, 40 O.L.R. 136. And I am unable to see how the fact that he is a defendant in certain criminal proceedings, in which he is not a compellable witness, can entitle him to exemption in all other proceedings. The question of competency or compellability must be determined with reference to the particular proceeding in which it is proposed to call the person as a witness, and not with reference to some other proceeding. And I can see no distinction in principle between the coroner's Court and any other Court in this respect. I cannot, therefore, discover any ground upon which Barnes is entitled to claim exemption from giving evidence upon the inquest now pending.

With this view of the law, I am in respectful agreement. The proposition that the competency and compellability of a person to be called as a witness must be determined with reference to the particular proceeding in which it is proposed to call the person as a witness, and not with reference to some other proceeding, is a rule that receives an application even in criminal trials where several persons, though jointly indicted, are proceeded against separately. In such cases, it is settled law that neither one is regarded as an accused person or a party in the trial against the others. This question was particularly considered by the Nova Scotia Supreme Court (in banco) in *Re Regan*[1]. At page 598, the Court said:

> Regan is not an *accused person* in the proceedings against Tanner, and the provisions of the Common Law and statute rendering an accused person on his trial not compellable as a witness for the prosecution against himself are therefore not applicable to him. Insofar as any prosecution against Regan himself is concerned, he can avail himself of the provisions of sec. 5 of The Canada Evidence Act R.S. Can., 1927, C. 59) and thus any evidence given by him on the proceedings against Tanner cannot be used against him in the proceedings against himself.

A similar matter was recently considered by the Court of Appeal in England in *William Gerald Boal, Roger John*

[1] (1939), 13 M.P.R. 584, 2 D.L.R. 135, 71 C.C.C. 221.

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Cordrey[1]. B. and C. were jointly indicated for, *inter alia,* conspiracy to stop and rob a mail train and for robbery with aggravation. On both counts, B. pleaded not guilty, and C. pleaded guilty to the count of conspiracy but not guilty to the count of robbery. The Court directed that the count of robbery should not be proceeded with with respect to C. without leave of the Court. B. was found guilty on both counts. In appeal, B. sought leave to call what was alleged to be "fresh evidence", to wit, the evidence of C. who was said to be then prepared to testify that B. had played the minor part in the affair. The submission that C. would have been a competent but not a compellable witness at the trial of B. under the *Criminal Evidence Act,* 1898, was rejected. The *ratio* of the decision is formulated as follows at page 345:

> This court takes the view that Cordrey was a competent and compellable witness at the trial and that, not being charged with an offence *actually within the consideration of the jury at the time,* he was not to be regarded as a "person charged" within the meaning of section 1 of the Act of 1898.

The italics are mine.

That this has long been the law in England is shown in *Winsor v. The Queen*[2], where it was said that where two prisoners are jointly indicted for felony and plead not guilty, but one only is "given in charge" to the jury, the other is an admissible witness although his plea of not guilty remains in the record undisposed of. Thus it appears that, under these provisions of the *Criminal Evidence Act* and of the *Canada Evidence Act* which deal with the question of compellability and of competency of a witness, a person "charged" is no other than a person who, being accused of an offence, is, at the time when the question arises, actually proceeded against for the offence. In England, a Coroner's inquisition is a mode of criminal prosecution, the finding of a Coroner's inquest accusing a person of causing the death of another, when held by a jury, is equivalent to the preferment and signing of a bill of indictment and the prisoner may be prosecuted upon such inquisition. *Archbold, Criminal Pleading Evidence and Practice, Thirty-fifth edition 314.* Such is not the case in Canada; and this, with

[1] (1964), 48 C.A.R. 342, 3 W.L.R. 593.
[2] (1866), L.R. 1 Q.B. 390.

respect to the compellability and competency of a witness, is a fundamental difference. Sections 488 and 448 of the *Criminal Code* provide:

488. (1) Except as provided in this Part no bill of indictment shall be preferred.

(2) No criminal information shall be laid or granted.

(3) No person shall be tried upon a coroner's inquisition.

448. (1) Where a person is alleged, by a verdict upon a coroner's inquisition, to have committed murder or manslaughter, but he has not been charged with the offence, the coroner shall

(*a*) direct, by warrant under his hand, that the person be taken into custody and be conveyed, as soon as possible, before a justice, or

(*b*) direct the person to enter into a recognizance before him with or without sureties, to appear before a justice.

(2) Where a coroner makes a direction under subsection (1) he shall transmit to the justice the evidence taken before him in the matter.

The predecessor to s. 448 was s. 667, the opening words of which were:

667. Every coroner, upon any inquisition taken before him whereby any person is *charged* with manslaughter or murder . . .

It is significant that in the 1955 Revision of the *Criminal Code,* the word "charged" appearing in the former section has been replaced in the new by the words "alleged . . . to have committed manslaughter or murder." Under our law, there is no party, no accused in a Coroner's inquest and it is only at the conclusion of the inquest that may arise the possibility of a person being alleged to have committed murder or manslaughter and then be compelled, by a Coroner's warrant, to appear in the Criminal Courts. Notwithstanding these fundamental differences between the Coroner's inquest in Canada and in England, it is interesting to note the decision rendered in England in *Re Cook*[1]. In that case, an application was made to the Court of Queen's Bench, at the instance of the Coroner who was conducting an inquest on the body of one Hannah Moore, for a writ to bring Cook before a Coroner and a jury so that the latter could be identified and give evidence before the Court. At the time of this application, Cook stood committed upon a charge of having wilfully murdered Hannah Moore. The writ was refused. However, this refusal was not founded on the reason that Cook was not a compellable or competent witness, but on the inconveniences attending upon his

[1](1845), 7 Q.B. 653, 115 E.R. 635.

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removal from the place of custody and the lack of sufficient ground being shown for his attendance before the Coroner. Coleridge J., as he then was, said:

> I presume the Court decides that it has power to grant the writ but that no necessity is made out on the present occasion.

Had the Court been of opinion that Cook was not a compellable and a competent witness, this would have been a peremptory reason and there would have been no occasion to rest the decision on the two grounds of inconvenience or lack of necessity for Cook's appearance at the inquest.

The appeal in *Rex v. Barnes, supra,* was heard by Meredith C.J. C.P. and Riddell, Latchford, Middleton and Lennox JJ. Meredith C.J. C.P. said, at page 51:

> On principle, therefore, it is not lawful, or proper, to examine the appellant in the coroner's Court in any way regarding the charge which is pending against him, as long as he is in jeopardy in respect of it. But he may, in my opinion, be examined as a witness in regard to the guilt of any other person, so long as the examination does not touch in any way the charge against him.

and at page 52:

> The result is that the appellant was wrong in disobeying his subpoena: he may be examined as to the guilt of others so long as the examination does not encroach upon his rights as a person charged with crime.

With the exception of Lennox J., who left the question open, none of the other Judges accepted the limitation of the examination suggested by Meredith C.J. C.P. Riddell J., at page 53, stated:

> I can find nothing in our legislation preventing the calling of any one as a witness before the coroner—had Parliament intended to make an exception in the case of one accused or supposed to be accused in some other Court or thought to be guilty of causing the death, no doubt such a provision would have been made in the Code.

And, at page 56, he added:

> Much has been said as to the alleged hardship upon Barnes' in being compelled to give evidence—it is, however, to be hoped that we have not yet arrived at the point that one accused of crime has so many and so high rights that the people have none. The administration of our law is not a game in which the cleverer and more astute is to win, but a serious proceeding by a people in earnest to discover the actual facts for the sake of public safety, the interest of the public generally. It is the duty of every citizen to tell all he knows for the sake of the people at large, their interest and security, and I am not inclined to stretch in any way rules which are directed to permitting any one to escape from the duties which all others admit and perform—it is for Parliament to frame rules and exceptions, not for the Court.

Middleton J., with the concurrence of Latchford J., dealing particularly with s. 5 of the *Canada Evidence Act,* said at page 57:

> Section 5 deals with this common law privilege and changes the Law, and now no witness shall be excused from answering any question put to him upon the ground that his answering might tend to criminate him. He is, however, granted some degree of protection, for the evidence that he may give shall not be used or receivable in evidence against him. That this protection is by no means as wide as that under the common law rule is obvious, and the change in our law no doubt shocks those whose mental inclination and training leads them to regard the common law privilege as a sacred thing. See, for example, the statement of the late Chief Justice of the King's Bench in Re Ginsberg, (1917) 27 Can. Cr. Cas. 447 where he points out that the protection afforded by the Legislature does not in his view, afford sufficient immunity, as the prosecutors are enabled to get information from the accused which would enable them to get convicting evidence aliunde without using his own evidence against him at all—that in fact the proceedings amount to an examination for discovery in a criminal case, "which cannot be". The Appellate Division, 38 D.L.R. 261, did not agree with this view, and in very fully considered judgments upheld not only the validity but the effectiveness of the change in the law.

Finally Lennox J., having said particularly, at page 59, that he had no right to advise or comment upon the action or attitude of the Crown, concluded that he saw no reason to doubt the correctness of the order appealed against.

Relying on these various excerpts from the reasons of the Court of Appeal in the *Barnes* case, *supra,* Bence C. J. Q.B., who heard the present case in first instance, added that the authority to call the appellant and the other accused as witnesses to give evidence as to their knowledge of what took place was contained in s. 8(*a*) and s. 15 of the *Coroners Act* and also that s. 5 of the *Canada Evidence Act* stipulated that they should not be excused. He also expressed his disagreement with the limitation suggested by Meredith C. J. C.P. in the *Barnes* case, *supra.*

The appeal in the Court of Appeal of the Province of Saskatchewan was heard by Culliton C.J.A. and Brownridge, Hall and Maguire JJ. A. At that stage of the proceeding, appellant questioned the validity of ss. 8(*a*), 15 and 20 of the *Coroners Act* of Saskatchewan submitting that they were beyond the powers of the provincial legislature in that such sections related to criminal law and procedure. Chief Justice Culliton rendered the judgment for the Court. With respect to the words "Procedure in Criminal Matters"

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appearing in s. 91(27) of the *B.N.A. Act,* he adopted the meaning ascribed thereto by *Macdonald C.J.A., at page 238, in In Re Public Inquiries Act*[1], to wit:

> "Criminal Matters" are, in my opinion, proceedings in the criminal Courts, and "procedure" means the steps to be taken in prosecutions or other criminal proceedings in such Courts.

and he concluded:

> In my opinion, the impugned sections do not relate to steps to be taken in a prosecution or other criminal proceeding, but rather, in pith and substance, relate to the administration of justice within the province and are thus within the competence of the Provincial Legislature.

He then said:

> Even if I should be wrong in this conclusion, the position of the appellant would not be improved. The Coroner's Court being a criminal court, the provisions of the Canada Evidence Act apply to its proceedings.
>
> * * *
>
> While the Coroner's Court is a criminal Court of record, it is a court of inquiry, not of accusation, and the verdict of a coroner's jury does not bind any person whose conduct may be involved in its findings and does not, in any way, constitute any adjudication of rights affecting either person or property. There is no accused and there are no parties. *Wolfe v. Robinson (supra).* Notwithstanding that the accused has been charged of an offence arising out of the death being investigated, he appears at the inquest as a witness and, as such, is bound by the provisions of s. 5(1) of the Canada Evidence Act. *Rex v. Barnes (supra).* In giving evidence he is entitled to the protection given to him by subsection 2 of section 5 and by the corresponding provision of the Saskatchewan Evidence Act.

Wolfe v. Robinson[2] was decided by Wells J. in a very fully considered judgment.

Finally and with respect to the submission of counsel for the appellant that an application of the law such as the one contended for by respondent would be in contravention of s. 2(*e*) of the *Canadian Bill of Rights,* Culliton C.J.A. said that the foregoing section had no application and that s. 2(*d*) of the *Canadian Bill of Rights* recognizes the right to compel a person to give evidence if he is represented by counsel and given protection against self-incrimination and that, inasmuch as appellant was represented by counsel at the inquest, he was given the protection envisaged by the *Canadian Bill of Rights.*

The rule *nemo tenetur seipsum accusare,* invoked on behalf of appellant, has, through the years, been modified or

[1] (1919), 48 D.L.R. 237, 3 W.W.R. 115, 33 C.C.C. 119.
[2] (1961), 129 C.C.C. 361, [1961] O.R. 250.

trenched upon by statute and the privileges to which it gave rise have, in certain cases, been conditioned or abrogated. This is illustrated particularly in *Walker v. The King*[1] and in *Re Frilegh*[2]. In the *Walker* case, *supra,* the Court had to consider the validity of a provincial enactment compelling the person in charge of a vehicle, directly or indirectly involved in an accident, to give certain informations in relation thereto. Sir Lyman Duff C.J., relying particularly on *Rex v. Coote*[3], considered the impugned enactment as

> a measure for securing information which may be employed for the purposes of legal proceedings, instituted either privately or *ad vindicatam publicam*

and stated that

> there was no rule of law that statements made by an accused under compulsion of statute are, because of such compulsion alone, inadmissible against him in criminal proceedings. Generally speaking, such statements are admissible unless they fall under the scope of some specific enactment or rule excluding them.

In *Re Frilegh, supra,* a debtor objected to submit to an examination, as any questions to be answered might tend to incriminate him on a criminal charge preferred against him for an offence under the *Bankruptcy Act.* The objection was rejected. The Court relied on an amendment made in 1933, c. 31, s. 33(2), adding subs. (9), and added that even prior to this amendment, a debtor was not entitled to object on the alleged ground in view of *Re Ginsberg*[4] and in view of the provisions of ss. 2 and 5 of the *Canada Evidence Act.*

The relevant sections of the *Canada Evidence Act* to be here considered are s. 4(1) and s. 5(1) and (2).

> 4. (1) Every person *charged with an offence,* and, except as in this section otherwise provided, the wife or husband, as the case may be, of the person so *charged,* is a competent witness for the *defence,* whether the person so *charged is charged solely or jointly with any other person.*

The words of s. 4(1), here italicized, make it clear that the privilege therein mentioned is conferred to no other than a person charged with an offence, to whom it becomes available on no occasion and time other than when the prosecution against him for that offence is actually proceeded with under the *Criminal Code,* in the criminal Courts.

[1] [1939] S.C.R. 214, 2 D.L.R. 353, 71 C.C.C. 305.
[2] (1926), 7 C.B.R. 487, 29 O.W.N. 394.
[3] (1873), L.R. 4 P.C. 599, 17 E.R. 587.
[4] (1917), 40 O.L.R. 136, 38 D.L.R. 261.

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5. (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence, R.S., c. 59, s. 5.

By these provisions, the *Canada Evidence Act* removes the safeguard a person had at Common Law to refuse to answer any questions that might criminate him. He is now obliged to do so but such evidence may not be used against him if he claims the protection of the Act. The provisions of s. 5 (1) and (2) are unqualified and of general application. Subject only to some specific statutory exceptions of which none applies at a Coroner's inquest, no one —other than a person charged of an offence, on the occasion and at the time at which he is actually proceeded against for that offence—is excused from being called to give evidence on the ground that the answers he might give may tend to incriminate him. If a co-accused, of which the prosecution is not actually proceeded with, under the *Criminal Code*, in the criminal Courts, is a compellable and competent witness when called to testify in the prosecution of another co-accused, *a fortiori* a person, whether charged or not with an offence, is a compellable and competent witness at a Coroner's inquest where no one is regarded by law as an accused, at and for the purpose of that inquest, prior to the very time of its conclusion. Being present and represented by counsel before the Coroner when called to the witness stand, appellant's objection to testify could not obtain.

With deference to those who entertain a contrary opinion, I am in respectful agreement with the conclusion reached by Orde J. and the Court of Appeal for Ontario in the *Barnes* case, *supra,* and with the conclusion reached by Bence C.J. Q.B. and the Court of Appeal for Saskatchewan, in the present case, with respect to the application and effect of s. 5 of the *Canada Evidence Act.*

I also agree with the opinion expressed in this case, in the Court below, as to appellant's submission based on the *Canadian Bill of Rights*; and as to this, I only want to add the following statement of our brother Ritchie, then speaking for the majority of the Court, in *Robertson and Rosetanni v. The Queen*[1]:

> It is to be remembered that the human rights and fundamental freedoms recognized by the Courts of Canada before the enactment of the *Canadian Bill of Rights* and guaranteed by that statute were the rights and freedoms of men living together in an organized society subject to a rational, developed and civilized system of law which imposed limitations on the absolute liberty of the individual.

In these views, it is unnecessary to consider the arguments related to the constitutionality of the impugned sections of the *Coroners Act* of Saskatchewan.

I would dismiss the appeal.

Appeal allowed, no order as to costs, Fauteux J. *dissenting.*

Solicitors for the appellant: John N. Conroy & Son, North Battleford.

Solicitor for the Attorney General for Saskatchewan: R. S. Meldrum, Regina.

Solictor for the Attorney General for Canada: T. D. MacDonald, Ottawa.

Solicitors for the Attorney General of Quebec: Riel, Le Dain, Bissonnette, Vermette & Ryan, Montreal.

Solicitor for the Attorney General for Ontario: F. W. Callaghan, Toronto.

Solicitor for the Attorney General for Alberta: W. Henkel, Edmonton.

[1] [1963] S.C.R. 651 at 655, 41 C.R. 392, [1964] 1 C.C.C. 1.

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*Feb. 1, 2
Apr. 6

THE ATTORNEY GENERAL OF BRITISH COLUMBIA ....APPELLANT;

AND

LLOYD G. McKENZIE, Q.C. .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Validity of provincial legislation—Legislation conferring divorce jurisdiction on local judges of Supreme Court—Whether ultra vires—B.N.A. Act, 1867, ss. 91, 92, 96, 101—Supreme Court Act Amendment Act 1964, 1964 (B.C.), c. 56—Constitutional Questions Determination Act, R.S.B.C. 1960, c. 72—Supreme Court Act, R.S.C. 1952, c. 259, s. 37.

Pursuant to the *Constitutional Questions Determination Act,* R.S.B.C. 1960, c. 72, the Lieutenant Governor in Council of British Columbia referred to the Court of Appeal the question of determining the validity of part of s. 3 of the *Supreme Court Act Amendment Act 1964,* 1964 (B.C.), c. 56, which purports to confer jurisdiction in divorce and matrimonial causes upon County Court Judges sitting as local judges of the Supreme Court. By a unanimous judgment, the Court of Appeal held that the impugned legislation was *ultra vires*. The Attorney General for British Columbia appealed to this Court pursuant to s. 37 of the *Supreme Court Act,* R.S.C. 1952, c. 259.

Held: The appeal should be allowed.

Per Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Ritchie, Hall and Spence JJ.: The Dominion parliament has not seen fit to pass any legislation pursuant to its power under s. 101 of the *B.N.A. Act* providing for the establishment of Courts for the administration of the law of marriage and divorce in British Columbia. It was therefore within the legislative competence of the legislature of that province to pass laws relating to the constitution, maintenance and organization of such Courts. By virtue of s. 91(26) of the *B.N.A. Act* the provincial legislature is precluded from making substantive changes in the law of divorce as it existed in British Columbia at Confederation, but the impugned legislation does not create any substantive right or make any changes in the law or jurisdiction in that regard. The right to grant a divorce in British Columbia remains vested in the Supreme Court as previously, and the effect of the new legislation is limited to reorganizing the administration of justice in that Court by allocating jurisdiction to Courts presided over by local judges of the Supreme Court. It cannot be said that this constitutes provincial legislation purporting to appoint judges of a Superior Court. It can only be characterized as a valid exercise of provincial power under s. 92(14) of the *B.N.A. Act.* The present legislation is not concerned with conferring jurisdiction "upon persons", but with defining the jurisdiction of the Courts. The provisions of s. 92(14) empower the provincial legislature when reorganizing the Courts of the province to allocate jurisdiction in divorce and matrimonial causes to a Court presided over by a judge appointed by the Governor General. This is not a case in which the province has sought to regulate the exercise of the Dominion authority in relation

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

to judicial appointments, it is rather a case in which the legislature has sought to regulate the administration of justice within a province by prescribing the jurisdiction to be exercised by provincial Courts presided over by federally appointed judges. There is no conflict between the impugned legislation and ss. 96 to 101 of the *B.N.A. Act.*

Per Judson J.: All County or District Judges are by the terms of their appointment *ex officio* local judges of the Superior Court in the province in which they are appointed. In British Columbia in that capacity they have long exercised functions assigned to them by provincial legislation, but never as trial judges with complete control over the trial. The present legislation gives them this control in divorce actions but in their capacity as local judges. It is still the Supreme Court that is functioning. Furthermore the province of British Columbia is competent to empower the County Courts to exercise this jurisdiction and no constitutional limitation would arise from s. 96 of the *B.N.A. Act* if the province were to choose to frame its legislation in this way.

Droit constitutionnel—Validité d'un statut provincial—Statut conférant aux juges locaux de la Cour suprême juridiction en matières de divorce—Statut est-il ultra vires—Acte de l'Amérique du Nord britannique, 1867, arts. 91, 92, 96, 101—Supreme Court Act Amendment Act 1964, 1964 (B.C.), c. 56—Constitutional Questions Determination Act, R.S.B.C. 1960, c. 72—Loi sur la Cour suprême, S.R.C. 1952, c. 259, s. 37.

Conformément à la loi intitulée *Constitutional Questions Determination Act,* R.S.B.C. 1960, c. 72, le lieutenant-gouverneur en conseil de la Colombie-Britannique a référé à la Cour d'Appel la question de déterminer la validité de la partie de l'art. 3 de la loi, intitulée *Supreme Court Act Amendment Act 1964,* 1964 (B.C.), c. 56, dont le but est de conférer la juridiction en matières de divorce aux juges de la Cour de Comté siégeant comme juges locaux de la Cour suprême. Par un jugement unanime, la Cour d'Appel jugea que le statut attaqué était *ultra vires.* Le procureur général de la Colombie-Britannique en appela devant cette Cour, en vertu de l'art. 37 de la *Loi sur la Cour suprême,* S.R.C. 1952, c. 259.

Arrêt: L'appel doit être maintenu.

Le Juge en Chef Taschereau et les Juges Cartwright, Fauteux, Abbott, Martland, Ritchie, Hall et Spence: Le parlement fédéral n'a pas jugé à propos d'adopter une législation en vertu de son pouvoir sous l'art. 101 de l'*Acte de l'Amérique du Nord britannique* pour pourvoir à la création de Cours pour l'administration de la loi du mariage et du divorce en Colombie-Britannique. La législature de cette province avait donc la compétence législative d'adopter des lois concernant la création, le maintien et l'organisation de telles Cours. En vertu de l'art. 91(26) le l'*Acte de l'Amérique du Nord britannique* la législature provinciale ne peut pas faire des changements substantiels dans la loi sur le divorce telle qu'elle existait en Colombie-Britannique lors de la Confédération, mais la législation attaquée ne crée aucun droit substantiel ou ne fait aucun changement dans la loi ou la juridiction sur ce sujet. Le droit d'accorder un divorce en Colombie-Britannique demeure investi dans la Cour suprême tel qu'auparavant, et l'effet de la nouvelle législation est limité à la réorganisation de l'administration de la justice dans cette Cour en conférant la juridiction aux Cours présidées par les juges locaux de la Cour suprême. On ne peut pas dire que cela constitue une législation provinciale ayant pour but de nommer des

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juges à une Cour supérieure. On peut caractériser cette législation seulement comme étant un exercice valide du pouvoir provincial sous l'art. 92(14) de l'*Acte de l'Amérique du Nord britannique*. La présente législation ne vise pas à conférer la juridiction «à des personnes» mais à définir la juridiction des Cours. Les dispositions de l'art. 92(14) donnent le pouvoir à la législature provinciale, lorsqu'elle réorganise les Cours de la province, de conférer la juridiction en matières de divorce à une Cour présidée par un juge nommé par le Gouverneur Général. Il ne s'agit pas ici d'un cas où la province tente de réglementer l'exercice de l'autorité fédérale concernant les nominations judiciaires, mais c'est plutôt un cas où la législature a tenté de réglementer l'administration de la justice dans la province en prescrivant la juridiction à être exercée par les Cours provinciales présidées par des juges nommés par le fédéral. Il n'y a aucun conflit entre la législation attaquée et les arts. 96 à 101 de l'*Acte de l'Amérique du Nord britannique*.

Le Juge Judson: Tous les juges de comté ou de district sont de par les termes de leur nomination *ex officio* des juges locaux de la Cour supérieure dans la province où ils sont nommés. En Colombie-Britannique, en cette capacité, ils ont depuis longtemps exercé les fonctions que la législation provinciale leur a attribuées, mais jamais comme juges de première instance avec contrôle complet du procès. La présente législation leur donne ce contrôle en matières de divorce mais en leur capacité de juges locaux. C'est toujours la Cour suprême qui agit. De plus, la province de la Colombie-Britannique est compétente pour donner le pouvoir aux Cours de comté d'exercer cette juridiction, et aucune limite constitutionnelle ne se soulèverait sous l'art. 96 de l'*Acte de l'Amérique du Nord britannique* si la province décidait de façonner sa législation de cette manière.

APPEL d'un jugement de la Cour d'appel de la Colombie-Britannique[1], declarant que partie de l'art. 3 de la loi intitulée *Supreme Court Act Amendment Act 1964* était *ultra vires*. Appel maintenu.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], holding that part of s. 3 of the *Supreme Court Act Amendment Act 1964* was *ultra vires*. Appeal allowed.

W. G. Burke-Robertson, Q.C., and *M. H. Smith*, for the appellant.

L. G. McKenzie, Q.C. in person.

D. S. Maxwell, Q.C., and *N. A. Chalmers*, for the Attorney General for Canada.

Gérald LeDain, Q.C., for the Attorney General for Quebec.

[1] (1965), 50 W.W.R. 193, 48 D.L.R. (2d) 447.

F. Callaghan, for the Attorney General for Ontario.

The judgment of Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Ritchie, Hall and Spence JJ. was delivered by

RITCHIE J.:—This is an appeal brought in accordance with the provisions of s. 37 of the *Supreme Court Act,* R.S.C. 1952, c. 259, from a unanimous opinion of the Court of Appeal for British Columbia[1] answering in the negative the following question referred to it under the provisions of the *Constitutional Questions Determination Act,* R.S.B.C. 1960, c. 72:

> Is that part of section 3 of the Supreme Court Act Amendment Act 1964, being Chapter 56 of the Statutes of British Columbia 1964, which provides for the amendment of section 18 of the Supreme Court Act by inserting the words 'the Divorce and Matrimonial Causes Act as amended by the Divorce Jurisdiction Act and by the Marriage and Divorce Act of Canada' as clause (d1) of subsection (2) thereof intra vires the Legislature of the Province?

Pursuant to notice of the constitutional question involved having been given by order of the Chief Justice pursuant to Rule 18 of the Rules of this Court, the Attorney General of Canada and the Attorneys General of the Provinces of Ontario and Quebec appeared on the hearing of this appeal.

The relevant portions of the *Supreme Court Act* of British Columbia as amended by c. 56 of the Statutes of British Columbia 1964, read as follows:

> 18. (1) Judges of the several County Courts are Judges of the Court for the purposes of their jurisdiction in actions in the Court, and in the exercise of such jurisdiction may be styled "Local Judges of the Supreme Court of British Columbia", and have in all causes and matters in the Court, subject to Rules of Court, power and authority to do and perform all such acts and transact all such business, in respect of causes and matters in and before the Court, as they are by statute or Rules of Court in that behalf from time to time empowered to do and perform.
>
> (2) Without thereby limiting the generality of the provisions of subsection (1), it is declared that the jurisdiction of the Judges of the several County Courts as Local Judges of the Supreme Court extends to the exercising of all such powers and authorities, and the performing of all such acts, and the transacting of all such business as may be exercised, performed, or transacted by the Supreme Court or any Judge thereof under the provisions of
>
> (a) the *Administration Act,* or by virtue of any Statute or of any law in force in the Province in respect of matters or causes relating to the grant or revocation of probate of wills or letters of administration;

[1] (1965), 50 W.W.R. 193, 48 D.L.R. (2d) 447.

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(b) the *Bills of Sale Act*;
(b1) the *Adoption Act*;
(c) the *Companies Act*;
(d) the *Creditors' Relief Act*;
(d1) the *Divorce and Matrimonial Causes Act* as amended by the *Divorce Jurisdiction Act* and by the *Marriage and Divorce Act* of Canada;
(e) the *Equal Guardianship of Infants Act*;
(f) the *Infants Act*;
(g) the *Land Registry Act*;
(h) the *Quieting Titles Act*;
(i) the *Trustee Act*;
(j) the *Water Act*.

The constitutional validity of clause (d1) of the amended subsection is challenged on the grounds that it is legislation in relation to "marriage and divorce", a field which is assigned to the exclusive legislative authority of the Parliament of Canada by s. 91(26) of the *British North America Act*, and that it purports to authorize judicial appointments which by the terms of s. 96 of that Act are required to be made by the Governor-General.

The Court of Appeal phrased these questions in the following terms:

(1) Whether the Province may legislate in respect of Divorce and Matrimonial Causes.
(2) Whether such legislation is an appointment within the power of the Governor-General in Council under Section 96 of the B.N.A. Act.

The well known provisions of s. 96 read as follows:

The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Mr. Justice Tysoe, with whose conclusions the other members of the Court of Appeal agreed, held the impugned legislation to be *ultra vires* on the second of the above grounds and accordingly found it unnecessary to express a final opinion with respect to the contention that the amendment constituted legislation in relation to "marriage and divorce". Mr. Justice Sheppard however, having discussed the historical origins of the divorce jurisdiction of the Supreme Court of British Columbia, proceeded to hold:

. . . that the Legislature of British Columbia under Section 92(14) of the British North America Act has legislative jurisdiction to constitute a Court having original jurisdiction in divorce, and in creating the organization of the Court, to designate the offices within the Court and their jurisdiction in divorce equally as in other matters; *Watts v. Watts*, 1908 A.C.

573; *Walker v. Walker,* 1919 A.C. 947; *Board v. Board,* 1919 A.C. 956. That would enable the legislature to create the office of Local Judge and to define the jurisdiction thereof, subject always to any Dominion legislation under Section 101 of the British North America Act by reason of divorce coming within Section 91 ss. 26.

The case of *Watts v. Watts*[1] clearly recognized the jurisdiction of the Supreme Court of British Columbia in matters of divorce as having been acquired by virtue of the pre-Confederation adoption in that Province of the *Divorce and Matrimonial Causes Act* passed in England in 1857. In the course of the opinion delivered by Lord Collins on behalf of the Privy Council in that case, express approval is given to the judgment of Martin, J. In *Sheppard v. Sheppard*[2], where the following passage occurs:

> Moreover, while on the one hand it is true that the Legislature of a Province has no power to legislate in divorce matters so far as expending or contracting the jurisdiction in that respect possessed by its Courts before the Union, yet on the other hand it is equally true that the Court itself has inherent power to make rules regulating its procedure, and that power the Provincial Legislature can take from it in divorce matters as it has in all other matters in this Court, and therefore may, in this sense, legislate by rules of court or otherwise, respecting the regulation of the procedure by which the unalterable Ante-Union jurisdiction may be exercised. Under section 92(14) of the British North America Act the Provincial Legislatures have the exclusive power to constitute, maintain, and organize Courts for the purpose of exercising all jurisdictions whether acquired before or after the Union—*Regina v. Bush* (1888), 15 Ont. 398; *In re Small Debts Act* (1896), 5 B.C. 246. This view is indeed in effect that which is expressed by Clement, J., in his Canadian Constitution (1904), p. 235, note:
>
> > It is submitted that, given a law permitting divorce, the administration of that law would *prima facie* fall to Provincial Courts, constituted under Provincial legislation—subject always, of course, to the power of the Dominion Parliament to constitute additional Courts, under s. 101, and to regulate procedure in divorce cases, if so disposed.

The Dominion Parliament has not seen fit to pass any legislation pursuant to its power under s. 101 of the *British North America Act* providing for the establishment of courts for the administration of the law of "marriage and divorce" in British Columbia and I am accordingly in agreement with Mr. Justice Sheppard that it is within the legislative competence of the Legislature of that Province to pass laws relating to the constitution, maintenance and organization of such courts.

[1] [1908] A.C. 573.

[2] (1908), 13 B.C.R. 486 at 519.

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The Provincial Legislature is by virtue of the provisions of s. 91(26) of the *British North America Act* precluded from making substantive changes in the law of divorce as it existed in British Columbia at the time when that Province entered into Confederation, but the impugned legislation does not in my opinion create any substantive right or make any changes in the law or jurisdiction in that regard. The right to grant a divorce in British Columbia remains vested in the Supreme Court as it previously did and the effect of the new legislation is limited to reorganizing the administration of justice in that Court by allocating jurisdiction under the *Divorce and Matrimonial Causes Act* (as amended by federal legislation) to courts presided over by Local Judges of the Supreme Court appointed by the Governor-General, and unless it can be said that this constitutes provincial legislation purporting to appoint judges of a superior court, it appears to me that it can only be characterized as a valid exercise of provincial power under s. 92(14) which reads as follows:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, . . .
>
> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

The reasoning which led Tysoe J.A. to the conclusion that the legislation in question constitutes an attempt by the Province to exercise the power of appointing superior court judges which is vested in the Governor-General under s. 96 of the *British North America Act,* is summarized in the following excerpt from his reasons for judgment:

> The effect of the legislation in question is to confer upon County Court Judges, acting as Local Judges of the Supreme Court, power to fully and finally adjudicate upon the rights of the parties in Supreme Court actions for divorce and judicial separation as fully and effectually as Supreme Court Judges can do. This jurisdiction given to the County Court Judges is to be exercised in the Supreme Court and their judgments will be judgments of the Supreme Court. In my opinion this is a clear case of constituting Judges of the County Court Judges of the Supreme Court. What else are they, notwithstanding their designation as Local Judges, if they can and do exercise the jurisdiction, powers and functions and all their actions and judgments are those of Supreme Court Judges. It is true that the jurisdiction is limited to one branch of law; but it is unlimited within that sphere, and is subject only, with respect to their final judgments, to appeals to the Court in the same way as final judgments of any ordinary and

properly appointed judges of the Supreme Court. In my opinion this limitation does not affect the position. It is also my opinion that the *Provincial Legislature has no more power to confer such a jurisdiction upon persons who have been appointed by the Dominion to the County Courts and as Local Judges of the Supreme Court with the powers set out in their Letters Patent, than it has to confer it upon provincially appointed Masters, Magistrates or other persons.*

The italics are my own.

With the greatest respect, it appears to me that the present legislation is not concerned with conferring jurisdiction *"upon persons"* but with defining the jurisdiction of courts. The distinction between a provincial legislature conferring jurisdiction upon courts presided over by provincially appointed officials on the one hand and upon courts to which the Governor-General has appointed judges on the other hand, is that in the former case the provincially appointed official is excluded by reason of the origin of his appointment from exercising jurisdiction broadly conforming to the type exercised by superior, district or county courts, (see *In re The Adoption Act*[1], *In re Labour Relations Board of Saskatchewan v. John East Iron Works*[2] and *Attorney General for Ontario and Display Services Company Limited v. Victoria Medical Building Limited*[3]), whereas it is within the exclusive power of the provincial legislature to define the jurisdiction of provincial courts presided over by federally appointed judges, and as Strong J. observed in *In re County Courts of British Columbia*[4]:

> . . . if the jurisdiction of the courts is to be defined by the provincial legislatures that must necessarily also involve the jurisdiction of the judges who constitute such courts.

See also *A. A. Dupon v. Inglis*[5], per Rand J. at 542.

Since 1891 (Statutes of British Columbia 1891, c. 8) the provincial legislation has provided for "Local Judges of the Supreme Court of British Columbia" to preside over courts transacting business in causes and actions in the Supreme Court of British Columbia to such extent "as they are by statute or rules of court in that behalf from time to time empowered to do . . . . " and although these judges

[1] [1938] S.C.R. 398, 71 C.C.C. 110, 3 D.L.R. 497.
[2] [1949] A.C. 134, [1948] 4 D.L.R. 673, [1948] 2 W.W.R. 1055.
[3] [1960] S.C.R. 32, 21 D.L.R. (2d) 97.
[4] (1892), 21 S.C.R. 446 at 453.
[5] [1958] S.C.R. 535, 14 D.L.R. (2d) 417.

are judges of the County Courts they are specifically appointed as Local Judges under a patent issued by the Governor-General in Council which reads as follows:

KNOW YOU that, reposing trust and confidence in your loyalty, integrity, and ability, we did, on the ..... day of ....., in the year of Our Lord One thousand nine hundred and ....., and in the ..... year of Our Reign, constitute and appoint you the said ..... to be *A LOCAL JUDGE OF THE SUPREME COURT OF BRITISH COLUMBIA*

TO HAVE, hold, exercise and enjoy the said office of a Local Judge of the Supreme Court of British Columbia, unto you the said ..... with all and every the powers, rights, authority, privileges, profits, emoluments and advantages unto the said office of right and by Law appertaining during your good behaviour and your tenure of office as a Judge of the County Court of ....., in the Province of British Columbia.

The form of the Minute of the Privy Council authorizing such appointment reads as follows:

The Committee of the Privy Council, on the recommendation of the Minister of Justice, advise that ..... of the City of .....,.. in the Province of British Columbia, Barrister at Law, be appointed a Judge of the County Court of ..... in the said Province, effective February 1st, 1965.

The Committee further advise that the said ..... be appointed a Local Judge of the Supreme Court of British Columbia during his tenure of office as a Judge of the said County Court.

There can thus be no doubt that "Local Judges of the Supreme Court of British Columbia" are appointed by the Governor-General in Council, but it is contended that under the impugned legislation Judges of the County Court in their capacity as "Local Judges of the Supreme Court" are empowered to exercise jurisdiction formerly reserved to Judges of the Superior Court, to whom, unlike the Judges of the County Courts, security of tenure is guaranteed in accordance with s. 99 of the *British North America Act* which reads as follows:

The Judges of the Superior Courts shall hold Office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

The complaint is that the legislation has the effect of authorizing persons to preside over Courts exercising the jurisdiction of superior courts who have not been appointed in accordance with this section. In the present case, however, the patents issued to Local Judges by the Governor-General expressly appoint them to that office "during good

behaviour" although the term of the appointment is limited to the period during which the appointee remains a Judge of the County Court. In my opinion the provisions of s. 92(14) empower the provincial legislature when reorganizing the courts of the Province to allocate jurisdiction in divorce and matrimonial causes to a court presided over by a judge who is so appointed.

It is contended also that the impugned legislation is in excess of the powers of the provincial legislature in that it restricts the persons eligible to be "Local Judges of the Supreme Court", with power to exercise the jurisdiction of a Superior Court Judge, to "Judges of the several County Courts" and thus curtails the unlimited right of selection of judges of the Superior Court which is vested in the Governor-General in Council under s. 96 of the *British North America Act*. The latter proposition is forcefully stated by Davey J.A. in the last paragraph of his reasons for judgment in the Court of Appeal where he says:

> The letters patent of the Governor-General appointing the several County Court judges to be local judges of the Supreme Court are not valid appointments of superior court judges under section 96, since the Supreme Court Act passed by the provincial legislature specifies who the local judges shall be and thereby in effect requires the Governor-General to appoint the County Court judges to be the local judges, or to make no appointment at all, instead of leaving the Governor-General free to exercise his power at large, subject only to the provisions of the Judges Act, as section 96 intends.

In support of this contention reliance is placed on the decision of the Privy Council in *Attorney General for Ontario v. Attorney General for Canada*[1], dismissing an appeal from the decision of the Appellate Division of the Supreme Court of Ontario which is reported as *Re Judicature Act*[2]. By the legislation there in question, the Lieutenant-Governor in Council was directed to assign the judges of the Supreme Court who were to constitute the Appellate Division of that Court and it was provided that one of their number was to be designated by the Lieutenant-Governor in Council as President of that division and to be called Chief Justice of Ontario and that the judges not so assigned were to be judges of the High Court Division, one of whom was to be designated by the Lieutenant-Governor in Council as Chief Justice of that division. This legislation

[1] [1925] A.C. 750, 1 W.W.R. 1131, 2 D.L.R. 753.
[2] (1924), 56 O.L.R. 1, 4 D.L.R. 529.

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was found to be *ultra vires* on the ground that it constituted a colourable attempt to vest in the Lieutenant-Governor in Council the powers reserved to the Governor-General in Council by s. 96, and in a very short judgment in the Privy Council Lord Cave said, at page 753:

> What is the effect of these provisions? It can hardly be doubted that the result of them is to authorize the Lieutenant-Governor of the province to assign—that is to say, to appoint—certain judges of the High Court to be judges of the Appellate Division of the Supreme Court, and also to designate—that is to say, to appoint—certain judges to hold the offices of Chief Justice of Ontario and Chief Justice of the High Court Division. If that is the real effect of the statute, as it appears to be, there can be no doubt that the effect of the statute, if valid, would be to transfer the right to appointment of the two Chief Justices and the judges of Appeal from the Governor-General of Canada to the Lieutenant-Governor of Ontario in Council; and if so, it must follow that the statute is to that extent inconsistent with s. 96 of the Act of 1867 and beyond the powers of the Legislature of Ontario.

In my view there is a fundamental difference between the question dealt with in that case and the one which is raised by the present appeal; it is the difference between the power to designate or appoint individual judges of the Superior and County Courts which is vested in the federal authority and the power to define the jurisdiction of the courts over which those judges are to preside, which in civil matters is exclusively within the provincial field. This is not, in my opinion, a case in which the province has sought to regulate the exercise of the dominion authority in relation to judicial appointments by prescribing the class of persons from whom the appointments to judicial office shall be selected, it is rather a case in which the legislature has sought to regulate the administration of justice within a province by prescribing the jurisdiction to be exercised by provincial courts presided over by federally appointed judges.

I see no conflict between the legislation here in question and ss. 96 to 101 of the *British North America Act* and I would accordingly allow this appeal and direct that the question referred to the Court of Appeal of British Columbia be answered in the affirmative.

JUDSON J.:—British Columbia legislation has conferred upon local judges of the Supreme Court of British Columbia jurisdiction in divorce concurrent with that of the Supreme Court of British Columbia. Since the questions raised by Clement J., in the first instance in 1907, were settled in the

Privy Council in *Watts & A.G.B.C. v. Watts*[1], there has been no doubt that the Supreme Court of British Columbia has this jurisdiction. The question here for determination is whether the province under s. 92(14) can confer concurrent jurisdiction on local judges of the Supreme Court. It is apparent and the reasons delivered in the British Columbia Court of Appeal recognize this, that the only possible constitutional limitation arises from s. 96 of the *British North America Act*.

All the judges in British Columbia[2] have held that there does exist such a limitation and that the legislation is invalid. Their reason is that the legislation offends s. 96 of the *British North America Act* because it makes a local judge of the Supreme Court, who is in reality a County Court Judge, into a Judge of the Supreme Court of British Columbia. I do not think that it does. The case is widely different from Ontario legislation considered in the Reference in 1924, which attempted to limit the Governor General's power under s. 96 to appointing judges generally to the Supreme Court of Ontario and purported to reserve to the province the power to assign those judges to the High Court of Justice for trial work and to the Appellate Division and to appoint the Chief Justices. It is also widely different from *Display Services*[3], where provincial legislation attempted to confer upon a judicial officer not appointed under s. 96 the jurisdiction of a judge in Mechanics Lien actions.

The Attorney General for British Columbia and the Attorney General for Canada both support the legislation but on different grounds. The Attorney General for British Columbia says that the province can redistribute this item of jurisdiction within s. 96 courts generally and that this power is all the more plain where the recipient of the jurisdiction is a local judge of the Supreme Court. The Attorney General for Canada says that because of the Dominion power over divorce and because jurisdiction is now in the Supreme Court of British Columbia, it is the fact that the county judge is a local judge of the Supreme Court by Dominion appointment that saves the legislation. The

[1] [1908] A.C. 573.
[2] (1965), 50 W.W.R. 193, 48 D.L.R. (2d) 447.
[3] [1960] S.C.R. 32, 21 D.L.R. (2d) 97.

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divorce will still be granted in the Supreme Court of British Columbia with the local judge presiding. There is really no problem here. All county or district judges are by the terms of their appointment *ex officio* local judges of the Superior Court in the province in which they are appointed. In British Columbia in that capacity they have long exercised functions assigned to them by provincial legislation, but never as trial judges with complete control over the trial. The present legislation does give them this control in divorce actions but in their capacity as local judges. It is still the Supreme Court that is functioning.

I would go further and hold, contrary to the submission of the Attorney General of Canada, that the Province of British Columbia is competent to empower the county courts to exercise this jurisdiction and that no constitutional limitation would arise from s. 96 of the *British North America Act,* if the province were to choose to frame its legislation in this way.

I would allow the appeal.

Appeal allowed.

Solicitor for the appellant: M. H. Smith, Victoria.

Solicitor for the respondent: Lloyd G. McKenzie, Victoria.

Solicitor for the Attorney General of Canada: E. A. Driedger, Ottawa.

Solicitor for the Attorney General of Quebec: G. LeDain, Montreal.

Solicitor for the Attorney General for Ontario: F. W. Callaghan, Toronto.

HOLY ROSARY PARISH (THOROLD) CREDIT UNION LIMITED ....APPELLANT;

1965 Feb. 9 Apr. 6

AND

THE PREMIER TRUST COMPANY, Trustee of Estate of Herbert Léger Robitaille, a bankrupt ..... .RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Assignment of wages to creditor—Subsequent assignment in bankruptcy—Whether assignment of after-acquired wages valid as against trustee in bankruptcy—Bankruptcy Act, R.S.C. 1952, c. 14.

On April 10, 1962, one R borrowed certain funds from the appellant credit union and on that date gave to the credit union an assignment of 30 per cent of his wages. Default having occurred in a payment of the instalments of indebtedness due by R to the credit union, the credit union notified his employer (E Co.) on November 27, 1962, of the assignment of wages. On January 8, 1963, R made an assignment in bankruptcy to the respondent company and its position as trustee was subsequently confirmed by a meeting of creditors. The credit union was notified by the trustee of the fact of the assignment and was supplied with a proof of claim form but never filed any proof of claim or appeared in the bankruptcy.

On March 14, 1963, the trustee notified E Co. that it required the said company to pay to it the funds deducted from R's wages up till that date. E. Co. took the position that it would hold the money pending an order of the Court declaring the assignment of wages to be void and unenforceable. An application for that declaration was made on behalf of the trustee on March 29, 1963, and it was so declared on May 6, 1963. The judgment of the lower Court was confirmed, on appeal, by the Court of Appeal, and the credit union by special leave further appealed to this Court.

Held: The appeal should be allowed and judgment should issue dismissing the application of the trustee for a declaration that the assignment of wages made by the bankrupt to the appellant was unenforceable against the trustee of the estate.

Under s. 39(*a*) of the *Bankruptcy Act,* R.S.C. 1952, c. 14, the property of the bankrupt did not comprise property held by the bankrupt in trust for any other person. So soon as the after-acquired wages were due to the bankrupt then the assignment operated in equity to transfer the property therein to the assignee. *Lundy v. Niagara Falls Railway Employees Credit Union* (1960), 1 C.B.R. (N.S.) 201; *Re Jones, Ex p. Nichols* (1883), 22 Ch. D. 782, distinguished; *In re Hunt* (1954), 34 C.B.R. 120; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *In re Lind, Industrials Finance Syndicate v. Lind* (1915), 84 L.J. Ch. 884; *Niagara Falls Railway Employees Credit Union v. International Nickel Co. Ltd.,* [1960] O.W.N. 42; *King v. Faraday & Partners Ltd.,* [1939] 2 All E.R. 478, referred to; *Re De Marney, Official Receiver v. Salaman,* [1943] 1 All E.R. 275, disapproved.

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

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HOLY ROSARY PARISH (THOROLD) CREDIT UNION LTD. v. PREMIER TRUST CO.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment of Smily J. Appeal allowed.

L. W. Houlden, Q.C., and *D. E. Baird,* for the appellant.

R. H. Frayne, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal by special leave from the judgment of the Court of Appeal for Ontario pronounced on September 12, 1963. The judgment of that Court confirmed that of the Honourable Mr. Justice Smily pronounced May 6, 1963, in which he declared

> that the assignment of wages made by the said bankrupt, Herbert Léger Robitaille, to the Holy Rosary Credit Union dated the 10th of April 1962, and presently filed with the Empire Rug Mills Limited, employer of the said bankrupt, on the 27th day of November 1962, is void and unenforceable as against the said The Premier Trust Company, Trustee of the estate of the said bankrupt, and it is ordered and adjudged accordingly.

On April 10, 1962, the said Herbert Léger Robitaille borrowed certain funds from the Holy Rosary (Thorold) Credit Union Limited and on that date gave to the Credit Union an assignment of 30 per cent of all the wages, salary, commission, or other moneys owing to him or thereafter to become owing to him, or earned by him in the employ of the Empire Rug Mills Limited, or any other person, firm or corporation by whom he might thereafter be employed. Default having occurred in a payment of the instalments of indebtedness due by the said Robitaille to the Credit Union, the Credit Union notified his employer, Empire Rug Mills Limited, on November 27, 1962, of the assignment of wages.

On January 8, 1963, the said Robitaille made an assignment in bankruptcy to the Premier Trust Company Limited and its position as trustee was confirmed by a meeting of creditors held on January 22, 1963. The appellant Credit Union was notified by the trustee of the fact of the assignment and was supplied with a proof of claim form but never filed any proof of claim or appeared in the bankruptcy.

On March 14, 1963, the trustee by letter notified the Empire Rug Mills Limited that it required the said company to pay to it the funds deducted from Robitaille's wages up till that date. The Empire Rug Mills Limited took the position that it would hold the money pending

an order of the Court declaring the assignment of wages dated April 10, 1962, to be void and unenforceable. An application for that declaration was made on behalf of the trustee on March 29, 1963, and Smily J. so declared on May 6, 1963.

On May 23, 1963, the bankrupt Robitaille applied for and obtained his unconditional discharge from the bankruptcy.

No reasons in writing were delivered by the Court of Appeal but Smily J. in giving judgment said:

> I am, of course, bound by the judgment in the *Lundy v. Niagara Falls Railway Employees Credit Union* case, [1960] O.W.N. 539, 1 C.B.R. (N.S.) 201, 26 D.L.R. (2d) 47.

There are two distinctions between that decision and the present case. In the first place, in the *Lundy v. Niagara Falls* case, the only notice of the assignment to the employer was given after the bankruptcy. This was relied upon by the Credit Union in the present case in the argument before Smily J. but in this Court counsel for the Credit Union placed no reliance at all on such distinction. Secondly, in the *Lundy v. Niagara Falls* case, the creditor filed a claim in bankruptcy and although it did not value its security its manager was nominated as the sole inspector of the estate and actively engaged in the administration of the bankruptcy. As I shall point hereafter, that circumstance might well have determined the action in favour of the trustee as it would appear that in so doing the Credit Union had released its security.

The only other authority in Canada dealing with the issue as between the assignee of future wages and the trustee in bankruptcy which was cited to us or which I could discover would seem to be *In re Hunt*[1], in which Graham J. held in the Court of Queen's Bench of Saskatchewan that such assignment was valid as against the trustee despite the creditor's failure to notify the employer until after the bankruptcy occurred, and despite the fact that the creditor had filed a claim in the bankruptcy. *In re Hunt* does not seem to have been referred to in the consideration in the Court of Appeal of the *Lundy v. Niagara Falls* case, *supra*.

[1] (1954), 34 C.B.R. 120, 12 W.W.R. (N.S.) 552.

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The definition of "property" in s. 2(*o*) of the *Bankruptcy Act*, R.S.C. 1952, c. 14, reads as follows:

> (*o*) "property" includes money, goods, things in action, land, and every description of property, whether real or personal, movable or immovable, legal or equitable, and whether situate in Canada or elsewhere and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of, or incident to property.

Disregarding for the moment the assignment of the wages, there is no doubt that in Canada after-acquired wages or salaries of a bankrupt, subject to a fair and reasonable allowance to the debtor for maintenance of himself and his family, go to the trustee as property of the bankrupt: *In re Tod, Clarkson v. Tod*[1], and *Industrial Acceptance Corporation and T. Eaton Co. Ltd. of Montreal v. Lalonde*[2].

In my opinion, it is equally well established that an assignment for valuable consideration of property to be obtained in the future is a valid equitable assignment and one which is enforceable in equity so soon as the property comes into the possession of the assignor: *Tailby v. Official Receiver*[3].

In re Lind, Industrial Finance Syndicate v. Lind[4], Swinfen Eady L. J. said at p. 895:

> It is clear from these authorities that an assignment for value of future property actually binds the property itself, directly if it is acquired, automatically on the happening of the event, and without any further act on the part of the assignor, and does not merely rest in and amount to a right in contract giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for.

Phillimore L. J., said at p. 897:

> But, notwithstanding these allusions to the specific performance of contracts, it is, I think, well and long settled that the right of the assignee is a higher right than the right to have specific performance of a contract, that the assignment creates an equitable charge, which arises immediately upon the property coming into existence. Either then no further act of assurance from the assignor is required, or, if there be something necessary to be done by him to pass the legal estate or complete the title, he has to do it, not by reason of a covenant for further assurance, the persistence of which, through bankruptcy, it is unnecessary to discuss, but because it is due from him as trustee for his assignee.

[1] [1934] S.C.R. 230, 15 C.B.R. 253, 2 D.L.R. 316.
[2] [1952] 2 S.C.R. 109, 32 C.B.R. 191, 3 D.L.R. 348.
[3] (1888), 13 App. Cas. 523, 58 L.J.Q.B. 75.
[4] (1915), 84 L.J. Ch. 884.

Bankes L. J., said at p. 902:

> It appears to me to be manifest from these statements of the law that equity regarded an assignment for value of future-acquired property as containing an enforceable security as against the property assigned quite independent of the personal obligation of the assignor arising out of his imported covenant to assign. It is true that the security was not enforceable until the property came into existence, but nevertheless the security was there, and the assignor was the bare trustee of the assignee to receive and hold the property for him when it came into existence.

The *Lind* case was not one of an assignment of wages to be earned in the future but it was an assignment of property to be acquired in the future, and a bankruptcy did follow the assignment.

Indeed, the valid and enforceable character of the assignment as an equitable assignment was upheld by the Court of Appeal for Ontario in *Niagara Falls Railway Employees Credit Union v. International Nickel Co. Ltd.*[1] In that Court, the argument that such an assignment was contrary to public policy was also disposed of. Such an argument was suggested in this Court upon the present argument but it was not relied upon. If the assignment of the wages to be acquired thereafter is a valid, equitable assignment and creates a valid, equitable security, there is no reason why the property of the debtor in those after-acquired wages should not pass to the trustee subject to such security. In my view, such result is not affected materially by the decisions in a series of cases exemplified by *Re Jones, Ex. p. Nichols*[2]. In those cases, the debtor with the permission of the trustee continued to carry on a business after his bankruptcy. Of course, it is trite law that any property acquired in the conduct of that business becomes the property of the trustee in bankruptcy.

There are two interesting decisions in the English Courts in fairly late years. The first is *King v. Michael Faraday and Partners Ltd.*[3], which was a decision of Atkinson J. There the debtor had been the managing director of a company under agreement which assured him a very large salary until 1941. In 1933 a judgment for £34,000 odd was awarded against him and to avoid proceedings upon the judgment he assigned certain insurance policies to his creditor and also assigned to him £1,000 per annum to be

[1] [1960]O.W.N. 42, 23 D.L.R. (2d) 215.
[2] (1883), 22 Ch. D. 782, 52 L.J. Ch. 635. [3] [1939] 2 All E.R. 478.

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paid out of his salary for a period of ten years. To effect the latter assignment, the debtor signed an irrevocable request and authority to the company to make such payments to the creditor. In 1938, after payment had been made for five years, the company was obliged to reduce the debtor's salary to £1,000 per annum and at about the same time a receiving order was made against the debtor. The trustee in bankruptcy allowed the debtor to retain his salary of £1,000 per annum for the maintenance of himself and his family. The personal representative of the original creditor proved in the bankruptcy for the whole amount of the debt without ever giving credit for or without valuing any security. The creditor's solicitor was a member of the committee of inspection, attended meetings and voted in respect of the full amount of £24,000 for which she had filed her proof of claim. The creditor then took action to enforce as an equitable assignment the claim against the debtor's salary. The case was set down to be argued as a preliminary issue of law under Ord. 25, r. 2, in English Practice. Atkinson J. gave effect to what he described as "three much more formidable defences". The first of these was frustration by the reduction of the debtor's salary to £1,000 per year which, at any rate, in the opinion of the trustee, was merely sufficient to permit him to maintain himself and his family. The second was that by proving in the bankruptcy for the full amount of her judgment the plaintiff, the creditor, had elected to take her remedy in the bankruptcy rather than by the enforcement of her security. The third was that the assignment was, under the circumstances, contrary to public policy. It may be noted that the second defence to which Atkinson J. gave effect was sufficient to dispose of the case of *Lundy v. Niagara Falls Railway Employees Credit Union, supra,* and that no such situation maintains in the present case where the creditor has not proved in the bankruptcy. It should be further noted that the respondent in the present case could, by virtue of s. 108 of the *Bankruptcy Act,* have required the secured creditor to file his claim, and by virtue of s. 87(1) of the same statute have demanded that the secured creditor value his security. Had the secured creditor done so, it would have been subject to having the claim redeemed by the trustee.

The third defence to which Atkinson J. gave effect, i.e., the bar of public policy, has been disposed of in *Niagara Falls Railway Employees Credit Union v. International Nickel Co. Ltd., supra.* Moreover, by s. 7(6) of *The Wages Act,* R.S.O. 1960, c. 421, effective on March 29, 1961, any contract made thereafter which provided for the assignment by the debtor to the creditor of a portion of not more than 30 per cent of the wage earner's wages to be earned in the future was not invalid. The assignment of wages in the present case was made on April 10, 1962. However, in *King v. Faraday Ltd., supra,* Atkinson J., before dealing with those three defences, all of which he sustained, considered the question of whether an assignment of after-acquired wages was valid as against a trustee in bankruptcy. At p. 484, he said:

> The next point which was made was this. It was argued that a man cannot charge his personal earnings to be made during a bankruptcy, because such earnings become, so it was said, due not merely to the debtor, but also to the trustee in cases like *Re Jones, Ex. p. Nichols* (1883), 22 Ch. D. 782, and *Wilmot v. Alton,* [1897] 1 Q.B. 17, and that class of case, upon which reliance was placed. If those cases are analysed, it will be seen that in all of them the earnings in dispute were made, not by the bankrupt, but by the trustee. If a trustee permits a debtor to carry on his business, he carries it on as agent for the trustee, and it is true to say that the earnings are really the earnings of the trustee, and not of the debtor. In this case, however, the debtor is carrying on under a personal agreement. He is not carrying on in any sense as agent for the trustee. At any rate, so far as I am concerned, I am not prepared to hold that a man cannot before bankruptcy charge his personal earnings under a personal agreement over and above what is required for the maintenance of himself and his family so as to give good title against his trustee. Therefore, I think that the argument based on *Re Jones, Ex. p. Nichols, supra,* fails as well.

In *Re De Marney, Official Receiver v. Salaman*[1], Farwell J., in the Chancery Division, considered this situation. A debtor by a deed made before bankruptcy undertook to pay to the trustee under the arrangement one-half of all earnings less income tax. Thereafter, he was adjudged bankrupt. The question to be determined was whether the trustee in bankruptcy was entitled to the bankrupt's earn-

[1] [1943] 1 All E. R. 275.

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ings after the date of adjudication, having regard to the terms of the deed of arrangement. Farwell J., in a very brief judgment, stated:

> The question is whether the trustee in bankruptcy is entitled to be paid the moneys earned by the bankrupt since the date of the adjudication, having regard to the terms of the deed. If this was a charge of future profits of a business, there would, I think, be no doubt that the trustee in bankruptcy would be entitled to them. It is said, however, that this is not a case of the future profits of a business, but a charge upon the future proposed earnings of the bankrupt and that in this case different considerations arise. I have looked at the various cases which were cited to me and have considered them with care, and I am quite unable to find sufficient justification for saying that the principle applicable to future earnings of a business does not apply to the present case.

I am unable to accept this terse decision and I prefer the very carefully reasoned judgment of Atkinson J. in *King v. Faraday Ltd., supra,* based as the latter judgment is on the authority of *Tailby v. Official Receiver, supra,* and *Re Lind, supra.*

Laidlaw J.A., in giving the judgment for the Court of Appeal in *Lundy v. Niagara Falls Railway Employees Credit Union, supra,* quoted Williams on Bankruptcy, 17th ed., at p. 75, as follows:

> At common law a document purporting to be an assignment of property thereafter to be acquired by the assignor passes no property to the assignee unless and until there be, besides the acquisition of the property by the assignor, some *actus interveniens,* such as seizure by the assignee; but in equity, although a contract engaging to transfer property not in existence as the property of the assignor cannot operate as an immediate alienation, yet, if the assignor afterwards becomes possessed of property answering the description in the contract, it will transfer the beneficial interest to the purchaser immediately upon the property being acquired, provided it appear therefrom that such is the intention of the parties; but not if it appear that the intention of the parties is that there shall be merely a power to seize after-acquired property as distinguished from an interest therein on its acquirement.

And continued:

> That statement of law must be read with s. 39 of the Bankruptcy Act, quoted *supra.* I can find no ambiguity in the relevant language of that section and no doubt arises therefrom in my mind. The wages earned and falling due to the appellant after he made an assignment in bankruptcy did not form part of his property at the date of the assignment in bankruptcy. He acquired the right to those wages after his bankruptcy and before his discharge. In my opinion, that right became property of the bankrupt appellant and vested in the trustee in bankruptcy by virtue of s. 39 of the Bankruptcy Act.

But by the very terms of s. 39(*a*), the property of the bankrupt shall not comprise property held by the bankrupt in trust for any other person. And the whole import of the cases which I have cited, *supra,* is to the effect that so soon as those after-acquired wages are due to the bankrupt then the assignment operates in equity to transfer the property therein to the assignee.

I am, therefore, of the opinion that the appeal should be allowed and that judgment should issue dismissing the application of the trustee for a declaration that the assignment of wages made by the bankrupt to the Holy Rosary Credit Union dated April 10, 1962, is unenforceable against the trustee of the estate. The effect of the discharge of the bankrupt upon the appellant's right to obtain a portion of the wages earned by the bankrupt after his discharge is not an issue in this appeal, and I express no view thereon. Pursuant to the terms imposed when leave to appeal to this Court was granted there will be no order as to costs in the Courts below and the appellant will pay to the respondent its party and party costs in this Court.

Appeal allowed.

Solicitors for the appellant: Young & McNamara, Thorold.

Solicitors for the respondent: Freeman & Frayne, St. Catharines.

1964
*Nov. 10, 12, 13
1965
Apr. 9

GORDON BLANCHARD WISWELL, WILLIAM ARTHUR JOHNSTON AND GERALDINE MARY WILSON, suing on behalf of themselves and of all other members of the Crescentwood Home Owners Association (*Plaintiffs*) .... APPELLANTS;

AND

THE METROPOLITAN CORPORATION OF GREATER WINNIPEG (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal corporations—Zoning by-law—Failure to comply with Council's procedural resolution—Action for declaration of invalidity of by-law—Whether action barred by limitation period—The Metropolitan Winnipeg Act, 1960 (Man.), c. 40, s. 206(4) [am. 1962, c. 97, s. 29(a)](5) [en. 1962, c. 97, s. 29(b)].

The appellants were successful at trial in an action asking for a declaration that an amending zoning by-law passed by the respondent was invalid. The trial judgment was reversed on appeal, two members of the Court dissenting. The Metropolitan Council's procedural resolution for amendments to zoning by-laws required that notices of hearings be advertised in at least two newspapers and that notices be posted by the applicant for an amendment on the premises which were the subject-matter of the proposed amendment. The required notice was published in two newspapers but no notices were posted on the premises. A home owners association to which the appellants belonged and which was known by the respondent to be opposed to the application did not see the newspaper advertisements and had no notice or knowledge of the application.

The majority in the Court of Appeal held that even if the notice was defective for lack of posting, the most that could have been made of this omission was to find that the by-law was voidable only and not void, that under s. 206(5) of *The Metropolitan Winnipeg Act,* 1960 (Man.), c. 40, it had to be attacked within a three months' limitation period, and that, no such attack having been made, the by-law must stand. The trial judge and the dissenting judges in the Court of Appeal held that the by-law was void and could be attacked in an action for a declaration of invalidity even after the three months' limitation period had elapsed.

Held (Judson J. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Cartwright and Spence JJ.: Subject to the reservation that it was not necessary to decide whether the attacked by-law was void, agreement

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

was expressed with the reasons of Hall J. On the assumption that the by-law was merely voidable, the appellants' action was not barred by s. 206(5) of *The Metropolitan Winnipeg Act. Re Gordon and De Laval Co. Ltd.*, [1938] O.R. 462, referred to.

Per Martland and Hall JJ.: In enacting the amending zoning by-law the respondent was engaged in a quasi-judicial matter and was in law required to act fairly and impartially. It was obliged to act in good faith and fairly listen to both sides. *St. John v. Fraser,* [1935] S.C.R. 441; *Board of Education v. Rice,* [1911] A. C. 179; *Re Howard and City of Toronto* (1928), 61 O.L.R. 563, referred to.

In the particular circumstances of this case the by-law was void. It was not merely the failure to post the placards but the manifest ignoring of the fact that the home owners association would oppose the by-law. A body with power to decide was obliged not to act until it had afforded the other party affected a proper opportunity to be heard. *Ridge v. Baldwin,* [1932] 2 AII E.R. 66, referred to.

However, even if the by-law was voidable only, s. 206 of *The Metropolitan Winnipeg Act* would not bar the action for a declaratory judgment declaring the by-law invalid. The section appeared to provide a summary procedure to quash by-laws of the Metropolitan Council but it did not apply to an action such as this. There was nothing in the section depriving the appellants of their right to bring an action to have the by-law declared invalid. *Wanderers Investment Co. v. City of Winnipeg,* [1917] 2 W.W.R. 197, referred to.

Per Judson J., *dissenting*: However one might characterize the form of activity in which the Metropolitan Council was engaged when it passed the amending by-law, it was a function which involved private rights in addition to those of the applicant and the municipality could not act without notice to those affected. But they gave clear, reasonable and adequate notice and the failure to direct the posting of notices pursuant to their own internal regulations, which were subject to their own control, did not affect the validity of their by-law. This by-law was within the municipal function. The failure to post notices did not go to the question of jurisdiction nor was posting a condition precedent to the exercise of the statutory power. The by-law was validly enacted and was not open to any successful attack either by way of motion to quash or by way of action.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], allowing an appeal from a judgment of Smith J. in which it was held that an amending zoning by-law of the Metropolitan Council of Greater Winnipeg was invalid. Appeal allowed, Judson J. dissenting.

D. J. Jessiman, Q.C., and *A. K. Twaddle,* for the plaintiffs, appellants.

D. C. Lennox and *J. D. McNairnay,* for the defendant, respondent.

[1] (1963), 48 W.W.R. 193, 45 D.L.R. (2d) 348.

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The judgment of Cartwright and Spence JJ. was delivered by

CARTWRIGHT J.:—In this appeal I agree with the conclusion of my brother Hall and subject to one reservation with his reasons.

I do not find it necessary to decide whether the by-law which is attacked was void and propose to deal with the appeal on the assumption that it was merely voidable. On that assumption, I agree with the reasons of my brother Hall for holding that, even if the by-law was voidable only, the appellants' action was not barred by s.206(5) of *The Metropolitan Winnipeg Act,* 1960 (Man.), c. 40.

I wish to add a reference to the decision of the Court of Appeal for Ontario in *Re Gordon and De Laval Co. Ltd.*[1] in which Middleton J. A., with whose reasons all the other members of the Court agreed, said at p. 468:

> The Municipal Act, R.S.O. 1937, ch. 266, provides machinery for summarily determining the validity or invalidity of municipal by-laws. This machinery had not been invoked within the time limited by the statute. This did not deprive the Supreme Court of its jurisdiction to set aside the by-law or to pronounce a declaratory decree concerning its validity . . .

In my opinion this passage, whether or not it was strictly necessary to the decision, correctly states the law and is applicable to the circumstances of the case at bar.

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

The judgment of Martland and Hall JJ. was delivered by

HALL J.:—This is an appeal from the judgment of the Court of Appeal for Manitoba[2] allowing the appeal of the respondent from the judgment of Smith J. of the Court of Queen's Bench in which he held that By-law No. 177 of the Metropolitan Corporation of Greater Winnipeg was invalid.

On April 13, 1962, the Council of the Metropolitan Corporation of Greater Winnipeg passed By-law No. 177 rezoning from "R1" Single-Family District to "R4A" Multiple-Family District the following land:

> In the City of Winnipeg, in the Province of Manitoba, being in accordance with the Special Survey of the said City and being Lots Forty to Forty-five, both inclusive, which lots are shown on a plan of survey of part of Lot Forty-five of the Parish of Saint Boniface registered in the

[1] [1938] O.R. 462.

[2] (1964), 48 W.W.R. 193, 45 D.L.R. (2d) 348.

Winnipeg Land Titles Office as No. 308, excepting out of said Lots Forty-four and Forty-five all that portion coloured pink on Plan 5262 taken for a road diversion by the City of Winnipeg.

This land is situate at the northwest corner of the intersection of Academy Road and Wellington Crescent and comprises approximately 3.4 acres. It is bounded on the north by the Assiniboine River, on the east by Academy Road and the approach to the Maryland Bridge, on the south by Wellington Crescent on which it fronts, and on the west by the easterly boundary of the Shrine Hospital property. The site is located immediately to the west of and adjacent to the south end of Maryland Bridge. Wellington Crescent up to Academy Road, and Academy Road itself, are both designated as major thoroughfares under the Draft Development Plan of the Metropolitan Corporation of Greater Winnipeg. Lots Forty-three, Forty-four and Forty-five comprising approximately 1.8 acres were at all times relevant to this action owned by the late Dr. B. J. Ginsburg. Lots Forty, Forty-one and Forty-two comprising the most westerly three lots of the area rezoned and forming an area of approximately 1.6 acres were at all times relevant to this action owned by Mr. Joseph Harris.

The appellants who are members of an unincorporated association known as the Crescentwood Home Owners Association brought action on their own behalf and on behalf of all other members of the Association to have said By-law No. 177 of the respondent declared invalid. The Crescentwood Home Owners Association is comprised of residents of the Crescentwood area in the City of Winnipeg which includes the tract covered by By-law No. 177. The overall objective of the Association has been to maintain the area in question as a single-family dwelling area. The Association had consistently opposed any attempts to have the area or any part of it rezoned or used for any purpose other than for single-family units.

In 1956 Dr. Ginsburg obtained two orders from the Zoning Board of the City of Winnipeg permitting him to erect on his property an 8-storey 64-suite apartment block. The granting of these orders was opposed by the Association which also unsuccessfully appealed both orders to the Municipal and Public Utility Board. The orders were for one year and were renewed from year to year *ex parte* and without notice to the Association and were in force and

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effect on April 1, 1961, when the Metropolitan Corporation of Great Winnipeg succeeded the City of Winnipeg in jurisdiction over zoning matters.

On November 22, 1961, Messrs. Johnston, Jessiman, Gardner & Johnston, as solicitors for the appellants, wrote the respondent as follows:

The Metropolitan Corporation of Greater Winnipeg,
100 Main Street,
Winnipeg, Manitoba.

Attention: Mr. John Pelletier

Dear Sirs:

Re: City of Winnipeg Zoning Board Orders

We act on behalf of the Crescentwood Home Owners Association.

As you know, the City of Winnipeg Zoning Board granted one year extensions to many of the orders made by it just prior to all zoning functions being taken over by Metro in April, 1961. We are interested in what our client's position is in respect to two such orders, namely, Z46/56 and Z113/57. The particulars of these two orders are as follows:

(1) Z46/56—on February 14th, 1956, the City of Winnipeg Zoning Board granted this order varying the Z. 1 restrictions applicable to the land commonly known as 3 Academy Road and 387 Wellington Crescent, being lot 43 and part of lots 44 and 45, D.G.S. 43/45 St. Boniface, plan 308, to permit the construction and maintenance of an eight storey apartment building containing sixty-four suites and twelve maids' rooms. The said order stipulated that it would automatically expire one year from February 14th, 1956, unless satisfactory operations to construct the said apartment building were completed or an extension of time granted by the Board.

(2) Z113/57—On April 23rd, 1957, the Board granted order No. Z113/57 varying the R. 1 restrictions applicable to a triangular portion of land at the north-west corner of Wellington Crescent and Academy Road to permit the said land to be used in conjunction with adjoining land, being the land described in the preceding paragraph, for the construction and maintenance of the said apartment building in accordance with plans filed with the Board. This order was likewise to expire within one year unless construction was commenced or an extension granted within that period.

The said orders have been extended by the Board from year to year. The last extension granted in respect to Z46/56 expired on February 14th, 1962, while that granted in respect to Z113/57 expires on April 23rd, 1962. On behalf of our client we opposed both applications which were granted by the Board on the dates as indicated and appealed both orders to the Municipal and Public Utility Board which were dismissed.

Our understanding is that the Board extended its orders upon an *ex parte* application being made to it for renewal. Orders Nos. Z46/56 and Z113/57 have been renewed four and three times respectively, without any notice of such application for renewal being given to our client.

Subsection 3 of section 82 of the Metropolitan Winnipeg Act appears to provide that the Metro Council has all the rights and powers possessed by the Winnipeg Zoning Board.

It would be much appreciated if you would send us a letter advising what policy the Metro Council is adopting towards applications to renew

the validity of zoning orders of the Winnipeg Zoning Board such as Z46/56 and Z113/57. We submit that under the circumstances relating to these two orders, no further extension should be granted by the Council. If this policy were followed it would mean that unless satisfactory operations to construct the said apartment building have been completed before the last extensions granted by the Board expire then a new application to vary the R. 1 restrictions applying to the said land will have to be made to the Board of Adjustment. Such a policy would ensure that our client would have an opportunity to make representations against such an application if it felt it was in its interest to do so.

In the alternative, if the Council decides to entertain applications to renew such orders then we ask that notice be given to our client so that it will have the opportunity to be heard at the hearing of such an application.

Yours truly,
JOHNSTON, JESSIMAN, GARDNER & JOHNSTON,
Per: "W. P. Riley"

WPR:dm

On or about December 22, 1961, Dr. Ginsburg applied to the Metropolitan Corporation of Greater Winnipeg to further extend these Zoning Board orders to April 30, 1963. The application was first heard by the Committee on Planning on January 4, 1962, at which time Mr. D. J. Jessiman, Q.C., representing the Association, opposed the granting of the proposed extension of time on the Zoning Board orders. The Planning Committee recommended that the orders be extended until April 30, 1963. The application with the recommendation of the Director of Planning was dealt with by the Metropolitan Council on January 11, 1962. Mr. Jessiman again appeared to oppose the granting of the extension of time being asked for. The Metropolitan Council overruled the objection and extended the time to April 30, 1963.

Meanwhile, Dr. Ginsburg had requested the Metropolitan Corporation by letter dated December 27, 1961, to rezone his land from "R1" to "R4A". On January 29, 1962, the Director of Planning, after a meeting of the Technical Committee, composed of staff members of the Corporation, had considered the application, recommended to the Planning Committee that both the Ginsburg and Harris land be rezoned to an appropriate multiple-family dwelling category.

At its meeting of February 1, 1962, the Committee on Planning concurred in the recommendation of the Director and instructed the Director to proceed with the usual publication of a notice of public hearing. Subsequently, on

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March 1 and March 8, 1962, a notice appeared in the Winnipeg Free Press and the Winnipeg Tribune advising of the meeting to be held on March 12th.

At the Committee on Planning meeting on March 12th, no one appeared in opposition to the application for rezoning. The Committee recommended to Council that all six lots, *i.e.*, the Ginsburg and the Harris property, be rezoned to "R4A" classification, a multiple-family district. Council accepted the recommendation of the Planning Committee and subsequently By-law No. 177 was passed on April 13, 1962. In the meantime, Dr. Ginsburg had died.

On November 28, 1963, the appellants issued a statement of claim asking for a declaratory judgment to the effect that By-law No. 177 was invalid.

On December 18, 1963, the respondent issued a building permit to Welbridge Holdings Limited of Winnipeg who had taken over the Ginsburg interests to erect on the lands in question a 12-storey high-rise apartment block to contain 166 suites, the dimensions of the building being 166′ ×198′9″. The appellants amended their statement of claim on January 20, 1964, claiming a declaration that the said building permit was invalid and should be cancelled.

The Crescentwood Home Owners had no notice or knowledge of Dr. Ginsburg's application to rezone from "R1" to "R4A".

The appellants contended (1) that the Association should have had notice of the application to rezone as aforesaid and, not having been notified or given an opportunity to oppose the application to rezone, By-law No. 177 was null and void; (2) that By-law No. 177 was not passed in good faith and in the public interest, but was, in fact, passed for Dr. Ginsburg's benefit only and was void.

The appellants rely on para. 10 of the Metropolitan Council's resolution which it adopted as the procedure to be followed in connection with applications to amend zoning by-laws and town planning schemes. Para. 10 of that resolution reads:

> 10. Public notice shall be given by advertising in at least two newspapers having a general circulation in the Metropolitan Area each week for at least two weeks before the hearing. The Director of Planning shall notify the municipality in which the land is situated of the proposed amendment and the time and place when the Committee on Planning will consider the amendment. The Director of Planning shall give to the applicant notices to be posted by

> the applicant on the premises which are the subject of the proposed amendment. Such notices must be erected by the applicant not less than 14 days before the date set for the hearing and shall be in such form as the Director of Planning may from time to time prescribe . . . .

Notice of Dr. Ginsburg's application to rezone was published in two newspapers having a general circulation in the metropolitan area, the Winnipeg Tribune and the Winnipeg Free Press in the issues of March 1 and March 8, 1962. The size of the advertisements was criticized, but it must be accepted that the advertisements were in the type and format usually used for legal notices of various kinds. The notice in question dealt with four applications, two in the City of Winnipeg, one in the Rural Municipality of Assiniboia and one in the Rural Municipality of St. Vital. Insofar as it dealt with the area in question in this appeal, the notice read:

> THE METROPOLITAN CORPORATION
> OF GREATER WINNIPEG
> ZONING NOTICE
>
> TAKE NOTICE that the Planning Committee of the Metropolitan Corporation of Greater Winnipeg will hold a public hearing at 2:00 p.m., Monday, March 12, 1962, in the Council Chambers, 100 Main Street, for the purpose of considering a re-zoning of the following areas and permitting certain specific uses on particular properties:
>
> 1. City of Winnipeg
>
> * * *
>
> (*b*) Northwest corner Wellington Crescent and Academy Road. From "R1" (One-family) District to "R4A" (Multiple-family) District property situated on the Northwest corner of Wellington Crescent and Academy Road more particularly described as Lots 40 to 45 inclusive, Plan 308, D.G.S. 45 Parish of St. Boniface except that portion of Lot 45 shown on Plan 5262 reserved for a road diversion by the City of Winnipeg. It is proposed to erect a multi-storey luxury apartment block on this property.

However, the second requirement of para. 10 above as to notices to be posted by the applicant on the premises was not compiled with. No notices were posted on the premises. No reason for this omission or explanation therefor was given and it appears that the Metropolitan Council proceeded to deal with the application on the basis that the requirements of said para. 10 had been complied with.

The respondent took the position that in enacting By-law No. 177 it was engaged in a legislative function and not in a quasi-judicial act and that it had the right to proceed without notice to interested parties despite its own procedure resolution before mentioned.

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I agree with Freedman J. A. when, on this aspect of the matter, he says:

> But to say that the enactment of By-law No. 177 was simply a legislative act is to ignore the realities and the substance of the case. For this was not a by-law of wide or general application, passed by the Metropolitan Council because of a conviction that an entire area had undergone a change in character and hence was in need of re-classification for zoning purposes. Rather this was a specific decision made upon a specific application concerned with a specific parcel of land. Metro had before it the application of Dr. Ginsburg, since deceased, for permission to erect a high-rise apartment building on the site in question. Under then existing zoning regulations such a building would not be lawful. To grant the application would require a variation in the zoning restrictions. Many residents of that area, as Metro well knew, were opposed to such a variation, claiming that it would adversely affect their own rights as property holders in the district. In proceeding to enact By-law No. 177 Metro was essentially dealing with a dispute between Dr. Ginsburg, who wanted the zoning requirements to be altered for his benefit, and those other residents of the district who wanted the zoning restrictions to continue as they were. That Metro resolved the dispute by the device of an amending by-law did indeed give to its proceedings an appearance of a legislative character. But in truth the process in which it was engaged was quasi-judicial in nature; and I feel I must so treat it.
>
> Then counsel argues as well that the governing statute does not call for notice. Hence, he says, notice was not required. I am unable to accept this contention. A long line of authorities, both old and recent, establish that in judicial or quasi-judicial proceedings notice is required unless the statute expressly dispenses with it. The mere silence of the statute is not enough to do away with notice. In such cases, as has been said, the justice of the common law will supply the omission of the legislature. Some of the authorities dealing with this subject are referred to by Kirby J. in the recent case of *Camac Exploration Ltd. v. Oil and Gas Conservation Board of Alberta,* (1964), 47 W.W.R. 81.

The fact is that the Association did not see the notice which was published in the Winnipeg Tribune and the Winnipeg Free Press on March 1 and 8, 1962. An explanation as to why the Association did not see the advertisement published in the Winnipeg Tribune and the Winnipeg Free Press is that Mr. S. Greene who was secretary of the Association at the relevant time and who died prior to the trial was out of Winnipeg on holidays at that period in March 1962. Metro could not, of course, be expected to know this. However, it was stated in evidence by Mr. Johnston who was president of the Association at the time in question that if the placards contemplated by para. 10 of the procedure resolution had been erected on the premises for the 14-day period before the date set for the hearing he would certainly have seen them. He testified further

that if he or some other member of the Association had seen the placards the Association would have taken certain action to oppose the application on March 12th. It may be worth observing that on March 1, 1962, Metro notified Messrs. Keith & Westbury, solicitors for Dr. Ginsburg that the application to rezone the property would be considered by the Planning Committee of Metro at a public hearing to be held at 2:00 p.m., Monday, March 12, 1962, and the letter concluded with this paragraph: "You or an accredited representative should attend this meeting in accordance with section 80 of the Metropolitan Winnipeg Act." No similar or any notice was sent to the Association and as it was no one from the Association appeared to oppose the application when it came before Metro Council on March 12, 1962. It is manifest that had the Association received notice of the hearing or had it been aware that the application was to be dealt with on March 12, 1962, it would have had counsel present to object to the rezoning. The Association had on January 11, 1962, opposed extending the Zoning Board orders which Dr. Ginsburg had obtained in 1956 and which had been renewed from year to year until 1961. Although Metro knew of the Association's pronounced interest in any rezoning of the property in question, it did not communicate with it when Dr. Ginsburg applied on December 27, 1961 to rezone from "R1" to "R4A", nor did Metro, when all the interested parties were before it, make any reference to that new application when on January 4, 1962, and on January 11, 1962, council for the Association opposed further extending the 1956 orders permitting Dr. Ginsburg to erect a 64-suite apartment building. Moreover, Metro, on January 23, 1962, wrote Messrs. Johnston, Jessiman, Gardner & Johnston as follows:

Messrs. Johnston, Jessiman, Gardner & Johnston,
Barristers,
3rd Floor, Natural Gas Bldg.,
265 Notre Dame Avenue,
WINNIPEG 2, Manitoba.

Att: Mr. D. J. Jessiman.

Dear Sirs:

Please be advised that at its meeting held on January 11th, 1962, the Metropolitan Council granted an extension of Winnipeg Zoning Board Orders Z46/56 and Z113/57 in favour of Dr. B. J. Ginsburg, insofar as they affect No. 3 Academv Road and No. 587 Wellington Crescent, and more

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particularly described as Lot 43 and part of Lots 44 and 45, D.G.S. 43/45, St. Boniface, Plan 308 to April 30th, 1963, the said orders allowing the applicant to construct a 64 suite apartment block in the above noted site.

Yours truly,

"D. C. Lennox"
D. C. Lennox,
Secretary.

RGP/nm

This letter refers to the orders permitting a 64-suite apartment building without in any way referring to the new application to rezone and to erect a 12-storey 166-suite apartment building which was then actually under consideration. Metro was aware at this time that Dr. Ginsburg did not intend proceeding with the 8-storey 64-suite project.

What are the legal consequences of the manner in which Dr. Ginsburg's application to rezone was dealt with by the respondent? The matter being, as I have stated, a quasi-judicial one, Metro was in law required to act fairly and impartially: See *St. John v. Fraser*[1], at p. 452. In the language of Lord Loreburn in *Board of Education v. Rice*[2], at p. 182: ". . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything."

The obligation of a municipal body in carrying out its responsibilities is aptly and correctly stated by Masten J. A. in *Re Howard and City of Toronto*[3], at p. 576:

> In dealing with a proposed by-law which involves a conflict of interests between private individuals who are affected, the council, while exercising a discretion vested in it by statute, acts in a quasi-judicial capacity . . . and its preliminary investigations and all subsequent proceedings ought to be conducted in a judicial manner, with fairness to all parties concerned.

And, at p. 579:

> The council is empowered in cases like this to adjudicate between conflicting interests.
>
> In performing that duty councils are bound, like courts of justice, to see that every person interested is afforded full opportunity of presenting his views and contentions. The powers conferred on the council carry with them an obligation to see that every one affected gets British fair play, not only from the council itself when passing the by-law, but from its officers and committees in the preliminary steps leading up to the final result.

[1] [1935] S.C.R. 441. [2] [1911] A.C. 179.
[3] (1928), 61 O.L.R. 563.

Guy J.A., (Schultz J.A. concurring) after referring to these quotations, went on to say:

The evidence disclosed so much correspondence and discussion over such a lengthy period of time, that it is not open to the Metro Council to rely on the argument that this was a legislative by-law for the good of the community, in the public interest, in good faith, and initiated by Metro Council itself in an attempt to "better the lot of" the inhabitants of the Metropolitan area as a whole. In the light of all of the evidence, it is clear that the passage of this by-law was simply the end result of a plan conceived and carried forward by Dr. Ginsburg and his solicitors.

This in turn indicates that the by-law was passed in the interest of one person directly and would only indirectly benefit the Metropolitan area as a whole. This, of course, goes to the matter of public interest.

The fact that written notice, of a hearing of February 1, 1962 and March 12, 1962, was sent to Dr. Ginsburg's solicitors *and not to the Home Owners,* despite the fact that the opposing interests of the Home Owners were known to Metro, not only places Metro in an untenable position from the standpoint of equitable justice, but emphasizes the argument that the passage of this by-law was indeed to benefit one person and had little if any regard for the public interest as a whole.

The point to be decided is whether the failure to post the placards on the premises and proceeding to hold hearings on Dr. Ginsburg's application to rezone in the absence of the Association when Metro knew that the Association would oppose any such application and was actually opposing the extension applications at that very time, vitiated By-law No. 177 and rendered it a nullity.

I am of opinion that the by-law was void in the particular circumstances of this case. It was not merely the failure to post the placards but the manifest ignoring of the fact known to it that the Association would oppose the by-law and that the Association had been advised by the letter of January 23, 1962 (Ex.1) that the orders of 1956 had been extended to April 30, 1963 for the 8-storey 64-suite apartment block, leaving the Association with no reason to believe or expect that the concurrent application to rezone was at that very time being processed without its knowledge.

The obligation on a body with the power to decide not to act until it has afforded the other party affected a proper opportunity to be heard is aptly stated by Lord Reid in *Ridge v. Baldwin*[1], at p. 81 as follows:

Then there was considerable argument whether in the result the watch committee's decision is void or merely voidable. Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void and that was expressly decided in *Wood v. Wood,* (1874) L.R. 9 Exch. 190. I see no reason to doubt these

[1] [1963] 2 All E.R. 66.

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authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case.

Having arrived at the conclusion that the by-law was void, there remains for determination the question whether the appellant's action was barred by the provisions of s. 206 of *The Metropolitan Winnipeg Act,* 1960 (Man.), c. 40, which reads as follows:

> 206. (4) Any resident of the metropolitan area may apply to a judge of the Court of Queen's Bench in chambers to quash a by-law of the metropolitan council in the manner in which, and for the reasons for which, a by-law of a municipal council may be quashed under sections 390 to 391 and 393 to 395 of The Municipal Act and those sections and subsection (2) of section 290 of that Act apply, *mutatis mutandis,* to an application made under this subsection and in particular, substituting the expression "metropolitan corporation" for "municipal corporation" and "secretary" for "clerk". [am. 1962, c. 97, s. 29(a)]
>
> (5) No application under subsection (4) shall be entertained unless it is made within three months from the passing of the by-law. [enacted 1962, c. 97, s. 29(b)]

This section cannot be invoked as a bar to the action. The law in this regard is stated by Rogers in The Law of Canadian Municipal Corporations, vol. 2, p. 893, as follows:

> . . . if a by-law is within the power of the council and remains unimpeached within the time limited, it is validated by the effluxion of time.
>
> It must be stressed, however, that the curative effect of a failure to quash a by-law is limited to by-laws which are merely voidable and not void. The courts have made a distinction between these two classes of illegal by-laws. A voidable by-law is one that is defective for non-observance or want of compliance with a statutory formality or an irregularity in the proceedings relating to its passing and is therefore liable to be quashed whereas a void by-law is one that is beyond the competence to enact either because of complete lack of power to legislate upon the subject matter or because of a non-compliance with a prerequisite to its passing.

Even if the by-law was voidable only as argued by the respondent, I do not think that s. 206 of *The Metropolitan Winnipeg Act, supra,* would bar the action for a declaratory judgment declaring the by-law invalid. The section in question appears to provide a summary procedure to quash by-laws of the Metropolitan Council but it does not apply to an action such as this. There is nothing in the section depriving the appellants of their right to bring an action to have the by-law declared invalid: *Wanderers Investment Co. v. The City of Winnipeg*[1], at p. 205.

[1] [1917] 2 W.W.R. 197.

In view of my finding that the by-law was void for want of notice and for failure to give the appellants an opportunity to oppose the application to rezone, I do not find it necessary to deal with the second ground that By-law No. 177 was not passed in good faith and in the public interest.

I would accordingly allow the appeal and restore the judgment of Rhodes Smith J. with costs throughout.

JUDSON J. (*dissenting*):—In spite of the wide range of the argument on this appeal, the issue is very narrow. The trial judge quashed an amending zoning by-law for want of notice. This judgment was reversed on appeal, Guy and Schultz JJ. A., dissenting. The sole question is whether adequate notice was given. There is no statutory requirement that any notice be given. The requirements are to be found in the Metropolitan Council's own procedural resolution for amendments to zoning by-laws. Without setting out the section in full, it provides for advertising in at least two newspapers and by the posting of notices by the applicant for the amendment on the premises which are the subject-matter of the proposed amendment. The criticism of the newspaper advertising by counsel for the appellant is, in my opinion, without foundation. It was clear and prominent and should have come to the notice of the appellants. They left the task of perusing advertising to a paid official of their association. He was away at the time of the advertising and his office assistants failed to see it. It is not disputed that there was no posting of notices on the property and that there was no resolution of Council dispensing with this, as there could have been.

The majority in the Court of Appeal held that even if the notice was defective for lack of the posting, the most that could have been made of this omission was to find that the by-law was voidable only and not void, that it had to be attacked within a three months' limitation period, and that, no such attack having been made, the by-law must stand. The trial judge and the dissenting judges in the Court of Appeal held that the by-law was void and could be attacked in an action for a declaration of invalidity even after the three months' limitation period had elapsed.

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WISWELL *et al.* *v.* METROPOLITAN CORPORATION OF GREATER WINNIPEG

Judson J

Both the trial judge and the majority in the Court of Appeal found that the by-law was passed in good faith and in the public interest.

I do not think that it helps one towards a solution of this case to put a label on the form of activity in which the Metropolitan Council was engaged when it passed this amending by-law. Counsel for the municipality wants to call it legislative and from that he argues that they could act without notice. The majority of the judges prefer the term quasi-judicial. However one may characterize the function, it was one which involved private rights in addition to those of the applicant and I prefer to say that the municipality could not act without notice to those affected. But I think that they gave clear, reasonable and adequate notice and that failure to direct the posting of notices pursuant to their own internal regulations, which were subject to their own control, does not affect the validity of their by-law. This by-law was within the municipal function. The failure to post notices does not go to the question of jurisdiction nor is posting a condition precedent to the exercise of the statutory power. I think that this by-law was validly enacted and was not open to any successful attack either by way of motion to quash or by way of action.

I would dismiss the appeal with costs.

Appeal allowed with costs, JUDSON J. *dissenting.*

Solicitors for the plaintiffs, appellants: Johnston, Jessiman, Gardner, Twaddle & Johnston, Winnipeg.

Solicitor for the defendant, respondent: D. C. Lennox, Winnipeg.

ALICE PICARD (*Demanderesse*).....APPELANTE;

ET

LA CITÉ DE QUÉBEC (*Défenderesse*).....INTIMÉE.

1964 *Déc. 2 — 1965 Avril 9

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Droit municipal—Chute sur trottoir glacé—Responsabilité—Diligence de la cité—Fardeau de la preuve—Avis incomplet—Charte de la Cité de Québec, art. 535—Code civil, art. 1053.

La demanderesse fut blessée lorsqu'elle fit une chute sur un trottoir de la cité. Alléguant que cet accident était dû uniquement à la faute, négligence, imprudence et incurie de la cité, la demanderesse poursuivit cette dernière. Le verdict du jury fut à l'effet que la cité était en faute et ce verdict fut confirmé par le juge au procès. La Cour d'Appel rejeta l'action. La demanderesse en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le juge en chef Taschereau et les juges Fauteux et Abbott: Il existe des doutes sérieux sur la validité de l'avis donné à la cité et exigé par l'art. 535 de sa charte. Cet avis était vague et imprécis, et suggérait à la cité de s'adresser à un certain constable pour obtenir tous les détails. La connaissance d'un accident que certains employés de la corporation peuvent acquérir individuellement ne peut remplacer l'avis exigé.

Indépendamment de cette technicalité légale, la demanderesse qui avait le fardeau de la preuve n'a pas réussi à établir la faute de la cité sous l'art. 1053 du *Code civil*. La ville n'est pas l'assureur de ceux qui se servent de ses trottoirs. Il faut qu'il soit démontré qu'il y a eu négligence de la part de la cité ou de ses employés, et que c'est de cette négligence que le dommage a résulté. L'art. 535A de la charte dispense la municipalité de toute responsabilité à moins que le réclamant n'établisse que l'accident a été causé par la négligence ou faute de la municipalité, le tribunal devant tenir compte des conditions climatériques. Dans le cas présent, cette faute n'existait pas. La cité a fait preuve de la diligence voulue. La preuve démontre que les trottoirs à cet endroit avaient été sablés là où il y avait de la neige ou de la glace.

Les juges Cartright et Hall: The notice given to the City did not comply with the requirements of s. 535 of the City Charter.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant le jugement du juge Lizotte qui avait confirmé le verdict du jury. Appel rejeté.

*CORAM: Le Juge en Chef Taschereau et les Juges Cartwright, Fauteux, Abbott et Hall.

[1] [1946] B.R. 746.

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Lawrence Corriveau, C.R., pour la demanderesse, appelante.

Jacques de Billy, C.R., pour la défenderesse, intimée.

Le jugement du juge en chef Taschereau et des juges Fauteux et Abbott fut rendu par

LE JUGE EN CHEF:—La demanderesse, domiciliée à Québec, allègue que le ou vers le 4 mars 1961, à 4 heures p.m., elle fut victime d'un accident qui lui a causé des blessures graves qu'elle a évaluées à la somme de $36,927.32, et qu'elle réclame dans la présente action.

Elle circulait, à cette date, à pied, sur le trottoir qui borde le côté nord de la rue St-Jean, en front de l'hôtel Montcalm, et plus spécialement en son tronçon situé entre la rue d'Youville et la Côte des Glacis. Elle fit une chute sur un trottoir qu'elle prétend avoir été couvert de glace, et qui présentait de sérieux dangers pour les piétons à cet endroit. Cet accident, d'après elle, serait dû uniquement à la faute de la Cité défenderesse, à sa négligence, son imprudence et son incurie.

La défenderesse aurait retardé ou négligé de voir à ce que cette glace, qui se trouvait au moment précis de l'accident à cet endroit, fut enlevée, ou encore que le passage des piétons puisse se faire sans aucun danger.

La cité fait reposer sa défense sur plusieurs points. En premier lieu, elle soutient que l'avis que la demanderesse est obligée de donner à la Cité de Québec en vertu de la Charte (art. 535), est irrégulier, illégal et nul et non conforme aux exigences de la loi. Elle plaide également que la demanderesse n'est pas tombée sur le trottoir, mais bien dans la rue, mais, qu'à tout événement, qu'elle soit tombée dans la rue ou sur le trottoir, il n'y avait ni neige ni glace et l'asphalte était sèche ainsi qu'elle l'aurait admis elle-même après l'accident. Enfin, la défenderesse allègue que le trottoir et la rue avaient été parfaitement entretenus, étaient en très bon état, nullement dangereux, et que du sable avait été répandu, et que si la demanderesse est tombée et a subi l'accident dont elle se plaint, cela ne peut être dû qu'à sa propre faute, sa négligence, son imprudence. La défenderesse ajoute également que même si le trottoir

ou la rue avaient pu être glissants, ce qui est expressément nié, cela n'aurait pu dépendre que de circonstances absolument en dehors du contrôle de la défenderesse, qu'elle ne pouvait empêcher malgré toutes les précautions qu'elle pouvait prendre. Les dommages, enfin, seraient exagérés et la demanderesse n'aurait pas subi, étant donné la chute qu'elle a faite, des blessures aussi sérieuses qu'elle allègue.

J'entretiens des doutes sérieux sur la validité de l'avis donné à la Cité défenderesse, et exigé par l'art. 535 de la Charte. Cet avis est nécessaire pour que prenne naissance le droit d'action, et s'il est insuffisamment libellé, s'il ne fournit pas à la Ville les informations nécessaires sur la nature de l'accident, le détail des dommages soufferts, la cause de ces dommages, l'endroit où ils sont arrivés, la condition préalable et essentielle à l'existence du droit d'action est absente, et la réclamation ne peut réussir. *Baribeau v. Cité de Québec*[1].

L'avis donné à la Cité de Québec, et adressé au Chef du Contentieux, est vague et imprécis, et suggère à ville, pour obtenir tous les détails, de s'adresser au constable Chamberland qui est arrivé sur les lieux quelques instants après la chute de la victime.

La connaissance de l'accident que certains employés de la corporation ont pu acquérir individuellement ne peut remplacer l'avis exigé par la Charte. *Cité de Montréal v. Bradley*[2].

Dans une cause de *Jobin v. Thetford Mines*[3], M. le Juge Anglin disait:

> The purpose of the notice was to give the municipal corporation such knowledge of the claim in respect of which it was given as would enable it to make the necessary inquiries to ascertain, within a reasonable time after the claim arose, the basis of it, and the material facts and circumstances affecting the Corporation's liability.

Dans *Montreal Street Railway v. Patenaude*[4], la Cour du Banc du Roi a dit:

> Il est maintenant de jurisprudence que l'action ne peut être portée que si l'avis a été donné au préalable, tel que prescrit, et que sans cet avis le droit de réclamer en justice n'existe pas.

[1] [1934] R.C.S. 622.
[2] [1927] R.C.S. 279.
[3] [1925] R.C.S. 686 à 687.
[4] (1907), 16 B.R. 541 à 543.

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Enfin, dans la cause de *La Cité de Québec v. Baribeau, supra.*, M. le Juge Rinfret, parlant pour la Cour, s'exprimait de la façon suivante:

> Cette exigence de la loi, par exemple, ne peut être mise de côté sous prétexte d'absence de préjudice. Le texte de l'article 535 ne permet pas d'introduire ce correctif (*Carmichael v. City of Edmonton* (1933) R.C.S. 650). En particulier, la connaissance de l'accident que certains employés ou certains officiers de la corporation ont pu acquérir individuellement ne peut remplacer l'avis exigé par la charte (*Cité de Montréal v. Bradley* (1927) R.C.S. 279, à 283). L'absence de préjudice ou la connaissance des faits par les employés ou les officiers de la cité ne peut être d'un certain poids que dans la question de savoir si un avis qui a été reçu dans les délais contient les détails ou les indications suffisantes.

Devant cette jurisprudence, il est difficile d'entretenir de sérieuses hésitations, mais je ne désire pas faire reposer mon jugement sur cette technicalité légale. Évidemment, cette action ne peut réussir que si toutes les conditions de l'article 1053 trouvent leur application. La demanderesse a fardeau de la preuve et doit établir la faute de l'intimée, et il est bon de ne pas oublier qu'il n'existe pas de présomption légale contre la Cité de Québec.

Comme j'ai eu l'occasion de la dire déjà, et trop de piétons croient le contraire, la Ville n'est pas l'assureur de ceux qui se servent de ses trottoirs. Le fait de faire une chute sur un trottoir ne donne pas nécessairement ouverture à une réclamation pour les dommages subis. Il faut nécessairement établir la faute de la cité. *La Commission des Accidents du Travail de Québec v. La Cité de Québec*[1].

Il faut qu'il soit démontré par la balance des probabilités qu'il y a eu négligence de la part de la cité ou de ses employés, et que c'est de cette négligence que le dommage a résulté. Ce que l'on exige des municipalités ce n'est pas un standard de perfection. *Paquin v. La Cité de Verdun*[2]. On ne peut demander aux villes de prévoir l'incertitude des éléments, et la vigilance simultanée de tous les moments dans tous les endroits de leur territoire serait leur imposer une obligation déraisonnable. Comme il a été dit dans la cause de *Paquin v. La Cité de Verdun, supra,* il peut arriver, et il arrive malheureusement des accidents, où s'exerce

[1] [1950] B.R. 393.

[2] [1962] R.C.S. 100.

cependant très bien la surveillance municipale, et qui résultent d'aucune négligence et pour lesquels il n'y a pas de compensation sanctionnée par la loi civile. *Garberi v. Cité de Montréal*[1].

En 1937, le caractère de la responsabilité en cette matière a été précisé par la disposition suivante:

> 535*a*) Nonobstant toute loi générale ou spéciale, la cité ne peut être tenue responsable des dommages résultant d'un accident dont une personne est victime sur les trottoirs, rues ou chemins, en raison de la neige ou de la glace, à moins que le réclamant n'établisse que ledit accident a été causé par négligence ou faute de ladite corporation, le tribunal devant *tenir compte des conditions climatériques.* (1 Geo. VI, c. 102, art. 76).

Cette disposition légale est empreinte du bon sens le plus élémentaire, et reflète bien l'idée du législateur qui ne veut pas imposer une charge trop onéreuse aux municipalités. Comme il a été dit déjà, la Cité n'est pas tenue d'assurer que ses rues et trottoirs ne seraient jamais glissants; elle est seulement obligée de prendre les précautions que prendrait un homme diligent pour atteindre ce but. La seule responsabilité de la municipalité existe lorsque l'état du trottoir, s'il a été la cause d'un dommage, a été le résultat d'une faute que la victime doit établir.

Dans le cas qui nous occupe, je ne vois pas l'existence de cette faute génératrice de la responsabilité de la Cité défenderesse. Au moment de l'accident, une grande surface des trottoirs était libre de neige et de glace. Le temps était beau, c'était une journée ensoleillée. Au cours de la matinée, les trottoirs de la rue St-Jean ont été sablés partout où il y avait de la neige ou de la glace. La température de cette journée du 4 mars, à l'Ancienne Lorette, tel que prouvé par le Service de météorologie du ministère des Transports du Canada, était la suivante: à 8 heures du matin, 22°; à 9 heures, 24°; à 10 heures, 25°; à 11 heures, 27°; à midi, 29°; à 1 heure, 31°; à 2 heures, 33°; à 3 heures, 33°; à 4 heures, 31° et à 5 heures, 29°.

Il a cependant été établi qu'entre l'Ancienne Lorette et la Cité de Québec il y a une différence d'environ 5 degrés

[1] [1961] R.C.S. 408.

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dans la température, de sorte qu'à 4 heures, c'est-à-dire au moment où l'accident est arrivé la température au Carré d'Youville était de 36°.

Il peut arriver évidemment qu'entre le temps où le sable a été déposé le matin et le temps où l'accident est arrivé, une légère couche de glace se soit formée. Il est également possible que la neige ou la glace fondante ait entraîné le sable et y ait laissé une surface glissante. Mais cela ne constitue pas une négligence qui entraîne la responsabilité de la ville. Celle-ci n'est pas tenue, quand elle doit surveiller 100 milles de trottoirs, étant donné les conditions climatériques du 4 mars, de faire plus que ce qu'elle a fait. Je crois que la Cité a fait preuve de la diligence voulue. Comme le dit M. le Juge Badeaux de la Cour d'Appel: «L'on ne peut exiger de l'appelante qu'elle protège chaque pouce et chaque pied de ses trottoirs à chaque instant, surtout dans une ville de l'importance de la Cité de Québec.»

Je n'oublie pas qu'il s'agit d'un procès devant un juge et des jurés, et qu'il est très difficile pour cette Cour d'intervenir sur les questions de faits. J'admets donc, malgré que la preuve soit contradictoire, qu'il y avait de la glace à l'endroit où est tombée la victime (418 C.P.C.) Mais, où ce procès est entaché d'erreur, c'est, lorsque répondant aux questions suivantes:

> Q. Si la demanderesse a subi des dommages, est-prouvé que l'accident a été causé par négligence ou faute de la demanderesse, Cité de Québec?
>
> R. Douze—oui.
>
> Q. Si oui, dire en quoi consiste cette négligence ou faute.
>
> R. Une surface glacée très glissante; application de sable non suffisante pour cette partie très achalandée de la ville.
>
> Q. Combien?
>
> R. Douze.

les réponses ci-dessus ont été données.

Ces réponses données par le jury élèvent, comme on peut le voir, le standard de précaution à un degré supérieur à celui requis par la loi. On voudrait que les rues soient sablées à chaque fois que se présente un changement de température. Ceci est une erreur et n'est pas la loi de la province. La Cour d'Appel[1] était donc justifiée de dire, comme elle l'a dit,

[1] [1946] B.R. 746.

que le juge présidant au procès aurait dû accorder la motion orale de l'appelante pour retirer la cause du jury, qu'il a erré en ne l'accordant pas, et en refusant de rejeter l'action de l'intimée et en confirmant le verdict du jury.

Cette conclusion à laquelle j'arrive me dispense d'examiner les autres aspects de cette cause. Je rejetterais donc l'appel avec dépens de toutes les Cours.

Le jugement des Juges Cartwright et Hall fut rendu par

HALL J.:—The facts are full set out in the judgment of the Chief Justice. I agree that the appeal must be dismissed but solely on the ground that the notice which the appellant gave to the respondent on March 10, 1961, in purported compliance with art. 535 of the Charter of the City of Quebec did not comply with the requirements of art. 535. In this regard I agree with Taschereau J. in the Court of Queen's Bench and I do not find it necessary to add anything to what he said in his reasons for judgment on this point.

The appeal should accordingly be dismissed with costs.

Appel rejeté avec dépens.

Procureur de la demanderesse, appelante: L. Corriveau, Québec.

Procureurs de la défenderesse, intimée: Gagnon, de Billy, Cantin & Dionne, Québec.

1965
*Mars 10
Mai 17

IMPERIAL OIL LIMITED (*Défenderesse*) ..... APPELANTE;

ET

JEAN-LOUIS NADEAU *et al.* (*Demandeurs*) ..... INTIMÉS.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Négligence—Explosion—Gasoline livrée à un garage—Surplus de gasoline déversé dans la neige et pénétrant dans le garage—Défaut de fermer les valves—Responsabilité du livreur—Code civil, art. 1053, 1054.

Un camion-citerne, propriété de la défenderesse et conduit par son employé L, a livré de la gasoline au garage du demandeur. Cette opération requérait le remplissage de deux réservoirs. Le remplissage du réservoir n° 1 fut fait avec un boyau auquel était attaché un joint automatique, connu sous le nom de "fast filling", qui ne permettait pas à un surplus de gasoline de pénétrer dans le réservoir. Le boyau destiné à remplir le réservoir n° 2 n'était pas équipé de ce joint automatique et pouvait permettre à un surplus de gasoline de pénétrer dans le réservoir à moins que ne se présente l'intervention d'une personne pour discontinuer son opération. La gasoline destinée au réservoir n° 2 a refoulé et s'est répandue dans la neige et a pénétré dans la cave du garage. On évalua la quantité de gasoline ainsi entrée dans la cave entre 50 et 75 gallons. Cette gasoline occasionna la mise en opération d'une pompe automatique électrique; une étincelle s'est produite qui provoqua une explosion. La Cour supérieure et la Cour d'Appel ont toutes deux retenu la responsabilité de la défenderesse. Cette dernière en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Les employés des compagnies d'huile qui livrent de l'essence à leurs clients doivent être vigilants, attentifs et exercer une prudence qui élimine autant que possible tout risque d'accident. L'explosion dans le cas présent a résulté de la faute unique du préposé de la défenderesse et les causes de cette explosion furent le renversement de l'essence et le défaut de fermer la soupage des réservoirs. Il n'y a rien dans la preuve qui pourrait justifier l'argument de la défenderesse que le lien de causabilité a été brisé par l'inaction du demandeur.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Cousineau. Appel rejeté.

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*CORAM: Le Juge en Chef Taschereau et les Juges Fauteux, Abbott, Ritchie et Hall.

[1] [1964] B.R. 834.

L. P. de Grandpré, C.R., pour la défenderesse, appelante.

Jacques Leduc, C.R., et *Paul-Émile Ally, C.R.*, pour les demandeurs, intimés.

Le jugement de la Cour fut rendu par

LE JUGE EN CHEF:—Il s'agit d'appels de jugements rendus par M. le Juge Cousineau de la Cour supérieure de Québec, District de Québec. La Cour d'Appel[1] a confirmé ces jugements en vertu desquels Imperial Oil Limited a été condamnée à payer les montants suivants:

Jean-Louis Nadeau	$45,000
Federated Mutual Implement & Hardware Insurance Co.	60,000
René Nadeau	23,000
Léo Boisclair	9,000

Tous ces montants sont suffisants pour donner juridiction à la Cour suprême du Canada d'entendre le présent appel, mais, en ce qui concerne Léo Boisclair, comme il ne s'agit que d'un montant de $9,000, une permission spéciale d'appeler a été accordée à Imperial Oil Limited.

Les faits sont les suivants: Le 6 janvier 1959, un camion-citerne, propriété de l'appelante, et conduit par son employé, Marcel Lefebvre, a livré de la gazoline au garage Nadeau, à Pierreville, dans la province de Québec. A son arrivée au garage, Lefebvre a mesuré le nombre de gallons de gazoline qui étaient contenus dans les réservoirs du garage, et il trouva que dans les réservoirs n°s 1 et 2 il pouvait livrer 2,500 gallons de gazoline nouvelle.

Le remplissage n° 1 du garage fut fait avec un boyau auquel était attaché un joint automatique, connu sous le nom de "fast filling", qui ne permettait pas à un surplus de gazoline de pénétrer dans le réservoir. Le boyau destiné à remplir le réservoir n° 2 du garage était équipé de façon différente. Il n'y avait pas de "fast filling joint" et pouvait permettre à un surplus de gazoline de pénétrer dans le réservoir, dans certains cas, à moins que ne se présente l'intervention d'une personne pour discontinuer son opération.

[1] [1964] B.R. 834.

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A un certain moment, pendant que le réservoir n° 1 recevait la gazoline venant du camion, la gazoline destinée au réservoir n° 2 a refoulé et s'est répandue dans la neige qui se trouvait dans les environs, à côté du garage, et a évidemment pénétré dans la cave du garage où une explosion s'est produite. On évalue la quantité de gazoline ainsi entrée dans la cave entre 50 et 75 gallons.

Cette quantité de gazoline qui s'est ainsi répandue occasionna la mise en opération d'une pompe automatique située dans un puits pratiqué dans le plancher. Cette pompe servait à déverser l'eau qui pouvait, à l'occasion, pénétrer dans la cave, et, évidemment, dans ce puits s'est infiltrée la gazoline qui s'est échappée. Lorsque la pompe électrique, à cause de l'infiltration de cette gazoline et l'élèvement du niveau liquide dans le puits, s'est mise à fonctionner automatiquement, une étincelle s'est produite et c'est ce qui provoqua apparemment une explosion et causa les dommages mentionnés ci-dessus et qui ne sont pas contestés.

L'honorable Juge Cousineau, qui a entendu la cause en première instance, est arrivé à la conclusion que le préposé de l'appelante, Lefebvre, s'est trompé quand il a mesuré quelle quantité additionnelle d'essence le réservoir pourrait contenir. Comme il l'a dit lui-même dans son témoignage:

> Q. Le réservoir n° 2, dans votre opinion, il s'est rempli?
> R. Oui, pour que ça renverse il faut qu'il soit rempli. Il renversait parce qu'il était trop plein.

Ceci est la première faute que le juge de première instance a retenue pour établir la responsabilité de l'appelante, et, en second lieu, le juge ajoute que Lefebvre n'était pas près des valves de son camion au moment où la gazoline a commencé à se déverser.

Le Cour d'Appel n'a pas trouvé que Lefebvre s'était trompé en prenant les mesures, mais a été d'avis, avec le juge au procès, que Lefebvre aurait dû être en position de fermer immédiatement les valves quand le surplus s'est déversé dans la neige, et a pénétré dans le sous-sol du garage.

Je n'ai pas d'hésitation à retenir l'imprudence de Lefebvre. Et, parce qu'il était dans l'exercice de ses fonctions, sa négligence entraîne la responsabilité de l'appelante.

Il est évident que les employés des compagnies d'huile, qui livrent ainsi de l'essence à leurs clients, doivent être vigilants, attentifs et exercer une prudence qui élimine autant que possible tout risque d'accident comme celui qui s'est produit dans le cas qui nous occupe. La Cour a été saisie à maintes reprises de causes de cette nature et la règle est toujours demeurée invariable. Ainsi, dans *Larocque v. Côté*[1], cette Cour a confirmé la décision de la Cour du banc, de la Reine[2], où l'honorable Juge Owen s'exprimait de la façon suivante:

> In my opinion the ordinary rule of prudence required that Larocque (le livreur) remain at the connection to watch that the delivery proceeded normally and in the event of any blockage or overflow to be in a position to close the valve promptly. Larocque's failure to stay at the valve during delivery constituted negligence.

Ainsi, également, dans une cause assez récente, *The Great Eastern Oil and Import Co., Ltd. v. Frederick Best Motor Assessories Co., Ltd.*[3], (1962) R.C.S. 118, cette Cour a décidé que le livreur d'huile ne demeurant pas auprès du tuyau des réservoirs et de la soupape du boyau conduisant au camion-citerne constituait une négligence. Les faits de cette cause sont très identiques à ceux du présent litige.

Je ne vois aucune raison de décider autrement. Je pense que l'explosion a résulté de la faute unique du préposé de la défenderesse-appelante et que les causes de cette explosion, qui a causé les dommages réclamés, sont le renversement de l'essence et le défaut de fermer la soupape des réservoirs.

Il s'agit d'une question de faits. Le juge au procès et la Cour d'Appel unanimement ont trouvé qu'il y a eu négligence de la part de Lefebvre et je ne vois pas comment cette Cour peut intervenir. Je ne trouve rien dans la preuve qui pourrait justifier l'argument de l'appelante que le lien de causalité a été brisé par l'inaction du demandeur Nadeau.

[1] [1962] R.C.S. 632, 36 D.L.R. (2d) 228.
[2] [1961] B.R. 583.
[3] [1962] R.C.S. 118, 46 M.P.R. 229, 31 D.L.R. (2d) 153.

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IMPERIAL OIL LTD. v. NADEAU *et al.*

Taschereau J.

Je suis d'opinion que les appels doivent être rejetés avec dépens.

Appels rejetés avec dépens.

Procureurs de la défenderesse, appelante: Tansey, de Grandpré, de Grandpré, Bergeron & Monet, Montréal.

Procureurs des demandeurs, intimés, J. L. Nadeau et L. Boisclair: P. E. Ally, Sorel.

Procureurs des demandeurs, intimés, Federated Mutual Implement et Hardware Insurance Co.: Birtz, Leduc & Durand, Montréal.

Procureurs du demandeur, intimé, R. Nadeau: Nantel, Mercure, Surprenant & Poliquin, Montréal.

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*Feb. 10, 11, 12 Apr. 9

JAMES KIRKPATRICK, DOUGLAS FRASER and VICTOR DAWSON (*defendants*) ....APPELLANTS;

AND

JOSEPH LAMENT, Jr., by his next friend Joseph Lament, Sr. (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Action for injuries received during course of arrest—Whether evidence supported jury's finding that excessive force used—Corroboration of evidence required by s. 15 of The Evidence Act, R.S.O. 1960, c.125.

The plaintiff, a mentally incompetent person so found, brought an action by his next friend for damages which he received when the defendants K and F, constables on the St. Catharines police force, acting on instructions of the defendant D, the sergeant thereof, arrested the plaintiff and brought him in to the police station at St. Catharines. The action was dismissed at trial. On appeal, the Court of Appeal allowed the appeal and directed a new trial. In answers to questions submitted by the trial judge the jury held that the defendant K used excessive force but that the excessive force did not cause the plaintiff's injuries. In

*PRESENT: Cartwright, Fauteux, Martland, Judson and Spence JJ.

the judgment of the Court of Appeal the second answer was regarded as perverse. The Court of Appeal also held that the trial was defective in that the trial judge did not explain to the jury what "corroborated" meant, or what was "material evidence", or the application of s.15 of the Ontario *Evidence Act*, R.S.O. 1960, c.125, to the evidence of the defendants.

Held (Cartwright J. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Fauteux, Martland, Judson and Spence JJ.: By implication the jury in its answers found that there was no excessive force until K had brought the plaintiff within the second set of doors of the police station. Their answer that there was excessive force from that latter point to the sergeant's desk was one unsupported by the evidence.

As to the issue with respect to corroboration, it was true that the trial judge did not define "corroboration" or, at any rate, did not give dictionary definitions for that word. He did, however, read to the jury s.15 of *The Evidence Act* and in his remarks there were references which dealt with the test of Hodgins J.A. in *McGregor v. Curry*, (1914), 31 O.L.R. 261, that the evidence tends to prove that the evidence relied on is true or probably true in some material particular. In addition, the trial judge gave to the jury specific examples of evidence which he deemed capable of corroboration if the jury believed such items of evidence and gave to them the probative effect which he suggested they were capable of having.

Priestman v. Colangelo et al., [1959] S.C.R. 615, referred to.

Per Cartwright J., *dissenting*: From the medical evidence read with the answers of the jury it appeared that the plaintiff's injury resulted from some or all of a series of acts of the defendant K some of which were tortious and some justified. In these circumstances, the trial judge should have told the jury that it was for the defendant to satisfy them that, on the balance of probabilities, the injury to the plaintiff was not caused or contributed to by those of the defendant's actions which were wrongful. The failure to give such direction was a sufficient ground for upholding the order of the Court of Appeal that there should be a new trial at all events as to the defendant K.

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from a judgment of Fraser J. Appeal allowed and judgment at trial restored, Cartwright J. dissenting.

J. R. Barr, Q.C., and *H. J. Daniel*, for the defendants, appellants.

J. J. Robinette, Q.C., and *A. Maloney, Q.C.*, for the plaintiff, respondent.

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CARTWRIGHT J. (*dissenting*):—The facts out of which this action arises and the course of the proceedings in the Courts below are set out in the reasons of my brother Spence.

I have reached the conclusion that we ought not to interfere with the decision of the Court of Appeal in so far as it directs a new trial of the action against Kirkpatrick.

I am unable to agree that we should set aside the answer made by the jury to question 4. It is only in unusual circumstances that a second appellate court will set aside a finding of fact made by a jury and adopted in the unanimous judgment of the first appellate court. It is not without significance that the suggestion that the finding should be set aside appears to have been made for the first time in the course of the opening argument of counsel for the appellants in this Court.

There is no difficulty in stating the rule by which the Court should be guided. It is succinctly stated by Duff C.J. giving the unanimous judgment of the Court in *McCannell v. McLean*[1], at p. 343:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. That is the principle on which this Court has acted for at least thirty years to my personal knowledge and it has been stated with varying terminology in judgments reported and unreported.

Later in the judgment, at p. 345, Duff C.J. points out that the application of the rule to the facts of a particular case will often involve "a question of not a little nicety" and concludes the passage with the observation: "it belongs, moreover, to a class of questions in the determination of which judges will naturally differ, and, as everyone knows, such differences of opinion do frequently appear."

Nothing would be gained by my reviewing in detail the evidence bearing on the matters raised in question 4. It appears to me that it would have justified the jury in find-

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

ing that the transition from reasonably necessary force to force that was unreasonable occurred at a point in time somewhat earlier than that at which their answer fixed it. Their finding that it was reasonable up to a certain point is no more sacrosanct than their finding that it was unreasonable thereafter.

If the answer to question 4 stands, as in my opinion it should, it is obvious that the respondent would be entitled to, at least, nominal damages against Kirkpatrick and to this extent the judgment given at the trial would be erroneous. However, this alone would not justify the granting of a new trial; the proper course would be for this Court to fix the amount of damages and consider what order as to costs would be appropriate.

A more serious question arises in regard to the answer given by the jury to question 5(*a*), that the excessive force did not cause the blood clot which accounts for the plantiff's present condition.

The plaintiff's action was framed as one for damages for assault. The defence pleaded was a denial of the assault and a plea that the defendant Kirkpatrick arrested the plaintiff, that he had reasonable grounds to believe that the plaintiff was guilty of an offence, that the plaintiff endeavoured to escape and that Kirkpatrick used no more force than was necessary to effect the arrest and prevent the plaintiff's escape.

It was established in evidence that during the period of a few minutes between the time when Kirkpatrick placed the plaintiff under arrest and the time when the latter collapsed in the police station Kirkpatrick, on several occasions, applied such force to the person of the plaintiff as would constitute an assault unless it was justified.

The medical evidence taken as a whole leads to the irresistible inference that it was what occurred in that period of a few minutes which directly caused the plaintiff's injury.

The result of this medical evidence read with the answers of the jury is that the plaintiff's injury was caused by a

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closely connected series of acts of force exerted by Kirkpatrick some of which were justified and some of which were not. It may well be that the learned trial judge was not called upon to anticipate this result but when it appeared from the answers of the jury it was, in my opinion, essential that he should have directed the jury to re-consider their answer to question 5(*a*) and given them a further direction as to the incidence of the burden of proof.

Up to this point the learned trial judge had instructed the jury that the onus was on the plaintiff to establish not only that one or more of the defendants assaulted him but also that the assault was the cause of his injury. No doubt this was a correct direction as to where the burden lay on the state of the pleadings. The question is, however, what was the necessary direction when it appeared that the plaintiff's injury resulted from some or all of a series of acts of the defendant Kirkpatrick some of which were tortious and some justified. After a consideration of the arguments of counsel and of the authorities on which they relied I have reached the conclusion that the learned trial judge should have told the jury that in these circumstances it was for the defendant to satisfy them that, on the balance of probabilities, the injury to the plaintiff was not caused or contributed to by those of the defendant's actions which were wrongful.

I do not think this is an undue extension of the principle on which *Cook v. Lewis*[1] was decided. To adapt the words of Rand J., at p. 832, to the facts of this case, Kirkpatrick by commingling wrongful acts with justifiable conduct has, in effect, destroyed the victim's power of proof.

It is not for us to weigh the evidence, but, in my opinion, the medical evidence taken as a whole would have warranted the jury in finding that the violence inflicted on the plaintiff which was nearest in point of time to his collapse, and which they have found to be wrongful, was a contributing cause of that collapse. On this vital issue the plaintiff was entitled to the verdict of a properly instructed jury.

[1] [1951] S.C.R. 830.

The failure to give the direction which I have indicated should have been given is, in my opinion, a sufficient ground for upholding the order of the Court of Appeal that there should be a new trial at all events as to the defendant Kirkpatrick and I would dismiss his appeal.

If my view had been shared by the other members of the Court it would have been necessary to consider whether the appeal should be allowed as to Dawson and Fraser and what order should be made as to costs, but as the decision of the majority is that the appeal of all three defendants succeeds I do not pursue these questions.

The judgment of Fauteux, Martland, Judson and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on June 6, 1963, which allowed an appeal from the judgment of Fraser J. at trial, pronounced on February 8, 1962, upon the jury's answers to questions as set out hereunder.

The learned trial judge dismissed the action and the Court of Appeal directed a new trial.

The action was one for damages for injuries received by the plaintiff on July 29, 1960, when the defendants Kirkpatrick and Fraser, constables on the St. Catharines police force, acting on instructions of the defendant Dawson, the sergeant thereof, arrested the plaintiff and brought him in to the police station at St. Catharines.

The learned judge, in his charge to the jury, submitted to the jury certain questions, those questions and the jury's answers thereto are as follows:

1. At the time of the plaintiff's arrest:
   (a) Was there a smell of alcohol on his breath? Answer: "Yes".
   (b) Did he admit he had been drinking? Answer: "Yes".
   (c) Was his speech thick? Answer: "Yes".
   (d) Did he have difficulty in getting his driver's licence from his wallet? Answer: "Yes".
   (e) Were his eyes glassy or bloodshot? Answer: "Yes".
   (f) Was he unsteady on his feet? Answer: "Yes".
2. At the time of the arrest were the facts such as to create a reasonable suspicion in the mind of a reasonable man that Lament had the care and control of his automobile while his ability was impaired? Answer: "Yes".

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3. Did the defendants, or any of them, use more force than was necessary to effect an arrest and keep the plaintiff in custody? Answer: "Yes".

4. If your answer to question 3 is "yes", of what did such excessive force consist? Give full particulars of when, where and by whom such force was used. Answer: "The excessive force consisted of the continued headlock, from when they (Kirkpatrick & Lament) entered the second set of doors to the counter, after they entered the main lobby. (By whom)—By Constable Kirkpatrick."

5. (a) If your answer to question 3 is "yes", did the excessive force cause the blood clot which accounts for the plaintiff's present condition? Answer: "No".

   (b) If your answer to question 5(a) is "yes", by what defendant or defendants was such force used? Not answered.

   (c) If your answer to question 3 is "yes" and your answer to question 5(a) is "yes", which act or acts of excessive force caused the blood clot in the plaintiff's brain? Not answered.

6. Regardless of your answer to any of the preceding questions, at what amount do you assess the plaintiff's damages resulting from the blood clot in the plaintiff's brain which formed on July 29th, 1960?

"Out-of-pocket	$ 7,529.79
Derived from Ford employment until now	4,003.50
Future income at 2,000 per year for 28 years expectancy	56,000.00
25 years of incapacity and care	32,500.00."

7. If your answer to question 3 is "yes", at what amount do you assess the plaintiff's damages, excluding all damages resulting from the blood clot which formed in the plaintiff's brain. And the answer to that is—appears to be nil, in brackets.

Upon the presentation of the appeal in this Court, many issues were argued very ably by counsel for the appellants and the respondents. I am of the opinion, however, that the appeal may be disposed of by considering only a very few issues.

In the judgment of the Court of Appeal, the jury's answer to question 5(*a*), *supra*, was regarded as perverse, as it will be seen that that is an answer which held that the excessive force found by the jury in their answer to question 4, did not cause the plaintiff's injuries. Upon the argument here, counsel for the appellants (defendants) took the position that there was no evidence upon which the jury could come to their answer to question 4. After careful consideration, I have come to the conclusion that I agree with that contention. There was evidence and, as I shall show hereafter,

evidence sufficiently corroborated to support the jury's answers to questions 1 and 2. The jury's answer to question 4, *supra,* implies a holding that no excessive force was used until the defendant Kirkpatrick and the plaintiff entered the second set of doors in the police station. In the evidence it is recounted that the plaintiff, when apparently impaired and in the control of an automobile vehicle, first resisted arrest on Church Street in St. Catharines, and then at the corner of Church and James Streets in that city attempted to leap from the moving police car, requiring the defendant Kirkpatrick to grasp him firmly by the right arm and then pull him pack into the automobile by the use of a headlock. Constable Fraser arrived to assist only by lifting the plaintiff's feet back into the car. The evidence further shows that the plaintiff, upon Constable Kirkpatrick stopping at the police station and leaving the car by the left door to walk around the back of the car, opened the right hand door and attempted to escape. He was again grasped by Constable Kirkpatrick who again put a headlock on the plaintiff and forced him to enter, still held by a headlock, through the front door of the police station, along a short corridor and through the second door into the main front office of the police station. During the whole of this, the plaintiff was still held in a headlock.

From the first or outer doorway to the police station, a 4-foot corridor led 5 feet 6 inches to a second set of doors then a space of 21 feet intervened between the second set of doors and the sergeant's desk surrounded by a counter which stood in the lobby of the police station.

On this warm, summer evening both sets of doors stood open. There is no evidence that Constable Kirkpatrick knew how far behind him was Constable Fraser who followed in the plaintiff's car. The plaintiff had twice tried to escape and there is not the slightest reason why Kirkpatrick should not have thought that if he should have loosened his grip on the plaintiff as he crossed the room the plaintiff would not again try to escape. If the force applied outside the police station was not excessive, and the jury have

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found it was not in their answers, then the application of the same force up to the moment Kirkpatrick let the plaintiff go and he stood up was no more excessive.

There is, therefore, no evidence of any change in the circumstances which would make the application of exactly the same degree of force during the few seconds it took to traverse the space between the second set of doors and the sergeant's desk excessive. I am, therefore, of the opinion that the jury having found that there was no excessive force until the passing through that second set of doors by the plaintiff and the defendant Kirkpatrick their answer that there was excessive force from that latter point to the sergeant's desk is one unsupported by the evidence. It must be remembered that in deciding whether, in any particular case, a police officer had used more force than it is reasonably necessary to prevent an escape by flight within the meaning of s. 25 of the *Criminal Code*, general statements as to the duty to take care to avoid injuries to others derived from negligence cases must be accepted with reservation and only upon giving full weight to the fact that the act complained of is one done under statutory powers and in pursuance of a statutory duty: Locke J. in *Priestman v. Colangelo et al.*[1], at p. 622. Cartwright and Martland JJ. dissented in view of the fact that the persons injured were not the persons whom the police sought to apprehend, a circumstance not applicable to the present case.

McLennan J.A., in giving reasons in the Court of Appeal, held that the trial was defective in that the learned trial judge did not explain to the jury what "corroborated" meant, or what was "material evidence", or the application of the section to the evidence of the defendants. The corroboration referred to is required by s. 15 of the Ontario *Evidence Act*, R.S.O. 1960, c. 125, which reads as follows:

> In an action by or against a mentally incompetent person so found, or a patient in a mental hospital, or a person who from unsoundness of mind is incapable of giving evidence, an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence, unless such evidence is corroborated by some other material evidence.

[1] [1959] S.C.R. 615.

The learned trial judge, at the commencement of the trial, had found as a fact that the plaintiff was a mentally incompetent person. Requirement of corroboration in a court action was considered by this Court in *Smallman v. Moore*[1]. There, the Court considered the corroboration required by what are now ss. 13 and 14 of the Ontario *Evidence Act, i.e.,* the section applicable to actions by or against the heirs, next-of-kin, executors, administrators or assigns, of a deceased person. In the latter case, the relevant provision reads:

> . . . an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

It will, therefore, be seen that the two sections, 14 and 15, are in *para materia.*

Kellock J. gave a judgment dissenting for other reasons but on the issue of corroboration his judgment was adopted by the majority. In the course of that judgment, he quoted from various authorities including *McGregor v. Curry*[2], where Hodgins J.A. said:

> As the statute has been construed in the cases upon the subject, corroborative evidence is not required as to every fact necessary to enable the opposite party to recover. It is enough if sufficient relevant facts and circumstances appear, which tend to prove that the evidence relied on for recovery is true, or probably true, in some material particular . . . . But the respondent's whole testimony, both in proof of his claim and in disproof of the defence, is the *evidence* upon which he recovers. Applying the cases referred to, if *any* part of that whole evidence is corroborated the statute is satisfied. This appears to follow as a proper conclusion.

And stated the principle as follows, at p. 301:

> However that may be, the section here does not say that every fact necessary to be proved to establish a cause of action must be corroborated by evidence other than that of the interested party but that the evidence of the interested party itself is to be corroborated by *some other material evidence.* I do not think that the word "matter" in the section is to be taken as synonymous with every fact required to be proved in establishing a cause of action and it has never, as far as I am aware, been so construed.

[1] [1948] S.C.R. 295.
[2] (1914), 31 O.L.R. 261.

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Applying that standard to the corroboration required by the statute, I must, with respect, differ with the learned judge in the Court of Appeal. It is true that the learned trial judge did not define "corroboration" or, at any rate, did not give dictionary definitions for that word. He did, however, read to the jury the section of the statute and said:

> Speaking particularly and not technically, it must be some evidence corroborating the defendants' testimony on some material point, and one of the defendants in this case, as there are three parties to the action, the evidence of each requires corroboration, and one of them cannot corroborate the evidence of the other or others.

And further:

> . . . you may, if you see fit, regard that as some corroboration of the. . . *making the defendant's story seem more probable* . . .

And further:

> . . . as a corroborative fact or circumstance *bearing on the probability or otherwise* of the defendant Kirkpatrick's evidence being true.

(The italicizing is my own.)

It will be seen that although those references do not include an exact definition of "corroboration", they do deal with the test of Hodgins J.A. that the evidence tends to prove that the evidence relied on is true or probably true in some material particular.

In addition, the learned trial judge gave to the jury five specific examples of evidence which he deemed capable of corroboration if the jury believed such items of evidence and gave to them the probative effect which he suggested they were capable of having. Counsel for the respondent here took the position that some of those items of evidence could not, in law, be corroboration. The first group of items of evidence given by the learned trial judge, that by the witnesses indicating that the plaintiff had some alcoholic beverages in the day, counsel objects to on the ground that it was completely equivocal in relation to the issue of whether there was reasonable and probable cause for the arrest. I do not find it equivocal. It is one of the factors which bear on the reasonableness of the belief of the defendant Kirkpatrick that the plaintiff should have been

placed under arrest, and in addition it supplies an element of probability that the plaintiff should have engaged in such foolish attempts to escape from custody as his attempt to leap from the moving car and to escape from Constable Kirkpatrick outside the police station.

The third piece of evidence cited by the learned trial judge as possible corroboration was the bruise on the upper arm of the plaintiff. This was suggested as corroborating the evidence of the defendant Kirkpatrick that he had grasped that arm as the plaintiff attempted to leap from the moving police cruiser. The objection is that there is no evidence as to whether the plaintiff's arm had been bruised previously.

Miss Orshinsky described the bruises which she observed when the plaintiff was brought into the hospital as follows:

> From its appearance, there were 4 small bruises fairly close together, on the inner aspect. On the inner aspect of his left arm above the elbow.
>
> Q. And would those bruises be consistent with a man reaching out and grabbing his left upper arm with his right hand? A. Very consistent.

Those marks, in my view, are so typical of the injury which would have been caused by the grabbing as testified to by the defendant Kirkpatrick that the objection goes more to the weight of the evidence than to the admissibility thereof.

The fifth group of items of corroboration which counsel for the respondent objected to as being inadmissible was the evidence of one Lyle Staff as to the very short time that lapsed between the time he saw the police cruiser on James street and the time he went into the police station. This evidence was adduced by the defendants in a denial of an alleged assault which had occurred subsequent to the plaintiff having fallen to the floor in the police station. For the reason which I shall outline hereafter, it is quite irrelevant to the issues in the present appeal.

Counsel for the respondent submitted that inadmissible evidence was permitted at the trial and that such inadmissible evidence went strongly to corroborate the evidence of

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the police officers and to contradict the evidence of four employees of the post office who swore that they had observed some of the events when standing in an open window some 100 to 150 feet away from the police station. No ruling was made on this subject in the Court of Appeal although McLennan J.A. said:

> A perusal of much of the evidence clearly indicates either ill-advised attempts to introduce inadmissible evidence or captious subjections to admissible evidence.

The evidence to which particular objection may be made may be summarized as follows. The various employees swore that they witnessed a police officer throw the plaintiff down on the floor of the police station so forcefully that at the very considerable distance away from the scene at which they stood they could hear and hear plainly the thud of the plaintiff's head on the floor. However, neither the admitting nurse, who saw the plaintiff when he arrived at the hospital, nor Dr. Dolan, the neurosurgeon who examined the plaintiff very carefully before operating on July 31st, found any trace of bump or bruises on the plaintiff's scalp. The defendants introduced as further evidence to contradict the evidence of the postal employees, *inter alia,* the evidence given by a Sgt. Gayder that he had caused another officer to stand in that same open window in the post office with his back to the window and then he, Gayder, had struck the floor of the police station with a hammer with blows of increasing force and yet it was only on the 15th and 16th blows that the listening officer indicated he could hear any sound, and that those blows had then become so forceful that he, Gayder, feared that he would break the floor. There is much, of course, to be said against that kind of evidence. It is absolutely impossible to duplicate all the elements affecting audibility on the night in question. But it would seem that that objection goes more to the weight of the evidence than to the admissibility and the learned trial judge, in his charge, said:

> Now, in connection with that incident, you have had some evidence of demonstration with the hammer performed by two of the—or test, rather, made by the police as to whether the sound could be heard across

the street. It was admitted, but I suggest to you—that evidence was permitted, but I suggest to you that you should scrutinize quite carefully any evidence of that kind made by interested parties, without independent control, and a matter such as the loudness of a sound, or the amount of strength used, or the strength of a smell, are all things which are difficult to measure, and to define with any exactness, and you have the evidence before you of that, for what it is worth but you should scrutinize it very closely for that reason.

I am of the opinion that there is a more convincing answer to this objection. That evidence went to contradict the evidence of the postal employees as to hearing the thud of the plaintiff's head when they alleged he was thrown to the floor. On all of the evidence, the plaintiff suffered his injuries when he stood erect in front of the sergeant's desk after Constable Kirkpatrick had released his headlock and then the plaintiff's eyes rolled and he slumped down. This all occurred prior to the alleged throwing of the plaintiff to the floor and, therefore, this evidence was quite irrelevant upon the issue of whether alleged excessive force caused the injury. It was said that these postal employees had also witnessed the events which occurred outside the police station before the headlock was put on the plaintiff by Constable Kirkpatrick. I have reviewed the evidence *in extenso* and quote resumes of those witnesses' evidence given in the respondent's factum:

William Fyfe—heard tires squealing down the street, heard Lament say "Let me go—I will go in by myself". Kirkpatrick had Lament in headlock. Kirkpatrick and Lament were going in through the door of the police station and Kirkpatrick took Lament and threw him to the counter of the police station.

James Andrews—they heard a man shout and holler. They ran to the window and saw Kirkpatrick bringing Lament in with a headlock around his neck . . .

Edward Makse—. . . they looked out the window and saw Kirkpatrick take Lament in with a headlock. He was about the front steps of the police station by then . . .

Harry Stevens—he saw Kirkpatrick holding Lament in a secure headlock. Lament appeared to be complaining about the headlock. He did not see Lament resist Kirkpatrick.

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Therefore, not one of these four persons saw the alleged attempt to escape by Lament outside the police station. Their observations all commenced after that, and therefore, their evidence cannot contradict the evidence of Kirkpatrick on the subject of the alleged escape and the contradiction of their evidence by the alleged inadmissible evidence in reference to the hammer test is irrelevant.

Having come to the conclusion that it was not open to the jury upon the evidence to answer questions 3 and 4 in the fashion which they did answer when they must have concluded that no excessive force was used up to the time the defendant Kirkpatrick brought the plaintiff within the second set of doors, then I am of the opinion that the action should have been dismissed as the trial judge did dismiss it.

Therefore, I would allow the appeal with costs both here and in the Court of Appeal, and restore the judgment at trial.

Appeal allowed, judgment at trial restored with costs, CARTWRIGHT J. *dissenting.*

Solicitors for the defendants, appellants: Fleming, Harris, Kerwin, Barr & Hildebrand, St. Catharines.

Solicitors for the plaintiff, respondent: Maloney & Hess, Toronto.

DOCTEUR HERVÉ LACHARITÉ (*Demandeur*) ..... APPELANT;

1965 *Mars 9 — Avril 6

ET

LA COMMUNAUTÉ DES SŒURS DE LA CHARITÉ (*Défenderesse*) ..... INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Négligence—Patrons et employés—Radiologiste employé par un hôpital—Appareil de Rayon-X—Blessures causées par la radiation—Responsabilité—Code civil, arts. 1053, 1054.

Le demandeur était un médecin-radiologiste employé par la défenderesse. Quelque cinq ans après que la défenderesse eut acheté un appareil de Rayon-X, sur la recommandation du demandeur, un érythème intense s'est développé sur la face dorsale des doigts de la main gauche du demandeur. Il poursuivit la défenderesse en alléguant que cet état était la conséquence immédiate de la radiation répétée des Rayons-X. L'action fut rejetée par la Cour supérieure et par la Cour d'Appel. D'où le pourvoi du demandeur devant cette Cour.

Arrêt: L'appel doit être rejeté.

On ne peut reprocher aucune faute à la défenderesse sous l'art. 1053 du *Code Civil.* Il est douteux que l'art. 1054 s'applique. Mais même si cet article devait s'appliquer, la défenderesse s'est libérée de toute responsabilité. Elle était dans l'impossibilité, en employant tous les moyens raisonnables, de prévenir l'acte qui a causé le dommage.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant le renvoi de l'action par le juge Marier. Appel rejeté.

Yvan Sabourin, C.R., pour le demandeur, appelant.

A. J. Campbell, C.R. et *C. J. Gélinas, C.R.,* pour la défenderesse, intimée.

Le jugement de la Cour fut rendu par

LE JUGE EN CHEF:—Le demandeur-appelant, qui est un médecin radiologiste, a poursuivi l'intimée, les Dames de la Communauté des Sœurs de la Charité de l'Hôpital Général de Montréal, et a réclamé la somme de $213,543.32. Il allègue dans son action que comme conséquence immédiate

*CORAM: Le Juge en Chef Taschereau et les Juges Abbott, Ritchie, Hall et Spence.

[1] [1963] B.R. 730.

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de la radiation répétée de rayons-X, un érythème intense s'est développé sur la face dorsale de tous ses doigts de la main gauche.

Les faits de cette cause sont complètement récités dans le jugement du juge au procès, dans les notes des juges de la Cour d'Appel[1], et il est en conséquence inutile de les répéter ici.

Je m'accorde avec les conclusions des juges des cours inférieures. Je crois qu'il n'y a aucune faute que l'on puisse reprocher à l'intimée en vertu de l'art. 1053 du *Code Civil,* mais j'entretiens des doutes quant à l'application de l'art. 1054 C.C., sur lequel le procureur de l'appelant a fortement insisté. Mais, même si cet art. 1054 devait s'appliquer, je suis clairement d'opinion que la défenderesse s'est libérée de toute responsabilité.

La défenderesse est bien la propriétaire de cet appareil de rayons-X, qu'elle a acheté sur la recommandation du demandeur lui-même. Le gardien juridique d'une chose est responsable des dommages causés par cette chose lorsqu'ils résultent du fait autonome de cette chose sans aucune intervention humaine, sauf s'il y a cas fortuit, force majeure, l'acte d'un tiers, ou l'impossibilité de prévenir le dommage par des moyens raisonnables. *Vide Vandry v. Quebec Railway*[2]*; Ville de Montréeal v. Watt & Scott, Ltd.*[3]*; W. & W. Cloaks Ltd. v. Osias Cooperberg et al.*[4]

Les tribunaux inférieurs, et je m'accorde avec eux, ont jugé que la défenderesse était dans l'impossibilité, en employant tous les moyens raisonnables, de prévenir l'acte qui a causé le dommage.

L'appel doit être rejeté avec dépens.

Appel rejeté avec dépens.

Procureur du demandeur, appelant: I. Sabourin.

Procureurs de la défenderesse, intimée: Lajoie, Gélinas & Lajoie, Montréal.

[1] [1963] B.R. 730.
[2] [1920] A.C. 662, 1 W.W.R. 901, 52 D.L.R. 136, 26 R.L. 244.
[3] [1922] 2 A.C. 555 at 563, 69 D.L.R. 1.
[4] [1959] R.C.S. 785, 21 D.L.R. (2d) 84.

OLIVE GEORGINA RUSTAD .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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*Mar. 1, 2
Apr. 6

ON APPEAL FROM THE COURT OF APPEAL
FOR BRITISH COLUMBIA

Criminal law—Non-capital murder—Evidence—Weight—Confessions made to friends—Charge to jury—Whether adequate.

Charged with the non-capital murder of her mother-in-law, the appellant was convicted of manslaughter. The medical evidence attributed the death to a blow or blows on the head. The only direct evidence to connect the appellant with the death consisted of an alleged confession made by her to her friend S, and of three statements she is alleged to have made to her friend K. During the three and a half years between the death and the trial, S gave several statements to the police and gave evidence under oath at the inquest, but each of her accounts differed as to her own activities on the night of the murder. It was not until three years after the night in question that she first told the police about the alleged confession. The accused was said to have been intoxicated when she made these statements. The Court of Appeal affirmed the conviction. The accused appealed to this Court.

Held (Abbott J. dissenting): The appeal should be allowed and a new trial directed on the charge of manslaughter.

Per Cartwright, Ritchie, Hall and Spence JJ.: The trial judge said enough to indicate that in weighing the evidence of K and S the jury should give serious consideration to the inconsistencies in the statements made by S and to the failure of both women to come forward with their stories at an earlier date. The theory of the defence that these two witnesses were unworthy of belief was expressed by the trial judge with sufficient clarity to comply with the authorities. *Deacon v. R.* [1947] S.C.R. 531.

There was however a total absence of any direction on the question of whether, if the appellant did make the incriminating statements attributed to her by the two women, those statements were in fact true. The evidence of the appellant's intoxication was such as to make it desirable for the trial judge to tell the jury that it was a factor to be taken into consideration in assessing the value of her confession and statements as evidence against her. Assuming that the inconsistencies between the alleged confession and the autopsy as to how the victim met her death was not raised by way of defence, and notwithstanding the fact that defence counsel did not object to the trial judge's failure to comment on it, the charge to the jury should nevertheless have contained specific direction to the effect that the truth of the appellant's alleged admission was to be considered in light of this discrepancy and in light also of her intoxication at the time when the admission was alleged to have been made.

Per Abbott J., *dissenting:* The objections to the trial judge's charge made by the appellant did not, as found by the Court of Appeal, constitute sufficient grounds to allow the appeal.

* PRESENT: Cartwright, Abbott, Ritchie, Hall and Spence JJ.

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Droit criminel—Meurtre non qualifié—Preuve—Poids—Aveu fait à des amies—Suffisance de l'adresse du juge au jury.

Accusée du meurtre non qualifié de sa belle-mère, l'appelante fut trouvée coupable d'homicide involontaire coupable. La preuve médicale attribua le décès de la victime à des coups portés sur la tête. La seule preuve directe contre l'appelante comprenait un prétendu aveu qu'elle aurait fait à son amie S, et trois déclarations qu'elle est supposée avoir faites à son amie K. Durant les trois années et demie entre le décès de la victime et le procès, S fit plusieurs déclarations à la police et témoigna sous serment à l'enquête du coroner, mais chacun de ses récits différait quant à ses propres activités la nuit du meurtre. Ce n'est que trois ans après la nuit en question qu'elle fit part à la police pour la première fois du prétendu aveu. L'appelante était supposée avoir été sous l'influence de la boisson lorsqu'elle fit ses déclarations. La Cour d'Appel confirma le verdict de culpabilité. L'accusée en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et un nouveau procès doit être ordonné sur l'accusation d'homicide involontaire coupable, le juge Abbott étant dissident.

Les juges Cartwright, Ritchie, Hall et Spence: Le juge au procès en a dit assez pour indiquer au jury qu'en évaluant la preuve de K et S, il devait prendre en considération les variances dans les déclarations faites par S et et le défaut des deux femmes de se présenter avec leurs récits à une date antérieure. La théorie de la défense que ces deux témoins ne méritaient pas d'être crus a été exprimée par le juge au procès avec assez de clarté pour rencontrer les exigences des autorités. *Deacon v. R.* [1947] R.C.S. 531.

Il y a eu cependant une absence totale de directive sur la question de savoir si, admettant que l'appelante ait fait les déclarations qui lui étaient imputées par les deux femmes, ces déclarations étaient en fait vraies. La preuve se rapportant à l'intoxication de l'appelante était telle qu'il était désirable que le juge au procès avertisse le jury que c'était un facteur qui devait être pris en considération dans l'évaluation de la valeur comme preuve contre elle de sa confession et de ses déclarations. En prenant pour acquis que les variances entre le prétendu aveu et le résultat de l'autopsie démontrant comment la victime avait succombé n'avaient pas été soulevées comme moyen de défense, et malgré le fait que l'avocat de la défense ne s'était pas objecté au défaut du juge de commenter ce point, l'adresse du juge au jury aurait dû quand même contenir une déclaration spécifique à l'effet que la véracité de la prétendue admission faite par l'appelante devait être considérée en regard de cette variance et aussi en regard de son intoxication au temps où cet aveu était supposé avoir été fait.

Le juge Abbott, *dissident:* Les griefs contre l'adresse du juge au procès soulevés par l'appelante ne constituaient pas, tel que la Cour d'Appel l'a déclaré, des motifs suffisants pour maintenir l'appel.

APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique[1], confirmant un verdict de culpabilité pour homicide involontaire coupable. Appel maintenu et nouveau procès ordonné, le juge Abbott étant dissident.

[1] [1965] 1 C.C.C. 323.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming the conviction of the appellant for manslaughter. Appeal allowed and new trial directed, Abbott J. dissenting.

H. A. D. Oliver, for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

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

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for British Columbia[1] by which that Court dismissed the appellant's appeal from her conviction for manslaughter on an indictment charging her with the non-capital murder of her mother-in-law, Mrs. Thrine Rustad on June 10, 1960.

It is apparent that the appellant was on very bad terms with her 80-year old mother-in-law who was her next door neighbour and who was found lying dead on the floor of her own house on June 10, 1960, and it is also clear that the old lady had come to a violent end which the medical evidence attributed to a blow or blows on the head, but the only direct evidence to connect the appellant with the death consisted of a confession which she is alleged to have made to her one-time friend, Mrs. Shannon. The prosecution contends that this confession finds some support in the story told by a young girl named Koronko of three statements made to her by the appellant and it is contended also that the evidence of fingerprints found on the back door by police sergeant Davies is consistent with the appellant having broken into her mother-in-law's house on the night of 9th-10th of June.

At the trial the appellant's counsel based the defence in large measure on the contention that the evidence of Mrs. Shannon and Miss Koronko was not worthy of belief and that without that evidence there was no case for the Crown.

Mrs. Shannon had spent the evening of the 9th of June at the appellant's house where she had dinner and where she and the appellant had a number of drinks together. She did not leave the house until the early hours of the morning of the 10th of June and on the following day made

[1] [1965] 1 C.C.C. 323.

a statement to the police which reads, in part, as follows:

> Shortly after at about 9:30 p.m. Mr. Rustad packed some of his things and left the house. I didn't see him going in his car as I wasn't paying attention. During this time a policeman came and spoke to Mrs. Rustad. At this time I was feeling quite sleepy as a result of my drink and lied on the couch in the living room and fell asleep. When I woke up it was about 3:00 a.m., and I saw Mrs. Rustad walking around . . . She was ranting and raving about something but I don't know what. At this time Mrs. Rustad was drinking rye and was very excited and drunk. I then got up and made her a cup of tea. While she was drinking her tea I washed the dishes. Shortly thereafter Mrs. Rustad went to bed and she fell asleep right away.

In the course of the more than three and a half years which elapsed between the death and the trial, Mrs. Shannon made three additional statements to the police and gave evidence under oath at the inquest, but each of the accounts which she gave differed as to her own activities on the night in question and it was not until August 24, 1963, that she first told the police about a confession saying:

> When I awoke on the couch Olive Rustad was standing in the middle of the living room and she came over to me and it was then she said: 'I killed the old lady'.

At the trial Mrs. Shannon described the conversation which she had with the appellant after she woke up in the following terms:

> Well, she came in and then she told me that she had been over to Mrs. Rustad . . . And she had words with her and then she said that she had killed her, and I said, 'Oh' or something like that. And then I said, 'Oh, no. You didn't'. And then she said that she had killed her with her own panties.
>
> Q. With what?
>
> A. Her own underwear.
>
> Q. Her own panties; that is, underwear. Yes?
>
> A. Oh, she said, 'You wouldn't like to have a murderess for a friend,' She said that to me. So I got sick and I left—and I went out, right out the back door. It was a warm night and the doors were open so I went right out to the fence and I got sick over the fence.

Miss Koronko, who was 20 years old at the date of the trial, recounted three isolated conversations which she had had with the appellant. The first was in July 1960 when they were alone together and Mrs. Rustad brought up the subject of her mother-in-law's death saying "that she hated the old lady but she could never kill her." Although Miss Koronko went to live with the appellant in the same house in May 1961, she does not appear to recall any other references to the matter until one night in December 1961, at

about midnight when she says that the appellant had been drinking and was "tight" and while "tight", was discussing her mother-in-law and then she began to cry very badly and she had her head down on her arms, on the table, and she said, "I'm sorry. I didn't mean to do it. I didn't mean to go that far."

The only other statement having any bearing on the matter to which Miss Koronko testified was allegedly made in February 1962 on an occasion when her boy friend, Len Soloway, was in the house and was talking about the trouble that his sister had with her mother-in-law. Miss Koronko says that the appellant at that time said "that she knew that mothers-in-law caused a lot of trouble and that Bernice, Len's sister, should do something about it before it was too late because Mrs. Rustad knew what it was like and she had to do something about hers". It is noteworthy that Soloway, who gave evidence, stated of this conversation, "I never thought it meant anything at that time".

Miss Koronko went on living with the appellant until November 1962 but does not appear to have made any mention of these conversations to anyone in authority until May 1963.

The first ground upon which leave to appeal to this Court was granted complained of the failure of the trial judge "to instruct the jury that it was dangerous and unsafe to put much reliance upon the evidence of Mrs. Shannon because of her numerous prior inconsistent statements both verbal and in writing and one prior statement that she testified to under oath".

I do not think that the differences in detail between the various accounts given by Mrs. Shannon of her own activities on June 9 justify the accusation of perjury which was so strongly urged against her by appellant's counsel, but if she was telling the truth at the trial about the appellant having confessed to the killing on the morning of the death, it is singular to say the least of it that when giving evidence at the inquiry into the same death only fifteen days after the alleged confession was made, she did not mention it at all and could only explain her failure to do so by saying, "I always felt that you could not tell about a murder or a killing unless you were an eye witness". This was undoubtedly a

circumstance bearing directly upon the weight to be attached to Mrs. Shannon's evidence and constituting a weakness in the Crown's case which the learned trial judge was bound to draw to the attention of the jury, and the same considerations apply, although in a lesser degree, to Miss Koronko whose evidence must be viewed in light of the fact that the statements which she alleged to have been made by the appellant were withheld by her from the authorities for nearly three years.

Mr. Justice McInnes, who presided at the trial, pointed out to the jury that there were inconsistencies in the various statements made by Mrs. Shannon and stressed particularly the fact that in making three of these statements and in giving evidence at the inquest she had said nothing about the appellant's confession. In dealing with the evidence of both these witnesses, the learned trial judge said:

> You saw these two women, Mrs. Shannon and Miss Koronko, under lengthy cross-examination by defence counsel. You have the fact that neither of them revealed what the accused told them for a long period afterwards. You will have to decide how they impressed you as witnesses and whether they are worthy of belief or not. It would be well for you in considering what degree of credibility you attach to their evidence to recall the evidence of Sergeant Davies as to the fingerprints and the manner in which they were put on the door according to Davies' evidence. Of course if you do not believe the women, then there is no necessity to consider Davies' evidence.

Although it is true that Mr. Justice McInnes would have been justified in using stronger language to describe the weaknesses inherent in the evidence of both these witnesses, I am none the less of opinion that he said enough to indicate that in weighing their evidence the jury should give serious consideration to the inconsistencies in Mrs. Shannon's statements and to the failure of both women to come forward with their stories at an earlier date. I think that the theory of the defence that these two witnesses were unworthy of belief was expressed in the judge's charge with sufficient clarity to comply with the requirements indicated by this Court in *Deacon v. The King*[1], and in the other cases referred to in the reasons for judgment delivered by Sheppard J.A. on behalf of the majority of the Court of Appeal. I would not quash the conviction on this ground,

[1] [1947] S.C.R. 531, 3 C.R. 265, 89 C.C.C. 1, 3 D.L.R. 772.

but there are more serious omissions which require consideration.

The whole tenor of the charge of the learned trial judge is to the effect that if the jury believed the evidence of Mrs. Shannon and Miss Koronko they would be justified in convicting, but there is a total absence of any direction on the question of whether, if the appellant did make the incriminating statements attributed to her by these women, those statements were in fact true.

At the trial Mrs. Shannon gave it as her opinion that the accused was intoxicated at the time of the alleged confession and in one of her previous statements she had said that she knew the appellant to be drunk and thought that she had lost her senses. Although the learned trial judge referred to these comments in instructing the jury as to the defence of drunkenness, he at no time gave them any instructions as to the effect of her having been intoxicated on the truth or falsity of what the appellant was alleged to have said. It is significant also that the nearest thing to an incriminating statement alleged to have been made to Miss Koronko was that made in December, 1961, when she says that the appellant was "tight". In my opinion in the present case the evidence of the appellant's intoxication was such as to make it desirable for the trial judge to tell the jury that it was a factor to be taken into consideration in assessing the value of her confession and her December 1961 statement to Miss Koronko as evidence against her.

Counsel for the appellant also complained that the learned trial judge had omitted to tell the jury that they should consider the question of the truth or falsity of the appellant's alleged admission to the killing of her mother-in-law in light of the fact that Mrs. Shannon represented her as saying that she had "killed her with her own panties" whereas in fact according to the medical evidence the old lady met her death as a result of a blow or blows on the head and there was no suggestion that she could have been killed "with her own panties". In this regard it appears to me that the case of *Kelsey v. The Queen*[1] is particularly pertinent. That was a case of murder in which the accused was alleged to have confessed nearly two years after the event to killing the murdered man by striking him with a

[1] [1953] 1 S.C.R. 220, 16 C.R. 119, 105 C.C.C. 97.

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hammer and using an icepick "to finish him". The medical evidence was that the death had been caused by blows inflicted on the head by a blunt instrument and that there was also evidence of blows by a rigid, round and pointed instrument. Fauteux, J. in discussing non-direction by a trial judge as a ground of appeal had this to say:

> The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial Judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance. *Had the autopsy, for instance, revealed poisoning instead of fracture of the skull as the cause of death, this undoubtedly would have, in this case, been a point of substance relevant to the theory of the defence. Far from conflicting with the appellant's admissions, independent proof of certain facts in the case tends to support his material admission, i.e. his participation in the commission of the murder.*

The italics are my own.

In the present case the autopsy revealed that death was caused by blows on the head instead of the method to which the appellant allegedly confessed. In my view this was undoubtedly a point of substance relevant to the theory of the defence upon which the appellant was entitled to have the jury directed.

I am in agreement with the views expressed in the reasons for judgment of Mr. Justice Davey in the Court of Appeal in so far as he says that:

> If the statement that appellant killed the victim with her own panties clearly implied that appellant strangled her with them, the inconsistency of that statement with the absence of any evidence of strangulation or that the panties played any part in the cause of death, would cogently suggest that either Shannon's evidence or appellant's admission was untrue. *In that case I would have had difficulty in supporting the verdict in the absence of a specific direction to the jury to consider the truth of the appellant's admission in the light of that discrepancy and the appellant's intoxication.*

The italics are my own.

Mr. Justice Davey, however, took the view that defence counsel had not raised the defence that the statements made by Mrs. Shannon were untrue and he accordingly went on to say:

> My difficulty is that the significance of the words 'with her own panties' in this context did not occur to either counsel at the trial and was not canvassed in the evidence. They might have meant something quite different from strangulation, and in my opinion it would be quite wrong to attach that meaning to the words when it was not suggested below or explored on the evidence.

With the greatest respect, I do not share the difficulty expressed by Davey J.A. because I think that the contention that the appellant's confession was false was implicit in the denial of guilt and I am also satisfied that the significance of the words "with her own panties" did occur to both counsel. While it is true that the references made to these words by defence counsel were primarily directed towards showing that Mrs. Shannon was not telling the truth, they none the less illustrate in the clearest terms the inconsistency between the method of killing described in the alleged confession and the cause of death as revealed by the medical evidence. On the other hand, it appears to me that Crown counsel invited the jury to consider that the evidence was consistent with the use of "panties" having produced strangulation or some other neck injury and having been a factor in the killing. I refer to the passage in which Crown counsel, after quoting the words ". . . and she said that she had killed her with her own panties" went on to say:

> Now may I just stop there for a moment while the thought crosses my mind. You might remember that bit of evidence in connection with the evidence of Dr. Harmon in which he testified as to the injuries to the neck of the deceased and the fingernail marks or scratches that appeared on the neck of the deceased woman.

As I have indicated, Dr. Harmon's evidence contained no suggestion that any neck injury caused or contributed to the death and he was not asked whether such injury as there was to the neck could have been caused by "panties", nor was such a thing suggested anywhere in his evidence.

I am of opinion that even assuming that the inconsistency between the alleged confession and the autopsy was not raised by way of defence and notwithstanding the fact that defence counsel did not object to the learned trial judge's failure to comment on it, the charge to the jury should nevertheless have contained specific direction to the effect that the truth of the appellant's alleged admission was to be considered in light of this discrepancy and in light also of the appellant's intoxication at the time when the admission was alleged to have been made.

The case of *McAskill v. The King*[1] was one of murder in which the question of whether the appellant was so affected by drink as to be incapable of having the intent to kill was

[1] [1931] S.C.R. 330, 55 C.C.C. 81, 3 D.L.R. 166.

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not directly raised by defence counsel and was not made the subject of direction by the learned trial judge. In considering the effect of the failure to put this issue before the jury, Duff J. said at page 335:

> The able and experienced judge who presided at the trial properly directed the attention of the jury to the defence as it was put before them by counsel for the prisoner; and, having done this, he did not ask them to apply their minds to the further issue we have just defined. It was the prisoner's right, however, notwithstanding the course of his counsel at the trial, to have the jury instructed upon this feature of the case. We think, therefore, that there must be a new trial.

I respectfully adopt this language as having direct application to the circumstances disclosed in the present case.

In view of all the above, I would allow this appeal, quash the conviction and direct that there be a new trial on the charge of manslaughter.

ABBOTT J. (*dissenting*):—This is an appeal, brought pursuant to leave, from the unanimous judgment of the Court of Appeal of British Columbia[1] pronounced on August 5, 1964, dismissing the appeal of the appellant from her conviction on December 5, 1963, by the Honourable Mr. Justice McInnis and a jury at the Court of Assize in the City of Vancouver on a charge of manslaughter reduced from non-capital murder, on which charge the appellant was, on December 16, 1963, sentenced to eight years in prison.

The appellant was convicted on the said charge as a result of the death of her mother-in-law. The principal evidence identifying the appellant as the one who caused the death consisted of statements made in conversations which took place on a number of occasions between the appellant and her friend, Helena A. Shannon and between the appellant and her friend, Roberta Dale Koronko. The appellant did not give evidence at the trial.

Since I have the misfortune to differ from the conclusion arrived at by the other members of this Court that a new trial should be ordered, and as it is not usual to discuss the details of the evidence when that course is followed, I shall simply state briefly the reasons for my dissent.

The contentions of the appellant upon which leave to appeal was granted are as follows:

1. That the learned trial judge failed to instruct the Jury that it was dangerous and unsafe to accept or put much reliance upon the evidence

[1] [1965] 1 C.C.C. 323.

of Helena C. Shannon because of her numerous prior inconsistent statements, both verbally and in writing and one prior inconsistent statement that was testified to under oath.

2. That the learned trial judge misdirected the Jury, or alternatively failed to direct the Jury so as to be a misdirection in law in omitting to leave with them the fact that the admissions were capable of more than one inference, and in coupling the conversation as testified to by Dale Koronko of July 1960, with that of December 1961, so as to give the statement of the December 1961, an inference of guilt that the words standing alone would not naturally and normally bear.
3. That the learned trial judge failed to instruct the Jury that even though they believed the evidence of Helena Shannon, they must still consider whether they would place any reliance on the admissions of the accused having regard to her state of sobriety at the time of making the same.
4. That the learned trial judge failed to instruct the Jury that even though they believed the evidence of Dale Koronko, they must still consider whether they would place any reliance on the admissions of the accused having regard to her state of sobriety and her emotional condition at the time of said statement was made.
5. That the learned trial judge erred in failing to direct the attention of the Jury to the fact that the admission alleged to have been made by the appellant indicated that the victim had been killed in a certain manner and that it was established that the victim had not been killed in that manner.

The principal argument made before us by Counsel for appellant related to the first ground, namely, that the learned trial judge failed to instruct the jury that it was dangerous and unsafe to put much reliance upon the evidence Helena Shannon because of what he contended were numerous prior inconsistent statements made by her, both verbally and in writing, and of one prior inconsistent statement under oath.

Counsel submitted that there is a duty in law resting upon a trial judge to give such a warning concerning incriminating evidence of a person who has previously given contradictory evidence under oath; and that such a warning ought to be given concerning contradictory statements not under oath when the defence sets up the unreliability of the evidence given by that witness at the trial.

This contention was fully dealt with by Davey J.A. in the Court below with whose reasons and conclusions I am in complete agreement. After carefully reviewing the authorities from *Re Harris*[1]—which decision he points out cannot be taken to correctly set forth the law of Canada—

[1] (1927), 20 Cr. App. R. 144.

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up to and including the decisions of this Court in *Deacon* v. *The Queen*[1], *Binet* v. *The Queen*[2] and *Lucas* v. *The Queen*[3], he said:

> From these authorities it seems to me that the obligation to give such a direction arises not from a distinct rule of law or of practice, but from the obligation resting upon the trial Judge under *Azoulay* v. *The Queen* (1952) 2 S.C.R. 495, and *Kelsey* v. *The Queen* (1953) 1 S.C.R. 220, to review the substantial parts of the evidence, and to give the jury the theory of the defence, so that they may appreciate the value and effect of the evidence, and how the law is to be applied to the facts as they find them; and to present clearly to the jury the pivotal questions upon which the defence stands.

After a further discussion of the nature of this obligation and a reference to certain authorities, he continued:

> In the present case the learned trial judge charged most carefully upon the series of conflicting statements given by Shannon and Koronko, and left it to the jury to consider their effect, and the long delay in revealing the facts as they gave them in the box, upon their credibility and the weight of their evidence. In my opinion the defence was in this respect properly put to the jury without giving a warning that it would be dangerous to convict on such evidence considering the explanations and the amount of other confirming evidence.
>
> The serious discrepancies in the earlier statements were the omission of the incriminating statements made by the appellant, and some of the surrounding detail. Shannon said she did not tell the full story in her earlier statements, because she was afraid of the appellant, and because she was not asked the appropriate questions to bring it out. But over and above that, both Shannon and Koronko were friends of the appellant and might well have withheld the incriminating information to help the appellant. So far as Shannon is concerned, there is no submission that she bore any enmity or ill will to the appellant that would lead to Shannon giving false evidence against her. There was no close connection or association between Shannon or Koronko, although they knew each other, that would cause Shannon to give false evidence against the appellant to favour Koronko. In view of the whole of the Crown's case, it would have been wrong for the learned trial judge to tell the jury that it would be dangerous to convict upon the evidence of Shannon and Koronko.

As to the other grounds raised by appellant relating to the truth of the statements made to Shannon and Koronko, drunkenness and the like, these too were fully dealt with in the Court below. I am in general agreement with what was

[1] [1947] S.C.R. 531, 3 C.R. 265, 89 C.C.C. 1, 3 D.L.R. 772.

[2] [1954] S.C.R 52, 17 C.R. 361.

[3] [1963] 1 C.C.C. 1, 39 C.R. 101.

said by Davey and Sheppard JJ.A. as to these grounds and have nothing to add.

I would dismiss the appeal.

Appeal allowed and new trial directed, ABBOTT J. *dissenting.*

Solicitors for the appellant: Oliver, Millar & Co., Vancouver.

Solicitor for the respondent: G. L. Murray, Vancouver.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

HARRY S. DEVEREUX .....RESPONDENT.

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*Feb. 17, 18
Apr. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Indian lands—Right of Indian Band to possession of Reserve Land—Right of lawful possessee to give by devise possession to non-Indian—Action by Crown for possession on behalf of Band—Indian Act, R.S.C. 1952, c. 149, ss. 20, 82, 31(1), 50.

The Crown claimed, under s. 31(1) of the *Indian Act,* R.S.C. 1952, c. 149, on behalf of the Six Nations Band of Indians possession of a farm which was part of the Band's Reserve Land in Ontario. In 1950, at the request of the defendant, who was not an Indian, and the widow of a member of the Band, who was lawfully in possession of the farm, a lease of the farm was granted by the Crown to the defendant for a term of ten years. Two years before the expiration of that lease, the widow died. By her will she devised her rights in the farm to the defendant who continued in possession for the balance of the term of the lease. The right in the land was then put up for sale, and the Crown, at the request of the purchaser who was a member of the Band, granted the defendant two successive permits for one year each. At the expiration of the second permit, the defendant refused to give up possession and the council of the Band moved to gain possession of the farm. The action by the Crown on behalf of the Band was dismissed by the Exchequer Court. The Crown appealed to this Court.

Held (Cartwright J. dissenting): The appeal should be allowed.

Per Taschereau C.J. and Martland, Judson and Hall JJ.: The rights of the defendant after the expiration of his second permit were governed by s. 50 of the *Indian Act.* Under that section, where a right to possession or occupation of land in a Reserve passes by devise to a person who is not entitled to reside on a Reserve, that right shall be offered for sale to the highest bidder among the persons who are entitled to reside on the Reserve and the proceeds of the sale shall be

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* PRESENT: Taschereau C.J. and Cartwright, Martland, Judson and Hall JJ.

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paid to the devisee. The procedure laid down by this section has been followed and the only rights of the defendant were to receive the proceeds of the sale of the right to possession. Section 31 does not require that an action to put a non-Indian off a Reserve can only, in respect of lands allocated to an individual Indian, be brought on behalf of that particular Indian. The action may be brought by the Crown on behalf of the Indian or the Band, depending upon who makes the allegation of wrongful possession or trespass.

An agreement entered into by the defendant and the purchaser which would have enabled the defendant to remain in possession at a rental which would have made it possible for the purchaser to make his instalment payments was void as the Department had not consented to any further lease or permit. The defendant must give up possession.

Per Cartwright, *dissenting:* The action could not succeed. Possession of the land was claimed on behalf of the Band, and on the evidence it was shown that the right to possession of the land in question was vested in an individual Indian and not in the Band. There is nothing in the *Indian Act* to alter the well-settled rule that to entitle a plaintiff to bring an action for the recovery of possession of land he must have a right of entry either legal or equitable.

Couronne—Terre appartenant aux Indiens—Droit de la Bande à la possession—Terre située sur la réserve—Droit du possesseur légal de donner par testament possession à une personne qui n'est pas un Indien—Action prise par la Couronne au nom de la Bande pour possession—Loi sur les Indiens, S.R.C. 1952, c. 149, arts. 20, 28, 31(1), 50.

Se basant sur l'art. 31(1) de la *Loi sur les Indiens,* S.R.C. 1952, c. 149, la Couronne a réclamé au nom de la Bande d'Indiens appelée Six Nations possession d'une ferme qui faisait partie de la Réserve de la Bande en Ontario. En 1950, à la demande du défendeur, qui n'était pas un Indien, et de la veuve d'un membre de la Bande, qui était en possession légale de la ferme, la Couronne a accordé au défendeur un bail de la ferme pour un terme de dix ans. La veuve décéda deux ans avant l'expiration de ce bail. Par son testament elle légua ses droits dans la ferme au défendeur qui continua en possession pour la balance du terme du bail. Le droit à cette terre fut alors offert en vente, et la Couronne, à la demande de l'acheteur qui était un membre de la Bande, accorda au défendeur deux permis successifs d'une année chacun. A l'expiration du second permis, le défendeur refusa d'abandonner la possession et le conseil de la Bande commença des démarches pour obtenir possession de la ferme. L'action par la Couronne au nom de la Bande fut rejetée par la Cour de l'Échiquier. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu, le Juge Cartwright étant dissident.

Le juge en chef Taschereau et les Juges Martland, Judson et Hall: Les droits du défendeur après l'expiration de son second permis étaient régis par l'art. 50 de la *Loi sur les Indiens.* En vertu de cet article, lorsqu'un droit à la possession ou à l'occupation de terres dans une Réserve passe par legs à une personne non autorisée à y résider, ce droit doit être offert en vente au plus haut enchérisseur entre les personnes habiles à résider dans la Réserve et le produit de la vente doit être versé au légataire. La procédure imposée par cet article

a été suivie et les seuls droits du défendeur étaient de recevoir le produit de la vente du droit à la possession. L'art. 31 ne requiert pas qu'une action, pour faire expulser une personne qui n'est pas un Indien de la Réserve, peut, quant à une terre qui a été allouée à un Indien en particulier, être instituée seulement au nom de cet Indien. L'action peut être instituée par la Couronne au nom de l'Indien ou de la Bande, dépendant qui allègue la possession illégale ou la pénétration sans droit.

Une entente intervenue entre le défendeur et l'acheteur, qui aurait permis au défendeur de demeurer en possession en payant un loyer qui aurait permis à l'acheteur d'échelonner ses paiements, était nulle parce que le Département n'avait pas consenti à un autre bail ou permis. Le défendeur doit abandonner la possession.

Le Juge Cartwright, *dissident:* L'action ne peut pas réussir. La possession de la terre était réclamée au nom de la Bande, et il est en preuve que le droit à la possession de la terre en question appartenait à un Indien en particulier et non pas à la Bande. Il n'y a rien dans la *Loi sur les Indiens* pour changer la règle bien établie que pour permettre à un demandeur de prendre action pour le recouvrement de la possession d'une terre, il doit avoir un droit d'entrée soit légal soit équitable.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier de Canada[1], rejetant une action prise par la Couronne au nom d'une Bande d'Indiens pour réclamer la possession d'une terre. Appel maintenu, le Juge Cartwright étant dissident.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1] dismissing an action by the Crown on behalf of a Band of Indians to recover possession of land. Appeal allowed, Cartwright J. dissenting.

N. A. Chalmers, for the appellant.

P. A. Ballachey, Q.C., for the respondent.

The judgment of Taschereau C. J. and of Martland, Judson and Hall JJ. was delivered by

JUDSON J.:—The judgment of the Exchequer Court[1] from which this appeal is taken rejects the Crown's claim for possession of a farm of 225 acres which is part of the Six Nations Indian Reserve in the County of Brant, Ontario. The action was brought under s. 31(1) of the Indian Act, R.S.C. 1952, c. 149, which reads:

31. (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been

[1] [1965] 1 Ex. C.R. 602.

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(a) unlawfully in occupation or possession of,
(b) claiming adversely the right to occupation or possession of, or
(c) trespassing upon

a reserve or part of a reserve, the Attorney General of Canada may exhibit an Information in the Exchequer Court of Canada claiming, on behalf of the Indian or the band, the relief or remedy sought.

The defendant, Harry Devereux, is not an Indian. He has assisted in the working of this farm since 1934, when he entered into a leasing agreement with Rachel Ann Davis, the widow of a member of the Six Nations Band. This private arrangement was void under s. 34(2) of the Indian Act, R.S.C. 1927, c. 98, now R.S.C. 1952, c. 149, s. 28(1), but at the request of Mrs. Davis and the defendant, the Crown granted to the defendant a lease of the farm for a term of ten years commencing December 1, 1950. This lease expired on November 30, 1960. On the expiry of the lease, two successive permits were granted to the defendant under s. 28(2) of the Indian Act, R.S.C. 1952, c. 149, allowing him to use and occupy the lands for agricultural purposes. The second of these permits expired on November 30, 1962. The defendant nevertheless still remains in possession of the lands. He claims his rights by devise under a will of Rachel Ann Davis, dated November 19, 1953, and admitted to probate in the Surrogate Court of the County of Brant on May 30, 1958. Rachel Ann Davis died on April 25, 1958.

In November 1962, the band council notified the defendant to vacate the property at the expiration of his permit, and in January, 1963, the Indian Superintendent at Brantford notified him to vacate on or before January 31, 1963.

On July 4, 1963, the band council passed a resolution alleging that the defendant was still unlawfully in possession of the lands and asking that the Attorney General of Canada bring this action.

It is clear that subsequent to November 30, 1962, the defendant can point to no applicable provision of the *Indian Act* which gives him the right to possess or use the lands in question.

When Mrs. Davis died in 1958, her title was that of locatee under s. 20, subs. (1), of the *Indian Act,* R.S.C. 1952, c. 149. She held a certificate of possession dated February 28, 1954, issued under s. 20, subs. (2) of the Act. The rights of the defendant after the expiry of his permit

on November 30, 1962, which was four years after the death of Mrs. Davis, are governed by s. 50 of the Act:

50. (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

(2) Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve, that right shall be offered for sale by the superintendent to the highest bidder among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.

(3) Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

(4) The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.

The procedure laid down by this section has been followed and the only rights of the defendant are now to receive the proceeds of the sale. This sale is not a cash transaction. The proceeds will be payable over a period of years.

The Exchequer Court, in dismissing the action, held, in effect, that in respect of land allocated to an individual Indian, an action under s. 31 above quoted would lie only at the instance of the individual Indian locatee and not at the instance of the band. In so holding I think there was error. I do not think that s. 31 requires that an action to put a non-Indian off a reserve can only, in respect of lands allocated to an individual Indian, be brought on behalf of that particular Indian. The terms of the section to me appear to be plain. The action may be brought by the Crown on behalf of the Indian or the band, depending upon who makes the allegation of wrongful possession or trespass.

The judgment under appeal involves a serious modification of the terms of s. 31(1). Instead of reading "Where an Indian or a band" alleges unlawful possession by a non-Indian, it should be understood to read "Where an Indian *in respect of land allocated to him* or a band *in respect of unallocated land*" makes the allegation of unlawful possession. I think that this interpretation is erroneous and that its acceptance would undermine the whole administration of the Act by enabling an Indian to make an unauthorized

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arrangement with a non-Indian and then, by refusing to make an individual complaint, enable the non-Indian to remain indefinitely.

The scheme of the *Indian Act* is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee. This is provided for by s. 28(1) of the Act. If s. 31 were restricted as to lands of which there is a locatee to actions brought at the instance of the locatee, agreements void under s. 28(1) by a locatee with a non-Indian in the alienation of reserve land would be effective and the whole scheme of the Act would be frustrated.

Reserve lands are set apart for and inalienable by the band and its members apart from express statutory provisions even when allocated to individual Indians. By definition (s. 2(1) (o)) "reserve" means

> a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.

By s. 2(1) (a), "band" means a body of Indians

> (i) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart . . .

By s. 18, reserves are to be held for the use and benefit of Indians. They are not subject to seizure under legal process (s. 29). By s. 37, they cannot be sold, alienated, leased or otherwise disposed of, except where the Act specially provides, until they have been surrendered to the Crown by the band for whose use and benefit in common the reserve was set apart. There is no right to possession and occupation acquired by devise or descent in a person who is not entitled to reside on the reserve (s. 50, subs. (1)).

One of the exceptions is that the Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered (s. 58(3)). It was under this section that the Minister had the power to make the ten-year lease to the defendant which expired on November 30, 1960.

Under this Act there are only two ways in which this defendant could be lawfully in possession of this farm, either under a lease made by the Minister for the benefit of any Indian under s. 58(3), or under a permit under s. 28(2).

Evidence was given of attempted arrangements between the defendant and the purchaser and the assignee of the purchaser under s. 50(2) which would have enabled the defendant to remain in possession at a rental which would have made it possible for the purchaser to make his instalment payments. The Crown took the position that these attempted arrangements were irrelevant, the Department not having consented to any further lease or permit. This objection was properly taken and the attempted arrangements do not assist in any way the defendant's claim to remain in possession. He also says that as an unpaid vendor who has not contracted to give up possession, he is entitled to remain in possession until he receives the full proceeds of the sale by the Superintendent made under s. 50 of the Act. He has no such right. He must give up possession and his right is limited by s. 50 to the receipt of the proceeds.

There should, therefore, be judgment for Her Majesty on behalf of the Six Nations Band of Indians that vacant possession of the lands be delivered with costs in this Court and in the Exchequer Court.

CARTWRIGHT J. (*dissenting*):—The facts and statutory provisions relevant to the solution of the questions raised on this appeal are set out inthe reasons of my brother Judson and in those of Thurlow J.

On the argument of the appeal we were told by counsel that the respondent is still in actual occupation of the lands in question. For the purposes of the appeal I am prepared to assume that the respondent has not shewn any right to remain in possession of these lands.

The action was commenced by an Information in which "Her Majesty the Queen on the Information of the Deputy Attorney General of Canada" is plaintiff and the respondent is defendant. The Information does not in terms allege that the Six Nations Band of Indians, hereinafter sometimes referred to as "the Band" is entitled to possession of the lands but does state that the Band has demanded vacant possession of the lands from the defendant and that he has refused to vacate the same. The prayer for relief so far as relevant reads:

The Deputy Attorney General of Canada, on behalf of Her Majesty, claims as follows:—

(*a*) vacant possession of the said lands on behalf of the Six Nations Band of Indians.

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It will be observed that possession is not claimed by Her Majesty in her own right but only on behalf of the Band. This is in accordance with the provisions of s. 31 of the *Indian Act* which so far as relevant reads:

31. (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been

(*a*) unlawfully in occupation or possession of . . . . a reserve or part of a reserve, the Attorney General of Canada may exhibit an Information in the Exchequer Court of Canada claiming, on behalf of the Indian or the band, the relief or remedy sought.

I can find no ambiguity in this section. It contemplates, as do many other provisions of the Act, that the right to possession of a parcel of land in a reserve may belong to the Band or to an individual Indian. The claim for possession is to be made either on behalf of the Band if it is entitled to possession or on behalf of the individual Indian if he is so entitled.

I agree with Thurlow J. that the evidence shews that the right to possession of the lands in question is vested in Hubert Clause or in Arnold and Gladys Hill, all of whom are Indians and members of the Band, and not in the Band.

I also agree with Thurlow J. when he says:

When a member of a band obtains lawful possession of land in a reserve the right which the band would otherwise have to possession of that land is at an end, though circumstances may arise in which the band may once again have a right of possession either by purchase of the individual members' right or on reversion of the right to the band under ss. 25(2) or 50(3). The statutory scheme accordingly in my opinion contemplates a statutory right of possession of any part of a reserve being vested in an individual member of a band, or in the band itself, but not in the band when it is vested in the individual member.

The applicable principle of law is accurately stated in the passage from Williams and Yates on Ejectment, 2nd ed., page 1 et seq, quoted and adopted by Thurlow J., and particularly the following sentences:

To entitle a plaintiff to bring an action for the recovery of possession of land he must have a right of entry either legal or equitable. A right of entry means a right to enter and take actual possession of lands, tenaments, or hereditaments, as incident to some estate or interest therein.

* * *

The right of entry must be a right to the immediate possession of the property. A reversionary or other future estate is not sufficient until it has become an estate in possession.

I can find nothing in the *Indian Act* to alter these well settled rules as to actions for the possession of the land.

For the reasons briefly stated above and for those given by Thurlow J., with which I am in full agreement, I would dismiss the appeal with costs.

Appeal allowed, CARTWRIGHT, J. *dissenting.*

Solicitor for the Appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent: Ballachey, Moore & Hart, Brantford.

HOFFMAN-LA ROCHE LIMITED .....APPELLANT;

AND

DELMAR CHEMICAL LIMITED .....RESPONDENT.

1965
*Mar. 15, 16
Apr. 9

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Compulsory licence—Patentee requesting oral hearing or cross-examination upon affidavits before Commissioner—Whether refusal by Commissioner a denial of justice—Public safety—Patent Act, R.S.C. 1952, c.203, s.41(3).

The Commissioner of Patents granted to the respondent a licence under s. 41(3) of the *Patent Act,* R.S.C. 1952, c. 203, to use, for the purpose of the preparation or production of medicine, an invention patented by the appellant. The Commissioner had refused the patentee's request that it be allowed an oral hearing or to cross-examine the licensee on the supporting affidavits filed with the application. The Exchequer Court found that the Commissioner's refusal was not a denial of justice as contended by the patentee. The latter appealed to this Court.

Held: The appeal should be dismissed.

The Commissioner was correct when he said that, there being no regulations governing the practice under s. 41(3), he was entitled to set the procedures and was not bound to hold a hearing on demand by one of the parties. It was for the Commissioner to decide whether or not the circumstances required an oral hearing, cross-examination upon affidavits, or oral submissions. His decision not to require any of these things could not be considered to be a denial of natural justice. Furthermore, the patentee had failed to establish any valid ground for disturbing the Commissioner's decision. The patentee had submitted what it contended were good reasons not to grant the licence. These were considered by the Commissioner and rejected. The patentee has not established that the Commissioner had acted on a wrong principle or that, on the evidence, his decision was manifestly wrong.

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* PRESENT: Taschereau C.J. and Abbott, Martland, Ritchie and Hall JJ.

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HOFFMAN-LA ROCHE LTD. v. DELMAR CHEMICAL LTD.

Brevets—Licence forcée—Requête du titulaire du brevet pour une audition ou un contre-interrogatoire sur affidavit devant la Commissaire—Le refus du Commissaire n'est pas un déni de justice—Sécurité du public —Loi sur les Brevets, S.R.C. 1952, c. 203, art. 41(3).

Le Commissaire des Brevets a émis en faveur de l'intimé une licence en vertu de l'art. 41(3) de la *Loi sur les Brevets*, S.R.C. 1952, c. 203, pour utiliser, pour les fins de la préparation ou production de médicaments, une invention brevetée par l'appelant. Le Commissaire avait refusé au titulaire du brevet de lui accorder une audition ou de lui permettre de contre-interroger le porteur de la licence sur les affidavits produits au soutien de la demande. La Cour de l'Échiquier a jugé que le refus du Commissaire n'était pas un déni de justice tel que le prétendait le titulaire du brevet. Ce dernier en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le Commissaire avait raison lorsqu'il a dit que, puisqu'il n'existait aucun règlement régissant la procédure sous l'art. 41(3), il avait droit d'établir la procédure et n'était pas obligé de tenir une audition sur la demande d'une des parties. Il appartenait au Commissaire de décider si les circonstances requéraient une audition, un contre-interrogatoire sur affidavits, ou des soumissions orales. Sa décision de ne requérir aucune de ces choses ne pouvait pas être considérée comme étant un déni de la justice naturelle. Bien plus, le titulaire du brevet n'a pas réussi à établir aucun motif valide pour faire changer le décision du Commissaire. Le titulaire du brevet avait soumis ce qu'il prétendait être des bonnes raisons pour que la licence ne soit pas accordée. Ces raisons furent considérées par le Commissaire et rejetées. Le titulaire du brevet n'a pas réussi à établir que le Commissaire avait agi en vertu d'un mauvais principe ou que, en se basant sur la preuve, sa décision avait été manifestement erronée.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Echiquier du Canada[1], maintenant en partie une décision du Commissaire des Brevets. Appel rejeté.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], maintaining in part a decision of the Commissioner of Patents. Appeal dismissed.

Gordon F. Henderson, Q.C., and R. G. McClenahan, for the appellant.

D. J. Wright and W. L. Hayhurst, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from the Exchequer Court of Canada[1] against the judgment of Thurlow J., who dismissed, in part, an appeal by the present appellant from a decision made by the Commissioner of Patents which,

[1] [1965] 1 Ex. C.R. 611.

pursuant to s. 41(3) of the Patent Act, R.S.C. 1952, c. 203, had granted to the respondent a licence to use, for the purpose of the preparation or production of medicine, the invention patented by Canadian Patent No. 612,497, dated January 10, 1961, held by the appellant. The Commissioner settled the royalty to be payable by the respondent to the appellant. The learned trial judge directed that that issue be referred back to the Commissioner for reconsideration and there is no appeal from that direction. The sole issue before us is as to whether the granting of the licence by the Commissioner was a valid exercise of his powers under s. 41(3).

The respondent's application for a licence under s. 41(3) was dated March 20, 1962. It was supported by the affidavit of its president. The patent in question is described in that application as follows:

> Patent No. 612,497 is governed by section 41(3) since the invention claimed is intended for and capable of being used for the preparation and production of 1, 4—benzodiazepine 4—oxides and acid addition salts thereof, and these products are medicines within the meaning of the section, being useful as sedatives and tranquilizers for humans. Generic names of the products are methaminodiazepoxide and chlordiazepoxide. The patentee sells the products under the trade mark LIBRIUM.

The respondent described its own capacities in the application as follows:

> The applicant and its predecessor Delmar Chemical Company have, since, 1941, been engaged in the synthesis and manufacture of many pharmaceutical fine chemicals, most of them organic synthetics, used as medicines within the meaning of section 41(3). The applicant is a substantial and reputable company with the facilities and technical know-how for manufacturing the product claimed in Patent No. 612,497 by the process claimed therein and is ready, willing and able to manufacture it by such process in its own premises in Canada and with its own equipment and personnel.

On April 2 the Commissioner wrote to the appellant advising of the application and that the respondent had been requested to serve on the appellant a copy of the application and affidavit. The letter went on to say:

> You will have sixty days within which to file with me your counter-statement supported by affidavit and serve a true copy on the representative of the applicant Ridout & Maybee, 111 Richmond Street, West, Toronto 1, Canada.
>
> The applicant will have thirty days to file a reply with me and serve a copy thereof upon you.

On the same date the Commissioner wrote to the respondent advising as to the steps to be taken regarding notice of

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its application, by way of advertising and notice to the appellant, and the times fixed for filing the appellant's counterstatement and the respondent's reply.

On May 25 appellant's solicitors wrote to the Commissioner requesting additional time for filing the counterstatement, because most of the technical information required to formulate it would have to be obtained from the office of the appellant's parent company in Switzerland. The Commissioner granted an extension of two months, until August 8.

The counterstatement was dated July 25 and supported by the affidavit of a vice-president of the appellant. It described the invention as belonging to a new class of compound not theretofore employed in medical therapeutics. It described the advantageous purposes of "Librium" and stated that the manufacturing process involved the use of highly volatile solids, dangerous to inhale. It stated that the respondent's described production facilities were not adequate to cope with the manufacture of Librium. It pointed out that if the licence were granted the quality of manufacturing, storage and capsulating treatment accorded the drug would no longer be subject to control, and urged that public interest would not be served by making the drug open and available to the public free from control.

Along with the counterstatement the appellant's solicitors filed a "demand for hearing" in respect of the application.

On August 8 the Commissioner wrote to the appellant's solicitors pointing out that there were no regulations governing the practice under s. 41(3), that he was entitled to set the procedure and that he was not bound to hold a hearing on demand by one of the parties. He pointed out that the respondent had thirty days to file a reply and that after that time he would decide whether a hearing was warranted or not.

A reply, dated August 13, was filed by the respondent.

On September 7 solicitors for the appellant wrote to the Commissioner in support of a request for a hearing, or, alternatively, a request to cross-examine the president of the respondent on his affidavits supporting the respondent's application and reply. The letter contended that issues of public safety and matters of public concern were involved in the application.

With respect to the matter of public safety, stress was laid upon risks involved in connection with the manufacture of the product. The appellant also urged that the manufacture of a product of inferior quality could destroy the reputation of Librium and have a detrimental effect upon the reputation of the appellant. It was suggested that the Commissioner inspect the respective plants of the appellant and the respondent.

On September 14 respondent's solicitors wrote a letter to the Commissioner in reply to this letter.

On November 19 the Commissioner wrote to the appellant's solicitors advising that he need not inspect the plants, and that he would decide, within a few weeks, whether a hearing would be held.

On November 23 appellant's solicitors again wrote to the Commissioner, stating that the respondent was not considered competent to produce a safe product and that improper control in the manufacture and handling of the product would create dangers to those handling it and to the consumers. A further demand for a hearing was made.

On February 6, 1963, the Commissioner made his decision. After reciting the provisions of s. 41 (3) of the Patent Act he went on to say:

> The Commissioner has no choice but to grant a licence, unless he sees good reason to the contrary. There being no regulations governing his inquiry, he is at liberty to use his judgment in any individual case in order to arrive at a just and fair conclusion.
>
> In the present case the patentee has forcefully objected to the grant of a licence mainly on the grounds that the process is one which involves a great deal of care on account of some volatile and unstable substances used therein or obtained therefrom.
>
> On the other hand the applicant claims that he was aware of the process having verified experimentally, on an adequate scale, that he can produce the products economically. Again in his reply to the counterstatement which stresses the dangers contingent with the process and the instability of some of the products involved the applicant reaffirms his awareness of the difficulties. He then goes on to name some of the hazardous substances and unstable chemical compounds which he handles.
>
> I have no reason to believe that the applicant has not the ability to make the compound. He is a well known manufacturer of synthetic organic compounds.
>
> I therefore decide that no hearing is necessary in this case and that the petition should be granted.

I have recited the various steps which occurred prior to the Commissioner's decision in some detail because the

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Martland J.

appellant contends that there was, in this case, a denial of natural justice.

The appellant's appeal from the Commissioner's decision to the Exchequer Court was dismissed, and the appellant now appeals to this Court.

The relevant provision of the *Patent Act*, s. 41(3), provides as follows:

> (3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

This subsection does not lay down any procedure to be followed by the Commissioner before reaching his decision and, in this respect, differs materially from proceedings under ss. 67 to 72 of the Act in respect of allegations of an abuse of patent rights. Under s. 71(2) any of the parties in such proceedings may demand a hearing.

In my opinion the Commissioner was correct when he said in the present case, in his letter to the appellant's solicitors, dated August 8, 1962, that, there being no regulations governing the practice under s. 41(3), he was entitled to set the procedures and was not bound to hold a hearing on demand by one of the parties.

Counsel for the appellant did not contend that a party to a proceeding under s. 41(3) could demand a hearing, but he did urge that the failure of the Commissioner to permit cross-examination upon the affidavits filed by the respondent to support its application and its reply and to permit oral argument was a denial of justice in the circumstances of the present case.

Various authorities were cited by the appellant regarding the subject of natural justice, including the decision of the House of Lords in *Ridge v. Baldwin*[1]. It is, however, unnecessary to embark on a discussion of the principles laid down in that and other similar cases because, in the circumstances of this case, whether he was obligated to do so or

[1] [1963] 2 All E.R. 66, [1964] A.C. 40.

not, the Commissioner did cause the respondent to serve the appellant with a copy of the application and affidavit; he did furnish to the appellant ample opportunity to present its case in writing, and the appellant did make written submissions to the Commissioner.

I have already referred to the substantial difference which exists between an application under s. 41(3) and one made under s. 67 or 68 in respect of the procedural requirements. As the Commissioner correctly pointed out in this case, he was entitled to set the procedures, and he did so. It was for him to decide whether or not the circumstances required an oral hearing, cross-examination upon affidavits, or oral submissions. In my opinion, his decision not to require any of these things cannot be considered to be a denial of natural justice to the appellant.

I am also of the opinion that the appellant has failed to establish any valid ground for disturbing the decision which the Commissioner has reached. Section 41(3) required him to grant to the respondent the licence applied for by it, unless he saw good reason to the contrary. The appellant submitted to him what it contended were good reasons to the contrary and these were considered by him. As was pointed out in *Parke, Davis & Company v. Fine Chemicals of Canada, Limited*[1], the decision was his to make. While an appeal lies from that decision, in order to succeed it is for the appellant to show that he acted on a wrong principle or that, on the evidence, the decision was manifestly wrong. In my opinion the appellant has not established either of these things in the present case.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: Ridout & Maybee, Toronto.

[1] [1959] S.C.R. 219 at 228, 18 Fox Pat. C. 125, 30 C.P.R. 59, 17 D.L.R. (2d)153.

1965
*Apr. 12
Apr. 14

GERTRUDE D. SMITH, JAMES S. SMITH and BERNARD E. SMITH, Jr., Executors of the last Will and Testament of Bernard E. Smith, deceased ..... APPLICANTS;

AND

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

MOTION FOR LEAVE TO APPEAL

Appeals—Taxation—Income tax—Leave to appeal—Whether appeal from Taxation Board to Exchequer Court a trial de novo—Whether decision by Exchequer Court on procedural matter subject to review by Supreme Court—Income Tax Act, R.S.C. 1952, c. 148, ss. 91, 99(2).

The Crown appealed to the Exchequer Court from a decision of the Income Tax Appeal Board. The taxpayer moved for an order quashing the appeal or, alternatively, for an order striking from the notice of appeal all passages alleging misrepresentation or fraud. Both motions were dismissed by the Exchequer Court. The taxpayer applied for leave to appeal to this Court. The substantial question to be debated on the appeal would be whether an appeal from the Income Tax Appeal Board to the Exchequer Court was in the nature of a trial *de novo*.

Held: The application for leave to appeal should be refused.

It has already been decided in *Campbell v. M.N.R.*, [1953] 1 S.C.R. 3, that an appeal from the Tax Appeal Board to the Exchequer Court was a trial *de novo*.

The striking out of parts of the notice of appeal deals with a procedural matter. S. 99(2) of the *Income Tax Act* gives the Court or a judge a discretionary power to do so, and it was never intended that decisions in the Exchequer Court on ordinary questions of practice or procedure should be subject to revision by this Court.

Appels—Revenu—Impôt sur le revenu—Permission d'appeler—Un appel à la Cour de l'Échiquier d'un jugement de la Commission d'Appel de l'Impôt sur le Revenu est-il un procès de novo*—La décision de la Cour de l'Échiquier sur une matière de procédure est-elle sujette à revision par la Cour suprême—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 91, 99(2).*

La Couronne appela à la Cour de l'Échiquier d'un jugement de la Commission d'Appel de l'Impôt sur le Revenu. Le contribuable présenta une requête pour faire rejeter l'appel ou, alternativement, pour faire radier de l'avis de l'appel tous les passages alléguant dol ou fraude. Ces requêtes furent rejetées par la Cour de l'Échiquier. Le contribuable fit une demande pour permission d'appeler devant cette Cour. La question substantielle a être débattue en appel serait à savoir si

* PRESENT: Hall J. in Chambers.

un appel à la Cour de l'Échiquier d'un jugement de la Commission d'Appel de l'Impôt sur le Revenu est de la nature d'un procès *de novo*.

Arrêt: La demande pour permission d'appeler doit être refusée.

Il a déjà été décidé dans la cause de *Campbell v. M.N.R.*, [1953] 1 R.C.S. 3, qu'un appel à la Cour de l'Échiquier d'un jugement de la Commission était un procès *de novo*.

La radiation de parties de l'avis de l'appel soulève une question de procédure. L'art. 99(2) de la *Loi de l'Impôt sur le Revenu* donne à la Cour ou à un juge un pouvoir discrétionnaire de faire cette radiation, et les décisions de la Cour de l'Échiquier sur des questions ordinaires de pratique ou de procédure n'ont jamais été destinées à être sujettes à revision par cette Cour.

DEMANDE devant le juge Hall en Chambre pour permission d'appeler d'un jugement interlocutoire du Président de la Cour de l'Échiquier. Demande refusée.

APPLICATION before Hall J. in Chambers for leave to appeal from an interlocutory judgment of the President of the Exchequer Court. Application dismissed.

I. S. Johnston, Q.C., for the applicant.

D. S. Maxwell, Q.C., contra.

The following judgment was delivered by

HALL J. (*in Chambers*):—The application for leave to appeal to this Court from the judgment of the learned President of the Exchequer Court dismissing an application by the applicants for an order quashing the respondent's appeal from the judgment of the Tax Appeal Board dated August 20, 1964, with respect to an income tax assessment for the 1953 taxation year and which also dismissed a motion by the applicants for an order striking out from the respondent's Notice of Appeal in respect of the assessment for the 1953 taxation year all those parts thereof alleging misrepresentation or fraud should be refused. The substantial question, namely, whether an appeal from the Tax Appeal Board to the Exchequer Court of Canada is or is not in the nature of a trial *de novo* which the applicants contend should be dealt with by the Supreme Court of Canada has already been decided by the Court in *Campbell v. Minister of National Revenue*.[1]

In that case, Locke J., speaking for the Court, said:

[1] [1953] 1 S.C.R. 3, [1952] C.T.C. 334, [1952] D.T.C. 1187.

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SMITH *et al.* v. MINISTER OF NATIONAL REVENUE

Hall J.

The proceedings on an appeal in such matters to the Exchequer Court are in the nature of a trial *de novo* and the appellant again gave evidence in that Court (1951) Ex. C.R. 290 and was cross-examined at length, and further evidence was given by his wife as to the reasons which had led her husband to sell certain of the properties.

and at p. 6:

While the proceedings before the Income Tax Appeal Board under the provisions of the *Income Tax Act* are by way of appeal from decisions of the Minister, the proceedings in the present matter are indistinguishable from those upon the trial of issues in other courts of record. By subsection 2 of section 91 of the *Act,* upon completion of the steps required by the statute on an appeal to the Exchequer Court, the matter is to be deemed as an action in that Court and the proceedings are conducted in the same manner as in other actions.

Mr. Johnston argued that these extracts from *Campbell v. Minister of National Revenue, supra,* were *obiter dicta.* I am unable to agree with that submission. In *Goldman v. Minister of National Revenue;*[1] the Honourable Mr. Justice Thorson, then President of the Court, went very fully into the point in issue here and concluded with this statement with which I agree:

There are, I think, several reasons for accepting the submission of counsel for the appellant that the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or the Minister, is a trial *de novo* of the issues involved therein. While there are several descriptions of the proceedings as an appeal and while it is true that on the appeal the Registrar of the Income Tax Act Appeal Board is required by section 91(1) of the *Income Tax Act* to transmit to the Registrar of this Court "all papers filed with the Board on the appeal thereto together with a transcript of the record of the proceedings before the Board" there is no provision that the appeal must be based on such record. On the contrary, section 89(3) requires the appellant to set out in the notice of appeal a statement of the allegations of fact, the statutory provisions and reasons which he intends to submit in support of his appeal and section 90(1) calls upon the respondent to serve and file a reply to the notice of appeal admitting or denying the facts alleged and containing a statement of such further allegations of fact and of such statutory provisions and reasons as he intends to rely on. There is nothing in these provisions to restrict the parties to the allegations of fact made before the Board. Additional facts or even different facts may be alleged. Then section 91(2) provides that upon the filing of the material referred to in section 91(1) or 91A and of the reply required by section 90, "the matter shall be deemed to be an action in the court and, unless the Court otherwise orders ready for hearing". This section is almost identical with section 63(2) of the *Income War Tax Act.* Its purpose is to give the parties the benefits of the proceedings in an action to establish their respective allegations which would not be available in an ordinary appeal. There would be no purpose in these provisions if Parliament intended that the appeal should be heard on the basis of the record before the Income Tax Appeal Board. They contemplate that the issues as defined by the

[1] [1951] Ex. C.R. 274 at 279, [1951] C.T.C. 241.

statement of facts and the reply should be tried by this Court according to the processes of an action in this Court. This necessitates a trial *de novo*. While this view lends itself to the possibility that the taxpayer or the Minister may make a different case or defence in this Court from that made before the Board and it may seem anomalous that Parliament should permit this there is nothing in the Act to bar it. The freedom of the Court to deal with the issues raised before it, without regard to the proceedings before the Board, is further indicated by the provision in section 91(3) that any fact or statutory provision not set out in the notice of appeal or reply may be pleaded or referred to in such manner and upon such terms as the Court may direct and by the power given to the court by section 91(4) of disposing of the appeal by dismissing it, vacating or varying the assessment or referring it back to the Minister.

All these considerations lead to the conclusion that the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or by the Minister, is a trial *de novo* of the issues involved, that the parties are not restricted to the issues either of fact or of law that were before the Board but are free to raise whatever issues they wish even if different from those raised before the Board and that it is the duty of the Court to hear and determine such issues without regard to the proceedings before the Board and without being affected by any findings made by it.

The second branch of the application, namely, to strike out certain parts of the Notice of Appeal with respect to the 1953 taxation year clearly deals with a procedural matter. Section 99(2) of the *Income Tax Act* gives the Court or a judge the discretionary power to strike out a Notice of Appeal or any part thereof. The learned President, Mr. Justice Jackett, in exercising his discretion, refused to strike out the parts of the Notice of Appeal objected to.

. . . it was never intended that decisions in the Exchequer Court on ordinary questions of practice or procedure should be subject to revision by this Court.

Kerwin C.J. in *Coast Construction Company v. The King.*[1]

The application for leave to appeal will therefore be dismissed with costs.

Application dismissed.

Solicitors for the applicants: Lash, Johnston, Sheard. & Pringle, Toronto.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

[1] [1951] S.C.R. 759 at 762.

1965
*Mar. 3, 4
Apr. 6

WELDWOOD - WESTPLY LIMITED (*Plaintiff*) ..... APPELLANT;

AND

DOUGLAS N. CUNDY (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contracts—Novation—Agreement to assume third party liability to extent of specific amount—Covenant to continue to do business with third party—Further extension of credit later refused—Whether failure of consideration—Justification in withholding further credit.

On May 11, 1962, the plaintiff company entered into an agreement with the defendant whereby the defendant agreed to assume $20,000 of the liability owing by company B to the plaintiff in consideration of certain covenants and in particular in consideration of the plaintiff continuing to do business with B. The defendant undertook to pay the $20,000 on or before August 11, 1962, and, following the execution of the agreement, he had B issue in his favour forty $500 post-dated cheques. The defendant endorsed and delivered these cheques to the plaintiff. After ten cheques were paid, three were dishonoured by non-payment when presented. The plaintiff then refused to extend further credit to B. It credited the defendant with the $5,000 received and after August 11, 1962, brought action for the balance of $15,000. The trial judge held that the plaintiff was justified in refusing to continue to extend credit after the three cheques were dishonoured. The Appellate Division reversed the trial judge on the basis that there had been an entire failure of consideration, thus relieving the defendant of his liability for the balance of the $20,000. An appeal was brought to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

Per Curiam: It was beyond question that the defendant assumed the liability of B to the extent of $20,000 and the plaintiff released B to the extent of this amount. That constituted a novation. *Commercial Bank of Tasmania v. Jones,* [1893] A.C. 313, referred to.

It was held that there was no failure of consideration. Business was carried on as usual after May 11th and credit was extended until it became apparent on the three cheques being dishonoured that B was finding it impossible to pay its liabilities as they became due. The plaintiff was justified in withholding further credit in the situation as it then developed. *Royal Bank of Canada v. Salvatori,* [1928] 3 W.W.R. 501, discussed; *Royal Bank of Canada v. Mills,* [1932] 3 W.W.R. 283, applied.

Per Spence J.: The defence that there could not be a novation of only part of the old debt failed. *Re Abernethy-Lougheed Logging Co., Attorney-General for British Columbia v. Salter,* [1940] 1 W.W.R. 319, distinguished; *Hodgson v. Anderson* (1825), 3 B. & C. 842; *Fairlie v. Denton and Barker* (1828), 8 B. & C. 395, referred to.

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

The further defence that the plaintiff's covenant to continue to do business with B was a condition precedent to the defendant's covenant to pay to the plaintiff the sum of $20,000, and that the plaintiff in breach of that covenant failed to continue to do business with B and freed the defendant from his covenant was also rejected. In the circumstances, there was no breach of the condition precedent.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta allowing an appeal from a judgment of Kirby J. Appeal allowed.

G. H. Steer, Q.C., for the plaintiff, appellant.

W. K. Moore, for the defendant, respondent.

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

HALL J.:—On May 11, 1962, an agreement was entered into between the appellant and the respondent as follows:

WHEREAS Four Square Lumber (Buildings) Ltd., hereinafter referred to as "Four Square" a body corporate carrying on business in the City of Calgary, in the Province of Alberta, is indebted to Weldwood for an amount exceeding $20,000.00.

AND WHEREAS Weldwood is concerned at the amount of the indebtedness of Four Square and has asked Four Square and Cundy for further and better security as a consideration of Weldwood continuing to do business with Four Square.

AND WHEREAS Cundy has agreed to assume $20,000.00 of the liability owing by Four Square to Weldwood.

NOW THIS AGREEMENT WITNESSETH that in consideration of the covenants herein expressed and in particular in consideration of Weldwood continuing to do business with Four Square which will be to your direct advantage as Cundy being an officer and/or shareholder thereof, it is mutually agreed between the parties hereto as follows:

1.—CUNDY hereby agrees to assume and promises to pay to Weldwood $20,000.00 of the indebtedness owing by Four Square to Weldwood.

2.—WELDWOOD hereby releases and discharges Four Square from any liability on the present indebtedness in the sum of $20,000.00.

3.—CUNDY promises to pay to Weldwood the sum of $20,000.00 on or before the 11th day of August, A.D. 1962 at the offices of Weldwood at 5707—3rd Street South East, Calgary, Alberta, to bear interest at the rate of 6% on the unpaid balance.

4.—Paragraph 3 hereof shall be considered a Promissory Note payable by Cundy in which the consideration is presumed.

5.—The parties hereto agree to execute such further documents and assurances to give effect to this Agreement.

This Agreement shall be binding on the parties hereto, their executors and successors or assigns.

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The circumstances leading up to the execution of this agreement may be summarized as follows. Between September 1957 and June 1962 Western Plywood Company Limited and its successor, Weldwood-Westply Limited, the appellant, supplied lumber and other building materials on a large scale to Four Square (Alberta) Lumber and its successor, Four Square Lumber (Buildings) Ltd. Throughout the most of this period the latter companies enjoyed and were allowed from sixty (60) to ninety (90) days to pay for the materials supplied, and at times enjoyed credit to the extent of $48,223.

In the fall of 1961 Western Plywood Company Limited was taken over by American interests and the company name emerged as Weldwood-Westply Limited. Immediately following the takeover by American interests, Allan H. Young, the manager of Weldwood-Westply Limited, the appellant herein, expressed concern to the respondent, a director and substantial creditor of Four Square Lumber (Buildings) Ltd., about the indebtedness of such company to Weldwood-Westply Limited. Young requested the respondent to guarantee the indebtedness of Four Square Lumber (Buildings) Ltd. The respondent refused to execute a guarantee.

In the spring of 1962, Four Square Lumber (Buildings) Ltd. decided to expand its business and was desirous of enjoying the same credit facilities with the appellant as they had in the past. The appellant, through its manager Young, indicated that such credit would be extended, if the respondent Cundy personally undertook to assume some responsibility for the Four Square Lumber (Buildings) Ltd. account. Cundy agreed to pay on or before August 11, 1962, the sum of $20,000 at the offices of the appellant in Calgary, the said payment to be credited to the account owing by Four Square Lumber (Buildings) Ltd. to the appellant, provided that the appellant extended the same credit facilities to Four Square Lumber (Buildings) Ltd. as it had done in the past. Accordingly, the foregoing agreement was executed. It is beyond question that the respondent Cundy assumed the liability of Four Square Lumber (Buildings) Ltd. to the extent of $20,000 and the appellant released Four Square Lumber (Buildings) Ltd. to the extent of the said amount. That constituted a novation (see *Commercial*

Bank of Tasmania v. Jones[1]). The respondent became indebted to the appellant in the sum of $20,000. At that time the appellant could not have brought action against Four Square Lumber (Buildings) Ltd. for the $20,000. The account of Four Square Lumber (Buildings) Ltd. was actually credited with the payment of $20,000 as of the date of the agreement, leaving the sum of $2,322.92 owing by Four Square Lumber (Buildings) Ltd. to the appellant at that time.

So far the transaction appears as a simple one. However, the respondent alleges that the said agreement was subject to the condition precedent that the respondent would become liable for the $20,000 on August 11, 1962 only if the appellant continued to do business and to extend credit to Four Square Lumber (Buildings) Ltd. as had been done in the past and he relies on the paragraph of the agreement which reads:

> NOW THIS AGREEMENT WITNESSETH that in consideration of the covenants herein expressed and in particular in consideration of Weldwood continuing to do business with Four Square which will be to your direct advantage as Cundy being an officer and/or shareholder thereof, it is mutually agreed between the parties hereto as follows:—

The appellant did continue to do business with Four Square Lumber (Buildings) Ltd. and extended credit for such materials as were ordered by Four Square Lumber (Buildings) Ltd. during the balance of the month of May and throughout the month of June 1962, but on or about July 1, 1962, the appellant refused to extent further credit to Four Square Lumber (Buildings) Ltd. At that time credit to the extent of some $7,600 had been extended. The reason credit was refused on and after July 1st was because three cheques of Four Square Lumber (Buildings) Ltd. for $500 each in the hands of the respondent had been dishonoured on being presented for payment during the last days of June 1962. These cheques came into being in the following circumstances. The respondent, having made himself liable to the appellant for the $20,000 which he undertook to pay on August 11, 1962, had Four Square Lumber (Buildings) Ltd. issue to him 40 $500 cheques post-dated four to five days apart. He endorsed and delivered them to the appellant. These cheques, if honoured on presentation, would have relieved him of the liability he had personally assumed,

[1] [1893] A.C. 313.

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though in a much longer period than to August 11, 1962. In this manner the respondent was actually having Four Square Lumber (Buildings) Ltd. use its working capital to discharge the liability that he had assumed to the appellant and this in May and June 1962 which was a slack time for Four Square Lumber (Buildings) Ltd. Ten of these $500 cheques were honoured prior to the first of the three cheques being dishonoured. The appellant credited the respondent with the $5,000 thus received and after August 11, 1962, brought this action for the balance of $15,000. The respondent defended, alleging:

> 6. The Defendant states that it was expressly understood and a condition precedent to the Agreement of the 11th day of May, A.D. 1962 that the Plaintiff would extend credit to Four Square Lumber (Buildings) Ltd. in the same manner as credit had previously been extended to Four Square (Alberta) Lumber Ltd. but that the Plaintiff repudiated the Agreement by calling off credit as agreed, thereby releasing the Defendant from any obligation to the Plaintiff.
>
> 7. In the alternative, the Defendant states that the Plaintiff persuaded the Defendant to sign the Agreement dated the 11th of May, A.D. 1962 conditional upon the Plaintiff continuing to do business with and extend credit to Four Square Lumber (Buildings) Ltd. and as the Plaintiff failed to satisfy this condition the Plaintiff is now estopped from claiming against the Defendant, Cundy.

The appellant claims that it had the right to refuse to extend further credit when the three $500 cheques were dishonoured and were not taken care of.

The action was tried by Kirby J. in the Supreme Court of Alberta who held that the appellant was justified in refusing to continue to extend credit after the three cheques were dishonoured. The Appellate Division of the Supreme Court of Alberta reversed the trial judge on the basis that there had been an entire failure of consideration, thus relieving the respondent of his liability for the balance of the $20,000. The Appellate Division purported to follow *Royal Bank of Canada v. Salvatori*[1]. I am unable to see that this case assists the respondent. In it their Lordships of the Privy Council held that there was a total failure of consideration in that the bank failed to perform the covenant to continue to deal with the debtors, Antoni Brothers, and that the guarantor, Salvatori, had not received the whole of the consideration upon which his covenant was based. In my view, a case much more in point is *Royal Bank of Canada v.*

[1] [1928] 3 W.W.R. 501.

Mills[1], where on a guarantee identical with the document in the *Salvatori* case the Appellate Division of the Supreme Court of Alberta held that there was no such failure of consideration where the bank continued to carry on a normal banking business with the debtor after the guarantee had been given. In the present case business was carried on as usual after May 11th and credit was extended until it became apparent on the three cheques being dishonoured that Four Square Lumber (Buildings) Ltd. was finding it impossible to pay its liabilities as they became due. In my view the appellant was justified in withholding further credit in the situation as it then developed.

I would allow the appeal with costs in this Court and in the Appellate Division of the Supreme Court of Alberta and restore the judgment of Kirby J.

Spence J.:—I have had the opportunity of reading the reasons for judgment of my brother Hall and I agree with both his reasons and the conclusions set out thereunder.

I desire, however, to add some comments in reference to two defences advanced by the respondent. Firstly, that there was no novation because the old debt was not extinguished. Certainly, the old debt was extinguished as to $20,000 thereof and therefore the defence must be that there could not be a novation of only part of the old debt. I have been unable to find any authority for that proposition and *Re Abernethy-Lougheed Logging Company, Attorney-General for British Columbia v. Salter*[2], cited by counsel for the respondent, is not in my view such an authority, as in that case the whole of the debt was subject to novation and the word "complete" used by Sloan J.A. at p. 326 had no reference to a purported novation of part of the debt. I have found that Williston in vol. 6 of the revised edition of his authoritative work on contracts, at p. 5241 states:

> Novation necessarily involves the immediate discharge of an old debt or duty, *or part of it,* and the creation of a new one.

thereby implying that the novation may be of part only of the original debt. In my view, *Hodgson v. Anderson*[3], and *Fairlie v. Denton and Barker*[4], are authorities for that proposition.

[1] [1932] 3 W.W.R. 283, 4 D.L.R. 574.
[2] [1940] 1 W.W.R. 319.
[3] (1825), 3 B. & C. 842, 107 E.R. 945.
[4] (1828), 8 B. & C. 395, 108 E.R. 1089.

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Secondly, the respondent urged as a defence that the appellant's covenant to contine to do business with Four Square Lumber (Buildings) Limited was a condition precedent to the respondent's covenant to pay to the appellant the sum of $20,000, and that the appellant in breach of that covenant failed to continue to do business with Four Square Lumber (Buildings) Limited and freed the respondent from his covenant.

This argument was successful in the Appellate Division of the Supreme Court of Alberta. Macdonald J. A., giving judgment for the Court, said:

It is clear that the cheques given by the appellant Cundy were not substituted for his covenant in the agreement of May 11th, 1962. We are satisfied that such cheques were voluntary payments in advance of the due date of the covenant to pay.

On the evidence it seems clear to us that the appellant has not received the consideration, that is, the whole of the consideration, upon which his covenant is based as the respondent breached the agreement by refusing and thereby failing to continue to do business with Four Square Lumber (Buildings) Ltd.

By reason of that failure, the appellant is not bound to perform his covenant. See *Royal Bank of Canada v. Salvatori* [1928] 3 W.W.R. 501 at 509.

On the evidence we are satisfied that the appellant did not instruct the respondent to desist from supplying goods to Four Square Lumber (Buildings) Ltd.

We would allow the appeal with costs.

I am in agreement with my brother Hall that *Royal Bank of Canada v. Mills*[1] is applicable to the situation. On the evidence, the appellant did continue thereafter to do business with Four Square Lumber (Buildings) Limited as before. As Harvey C.J. said in that case at p. 286:

Its . . . business . . . was carried on after the guaranty exactly as . . . before.

Although it is true that the orders given by Four Square to the appellant in the months which followed the delivery to the appellant of the agreement of May 11, 1962 were much smaller than had been delivered previously, what caused the appellant to refuse to continue to do business further with Four Square was the fact that three cheques of the said Four Square company for $500 each made in favour of the respondent, and by him endorsed and delivered to the appellant, were dishonoured in the space of a few weeks. These cheques were delivered to the appellant by the

[1] [1932] 3 W.W.R. 283.

respondent in the fashion and for the purpose set out by my brother Hall and in fact were prepayments, had they been honoured, of the respondent's convenant under the agreement. The appellant would not have been justified in refusing further to do business with Four Square because such cheques in prepayment had been dishonoured. But the appellant by the fact that such cheques, being cheques of the Four Square debts, were dishonoured had notice that that company was ceasing to do business and to pay its creditors in the ordinary fashion. The covenant to continue to do business cannot be interpreted as requiring the appellant to continue to supply credit to an insolvent purchaser. As Kirby J. said in his judgment at trial:

> In my mind, it has just boiled down to that, and I would think that Weldwood-Westply would be very poor businessmen if they continued to do business.

There was, therefore, no breach of the condition precedent and the refusal under these circumstances of the appellant to continue to do business with Four Square Lumber (Buildings) Limited cannot be relied upon as a defence freeing the respondent from his covenant.

For these reasons, and those given by my brother Hall, I would allow the appeal with costs in this Court and in the Court of Appeal, and restore the judgment at trial.

Appeal allowed with costs and judgment at trial restored.

Solicitors for the plaintiff, appellant: Woolliams, Kerr, Korman & Moore, Calgary.

Solicitors for the defendant, respondent: MacDonald, Cheeseman, Moore & Atkinson, Calgary.

1964
*Dec. 2, 3
1965
May 17

CARGILL GRAIN COMPANY LIMITED (*Plaintiff*) ..... APPELLANT;

AND

FOUNDATION COMPANY OF CANADA LIMITED (*Defendant*) ..... RESPONDENT.

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

Actions—Exception of lis pendens—Action in damages for breach of building contract against builder—Subsequent action by builder to preserve privilege and in damages—Cross-demand in second action by first plaintiff—Whether identity of parties, cause and object in cross-demand —Code of Civil Procedure, arts. 173, 215.

The plaintiff instituted in the district of Montreal an action against the defendant and several other construction companies for damages resulting from the failure to complete a building contract within the stipulated date, and invoked in particular against the defendant faulty work on a warehouse built by it. This action was defended by all defendants. After the completion of the work, the defendant instituted in the district of Saguenay an action against the original plaintiff for work done, materials furnished and damages. The original plaintiff filed a cross-demand in the second action for damages arising from the collapse of one of the warehouses built under the contract. The exception of *lis pendens* asking that the cross-demand be struck out was dismissed by the trial judge. This judgment was reversed by the Court of Appeal. The original plaintiff appealed to this Court.

Held: The appeal should be dismissed.

It is clear that *lis pendens* exists only if in both actions the parties, the cause and the object of the action are the same. There is no doubt that in the present case there was identity of parties and of cause. There was also identity of object. The damages claimed in the Montreal action were identical in character to those claimed by the plaintiff in its cross-demand. The mere fact that the amounts claimed might differ did not alter the nature of the object. Under art. 215 of the *Code of Civil Procedure,* additional damages cannot be claimed in a different action, but by incidental demand.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Beaudoin J. Appeal dismissed.

John J. Ahearn, Q.C., for the plaintiff, appellant.

Peter Laing, Q.C., for the defendant, respondent.

* PRESENT: Taschereau C.J. and Fauteux, Judson, Hall and Spence JJ.

[1] [1964] Quebec Q.B. 400.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—I am of the opinion that this appeal fails and that it should be dismissed. A short résumé of the facts is essential for the better understanding of this case.

In 1958, the Cargill Grain Company, Limited, Cross-Plaintiff-Appellant, planned the construction, in Baie Comeau, District of Saguenay, Province of Quebec, of a grain export and storage elevator on the St. Lawrence River, with a capacity in excess of eleven million bushels of grain and high-speed loading and unloading facilities. The appellant entered into a series of separate contracts, each for a different phase of the work.

The Foundation Company of Canada, Limited, submitted bids which were the lowest, and was awarded on or about November 5, 1958, Contract No. 3, on March 17, 1959, Contract No. 4, and on July 23, 1959, Contract No. 14, for the execution of part of the work required.

Cargill Grain was dissatisfied with the work done by Foundation Company and on July 21, 1960, took action in the Superior Court of the District of Montreal against Foundation Company, Cross-Defendant-Respondent in the present case, and Davie Shipbuilding Limited, Cobra Industries Inc., and Hennessy Riedner & Associates Inc., who were all contractors on the Baie Comeau construction, jointly and severally for the sum of $2,451,586.60 damages and further against the Cross-Defendant-Respondent alone for the sum of $170,851.50. The conclusions of the action further asked that the invoiced claims of Cross-Defendant-Respondent against Cross-Plaintiff-Appellant in the amount of $1,096,119.65 be annulled. This action was contested by all defendants, including, of course, Foundation Company.

The Cargill Grain Company alleges that it has sustained damages as a result of the completion of the Baie Comeau facility beyond its scheduled completion date and that

> .... moneys obtained by Cross-Defendant-Respondent as a result of fraud, duress and mistake of fact and law; and payments made to other contractors to correct Cross-Defendant-Respondent's faulty work. In short, Cross-Plaintiff-Appellant claimed in its Montreal action that the facility was completed late and that Cargill was forced to pay excessive sums of money due to Cross-Defendant-Respondent's dishonesty and the necessity to correct certain bad work.

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CARGILL GRAIN CO. LTD. v. FOUNDATION CO. OF CANADA LTD.

Taschereau C.J.

After the institution of this action in Montreal, construction was completed in Baie Comeau, but during the first loading of grain on August 19, 1960, part of Warehouse No. 1 perished.

On December 20, 1960, the Foundation Company launched an action in the District of Saguenay to preserve its privilege, and claimed against Cargill Grain Company the sum of $964,774.88 for work done, material furnished in execution of its contracts, and damages. After contesting this action on the merits, and some two and one-half years later, in May 1963, the appellant asked leave in the Saguenay action to file a cross-demand, in which it claimed cost of reconstruction of Warehouse No. 1 and damages, totalling $1,986,216.10. The respondent, Foundation Company, met this cross-demand by a Preliminary Exception of *Lis Pendens,* which was dismissed by the Superior Court, but the judgment of the learned trial judge was reversed by the judgment of the Court of Appeal.[1]

The Exception reads as follows:

> WHEREAS by Writ of Summons issued out of the Superior Court for the District of Montreal under No. 511763 of the records of that Court, the Cross-Plaintiff has sued the Cross-Defendant for damages arising out of *inter alia* the alleged improper construction by Cross-Defendant of Warehouse No. 1 at Baie Comeau; and
>
> WHEREAS the said action is still pending between the parties; and
>
> WHEREAS the present Cross-Demand is between the same parties acting in the same qualities, has the same object and is founded on the same cause, as can be seen by a copy of the Writ and Declaration, Particulars and Further Particulars and, more particularly, paragraph 32(4) of the said Declaration, and the Particulars, and Further Particulars thereto, in the Montreal action aforesaid; copies of said Writ and Declaration, Particulars and Further Particulars, being filed herewith as Cross-Defendant's Exhibits CD-1, CD-2, and CD-3 respectively.
>
> THAT Cross-Plaintiff's present Cross-Demand be dismissed with costs.

Under art. 173 of the *Code of Civil Procedure,* the defendant may, in case of *lis pendens,* ask, by a Preliminary Exception, that the action be dismissed. Here, what is asked is not that the action be dismissed, but that the cross-demand in the Murray Bay action be dismissed. It is clear that *lis pendens* exists only if in both cases (Montreal and Murray Bay) the parties, the cause and object of the

[1] [1964] Que. Q.B. 400.

case are the same. If these three conditions exist, the Exception must be allowed and the cross-demand of Cargill Grain claimed in the Murray Bay action must be dismissed.

I have no doubt that in the present case there is identity of parties and of cause. I am also of the opinion that there is identity of object. The damages claimed by the Cargill Company in the Montreal action are identical in character to those claimed by the same company in its cross-demand in the Murray Bay action.

The amount may be different but the object remains the same. The mere fact that the amounts claimed in the two litigations may differ does not alter the nature of the object. *Arsenault v. Monette*[1].

The rules that have to be applied in matters of *lis pendens* are the same that are to be applied in *res judicata* and they have to be applied here. These rules rest on the presumption of *res judicata* which is a bar to any further litigation on the same matter. This excludes the possibility of contradictory decisions on the same matter. Lacoste, de la chose jugée, n°s 14, 251; *Langevin v. Raymond*[2].

In the case of *Arsenault v. Monette, supra,* the Court of Appeal said:

> An exception of *lis pendens* should be maintained if it appears that the plaintiff took an action in the Magistrate's Court for damages to his automobile and that he instituted a second action in the Superior Court *claiming a greater amount as damages resulting from the same accident.* The issue whether an exception of *lis pendens* lies is governed by the principles of chose jugée.

Laurent, Droit civil vol. 20, p. 81 says:

> Quand la nouvelle demande est fondée sur *la même cause,* on peut la repousser par l'exception de chose jugée, car elle a été jugée; si l'on admettait une nouvelle action, il pourrait y avoir contrariété de décisions et, par suite, atteinte à l'autorité que la loi attache aux jugements. Dans ce cas, on peut dire que le procès doit avoir une fin, car il a été décidé, et on ne peut pas permettre que cette décision soit remise en question. Celui qui forme une nouvelle demande, fondée sur la même cause, n'a pas le droit de se plaindre si on le repousse par une fin de non-recevoir; il n'éprouve pas un déni de justice, car il a pu soutenir son droit, et il l'a soutenu devant le premier juge.

In the Montreal action, Cargill Grain claims in para. 6 of its statement of claim, *damages* for the *improper construction of Warehouse No.* 1, the foundation and preparation of the ground, causing the failure of the warehouse.

[1] [1951] Que. K.B. 372. [2] (1926), 41 Que. K.B. 412.

1965

CARGILL GRAIN CO. LTD. v. FOUNDATION CO. OF CANADA LTD.

Taschereau C.J.

This is an abstract of the particulars furnished by Cargill on January 3, 1962, following the action instituted in Montreal on July 21, 1960.

In defence to the action taken by Foundation Co. in 1963 Cargill made its cross-demand and alleged that the negligence and error of cross-defendant caused the perishing in part of Warehouse No. 1 on August 19, 1960.

The main claim by Cargill in its Montreal action appears to me to be the same as what is claimed in the Murray Bay action by the cross-demand. It should not be forgotten that a cross-demand is equivalent to an action. I have stated before that in such cases art. 173 applies and that the defendant may, in case of *lis pendens,* ask by a preliminary exception that the action be dismissed.

It is also trite law in the Province of Quebec that if additional damages have occurred since the first action was instituted, these additional damages cannot be claimed in a different action, or in a cross-demand in a different action, but by incidental demand by virtue of art. 215 of the *Code of Civil Procedure.* Under that section the plaintiff may, in the course of the suit, make such an incidental demand in order to claim a right accrued since the service of the principal action and connected with the right claimed originally.

On the whole, I concur with the reasons of Mr. Justice Rivard, and I would, therefore, dismiss the appeal with costs throughout.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellants Hyde, Ahern, de Brabant & Nuss, Montreal.

Attorneys for the defendant, respondent: Chisholm, Smith, Davis, Anglin, Laing, Weldon & Courtois, Montreal.

DOMINION AUTO ACCESSORIES LIMITED (*Defendant*) ..... APPELLANT;

1965
*Mar. 17
June 7

AND

BARBARA B. DE FREES and BETTS MACHINE COMPANY (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Infringement—Whether patent valid—Anticipation—Workshop improvement—Patent Act, R.S.C. 1952, c. 203.

The plaintiffs sued the defendant for infringement of a patent. The defendant conceded that it was guilty of infringement if the patent was found to be valid. The invention related to a removable sealing device for vehicle marking lights, which are used to outline trucks at night. The defendant contended that the invention was an obvious workshop improvement. The Exchequer Court held that the plaintiffs had a valid patent and that it had been infringed by the defendant. The latter appealed to this Court.

Held: The appeal should be dismissed.

The Exchequer Court was correct in finding that the claim of the letters patent had not been anticipated, that it defined an invention and that it was not an obvious workshop improvement.

Brevets—Contrefaçon—Validité du brevet—Anticipation—Perfectionnement d'atelier—Loi sur les Brevets, S.R.C. 1952, c. 203.

Les demandeurs ont poursuivi le défendeur pour contrefaçon d'un brevet. Le défendeur a admis qu'il était coupable de contrefaçon s'il était jugé que le brevet était valide. L'invention se rapporte à un appareil détachable sous scellés pour les lanternes marquant les véhicules et qui servent à délimiter les contours des camions la nuit. Le défendeur a prétendu que l'invention était un perfectionnement d'atelier manifeste. La Cour de l'Échiquier a jugé que les demandeurs avaient un brevet valide et que le défendeur était coupable de contrefaçon. Ce dernier en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

La Cour de l'Échiquier a eu raison en adjugeant que la revendication dans les lettres patentes n'avait pas été anticipée, qu'il y avait eu invention et qu'il ne s'agissait pas d'un perfectionnement d'atelier manifeste.

APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier du Canada[1], maintenant une action pour contrefaçon de brevet. Appel rejeté.

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*PRESENT: Taschereau C.J. and Abbott, Martland, Ritchie and Hall JJ.

[1] [1964] Ex. C.R. 331, 25 Fox Pat. C. 58.

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DOMINION AUTO ACCESSORIES LTD. v. DE FREES et al.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1], maintaining an action for infringement of a patent. Appeal dismissed.

Donald F. Sim, Q.C., for the defendant, appellant.

Gordon W. Ford, Q.C., and *David M. Rogers*, for the plaintiffs, respondents.

The judgment of the Court was delivered by

HALL J.:—This is an appeal by the appellant from the judgment of the Honourable Mr. Justice Noël in the Exchequer Court of Canada[1] dated October 23, 1963, holding the respondents' Patent No. 522,093 to be valid and to have been infringed by the appellant.

The action was for infringement of a patent, issued on February 28, 1956, to Joseph H. DeFrees, now owned by the respondent Barbara B. DeFrees, and licensed exclusively to the respondent Betts Machine Company, a United States corporation with head office in Warren, Pennsylvania.

The only question in issue is the validity of the respondents' patent. The appellant concedes that it has infringed the patent if the patent if found to be valid.

The invention relates to a "REMOVABLE SEALING DEVICE FOR VEHICLE MARKING LIGHT". Vehicle marking lights are used primarily on tanker trucks that travel on a highway and indicate at night the bounds of the truck, its edges and corners so as to indicate to other drivers the limits of the vehicle for the purpose of avoiding accidents. Some of these lights are also used to show the height of the vehicle. The lights on the side of the trucks are termed "coloured lights" whereas those at the front and at the rear are called "clearance lights".

The patent in suit is described at length in the judgment under appeal, but in short the claim covers a vapour-proof vehicle lamp consisting of a cup-shaped housing, a slightly cupped lens and a means of securing the two together; the lens goes into the housing telescopically and the housing is shaped to accept that telescope. The sealing of both parts is effected by means of O-rings and two mating grooves, one on the housing and the other on the lens so that when they come together in the proper relationship they snap into

[1] [1964] Ex. C.R. 331, 25 Fox Pat. C. 58.

position. When the grooves are in alignment and the O-ring is seated between them to effect a seal the flange on the outside of the lens abuts against the flange on the housing which is the snap seal effect.

The appellant argued that the judgment of Noël J. was erroneous in the following respects:

1. In finding Canadian Letters Patent No. 522,093 valid.
2. In finding that the claim of the said Letters Patent had not been anticipated.
3. In finding that the claim of the said Letters Patent defined an invention and was not an obvious workshop improvement.

The learned trial judge fully reviewed all the prior art, and concluded by saying:

> This exhaustive review of all the prior art enables me to say without hestitation that in none of the patents cited would the patentee in suit have found the solution that he solved by his patent and, consequently, the attack on the patent in suit on the basis of anticipation or lack of novelty must fail.

He then dealt fully with the matter of inventiveness or inventive ingenuity, and following an exhaustive review of the relevant law and of prior patents and devices, he rejected the claim that the device described in the patent was merely a workshop improvement and said:

> There is, therefore, here, in my opinion, impressive evidence of inventiveness and of a want in the fuel tanker trade that remained unfulfilled until the DeFrees patent came along and, consequently, the defendant's attack on the patent in this respect must fail.

Having considered the evidence, the arguments of counsel and the authorities to which they referred, and having the advantage of the exhaustive review of both the prior art and on the question of inventiveness so fully gone into by the learned trial judge, I find myself wholly in agreement with his conclusions and reasons and I am content to adopt them.

The appeal must, therefore, be dismissed with costs and the judgment of Noël J. affirmed.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: McCarthy & McCarthy, Toronto.

Solicitors for the plaintiffs, respondents: Rogers & Bereskin, Toronto.

1965
*May 19, 20
June 7

CANADIAN PACIFIC RAILWAY COMPANY ..... APPELLANT;

AND

THE ATTORNEY GENERAL OF QUEBEC and THE MINISTER OF ROADS OF QUEBEC ..... RESPONDENTS;

AND

THE MINISTER OF HIGHWAYS OF ALBERTA ..... INTERVENANT.

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Railways—Construction of overhead bridge as replacement for existing subway—Apportionment of cost—Railway Act, R.S.C. 1952, c. 234, ss. 39, 53(2), 260, 262, 267.

The Board of Transport Commissioners for Canada ordered the appellant railway to contribute 12½ per cent of the total cost of constructing an overhead bridge to replace an existing subway constructed in 1908 on a main highway in Quebec. The Board also directed a contribution of 50 per cent of the cost from the Railway Grade Crossing Fund. The balance was to be paid by the Department of Roads. Contending that the Board had erred in determining the amount to be paid by it, the railway company obtained leave to appeal to this Court.

Held: The appeal should be dismissed.

Sections 39 and 262 of the *Railway Act* give the Board very wide discretionary powers to order any construction, alterations, substitution or reconstruction of any railway crossing structure or subway and to apportion the cost of any such works between the railway company, municipal or other corporation or person. The discretionary powers so exercised are not subject to review by this Court. It is within the jurisdiction of the Board under s. 39(2) of the Act to determine by whom and in what proportions the cost and expense of the construction should be borne. *Toronto Transportation Comm. v. C.N.R.*, [1930] S.C.R. 94. There was no error in law in the judgment of the Board in relation to s. 267 of the Act.

Chemins de fer—Construction d'un pont pour remplacer un viaduc—Répartition des frais—Loi sur les Chemins de Fer, S.R.C. 1952, c. 234, arts. 39, 53(2), 260, 262, 267.

La Commission des Transports du Canada a ordonné à la compagnie de chemin de fer appelante de contribuer 12½ pour-cent du coût total de la construction d'un pont pour remplacer un viaduc construit en 1908 sur une des routes principales de Québec. La Commission a aussi ordonné une contribution de 50 pour-cent des frais de la part de la

*PRESENT: Taschereau C.J. and Abbott, Judson, Hall and Spence JJ.

Caisse des passages à niveau de chemins de fer. La balance devait être payée par le département de la Voirie. Prétendant que la Commission avait fait erreur en déterminant le montant qu'elle devait payer, la compagnie de chemin de fer a obtenu permission d'appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

Les arts. 39 et 262 de la *Loi sur les Chemins de Fer* donnent à la Commission des pouvoirs discrétionnaires très vastes de rendre une ordonnance pour toute construction, modification, substitution ou reconstruction de toute traverse à niveau ou viaduc, et pour répartir les frais de ces ouvrages entre la compagnie de chemin de fer, la corporation municipale ou autre ou la personne. Ces pouvoirs discrétionnaires ainsi exercés ne sont pas sujets à revision par cette Cour. Il est de la compétence de la Commission en vertu du l'art. 39(2) de la Loi de déterminer par qui et dans quelle proportion les frais et dépenses de la construction doivent être payés. *Toronto Transportation Commission v. C.N.R.*, [1930] R.C.S. 94. Il n'y avait aucune erreur de droit dans la décision de la Commission quant à l'art. 267 de la Loi.

APPEL d'une décision de la Commission des Transports du Canada. Appel rejeté.

APPEAL from a decision of the Board of Transport Commissioners for Canada. Appeal dismissed.

K. D. M. Spence, Q.C., and *J. E. Paradis, Q.C.*, for the appellant.

Jean Turgeon, Q.C., for the respondents.

J. J. Frawley, Q.C., for the intervenant.

The judgment of the Court was delivered by

HALL J.:—On June 22, 1962, the Minister of Roads of the Province of Quebec applied under s. 260 of the *Railway Act* to the Board of Transport Commissioners for Canada for an Order requiring the construction of an overhead bridge to replace an existing subway at mileage 100.54 Sherbrooke Sub-Division near the Village of South Stukely which had been constructed in 1908 pursuant to an Order of the Board of Railway Commissioners for Canada dated April 10, 1908, as No. 4593. Between the years 1908 and 1962 changes in the character and speed of highway traffic and size and number of highway vehicles had made the 1908 subway inadequate in dimensions and hazardous to modern highway traffic. The highway served by this subway had become Provincial Highway No. 1 between the Cities of Montreal and Sherbrooke. The new bridge over the railway line was

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to be built at mileage 100.36 and the subway at mileage 100.54 closed and the cost of closing the subway was to be included in the cost of construction of the overhead bridge at mileage 100.36.

With the consent of all parties and to enable the work to proceed, the Board of Transport Commissioners issued Order No. 109763 dated December 7, 1962, authorizing the constructing of the bridge, directing a contribution of 50 per cent of the cost of the construction from the Railway Grade Crossing Fund, reserving for further consideration the question of further apportionment of the balance of the cost of construction and assessing the cost of maintenance of the new structure to the Department of Roads of the Province of Quebec. On May 5, 1964, the Board of Transport Commissioners held a public hearing in the City of Quebec to determine the question reserved under its Order No. 109763 as to apportionment of the remaining 50 per cent of the cost of construction. The Board, on June 18, 1964, by Order No. 114746, directed that of the balance remaining to be allocated after the contribution of 50 per cent previously directed to be paid from the Railway Grade Crossing Fund 25 per cent (or 12½ per cent of the total) should be paid by Canadian Pacific Railway Company and the remainder by the Department of Roads of the Province of Quebec. This meant a contribution of approximately $42,000 by Canadian Pacific Railway Company. The Railway company had maintained that it should not be assessed any amount exceeding $15,000 which amount it argued represented the value of the only benefit that the Railway company would receive from the reconstruction project. The Railway company applied under s. 53(2) of the *Railway Act* and was given leave to appeal to this Court upon the following question of law:

> Did the Board of Transport Commissioners, by its judgment of June 18, 1964, fail to exercise its discretion validly under section 262 of the Railway Act to determine the portion to be borne by the appellant of the cost of a highway bridge across the railway, when it acted on the view that section 267 of the Railway Act imposed upon the railway company an obligation to replace a subway constructed in 1908 with a structure such as to afford safe and adequate facilities for present-day highway traffic?

Section 267 of the *Railway Act* reads as follows:

> Every structure by which any railway is carried over or under any highway or by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford

safe and adequate facilities for all traffic passing over, under or through such structure.

The contention of the Railway company before this Court was that the Board of Transport Commissioners erred in law in taking into consideration at all the provisions of s. 267 of the *Railway Act* and that, having given some weight to a continuing obligation on the part of the Railway company under s. 267 the Board had not properly or validly exercised the discretion which it had under s. 262 of the *Railway Act* to determine the portion to be borne by the appellant.

The question as framed by the appellant and the argument of counsel for the appellant would appear to suggest that the Board founded its judgment solely on s. 267. That such was not the case will be seen from the judgment of the Board which reads:

In trying to establish the value of its contribution, the Company makes the assumption that its obligation is limited to the maintenance or the replacement of the old structure. Yet, according to section 267 of the Railway Act, these structures "shall be so constructed and at all times be so maintained as to afford safe and adequate facilities for all traffic passing over, under or through them."

I believe that this can only be interpreted as meaning that the obligation of the Railway are related to the adequate facilities required, rather than to only the old structure, where it is no longer adequate for the traffic offering.

In the case of replacement of a level crossing by a grade separation, the Railway is asked to contribute on a percentage basis towards the cost of the grade separation. The Board has established a formula of apportionment of costs of construction whereby the Railway usually contributes 5 per cent, which has been generally accepted as representing the responsibility of the Railways with respect to such improvements. As the Board contributes 80 per cent of the cost of such works, the Railway's share is the equivalent of one-quarter of the remainder of the cost.

I believe that the responsibility of the Railway is no less in respect of the replacement of a grade separation which is inadequate for present day traffic. The fact that the Railway Act limits the contribution from The Railway Grade Crossing Fund to 50 per cent of the cost of the new structure is no reason why the proportion to be paid by the Company should be less than one-quarter of the remainder, as is the case for new grade separations.

I cannot agree with the position taken by the Company that its obligation to contribute towards the cost of grade separations to replace inadequate structures should be limited to the value of the improvement in its net financial position that would result from discontinuance of its commitments to maintain its existing structure. On the other hand, I consider that the suggestion of the Department that the Company should contribute 20 per cent of the cost of the structure is not well founded. There is no doubt that it will be difficult to assess, in dollars and cents,

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the value of the advantages that will accrue to the highway traffic as a result of this improvement. It is not difficult to see, however, that the benefits are greater to the highway than they are to the Railway.

I consider that it is fair and reasonable in this case to require the Company to contribute one-quarter of the remainder of the cost of construction, after the 50 per cent grant from The Railway Grade Crossing Fund, or 12½ per cent of the total cost, the remainder to be paid by the Quebec Department of Roads.

I am unable to see any error in law in the judgment of the Board in relation to s. 267.

Sections 39 and 262 of the *Railway Act* read as follows:

39. (1) When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, equipment, works, renewals or repairs to be provided, constructed, reconstructed, altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used and maintained.

(2) The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals, or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order, shall be paid.

262. Notwithstanding anything in this Act or any other Act, the Board may order what portion, if any, of the cost is to be borne respectively by the company, municipal or other corporation or person in respect of any order made by the Board under section 259, 260 or 261, and such order is binding on and enforceable against any railway company, municipal or other corporation or person named in such order.

These sections give the Board very wide discretionary powers to order any construction, alteration, substitution or reconstruction of any railway crossing structure or subway and to apportion the cost of any such works between the Railway Company, municipal or other corporation or person. The discretionary powers so exercised are not subject to review by this Court. It is within the jurisdiction of the Board under s. 39(2) to determine by whom and in what proportions the cost and expense of the construction should be borne: *Toronto Transportation Comm. v. C.N.R.*[1]

The appellant relied strongly on *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. Attorney-General*[2] and *Attorney-General v. Great Northern Rail-*

[1] [1930] S.C.R. 94 at 100, 1 D.L.R. 231, 36 C.R.C. 175.
[2] [1915] A.C. 654.

way Co.[1]. These cases which were decided in the House of Lords in 1915 and 1916 were considered by the Board of Railway Commissioners for Canada in *City of Hamilton v. Canadian Pacific and Toronto, Hamilton and Buffalo Railway Companies*[2]. Chief Commissioner Carvell there held that the principle followed in these two cases was not applicable to the situation in Canada where the jurisdiction and discretion of the Board were to be found in the provisions of the *Railway Act*. I am in agreement with this view and do not think that the two cases in question assist the appellant.

The appeal should accordingly be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: K. D. M. Spence, Montreal.

Solicitor for the respondents: J. Turgeon, Quebec.

Solicitor for the intervenant: J. J. Frawley, Ottawa.

DOUGLAS A. CASEY (*Plaintiff*) ..... APPELLANT;

AND

AUTOMOBILES RENAULT CANADA LIMITED (*Defendant*) ..... RESPONDENT;

AND

GEORGE COLEMAN and MAURICE MYRAND (*Defendants*).....

1964
*Nov. 13, 16, 17
1965
*Jan. 27
1965
May 17

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Malicious prosecution—Defendant laying information and withdrawing same at later date—Nothing done during interval by magistrate before whom information sworn—Whether a prosecution commenced so as to entitle plaintiff to claim against defendant for malicious prosecution.

One C, the general sales manager of the defendant company, was instructed to lay a charge of theft against the plaintiff. In the information it was stated that the informant had reasonable and probable

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

[1] [1916] 2 A.C. 356. [2] (1920), 25 C.R.C. 379.

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grounds to believe that the plaintiff did unlawfully steal twenty-six Renault Dauphine automobiles of a value exceeding fifty dollars, the property of the defendant company, contrary to the provisions of s. 280(a) of the *Criminal Code*. Following the laying of the information, on November 19, 1960, it remained in the office of the magistrate before whom it was sworn, and nothing further was done about it until December 13, when the magistrate received a letter, dated December 7, from C. In this letter C requested that the charge be withdrawn. The magistrate then wrote on the face of the information, "Withdrawn Dec. 13/60 at request of informant".

In an action for damages for malicious prosecution, judgment was given in favour of the plaintiff. On appeal, this decision was reversed. The Supreme Court of Nova Scotia, *in banco,* allowed the appeal after hearing argument on only one of the points raised by the defendant company, namely, that, in law, the prosecution upon which the action was based was never instituted or commenced. From this judgment the plaintiff appealed to this Court.

Held (Judson J. dissenting): The appeal should be allowed.

Per Cartwright, Martland, Ritchie and Spence JJ.: The mere presentation of a false complaint would not necessarily be a basis for a suit for malicious prosecution, but, if a complaint was made which disclosed an offence with which the magistrate had jurisdiction to deal and he took cognizance of it, that was a sufficient foundation for the action. *Mohamed Amin v. Bannerjee,* [1947] A.C. 322, followed.

Under s. 439 (1) of the *Criminal Code,* the magistrate could only receive the information provided it alleged those matters which would bring it within his jurisdiction, but, if it did, he was obligated to receive it. Having received the information, the magistrate was obliged to carry out the duties imposed upon him by s. 440(1) of the Code. In the present case, the magistrate received the information. It was obvious that he must have heard and considered the allegations made by the informant. He proceeded no further because the informant asked to withdraw the information. As in *Mohamed Amin v. Bannerjee, supra,* the essence of the matter here was the filing of an information to deal with which was within the magistrate's jurisdiction. At that point, in each case, the informant had done all he could do to launch criminal proceedings against the accused.

As the defendant had caused everything to be done which could be done unlawfully to set the law in motion against the plaintiff on a criminal charge, an action for malicious prosecution lay against the defendant, the other required elements of that tort having been established.

Yates v. The Queen (1885), 14 Q.B.D. 648; *Thorpe v. Priestnall,* [1897] 1 Q.B. 159, distinguished; *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1833), 11 Q.B.D. 674, referred to.

Per Judson J., *dissenting:* For the reasons given by the Court below, the appeal should be dismissed.

APPEAL from a judgment of the Supreme Court of Nova Scotia, *in banco*[1], allowing an appeal from a judgment given by Coffin J., following a trial by jury, whereby

[1] (1964), 49 M.P.R. 154, [1964] 3 C.C.C. 208.

damages were awarded to the plaintiff for malicious prosecution. Appeal allowed, Judson J. dissenting.

J. J. Robinette, Q.C., and *L. O. Clarke,* for the plaintiff, appellant.

J. H. Dickey, Q.C., and *L. J. Hayes,* for the defendant, respondent.

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

MARTLAND J.:—This case is concerned with an action for damages for malicious prosecution brought by the appellant against the respondent. It was tried by a judge and jury. On the basis of the answers given by the jury to questions submitted by the learned trial judge, judgment was given in favour of the appellant awarding him damages in the amount of $28,000 and costs. On appeal, this decision was reversed. The Supreme Court of Nova Scotia, *in banco,* allowed the appeal after hearing argument on only one of the points raised by the defendant company, namely, that, in law, the prosecution upon which the action was based was never instituted or commenced.

From this judgment the appellant has appealed to this Court. In argument before us the respondent submitted additional grounds upon which it was submitted the appellant's action ought to have been dismissed, and these points were fully argued.

The facts which gave rise to the action are as follows. Maritime Import Autos Limited (hereinafter referred to as "Maritime"), a Nova Scotia corporation, with its principal place of business in Amherst, in that province, was the distributor for the Maritime Provinces for the respondent, a Canadian corporation, with its head office in Montreal, which is engaged in the sale and distribution of Renault automobiles in Canada. The appellant resides at Amherst and is engaged in the automobile business. He organized various companies which distributed automobiles, including Maritime. At the times material to this action the appellant was the principal shareholder of Maritime, but was not an officer or director of that company.

In the spring of 1960 a meeting was held at Moncton by representatives of the respondent and of Maritime. The latter company was represented by the appellant, and by

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Mr. L. J. Kiley, its president, and Mr. T. A. Giles, its solicitor. At that meeting it was agreed that Maritime would store in Amherst some 120 Renault automobiles provided by the respondent, under a bailee agreement.

That agreement, which is dated June 2, 1960, acknowledges receipt from the respondent in good order and condition for storage at Maritime's premises in Amherst of a number of automobiles each individually described in the agreement.

It concluded with a paragraph reading:

> I/we, as Bailee, agree (a) to hold and store safely the Chattels free of charge for the Company which is the sole and absolute owner thereof (b) on demand of the Company to promptly deliver the Chattels, or any of them as may be specified by the Company to it or to its order, and (c) that the Chattels are not in my/our possession for purpose of sale and that I/we have no authority to encumber sell, operate or in any way dispose the Chattels and (d) to have the cars insured against the risks of fire, theft and damages directly caused by person acting maliciously.

Under the heading "Signature of Bailee" appeared the signature "L. J. Kiley". Below his signature appeared the words "Dealer Name" and beneath that appeared the stamped name "Maritime Import Autos Ltd. Amherst, N.S."

Giles testified at the trial that :

> Maritime Import Autos were told that they could use the cars from the bailee stock provided they notified Montreal Head Office so that they could be invoiced for them. As a matter of fact, I know from my examination of the records of the company, Maritime Import Autos Limited, that cars were taken from the bailee stock, were reported to Montreal, and were paid for by the company prior to the 26 that were taken sometime in October.

It appears that, subsequent to the meeting in Moncton, three cars were removed from storage by Maritime and sold and an invoice was sent by the respondent to Maritime for these. Later, in October, a further 10 cars were removed and sold, and by letter dated October 7, 1960, Maritime requested the respondent to send invoices for the same. Following this, a further 26 cars were removed. Maritime was unable to pay for the cars which had been removed.

Mr. Giles was sent to Montreal in November 1960, armed with a cheque for $3,000 and instructed to discuss arrangements for payment of the balance owing by Maritime to the respondent. On November 16 he met with Mr. LeBouedec, the general manager of the respondent, and with other

officers of that company. He was told that the respondent insisted on the appellant's personal guarantee of payment of the amount owing by Maritime.

Giles testified that at this meeting LeBouedec said to him: "This man Casey is nothing but a common thief and we are going to put him in his place." Giles replied to this by saying that the appellant knew nothing about the sale of the cars until after they were sold and that he was acting in good faith in trying to settle the matter.

Mr. Clement, the secretary-treasurer of the respondent, called as a witness for the defence, heard LeBouedec say that this was a technical theft committed by Casey.

This witness said that after Giles' departure, the meeting continued with LeBouedec and himself present and Mr. MacKay, the respondent's solicitor. They discussed the matter of payment for the 26 missing cars, and Clement said, in evidence:

And, according to the discussion that had just happened with Mr. Giles, we had the impression that we will never get paid, and Mr. MacKay immediately suggested that an information be laid immediately against Mr. D. A. Casey.

Neither LeBouedec nor MacKay gave evidence at the trial.

Following this, George Coleman, the general sales manager of the respondent, was instructed to proceed to Amherst to lay a charge of theft against the appellant, which he did. He attended upon a stipendiary magistrate there, Mr. Alfred C. Milner. Apparently upon the basis of what Coleman told him the magistrate drafted the information, which was signed by Coleman and sworn before the magistrate. That information was as follows:

CANADA
PROVINCE OF NOVA SCOTIA
MAGISTERIAL DISTRICT OF THE
PROVINCE OF NOVA SCOTIA
COUNTY OF CUMBERLAND

This is the information and complaint of George F. Coleman of Montreal in the Province of Quebec, General Sales Manager, hereinafter called the Informant.

The informant says that he has reasonable and probable grounds to believe and does believe that D. A. Casey of Amherst in the County of Cumberland at or near Amherst in the County of Cumberland in the Magisterial District of the Province of Nova Scotia between the 8th day of October, A.D. 1960 and the 25th day of October, A.D. 1960,

did unlawfully steal twenty-six Renault Dauphine automobiles of a value exceeding fifty dollars, the property of Automobiles Renault Canada Limited, contrary to the provisions of Section 280(a) of the Criminal Code.

Sworn before me this 19th day of November, A.D. 1960, at Amherst in the County of Cumberland (Sgd.) *Alfred C. Milner* A Stipendiary Magistrate in and for the County of Cumberland.	(Sgd.) *Geo. F. Coleman* Informant

The magistrate testified that he did not instruct Coleman to lay the information. Following the laying of the information, on November 19, 1960, it remained in his office, and nothing further was done about it until December 13, when the magistrate received a letter, dated December 7, from Coleman, reading as follows:

> I wish to inform you that it is my desire to withdraw the charge which was against D. A. Casey on November 19th, 1960.
>
> When the charge was laid, the evidence, on the basis of facts then known, appeared to be sufficient. However the information now available and the correspondence have been carefully reviewed and, on advice of counsel, it appears that at the present time there is insufficient evidence available to proceed with the complaint against Mr. Casey.
>
> I request therefore that the charge be withdrawn.

The magistrate then wrote, on the face of the information, "Withdrawn Dec. 13/60 at request of informant".

Prior to the withdrawal of the information, on November 23, Giles was visited by Mr. Myrand, the administrative secretary of the Toronto branch of the respondent. Giles' evidence as to his meeting with Myrand is as follows:

> I then asked him if he was authorized to act for Automobiles Renault Canada Limited in settling this problem over the payment for the cars. He said that he was. I asked him if he was in a position to withdraw the information if we would pay—by "we" I mean Mr. Casey—would pay them a certain number of dollars, and I said to him again "If we will pay you X number of dollars—10—$20,000.00, or thereabouts, you will withdraw the information?" and he said "Yes". I then said to him, "It is true, is it not, that the only reason you laid this information against Casey was to try and extract from him a certain amount of money?" and his answer was "Yes, just a little more pressure. Ha! Ha!". I then asked him if he would confirm by telephone with Montreal that he was actually authorized to act. A phone call was put through to Montreal, and, as a result of the phone call, or following it, he again reiterated he was in a position to act and that if we would pay him for the cars, or a certain amount of money, and $20,000.00 was a figure that was used quite a lot, that he would then withdraw the information immediately.

There was evidence that, following the laying of the information, the fact that the appellant had been charged with theft became widely known among people in the automobile business in Nova Scotia. Three witnesses testified that they had been advised that Casey had been charged with theft by persons employed by the respondent.

The learned trial judge submitted questions to the jury, in two series, the jury being charged in relation to the second set of questions after they had answered the first ones. The relevant questions and answers are as follows:

(1) Did the Defendants during 1960 look to the Plaintiff, D. A. Casey, as the person with whom they dealt in matters of importance in their dealings with Maritime Import Autos Ltd.? "No".

(2) Did the Defendants believe that Maritime Import Autos Ltd. had no right to sell any of the cars listed in the Bailee Receipt? "No".

(1) Was there a prosecution of the Plaintiff, Douglas A. Casey, by the Defendants? "Yes".

(2)(a) Did the Defendant, Automobile Renault (Canada) Ltd., act maliciously? "Yes".

.....

(3) What damages did the Plaintiff, Douglas A. Casey, suffer? "Twenty-eight thousand dollars ($28,000.00)".

On the basis of the answers given to the first series of questions the learned trial judge found that there was not reasonable and probable cause for the prosecution. On the basis of the answers given to the second series of questions he gave judgment in favour of the appellant.

I have not reviewed the evidence in great detail, and have set out mainly the evidence which was favourable to the appellant. The reason for this is that, apart from the main issue of law on which the appeal was allowed by the Court below, nearly all of the points urged by the respondent were on the basis of there being no evidence to support the findings of the jury. On the issue of law dealt with in the reasons below, there is no conflict as to the evidence.

In my opinion there was evidence upon which the jury could give the answers which it made to the questions put to it, and, on the basis of the first two answers given, the learned trial judge properly found lack of reasonable and probable cause for the laying of the information.

The instruction given to the jury by the learned trial judge regarding the respondent's contention that the respondent had acted on the advice of counsel in laying the

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charge and that this was strong evidence that it did not act maliciously, was sufficient. As has already been pointed out, the respondent's officer chiefly responsible in the matter of laying the information, LeBouedec, and the solicitor who was consulted, MacKay, did not give evidence.

I would not be prepared, in the circumstances of this case, to interfere with the jury's assessment of damages.

It was not contended before us that there had been no termination of the proceedings in favour of the appellant. In this connection we were referred to the proposition stated in Salmond on Torts, 13th ed., p. 726:

> If the prosecution has actually determined in any manner in favour of the plaintiff it matters nothing in what way this has taken place. There need not have been any acquittal on the merits. What the plaintiff requires for his action is not a judicial determination of his innocence but merely the absence of any judicial determination of his guilt. Thus it is enough if the prosecution has been discontinued, or if the accused has been acquitted by reason of some formal defect in the indictment, or if a conviction has been quashed, even if for some technical defect in the proceedings.

The important issue of law raised in this appeal is that which was decided in the respondent's favour in the Court below, as to whether a prosecution had been commenced against the appellant so as to entitle him to claim against the respondent for malicious prosecution.

The question thus raised is a difficult one. There is certainly authority in support of the position taken by the Court below, which is well summarized in para. 654 of vol. III of Restatement of the Law of Torts promulgated by the American Law Institute. That paragraph states, in relation to the tort of wrongful prosecution, that criminal proceedings are instituted when

> process is issued for the purpose of bringing the person accused of a criminal offense before an official or tribunal whose function is to determine whether the accused
> (i) shall be held for later determination of his guilt or innocence, or
> (ii) is guilty of the offense charged.

MacDonald J. in the Court below quotes an excerpt from Stephen on Malicious Prosecution (published in 1888), at p. 5:

> In order to be liable to an action for malicious prosecution a defendant must have prosecuted the plaintiff, and it therefore becomes necessary to determine what constitutes a prosecution.
>
> The only definition which, so far as I know, has been explicitly suggested, is that given by Mr. Justice Lopes in *Danby v. Beardsley*, 43 L.T.

603 (1881):—". . . this might be a definition of a prosecutor—a man actively instrumental in putting the criminal law in force." (This, however, requires to be qualified by the observation, that not merely the ministerial but the judicial functions of the criminal law must be put in motion, that is, some judicial officer must be made to act in his judicial capacity.)

I feel, however, that the starting point in considering this issue must be the leading case of *Mohamed Amin v. Bannerjee*[1], a decision of the Privy Council, on appeal from the High Court of Calcutta. In that case the respondents, who had been involved in a dispute of a civil character with the appellant, caused a petition of complaint to be filed against the appellant in a Police Magistrate's Court, which was registered as a charge of cheating under s. 420 of the *Indian Penal Code*. The magistrate, having taken cognizance of the case, subsequently held an inquiry, in open court, pursuant to s. 202 of the *Code of Criminal Procedure*, of which notice was given to the appellant, who attended and who was represented by counsel. After completion of the inquiry, the magistrate dismissed the complaint under s. 203 of that Code.

The relevant sections of the *Code of Criminal Procedure* provided as follows:

Section 200. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the magistrate:

Section 202. (1.) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance, or which has been transferred to him under s. 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint:

Provided that, save where the complaint has been made by a court, no such direction shall be made unless the complainant has been examined on oath under the provisions of s. 200.

(2a.) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.

Section 203. The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the result of the investigation or inquiry (if any) under s. 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.

[1] [1947] A.C. 322.

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These sections were contained in Chapter 16, headed "Of complaints to Magistrates". Chapter 17, which followed, was headed "Of the commencement of Proceedings before Magistrates" and laid down the procedure when the magistrate decided to issue process on the complaint.

The appellant sued for damages for malicious prosecution. The respondents contended that the stage of prosecution had not been reached, and that it would not be reached until the magistrate said he was satisfied that there was a *prima facie* case and that a summons would issue for the attendance of the accused. They relied upon *Yates v. The Queen*[1].

The appeal was allowed by the Privy Council, holding that the proceedings had reached a stage sufficient to found an action for malicious prosecution.

In the judgment, there were reviewed two conflicting lines of authority, one of which commenced with the case of *Golap Jan v. Bholanath Khettry*[2], in which, in an action for malicious prosecution, it appeared that a complaint before a magistrate had been referred by him to the police for inquiry, and had been dismissed by the magistrate following receipt of the police report. It was held that no prosecution had been commenced and that the action failed. Reliance was placed on *Yates v. The Queen, supra.* The other line of authority included the case of *Bishun Persad Narain Singh v. Phulman Singh*[3], which stated the proposition that the prosecution commenced when the prosecutor had taken the initial step; namely, making the complaint to the magistrate.

The judgment then proceeds as follows:

> The action for damages for malicious prosecution is part of the common law of England, administered by the High Court at Calcutta under its letters patent. The foundation of the action lies in abuse of the process of the court by wrongfully setting the law in motion, and it is designed to discourage the perversion of the machinery of justice for an improper purpose. The plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, that they terminated in his favour (if that be possible), and that he has suffered damage. As long ago as 1698 it was held by Holt C.J. in *Savile v. Roberts,* (1698) 1 Ld. Raym. 374, that damages might be claimed in an action under three heads, (1.) damage to the person, (2.) damage to property, and (3.) damage to reputation, and that rule has prevailed ever

[1] (1885), 14 Q.B.D. 648. [2] (1911), I.L.R. 38 C. 880.
[3] (1914), 19 C.W.N. 935.

since. That the word "prosecution" in the title of the action is not used in the technical sense which it bears in criminal law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings, for instance, falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company (*Quartz Hill Consolidated Gold Mining Co. v. Eyre,* (1883) 11 Q.B.D. 674). The reason why the action does not lie for falsely and maliciously prosecuting an ordinary civil action is, as explained by Bowen L.J. in the last mentioned case, that such a case does not necessarily and naturally involve damage to the party sued. A civil action which is false will be dismissed at the hearing. The defendant's reputation will be cleared of any imputations made against him, and he will be indemnified against his expenses by the award of costs against his opponent. The law does not award damages for mental anxiety, or for extra costs incurred beyond those imposed on the unsuccessful party. But a criminal charge involving scandal to reputation or the possible loss of life or liberty to the party charged does necessarily and naturally involve damage, and in such a case damage to reputation will be presumed.

From this consideration of the nature of an action for damages for malicious prosecution emerges the answer to the problem before the Board. To found an action for damages for malicious prosecution based on criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results. Their Lordships are not prepared to go as far as some of the courts in India in saying that the mere presentation of a false complaint which first seeks to set the criminal law in motion will per se found an action for damages for malicious prosecution. If the magistrate dismisses the complaint as disclosing no offence with which he can deal, it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff results. But in this case the magistrate took cognizance of the complaint, examined the complainant on oath, held an inquiry in open court under s. 202 which the plaintiff attended, and at which, as the learned judge has found, he incurred costs in defending himself. The plaint alleged the institution of criminal proceedings of a character necessarily involving damage to reputation and gave particulars of special damage alleged to have been suffered by the plaintiff. Their Lordships think that the action was well founded, and on the findings at the trial the plaintiff is entitled to judgment.

Before dealing with the effect of this judgment, MacDonald J., in the Court below, made reference to *Yates v. The Queen, supra,* and, in particular, the following extracts from the judgments in that case:

For my own part I consider that laying the information before the magistrate would not be the commencement of the prosecution, because the magistrate might refuse to grant a summons, and if no summons, how could it be said that a prosecution against any one ever commenced? (Per Brett M.R., at p. 657.)

On behalf of the plaintiff in error it has been said that the first application for the rule nisi is such commencement, but how can it be said that a prosecution is commenced before a person is summoned to answer a complaint. (Per Cotton L.J. at p. 661.)

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However, as is pointed out in the *Mohamed Amin* case, *Yates v. The Queen* was not concerned with an action for malicious prosecution, but with the question as to whether the fiat of the Director of Public Prosecutions was required before commencing a prosecution by information for libel in a newspaper by virtue of s. 3 of the *Newspaper Libel and Registration Act, 1881.*

Reference was then made to, and considerable reliance placed upon, *Thorpe v. Priestnall*[1], and, in particular, a passage from the judgment of Wills J., at p. 162. I quote from the reasons for judgment of MacDonald J., including his quotation from that case. The insertion of the capital letters and of the italics was made by MacDonald J., for greater ease of reference.

> (A) On looking at the words of the (Statute) it is clear that the institution of a prosecution is something which may be done by the chief constable as well as with his consent. The chief constable cannot grant a summons, nor when a summons is once granted has he any discretion to exercise as to whether it shall be served or not. Neither of those things, therefore, is the institution of the prosecution, which is a matter within his discretion. The institution of the prosecution must, therefore, be the laying of the information . . . (B) The passages in the judgment in *Yates v. Reg., supra,* only amount to *dicta,* . . . (C) *It may be that the magistrate does not act upon the information, and in that case no prosecution follows,* and there is nothing to which the phrase "commencement of a prosecution" is applicable. (D) *But where there is a prosecution, I cannot see any reason why the laying of the information (which started it) is not the commencement of the prosecution;* and I certainly think this has been the meaning of the phrase commonly accepted in the profession.

Concerning these passages four points are important in this case. Passage (A) holds that for the purposes of the statute in question the laying of the information was the institution of the prosecution which resulted in the conviction; for the reason specified in passage (D). As to passage (B), it is to be noted that though the passages quoted earlier from *Yates v. Reg.* are referred to correctly as amounting only to *dicta,* they do form the substance of proposition (C) relating to a case which stopped at the information stage (as did the case before us); and that a distinctly different proposition (D) was enunciated as to the commencement of a prosecution which continued beyond that stage, as it had in the case itself.

It would appear, therefore, that many of the decisions, relating to limitation and other statutes, have been in error in the uncritical acceptance of *Thorpe v. Priestnall* as implying that in all cases the institution of a prosecution is to be equated with the laying of the information, whereas cases in which nothing followed from that bare fact are to be excepted from that broad proposition.

[1] [1897] 1 Q.B. 159.

In my view the distinction drawn therein is one upon which this case may well turn. That distinction is (D) that when there has been a prosecution (beyond the information) the laying of the information, which started that prosecution, is to be held to be "the commencement of the prosecution" and that this is the meaning commonly accepted by the profession as to this most common situation; but (C), if the magistrate does not act upon the information there has been no such commencement.

Again it is pertinent to observe that this case was not concerned with an action for malicious prosecution. The question in issue was as to when a prosecution had been instituted within the meaning of the *Sunday Observance Prosecution Act, 1871,* which provided that no prosecution should be instituted for any offence under the *Sunday Observance Act, 1676,* except with the written consent of the chief officer of police of the police district in which the offence was committed. The appellant had been convicted under the *Sunday Observance Act,* but the written consent had not been given until after the information was laid. The case held that the prosecution was instituted when the information was laid and therefore the conviction was bad. The argument in support of the conviction relied upon *Yates v. The Queen.*

With great respect, I cannot regard the passages from the judgment of Wills J., marked by MacDonald J. as (C) and (D), as being anything more than an attempt to reconcile the *dicta* in the *Yates* case with the conclusion he himself had reached on the issue involved in the case before him. Both cases involved the interpretation of specific statutes, and the judgments were not directed to the point in issue here.

MacDonald J. suggests that the Privy Council, in *Mohamed Amin,* inferentially adopted passage (C) from the judgment of Wills J. when it was said:

Their Lordships are not prepared to go as far as some of the courts in India in saying that the mere presentation of a false complaint which first seeks to set the criminal law in motion will per se found an action for damages for malicious prosecution.

With respect, I do not agree that this is so. In *Mohamed Amin* the complaint was dismissed by the magistrate, and no prosecution followed the making of the complaint. It is true that the magistrate made an inquiry under s. 202 of the *Code of Criminal Procedure,* but the result of that was the dismissal of the complaint. No process was ever issued to bring the accused before the magistrate.

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I think it is important to read the passage from the Privy Council, just quoted, together with the sentence which immediately follows it:

> If the magistrate dismisses the complaint *as disclosing no offence with which he can deal,* it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff results.

(The italics are mine.)

Read together, they would appear to mean that the mere presentation of a false complaint will not necessarily be a basis for a suit for malicious prosecution, but that, if a complaint is made disclosing an offence with which the magistrate has jurisdiction to deal and he takes cognizance of it, that is a sufficient foundation for the action.

I turn now to consider s. 439(1) of the *Criminal Code.* It provides as follows:

> 439. (1) Any one who, upon reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information where it is alleged that
>
> (a) the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person
>
> (i) is or is believed to be, or
>
> (ii) resides or is believed to reside, within the territorial jurisdiction of the justice;
>
> (b) the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;
>
> (c) the person has anywhere unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or
>
> (d) the person has in his possession stolen property within the territorial jurisdiction of the justice.

The magistrate could only receive the information provided it alleged those matters which would bring it within his jurisdiction, but, if it did, he was obligated to receive it.

Having received the information, the magistrate is obliged to carry out the duties imposed upon him by s. 440(1) of the *Code*:

> 440. (1) A justice who receives an information shall
>
> (a) hear and consider, *ex parte,*
>
> (i) the allegations of the informant, and
>
> (ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and
>
> (b) issue, where he considers that a case for so doing is made out, a summons or warrant, as the case may be, to compel the accused to attend before him.

In the present case, the magistrate received the information. He obviously must have heard and considered the allegations which had been made by Coleman. According to his own evidence, he had not taken any further steps before he received the letter which requested the withdrawal of the information, following which he made a notation upon the information to the effect that it had been withdrawn at the request of the informant. It is clear that he had not taken any further steps thereafter because of the request made in the informant's letter asking for such withdrawal.

In *Mohamed Amin,* the magistrate postponed the issue of process until he had made an inquiry, following which he dismissed the complaint. MacDonald J. distinguishes the *Mohamed Amin* case from the present one on the basis that, in the former, the magistrate had performed a judicial function, comparable to what would have occurred, in the present case, if the magistrate had elected to hear evidence under s. 440(1) (a) (ii), but it is significant that the inquiry to be conducted under s. 202 of the *Code of Criminal Procedure* could, on the direction of the magistrate, have been made by a police officer.

With respect, though recognizing the factual difference between the two cases, I do not see any valid distinction in principle. In neither case did the matter proceed to the stage of issuing process to compel the attendance of the accused. In the one case, the matter stopped before that point because the magistrate, after an inquiry as to the truth or falsehood of the complaint, dismissed it. In the other, if he was fulfilling his duty, which in the absence of evidence to the contrary we must assume he did, the magistrate considered the allegations of the informant, and proceeded no further, not because he considered no case had been made out, but because the informant asked to withdraw the information.

In my opinion, the essence of the matter, in each case, was the filing of an information to deal with which was within the magistrate's jurisdiction. At that point, in each case, the informant had done all he could do to launch criminal proceedings against the accused.

I do not interpret the *Mohamed Amin* case as authority for the proposition that a case of malicious prosecution can never be founded on the laying of an information, but rather

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as establishing that the information must be one which discloses an offense with which the magistrate can deal. The essence of the matter, in that case, was not that the magistrate acted "judicially" by conducting an inquiry, but that, on the evidence, the magistrate had taken cognizance of the complaint. The proceedings in the present case had progressed just as far, so far as the accused was concerned, as they had in the case of *Mohamed Amin.*

I find support for the view which I have taken in the case of *Quartz Hill Consolidated Gold Mining Company v. Eyre*[1], which is referred to in the judgment in *Mohamed Amin,* but which was not discussed in the Court below. The issue in that case was as to whether the presentation, falsely and maliciously, of a petition to wind up a trading company would justify an action for damages by the company. The Court of Appeal held that it would. In that case, the petition had been presented, and the required advertising done, but it had never been served upon the company prior to its withdrawal by the petitioner. One of the judgments is written by Brett, M.R., who sat in the *Yates* case, two years later.

It is true that, in determining whether the proceedings instituted by the petitioner were akin to ordinary civil proceedings (in respect of which, though malicious, no action would lie) or to a bankruptcy petition, stress was laid upon the publicity attendant upon the petition because of the requirement of public advertising before the petition was heard. This, however, only went to the issue of whether an action would lie at all in relation to malicious proceedings for winding up. The important feature of the case is that it was the institution of proceedings which were never served which gave rise to the action.

The real principle involved in the case was stated by Bowen L.J., at p. 692:

> In the present instance we have to consider whether a petition to wind up a company falls upon the one side of the line or the other—whether, as the Master of the Rolls has said, it is more like an action which does not necessarily involve damage, and therefore will not, however maliciously and wrongfully brought, justify an action for malicious prosecution, or whether it is more like a bankruptcy petition. I do not see how a petition to wind up a company can be presented and advertised in the newspapers without striking a blow at its credit. I suppose that most of the lawyers of the present day have seen a great increase of

[1] (1833), 11 Q.B.D. 674.

three kinds of abuses, all of which are indulged in for the purpose of extorting the payment of some debt, which ought to be the subject of some civil redress. There is the abuse of the police courts when their process is used to extort money; there is the abuse of the bankruptcy law; and there is the abuse of the provisions in the Companies Act, 1862, for winding up companies. In all these three forms of abuse the aim is to wreck credit, and I should be sorry to think that since they all involve a blow at the credit of those against whom they are instituted, the law did not afterwards place in the hands of the injured and aggrieved persons who have been wrongfully assailed, a means of righting themselves and recouping themselves, as far as can be, for the mischief done to them.

That publicity attended the laying of the information in this case is clear. The evidence established that employees of the respondent were not only aware of it, but passed the information on to others.

I am therefore of the opinion, with great respect to the views expressed in the Court below, that, as the respondent had caused everything to be done which could be done wrongfully to set the law in motion against the appellant on a criminal charge, an action for malicious prosecution lay against the respondent, the other required elements of that tort being established.

In my opinion the appeal should be allowed and the judgment at trial restored, with costs to the appellant in this Court and in the Court below.

JUDSON J. (*dissenting*):—I would dismiss this appeal. I agree completely with the reasons delivered by the Nova Scotia Supreme Court, *in banco*[1].

Appeal allowed, judgment at trial restored, with costs, Judson J. dissenting.

Solicitor for the plaintiff, appellant: L. O. Clarke, Truro.

Solicitor for the defendant, respondent: Donald McInnes, Halifax.

[1] 49 M.P.R. 154, [1964] 3 C.C.C. 208.

1965
*May 31
June 14

CHRISTOPHER A. TONKS and HANNAH TONKS (*Defendants*) — APPELLANTS;

AND

HAZEL DOREEN REID and JOHN CAIRD REID (*Plaintiffs*) — RESPONDENTS;

AND

THE CORPORATION OF THE TOWNSHIP OF YORK (*Defendant by writ*).

MOTION TO QUASH

Appeals—Jurisdiction—Practice and procedure—Appeal to Supreme Court of Canada—Amount in controversy—Closure of street by municipality—Land not made available to adjoining owners—Land sold to nominee of Revee—Acquired and built upon by Reeve—Motion to quash—Supreme Court Act, R.S.C. 1952, c. 259, s. 36.

The Township of York closed a road and, instead of giving the owners of the properties adjoining the closed road the right to purchase the same, as provided for by the *Municipal Act*, sold it to a nominee of the defendant, who was a Reeve of the Township. The defendant paid $6,600 for the land and spent over $25,000 in building a house. The plaintiffs, as adjoining owners, instituted an action to set aside the sale and to quash the by-law purporting to approve it. The action was dismissed by the trial judge. This judgment was reversed by the Court of Appeal which declared that the by-law was invalid and that the transfer to the defendant should be set aside. The defendants appealed to this Court. The plaintiffs moved to quash on the ground that the amount of the matter in controversy in the appeal did not exceed $10,000 and that consequently there was no appeal under s. 36 of the *Supreme Court Act*.

Held: The motion to quash should be dismissed.

The amount or value of the matter in controversy in an appeal is the loss which the appellant will suffer if the judgment in appeal is upheld. In the present case the validity of the by-law was not all that was involved in this appeal, since the judgment under appeal deprived the defendants of their title. Consequently, if the appeal fails the defendants will have no title to a property on which they have expended over $30,000.

Appels—Juridiction—Procédure—Appel à la Cour suprême du Canada—Montant en litige—Fermeture d'un chemin par une municipalité—Terrain non mis à la disposition des propriétaires contigus—Terrain vendu à un prête-nom d'un conseiller municipal—Terrain acquis et construit par le conseiller—Demande pour faire rejeter l'appel—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 36.

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

La municipalité de York a ordonné la fermeture d'un chemin et, au lieu de donner aux propriétaires des terrains contigus à la route fermée le droit de l'acquérir, tel que prévu par le droit municipal, l'a vendu à un prête-nom du défendeur, qui était président du Conseil de la municipalité. Le défendeur a payé $6,600 pour le terrain et en a dépensé $25,000 pour y construire une maison. Les demandeurs, propriétaires contigus, instituèrent une action pour faire mettre de côté la vente et pour faire annuler le règlement l'approuvant. L'action fut rejetée par le juge au procès. Ce jugement fut renversé par la Cour d'Appel qui déclara que le règlement était invalide et que le transfert de la propriété au défendeur devait être mis de côté. Le défendeur porta appel devant cette Cour. Les demandeurs présentèrent une requête pour faire rejeter l'appel pour le motif que le montant de la matière en litige dans l'appel ne dépassait pas $10,000 et que, par conséquent, il n'y avait pas d'appel en vertu de l'art. 36 de la *Loi sur la Cour suprême.*

Arrêt: La requête pour rejet d'appel doit être rejetée.

Le montant ou la valeur de la matière en litige dans un appel est la perte que l'appelant souffrira si le jugement dont est appel est maintenu. Dans l'espèce, ce n'était pas seulement la validité du règlement qui était en jeu puisque le jugement dont est appel dépossédait les défendeurs de leur titre. En conséquence, si l'appel est rejeté, les défendeurs n'auront aucun titre à cette propriété sur laquelle ils ont dépensé au-delà de $30,000.

DEMANDE pour faire rejeter un appel pour défaut de juridiction. Demande rejetée.

APPLICATION to quash an appeal for lack of jurisdiction. Application dismissed.

B. Crane, for the motion.

H. E. Manning, Q.C., contra.

D. Diplock, Q.C., for the Township.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is a motion to quash the appeal on the ground that the amount or value of the matter in controversy in the appeal does not exceed $10,000 and that consequently no appeal lies under s. 36 of the *Supreme Court Act.*

The action commenced by the respondents Hazel Doreen Reid and John Caird Reid arises out of the following facts. The respondents were the owners of a property which was bounded on one side by Myra Road in the Township of York. The Township decided to close the road and under the terms of the *Municipal Act* on doing so was under an obligation to give to the owners of the properties adjoining

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the closed road the right to purchase the same. Instead of offering the property as required the Township sold it to a prête-nom of the appellant Christopher Tonks who is the Reeve of the Township. Tonks paid $6,600 for the land and has since spent over $25,000 in building a house on it.

The prayer for relief in the statement of claim asks inter alia:

(*a*) a mandamus requiring the council of the defendant Corporation to fix the price at which the lands described in paragraph 5 hereof are to be sold, which lands comprised a highway which was legally stopped-up;

(*b*) a declaration that the plaintiff Hazel Doreen Reid as the owner of the land which abuts on the lands therein described has the right to purchase the soil and freehold of the lands therein described for the sum of $6,600.00 or at the price fixed as aforesaid or, in the alternative of the Westerly half of the said lands for the sum of $3,300.00 or at one-half of the price fixed as aforesaid;

(*c*) an order quashing section 2 of by-law number 15649 purported to have been passed by the Council of the defendant Corporation on the ground that the same is ultra vires and in contravention of the provisions of Sections 36 and 477 of the Municipal Act being Revised Statutes of Ontario 1960, Chapter 249 and setting aside all and any deeds executed or delivered or purported so to be by the defendant Corporation in pursuance thereof;

(*d*) an order setting aside the purported sale of the lands described in paragraph 5 hereof and any by-law insofar as it purports to approve, ratify and confirm such purported sale of the lands described in paragraph 5 hereof and the authorization of the execution and delivery by the reeve and clerk of the defendant Corporation of a deed purporting to convey the lands therein described to the said Marie Eunice Froman;

(*e*) an order setting aside and declaring null and void the deed from Mary Eunice Froman to the defendants Christopher A. Tonks and Anna Tonks;

The action was defended by the Tonks and by the Township who asked that it be dismissed with costs. The action was tried by King J. without a jury and was dismissed without costs. On appeal to the Court of Appeal the appeal was allowed and it was declared that the by-law of the Township in so far as it approved the sale of the land in question is invalid and should be set aside and that the deed to the prête-nom of the Tonks and the deed from such prête-nom to the Tonks are null and void and should be set aside.

The appeal seeks to restore the judgment at the trial.

If the appeal succeeds the result will be that the Tonks are the owners of the land and the building upon it. If the appeal fails the result is that they have no title to this land. It seems to me that under these circumstances the amount in controversy in the appeal is the value of the land and building which exceeds $30,000.

It is said on behalf of the respondents that all that is really involved is the validity of the by-law but I cannot accept this argument. The judgment in appeal expressly declares the conveyance to the Tonks void and deprives them of their title.

It was submitted on behalf of the respondents that although the appellants are deprived of their title they would have a right to claim a lien on the lands for the money they have expended. Even if this were so I doubt whether it would be relevant; but it seems clear that if the judgment of the Court of Appeal stands the Tonks would have no such right. The judgment proceeds on the basis that Tonks was acting fraudulently throughout and if that be so he could not be said to have been acting under a bona fide mistake of title when he made the improvements.

Since the case of *Orpen v. Roberts*[1], it has been settled that the amount or value of the matter in controversy is the loss which the appellant will suffer if the judgment in appeal is up-held—see *Fallis v. United Fuel Investments Limited*[2], where it was said in the unanimous judgment of the Court:

> In my opinion the test to be applied in determining whether there is an amount involved in the proposed appeal exceeding $2000 is that set out in the judgment of this Court in *Orpen v. Roberts et al,* upholding the judgment of the Registrar affrming jurisdiction. The action was for an injunction to restrain the defendant from erecting a building nearer to the street line than 25 feet and to restrain the municipality from granting a permit for the erection of the proposed building. The report at page 367 reads as follows:
>
> > The Court said the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail. The evidence sufficiently shows that the loss—and therefore the amount or value in controversy—exceeds $2,000.
>
> Applying this test to the facts of the case at bar, the evidence shows that if the winding-up proceeds the appellant Fallis will suffer a loss greatly in excess of $2000.

[1] [1925] S.C.R. 364, 1 D.L.R. 1101.

[2] [1962] S.C.R. 771 at 774, 34 D.L.R. (2d) 175.

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In the case at bar if the appeal fails the appellants will have lost a property on which they have expended over $30,000, of which property under the judgment at the trial they were held to be the owners.

I would dismiss the motion with costs.

Application dismissed with costs.

Solicitors for the defendants, appellants: Smart & Biggar, Ottawa.

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

Solicitors for the Township of York: Honeywell, Baker, Gibson, Witherspoon, Lawrence & Diplock, Ottawa.

1965
*Mar. 23, 24
May 3

MARJORIE E. ABBOTT .....APPELLANT;

AND

MARY ANN GRANT .....RESPONDENT;

AND

MARJORIE E. ABBOTT and THE TORONTO GENERAL TRUSTS CORPORATION, Executors and Trustees of the last Will and Testament of James Duncan Grant, Deceased .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Trustees given implied power to lease—Stated income to widow—Balance of income and residue of estate to daughter—Whether widow put to election between gifts to her under will and her dower right.

The daughter of the testator appealed to this Court from a judgment of the Court of Appeal by which that Court, reversing the judgment of the trial judge, held that the testator's widow was not required to elect between her dower and the gifts to her under the will. The testator disposed of three parcels of real estate. He devised a cottage property absolutely to his daughter. No question of dower was raised in connection with this devise. The wife was given the right to continue to reside in the testator's house as long as she wished, and also $150 per month from the residue of the estate during her lifetime with the proviso that if she did not wish to continue in occupation of the

*PRESENT: Cartwright, Abbott, Judson, Hall and Spence JJ.

house, and so notified the trustees in writing, she was to have an additional $150 per month. It was held, and there was no appeal on the point, that the right to reside in the house was a devise of a life estate. Consequently no question of dower arose with respect to this disposition. The third parcel of real estate was an apartment building which contained eight suites.

The trustees were given powers to postpone conversion or sale and to retain the estate in the form in which it stood at the date of death. The balance of the income and the whole of the residue were to go to the daughter. The widow claimed dower in the apartment building in addition to the interest given to her by the will.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright, Abbott, Judson and Hall JJ.: In order to raise a case for election under a will, there must be on the face of the will a disposition by the testator of something belonging to a person who takes an interest under the will. This means that where dower is involved, unless the widow is expressly put to her election, it must be found from the will itself and not from parol evidence that the testator intended to dispose of his property in a manner inconsistent with the widow's right to dower.

An implied power to lease was given in the will. However, the cases where a widow must elect because of the power to lease all involved express powers. *Parker v. Sowerby* (1854), 4 De G. M. & G. 321; *Patrick v. Shaver* (1874), 21 Gr. 123; *Re Hunter, Hunter v. Hunter* (1904), 3 O.W.R. 141, referred to. But this principle did not extend to implied powers. *Laidlaw v. Jackes* (1878), 25 Gr. 293, referred to.

Also, the division of income did not raise a case for election. The widow was given nothing but income. She had no interest in the residue. Her interest in the income was a specified monthly sum subject to increase in a certain contingency. There was nothing on the face of the will when this disposition was made inconsistent with her right to dower.

Re Hill, [1951] O.R. 619, referred to.

Per Spence J., *dissenting:* The testator had carefully outlined a scheme of division which was compact and complete and left no room for the widow's claim for dower carving out of the estate such an amount as might well defeat the operation of the scheme.

Here it was not only the trustees' right but their duty to lease the suites, and the cases which held that an express power to lease puts the widow to her election applied equally to the situation in this estate. The realization that his trustees might have to hold the apartment house a few years before they could profitably realize upon it would cause the testator to give them the broad power to postpone conversion and to expect them to use it requiring them to lease and so in effect making a provision in his will inconsistent with his wife's taking dower from his estate.

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from a judgment of Landreville J. Appeal dismissed, Spence J. dissenting.

M. J. Galligan, for the appellant.

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Adrian T. Hewitt, Q.C., for the respondent, Mary Ann Grant.

M. M. Kertzer, for the Executors.

S. M. McBride, Q.C., for the Official Guardian.

The judgment of Cartwright, Abbott, Judson and Hall JJ. was delivered by

JUDSON J.:—The question in this appeal is whether the testator has put his widow to an election between the gifts to her under the will and her dower right in certain real property in the city of Ottawa. In order to raise a case for election under a will, there must be on the face of the will a disposition by the testator of something belonging to a person who takes an interest under the will. This means that where dower is involved, unless the widow is expressly put to her election, it must be found from the will itself and not from parol evidence that the testator intended to dispose of his property in a manner inconsistent with the widow's right to dower. The Court of Appeal has held, contrary to the judgment of the judge of first instance, that the widow was not put to her election. In my opinion, the judgment of the Court of Appeal is correct.

The contest here is between the widow and a daughter of a prior marriage. The testator disposed of three parcels of real estate. He devised a cottage property in the province of Quebec absolutely to his daughter. No question of dower has been raised in connection with this devise. He gave his wife the right to reside in 189 Acacia Road, Rockcliffe Park, in the province of Ontario, as long as she wished, and also $150 per month from the residue of the estate during her lifetime with the proviso that if she did not wish to continue in occupation of the house, and so notified the trustees in writing, she was to have an additional $150 per month. It has been held, and there is no appeal on this point, that the right to reside in 189 Acacia Road is a devise of a life estate. Consequently no question of dower arises with respect to this disposition. The third parcel of real estate is a small apartment building in the city of Ottawa which contains eight apartments. The wife claims dower in this apartment building in addition to the interest given to her by the will.

The dispositions of chattel property have no relevancy in this case. The testator made an elaborate list of the contents

of 189 Acacia Road which the wife was permitted to use as long as she wished. The will contains a long list of chattels left absolutely to the daughter. The daughter is the residuary beneficiary.

The testator gave the whole of his estate to trustees on trusts of which the following are relevant to these reasons:

(*e*) To use their discretion in the realization of my estate, with power to my trustees to sell, call in and convert into money any part of my estate not consisting of money at such time or times, in such manner and upon such terms, and either for cash or credit or for part cash and part credit as my said trustees may in their uncontrolled discretion decide upon, or to postpone such conversion of my estate or any part or parts thereof for such length of time as they may think best, or to reinvest any portion of the capital of my estate for such length of time as they may think best, and I hereby declare that my said trustees may retain any portion of my estate in the form in which it may be at my death (Notwithstanding that it may not be in the form of an investment in which trustees are authorized to invest trust funds, and whether or not there is a liability attached to any such portion of my estate) for such length of time as my said trustees may in their discretion deem advisable, and my trustees shall not be held responsible for any loss that may happen to my estate by reason of their so doing.

(*g*) To keep invested the residue of my estate and subject as hereinafter provided, to pay the sum of One Hundred and Fifty ($150.00) dollars per month to or for my said wife during her lifetime, provided that if during such time my said wife shall relinquish possession of the house referred to in sub-paragraph (*b*) of this paragraph, my said trustees shall pay to my said wife an additional sum of One Hundred and Fifty ($150.00) dollars in lieu of the benefit granted under the said sub-paragraph (b).

(*h*) To pay to my said daughter, Marjorie E. Abbott, for her own use absolutely the balance of the income from my estate.

(*i*) Upon the death of the survivor of me and my said wife to deliver the residue of my estate to my daughter, Marjorie E. Abbott, or in the event that she shall have pre-deceased the survivor of me and my said wife, to divide the residue of my said estate among her issue in equal shares per stirpes.

The appellant's first submission is that there is an implied power to lease and that this is enough to put the widow to her election. With the trustee's powers to postpone conversion or sale and to retain the estate in the form in which it stood at the date of death, I have no difficulty in finding an implied power to lease. However, the cases where a widow must elect because of the power to lease have all involved express powers. *Parker v. Sowerby*[1] was such a

[1] (1854), 4 De G. M. & G. 321.

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case. So also were *Patrick v. Shaver*[1] and *Re Hunter, Hunter v. Hunter*[2]. But it is clear that this principle does not extend to implied powers for the reasons given by Proudfoot V.C. in *Laidlaw v. Jackes*[3], at pp. 297-8.

> All the cases, where powers of leasing have been held to raise a case of election, have been cases of express powers, and proceeded upon the ground that they indicated an intention in the testator that his executors or trustees should exercise them, not only over his estate, but also over that of his wife. It is difficult to understand why any greater efficacy should be given to a power of this description than to a power of sale, which does not exclude dower: *Patrick v. Shaver* (21 Gr. 123); but at all events the reasoning does not apply to this implied power, which is only an incident to the implied estate, and that, I think, is subject to dower. It will not be presumed under these circumstances that the testator intended to confer a power over property which was not his, the wife's dower; but only intended that the executors should deal with his property, that is the land subject to the dower.

Problems arising from dower were comparatively few in England because of the *Dower Act,* (1833) 3 & 4 Will. 4., c. 105, according to which a widow was not entitled to dower out of any land which had been absolutely disposed by the husband in his lifetime or by his will (32 Hals., 3rd ed., p. 304). But in Ontario the old law continued that when dower had once attached to the land, the husband could not get rid of it by act *inter vivos* or by will. Litigation in Ontario on problems of election was frequent during the second half of the 19th century and there is no doubt that the Courts applied very technical rules. But they were needed by the technicalities of the law of property and we cannot modify them by judicial decision without adding to the confusion. It may well be that the whole problem of dower should be dealt with by the legislature in view of the present existence of legislation for the relief of dependants and the decreasing importance of real property in a modern estate as compared with earlier times.

I am also of the opinion that the division of income does not raise a case of election. The trustees are to keep invested the residue of the estate and to pay the widow $150 per month, to be increased by another $150 per month if she gives up the residence, and to pay the balance of the income to the daughter. If real and personal estate are blended, not for the purpose of its equal division but in order to obtain an income out of which payments of stated amounts are to be

[1] (1874), 21 Gr. 123. [2] (1904), 3 O.W.R. 141.
[3] (1878), 25 Gr. 293.

made annually to the wife, the division of the corpus not being made until after the wife's death, this is not inconsistent with the right to dower. (*Re Biggar, Biggar v. Stinson*[1]; *Leys v. Toronto General Trust Co.*[2]; *Re Urquhart*[3]; *Re Williamson*[4]; *Re Taylor*[5].)

On the other hand, if the widow is given not a fixed annual sum out of the income of the blended fund but a percentage of the whole net income so that it is clear that the payments to her must depend upon actual net revenue received from the estate from time to time, the provision is inconsistent with dower.

The cases where there has been a direction to establish a blended fund from which periodical payments are to be made to the widow, are most recently reviewed in the judgment of McRuer C.J.H.C. in *Re Hill*[6]. I agree with these reasons in their preference for the judgment of Middleton J. in *Re Williamson*[7], as contrasted with the reasons in *Re Hendry* [8], and *Re Williamson*[9].

The present case is comparatively simple. The widow is given nothing but income. She has no interest in the residue. Her interest in the income is a specified monthly sum subject to increase in a certain contingency. There is nothing on the face of the will when this disposition is made inconsistent with her right to dower.

I would dismiss the appeal and direct that the costs of all parties be payable out of the residue of the estate, those of the executors as between solicitor and client.

SPENCE J. (*dissenting*):—This is an appeal by the daughter of the late James Duncan Grant from the judgment of the Court of Appeal for Ontario pronounced on April 16, 1964, by which that Court, reversing the judgment of Landreville J. pronounced on June 3, 1963, held that the testator's widow, the respondent Mary Ann Grant, was not required to elect between her dower and the gifts to her

[1] (1884), 8 O.R. 372.
[2] (1892), 22 O.R. 603.
[3] (1910), 17 O.W.R. 937.
[4] (1916), 11 O.W.N. 142.
[5] (1904), 3 O.W.R. 745, reversed 4 O.W.R. 211.
[6] [1951] O.R. 619.
[7] (1916), 11 O.W.N. 142.
[8] [1931] O.R. 448.
[9] [1943] O.W.N. 270, affirmed without written reasons, [1943] O.W.N. 411.

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under the will. Leave to appeal was granted by the order of this Court made on October 6, 1964.

The basic principle for the determination of the question whether the widow is required to make her election as to dower is that given by Lord Cranworth in *Parker v. Sowerby*[1]:

> It is not, I think, quite correct to state the general rule of law as being, that, to raise a case of election against the wife, the will must show that the Testator had in his mind her right to dower, and that he meant to exclude it; *the rule rather is that it must appear from the Will that the Testator intended to dispose of his property in a manner inconsistent with his wife's right to dower.* (The italicizing is my own.)

It is permissible to consider the circumstances in which the will was executed in so far as those circumstances appear in the record and I think I should outline those circumstances so that the words of the will may be considered in the light of the circumstances.

The testator was domiciled in Ottawa but executed his will in Regina, Saskatchewan, on November 17, 1959. He made a codicil on March 3, 1960.

The testator had been married previously and had one daughter, the appellant Marjorie E. Abbott. He married the defendant Mary Ann Grant who survived him and who is, therefore, his widow and it is a question of whether Mrs. Grant must elect her dower with which this appeal is concerned.

Schedule "A" to the affidavit of John Fraser shows household goods and furniture at the Rockcliffe Park property—$418, household goods and furniture at 125 Somerset St. West, Ottawa—$50, 8-unit apartment house at 125 Somerset St. West—$50,000, 189 Acacia Avenue, Rockcliffe Park—$25,300, cash—$325.

The estate consisted of those amounts plus a cottage property at Norway Bay, in the province of Quebec, and a very large number, some 44, of "items of household use and ornaments". It will be seen that the only income bearing property is the 8-unit apartment house on Somerset St. West. That apartment house is referred to in the affidavits of Monk, Beckett, Fraser and Hodginson, filed upon the application for interpretation of the will. Referring particularly to the last affidavit, the property is an 8-unit apartment house on a lot with 70′ frontage and 103′ depth

[1] (1854), 4 De G. M. & G. 321.

and was a 3-storey, detached residence which has been converted. There is a 2-storey garage and storage building to the rear. Mr. Hodginson swore that he understood the buildings were from 50 to 60 years old. The property, therefore, has reached the age which, according to Mr. Hodginson, has resulted in a need for very extensive repairs both outside and inside. Mr. Fraser swore that the stoves and refrigerators were quite old and it would be necessary to replace them in the near future.

The net rental in the year ending June 30, 1961, as adjusted, amounted to $4,918.90, and in the year ending June 30, 1962, amounted to $4,649.49.

Those net rentals make no allowance for depreciation on the buildings or the stoves or refrigerators.

It must be presumed that the testator realized that the sole income bearing property in his estate was this apartment house and that the apartment house was one which if it was to be retained for any lengthy period was going to require a great deal of expenditure which could not help but affect seriously the net rental income. Now, under those circumstances, let us look at what he did in his last will and testament.

It would seem that the testator determined first the objects of his bounty and then carefully divided his estate between his widow and his daughter. Considering the bequests in the order he would think of them, he first set aside from his estate his cottage property in the province of Quebec and a carefully chosen list of personalty and gave them to his daughter absolutely. He then looked at the balance of his estate and determined how it should be utilized to discharge the claims on his bounty, firstly, the support of his widow, and then the enrichment of his daughter. It was apparent his widow would need adequate housing. He could provide that as he owned the residence at 189 Acacia Road, Rockcliffe Park, where she then resided, and so he provided that she should have the right to continue to reside there during her lifetime or until she gave notice in writing of her intention to abandon it. Of course, his widow needed furnishings therein and so he provided that she could have the use of those furnishings, which he carefully listed, during the period of occupancy and that thereafter they should go to his daughter absolutely.

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I realize that the specific devise of a piece of real estate alone will not require a widow to make her election: *Re Hurst*[1]; *Leys v. Toronto General Trusts Co.*[2]

I cite the devise of the cottage only as an incident of his careful division of his whole estate and therefore as an indication of his intent that the scheme should not be fractured by his widow requiring dower to be carved out.

Realizing that his widow required more than a furnished home he then dealt with his remaining assets again with the purpose of first providing her with support and thereafter benefiting his daughter. The balance of his estate he put into a blended fund—I shall deal with the powers given his executors in reference thereto hereafter—and from that blended fund he directed payments as follows:

> (1) There should be paid all taxes, insurance, repairs, mortgage interest and any sums necessary for the upkeep of the residence which he permitted his widow to occupy. Although the premises would appear to be free of mortgage, the executors appear to have expended $831.05 for such purpose in the first year and $638.58 in the second year.
>
> (2) To his widow the sum of $150 per month for life and should she in writing relinquish her possession of the residence at 189 Acacia Road that sum was to be increased by a like amount.
>
> (3) To his daughter, the balance of the *income* of the estate.
>
> (4) Upon the death of his widow the need for her support having terminated the whole residue of his estate could be devoted to the enrichment of his daughter and the testator, therefore, so provided.

Upon this analysis, I am inclined to conclude that the testator carefully outlined a scheme of division which covered his whole estate and distributed the whole of it so that the first claim on his bounty, *i.e.*, the support of his widow, would be taken care of by providing her with a home, maintained at the cost of the estate, the necessary furnishings therefor so long as she chose to occupy it, and an allowance which he deemed sufficient to cover her other living expenses. Having accomplished such end, he was free to recognize the other claim to his bounty, his daugher. He

[1] (1905), 11 O.L.R. 6. [2] (1892), 22 O.R. 603.

did so by giving her those assets not required to assure the discharge of the first claim—the cottage and the items of personalty—outright, and any income not necessary to assure that first purpose and then accomplished his second purpose in full by giving all the residue to his daughter after his widow's death. It would appear to me that this scheme was compact and complete and left no room for the widow's claim for dower carving out of the estate such an amount as might well defeat the operation of the scheme.

It should be noted that the widow makes no claim for dower out of the cottage property in Quebec. Her estate in the property at 189 Acacia Road given by this will exceeds any dower right and therefore dower if taken would have to come from the Somerset St. West apartment. I have described that property, both its income and its condition. I do not think it can be said with certainty, and the testator could not have assumed, that if one-third of the income were taken out of that property to pay dower there would be enough left to maintain the expenses on the Acadia Road residence and pay the widow her monthly allowance. As I have pointed out, the apartment house would seem to be in imminent need of expensive and extensive repairs and the residence itself may require the expenditure of money—such an expenditure is charged on the estate by the will.

Counsel for the widow agrees that when a specific power to lease is given in a will, the widow is put to her election as to dower, but submits that such election has never been held to result from a mere implied power to lease. There are, as I have pointed out, specific powers to postpone, for as long as the trustees deem fit, conversion of assets in this will and certainly a power to lease is therefore implied. But when one considers that the sole income bearing real property was an apartment house, it is difficult to regard the power to lease as merely implied and permissive. If the trustees retain unconverted this asset then it is their duty to obtain an income from it and the only method whereby such income may be obtained is by leasing the suites. I am, therefore, of the opinion that it is not only the trustees' right but their duty to lease, and the cases which hold that an express power to lease puts the widow to her election apply equally to the situation in this estate.

The testator, evidently a careful and thoughtful man with sound business sense, would realize that Somerset St. West

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was close to the commercial centre of Ottawa but, at any rate, in November 1959 the commercial centre had not yet reached out to encompass it and that his trustees might have to hold the apartment house a few years before they could profitably realize upon it. Such realization would cause him to give his trustees the broad power to postpone conversion and to expect them to use it requiring them to lease and so in effect making a provision in his will inconsistent with his widow's taking dower from his estate.

For these reasons and upon considering the will as a whole, I have come to the conclusion that its provisions are inconsistent with the widow's right to dower and that she is put to her election. I would allow the appeal and restore the judgment of Landreville J. The costs of all parties should be paid out of the estate, those of the executors as between solicitor and client.

Appeal dismissed with costs, SPENCE J. *dissenting.*

Solicitors for the appellant: McIlraith, McIlraith, McGregor and Johnston, Ottawa.

Solicitors for the respondent: Hewitt, Hewitt and Nesbitt, Ottawa.

Solicitors for the executors and trustees: Kennedy, Sweet, Lepofsky and O'Neil, Ottawa.

The Official Guardian, Toronto.

1964
*Nov. 25
1965
May 17

RALPH BEIM (*Plaintiff*) .....APPELLANT;

AND

JOSEPH GOYER (*Defendant*) .....RESPONDENT.

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

Damages—Negligence—Use of fire-arms—Fugitive shot accidentally by police officer—Responsibility.

The defendant, a police officer of the City of Montreal, saw the plaintiff, who was 14 years of age, driving a stolen automobile the wrong way on a one-way street. The plaintiff abandoned the car and ran off through a rocky, open, snow-covered field. He was not armed and had given no reason to suppose that he was. The defendant and the other police officer who was with him gave chase on foot. Several warning shots were fired by the two policemen. Owing to the rough terrain, the defendant fell twice while in pursuit. As the defendant prepared to

*PRESENT: Taschereau CJ. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

fire another shot into the air, he fell again, striking his right elbow on the ground, and the shot was discharged accidentally. The plaintiff was struck in the back and seriously injured. Through his tutor, he sued both the defendant and the City of Montreal. The action against the City was dismissed at trial and it was no longer a party to this appeal. The action was tried by a judge and jury. The jury found against the defendant for 60 per cent, and this verdict was affirmed by the trial judge. The Court of Appeal reversed the judgment and dismissed the action.

The plaintiff appealed to this Court.

Held (Fauteux, Martland and Judson JJ. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Taschereau C. J. and Cartwright, Abbott, Ritchie, Hall and Spence JJ.: There was evidence upon which the jury could based its finding that the defendant was at fault for carrying a revolver with finger on the trigger while running over rough and stony ground after having previously fallen a number of times. This finding should not have been disturbed.

Per Ritchie J.: It is apparent that the defendant himself did not consider the circumstances to be such as to make it necessary to fire at the fugitive. In fact these circumstances were not such as to justify his taking the risk of firing at him accidentally. The case of *Priestman v. Colangelo,* [1959] S.C.R. 615, was distinguishable.

Per Ritchie and Spence JJ.: This case was not concerned with the provisions of s. 25 of the *Criminal Code* and the issue of justification. The defence was made upon the allegation that the plaintiff was shot accidentally. The matter was reduced to a pure question of negligence. On that question, the jury was entitled and probably should have made the inference that the defendant had his finger on the trigger throughout.

Per Fauteux, Martland and Judson JJ., *dissenting*: The defendant was entitled, by reason of s. 25(4) of the *Criminal Code,* to use as much force as was necessary to prevent the plaintiff's escape, unless the escape could be prevented by reasonable means in a less violent manner. Force was not intentionally applied, and, apart from the firing of warning shots, it was difficult to see how, on the evidence, the plaintiff's escape could have been prevented by any means less violent than actually shooting at him. Moreover the trial judge was wrong in law when, charging the jury as to the use of force within the meaning of s. 25(4), he suggested that it did not matter whether the shot was fired intentionally or by accident.

On the question of negligence, the finding of the jury that the discharge of the revolver, though accidental, occurred through improper handling by the defendant, was not supported by the evidence. At best, it was an inference drawn from an answer given by the defendant which was only partially translated to them. The real issue as to whether the defendant was negligent was never determined at the trial. To hold the defendant to have been negligent would be erroneous. He was properly entitled to have his revolver in his hands. It was proper to seek to prevent the escape, without the use of any force, by the firing of warning shots into the air. It was not negligent to fire those shots while running, for, if the defendant had a duty to stop before firing into the air, the chances of the plaintiff's escape were enhanced, if he failed to heed the warning, and the likelihood of an arrest being made without actually shooting at him was thereby diminished.

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Dommages—Négligence—Usage d'armes à feu—Fuyard atteint accidentellement par une balle tirée par un agent de police—Responsabilité.

Le défendeur, un agent de police de la cité de Montréal, aperçut le demandeur, qui était alors âgé de 14 ans, conduisant une automobile volée dans le sens inverse d'une rue à sens unique. Le demandeur abandonna la voiture et se mit à courir à travers un terrain rocailleux, ouvert, et recouvert de neige. Il n'était pas armé et n'avait donné aucune raison de laisser supposer qu'il l'était. Le défendeur et l'autre policier qui était avec lui se mirent à sa poursuite à pied. Les deux policiers tirèrent plusieurs coups de revolver en l'air. Le défendeur tomba deux fois sur ce terrain raboteux. Comme le défendeur se préparait à tirer un autre coup en l'air, il tomba une autre fois, heurta son coude droit sur le sol, et le coup partit accidentellement. La balle frappa le demandeur dans le dos et lui causa des blessures très sérieuses. Par l'entremise de son tuteur, il poursuivit le défendeur et la cité de Montréal. L'action contre la cité fut rejetée et elle n'est plus une partie dans cet appel. L'action fut entendue par un juge et jury. Le jury a tenu le défendeur responsable pour 60 pour cent, et ce verdict fut confirmé par le juge au procès. La Cour d'Appel renversa ce jugement et rejeta l'action. Le demandeur en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et le jugement rendu au procès rétabli, les Juges Fauteux, Martland et Judson étant dissidents.

Le Juge en Chef Taschereau et les Juges Cartwright, Abbott, Ritchie, Hall et Spence: La preuve permettait au jury de trouver que le défendeur était en faute pour avoir eu un doigt sur la détente de son revolver alors qu'il courait sur un terrain raboteux et rocailleux, après qu'il eut tombé nombre de fois auparavant. Cette conclusion n'aurait pas dû être mise de côté.

Le Juge Ritchie: Il est évident que le défendeur lui-même ne considérait pas que les circonstances étaient telles qu'il était nécessaire de tirer sur le fuyard. En fait, ces circonstances n'étaient pas telles qu'elles le justifiaient de prendre le risque de tirer accidentellement sur lui. La cause *Priestman v. Colangelo,* [1959] R.C.S. 615, pouvait être différenciée.

Les Juges Ritchie et Spence: Cette cause ne porte pas sur les dispositions de l'art. 25 du *Code criminel* et la question de justification. La défense était basée sur l'allégation que le demandeur avait été atteint accidentellement. L'affaire était réduite à une pure question de négligence. Sur cette question, le jury avait le droit et probablement devait inférer que le défendeur avait eu tout le temps son doigt sur la détente.

Les Juges Fauteux, Martland et Judson, *dissidents*: En vertu de l'art. 25(4) du *Code Criminel,* le défendeur était justifié d'employer la force nécessaire pour empêcher la fuite du demandeur à moins que l'évasion puisse être empêchée par des moyens raisonnables d'une façon moins violente. La force n'a pas été employée intentionnellement, et, à part des coups tirés en l'air, il est difficile de voir comment, en se basant sur la preuve, l'évasion du demandeur aurait pu être empêchée par des moyens moins violents que de faire feu directement sur lui. En plus, le juge au procès a erré en droit lorsque, alors qu'il s'adressait au jury sur l'emploi de la force dans le sens de l'art. 25(4), il a suggéré qu'il n'importait pas que le coup ait été tiré intentionnellement ou par accident.

Sur la question de négligence, le verdict du jury que le revolver s'était déchargé, quoique accidentellement, parce que le défendeur l'avait manié improprement, n'était pas supporté par la preuve. Tout au plus, c'était une inférence tirée d'une réponse donnée par le défendeur et qui n'avait été traduite que partiellement au jury. La véritable question de savoir si le défendeur avait été négligent n'a jamais été déterminée au procès. Il serait erroné de dire que le défendeur avait été négligent. Il était justifié d'avoir son revolver à la main. Il était en droit d'essayer d'empêcher l'évasion, sans l'emploi de force, en tirant des coups dans l'air. Ce n'était pas une négligence que de tirer ces coups alors qu'il courait, parce que, si le défendeur avait un devoir d'arrêter avant de tirer dans l'air, les chances que le demandeur puisse s'échapper étaient augmentées si ce dernier ne s'occupait pas des avertissements, et les probabilités qu'il soit arrêté sans qu'il soit nécessaire de tirer directement sur lui étaient par conséquent réduites.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant le verdict d'un jury. Appel maintenu, les Juges Fauteux, Martland et Judson étant dissidents.

APPEAL from a judgment of the Court of Queen's Bench, province of Quebec[1], reversing the verdict of a jury. Appeal allowed, Fauteux, Martland and Judson JJ. dissenting.

S. Leon Mendelsohn, Q.C., and *Manuel Shactor, Q.C.*, for the plaintiff, appellant.

Philippe Beauregard, Q.C., and *Joseph St-Laurent, Q.C.*, for the defendant, respondent.

The judgment of the Chief Justice and of Cartwright, Abbout and Hall JJ. was delivered by

ABBOTT J.:—On July 9, 1957, appellant, then a minor and acting through his tutor, sued the respondent and the City of Montreal claiming damages for injuries sustained by appellant as a result of a shot fired by respondent, a constable of the City of Montreal.

The action was tried before Charbonneau J. assisted by a jury. He rendered judgment affirming the verdict of the jury, dismissed the action as against the city and maintained the action as against respondent for an amount of $32,036.80.

On appeal[1] the dismissal of the action against the city was confirmed and there is no appeal to this Court from that judgment. However the respondent's appeal was allowed

[1] [1964] Que. Q.B 558, 50 D.L.R. (2d) 550, *sub nom. Gordon v. Goyer.*

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and the action against him was dismissed, Montgomery J. dissenting. The present appeal is from that judgment. The quantum of damages is not now in issue.

The facts, which are fully set out in the judgments below, are not seriously in dispute. I need not recite them in detail.

The appellant, who in 1957 was 14 years of age, was driving a stolen car the wrong way on a one-way street. Stopped by two City of Montreal policemen, Roland Ménard and the respondent Joseph Goyer, he abandoned the car and ran off through a rocky, open, snow-covered field, pursued by the police. He was not armed and had given no reason to suppose that he was. After several warning shots had been fired by the two policemen, the respondent Goyer stumbled and fell, at the same time firing another shot which hit appellant in the neck, seriously injuring him.

The sole question in issue before this Court is whether the respondent was at fault, in failing to exercise proper care in the use of firearms when pursuing the appellant.

The jury found that he was at fault for the following reason: "Carrying revolver with finger on trigger while running over rough and stony ground after having previously fallen a number of times." There was evidence upon which the jury could base this finding and in my opinion it should not have been disturbed.

Each of the decided cases dealing with the use of firearms by peace officers, which were cited to us, turns largely on its own facts. Having considered the evidence, the arguments of counsel and the authorities to which they referred, I find myself in agreement with the conclusion and reasons of Montgomery J. I do not think that anything would be gained by attempting to summarize or restate those reasons and I am content to adopt them.

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

The judgment of Fauteux, Martland and Judson JJ. was delivered by

MARTLAND J. (*dissenting*):—This is an appeal from the Court of Queen's Bench (Appeal Side) for the Province of Quebec[1], which, by a majority of four to one, allowed an appeal by the defendant, the present respondent, from a

[1] [1964] Que. Q.B. 558, 50 D.L.R. (2d) 550.

judgment which had been given at trial in favour of the plaintiff, the present appellant, for damages for personal injuries in the amount of $32,036.80, with interest and costs. The judgment at trial was based upon answers given to specific questions by a jury.

The appellant's injuries were sustained on January 22, 1957, when he was fourteen years of age. There is evidence that, in appearance, he looked considerably older. One independent witness who observed him on that date believed he was a young man of 22 or 23 years. The appellant was struck by a bullet fired from the revolver of the respondent, a police constable, who was pursuing him in order to effect his arrest. The respondent had been a member of the Montreal Police force since 1935.

The circumstances leading up to the shooting were as follows. Between eleven o'clock and noon on the morning of that day the respondent, with another police constable, Ménard, was driving in a police vehicle toward the north on Wilderton Street, in Montreal. The respondent was in uniform. Before leaving the police station they had been advised regarding certain automobiles reported stolen. As they approached the intersection with Goyer Street (a one way thoroughfare) they observed a Pontiac automobile travelling in the wrong direction on that street. The driver of that car, on seeing the police vehicle, effected a U turn at the intersection of Goyer and Wilderton and headed west along Goyer Street. The respondent was able to note the licence number of the Pontiac, and realized that it was one of the automobiles reported stolen. The respondent set off in pursuit.

The appellant ignored the respondent's signal to stop, proceeded at a high rate of speed, bumped into a stationary vehicle, and finally stopped to the left of and off the street, after mounting the sidewalk. He then leaped out of the car and ran across a rough, rocky field, partially covered with snow, where there were no roads or buildings.

The police car stopped and Ménard was the first to commence the pursuit. He ran after the appellant, calling out to him, in both French and English, to stop. When this had no effect, he fired four shots in the air from his revolver. He ceased the chase when he was out of breath.

The respondent, for a time, was able to follow, in his automobile, the course taken by the appellant. He then left

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the car and ran in pursuit of the appellant. He also called to him, in both French and English, to stop, and he fired two warning shots in the air from his revolver. The appellant continued to run. Owing to the rough terrain, the respondent fell twice while in pursuit.

The respondent than prepared to fire a third shot into the air, but fell again, striking his right elbow on the ground, and a shot was discharged accidentally. This shot struck the appellant in the back, fracturing his spine. As a consequence the appellant suffered partial paralysis.

The appellant, through his tutor, sued both the respondent and the City of Montreal, of whose police force the respondent was a member. The action against the City was dismissed at the trial and it is no longer a party to the appeal before this Court.

The questions submitted to the jury at the trial, which are relevant to this appeal, and the answers given are as follows:

Question Number One:

Was the minor Ralph Biem, on January 22nd, 1957, hit by a bullet fired by the Defendant Joseph Goyer?

Answer: Yes.

Question Number Two:

Was the said Ralph Beim then in flight in fear of arrest?

Answer: Yes.

Question Number Three:

If you have answered the preceding question in the affirmative, was Ralph Beim then in flight in fear of arrest because:

(*a*) he had contravened municipal bylaws; or

(*b*) he knew that he had been driving a stolen automobile?

Answer: (*a*) no and (*b*) yes.

Question Number Four:

Did the said Defendant Joseph Goyer shoot at the said Ralph Beim voluntarily, or was his revolver discharged accidentally?

Answer: Accidentally.

Question Number Five:

If you have come to the conclusion that the revolver was on that occasion discharged accidentally, state if that discharge occurred;

(*a*) by pure accident?

(*b*) through improper handling by Defendant Joseph Goyer?

Answer: (*a*) by pure accident? No.

(*b*) through improper handling by Defendant Joseph Goyer?

Answer: Yes.

And in the affirmative, give all details as to how the said handling was improper or negligent?

Answer: Carrying a revolver with finger on the trigger while running over rough and stony ground, after having previously fallen a number of times.

Question Number Six:

Was constable Joseph Goyer then attempting to arrest the said Ralph Beim,

(a) because the latter may have contravened a municipal by-law, e.g., by driving too fast or in the wrong direction or making a U turn?

Answer: No.

or (b) because he had reason to believe that the said Ralp Beim was committing a criminal offence driving an automobile which had been stolen?

Answer: Yes.

Question Number Seven:

If you have come to the conclusion either that the revolver was discharged voluntarily or accidentally through neglect or want of skill of Defendant Joseph Goyer, was the said constable using an excess of force, and could the escape of Ralph Beim have been prevented by reasonable means in a less violent manner?

Answer: Yes.

Question Number Eight:

Was the said Ralph Beim wholly responsible for the injury he suffered, and in the affirmative state in detail what fault or faults he committed?

Answer: No.

Question Number Nine:

Was the said Ralph Beim responsible in part for the injury he suffered, and in the affirmative state what fault or faults he committed and the proportion you ascribe to his fault?

Answer: Yes, with qualifications. Aside from traffic violations, knowingly driving a stolen car and failing to stop when called upon to do so by a police officer; Beim fault 60%.

On the basis of these answers, the learned trial judge gave judgment in favour of the appellant against the respondent in the amount assessed by the jury and applying the percentage of fault attributed by the jury to the respondent. The respondent's appeal to the Court of Queen's Bench (Appeal Side) was successful.

The only issue seriously contested in this Court was that of liability.

In considering that question, attention must first be given to the provisions of s. 25(4) of the *Criminal Code,* which provides:

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest,

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in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

The effect of that provision was considered by this Court in *Priestman v. Colangelo*[1]. In that case two police officers in a patrol car were pursuing the driver of a stolen vehicle. On three occasions, when trying to pass the stolen car, the driver of it cut off the police car. Thereafter one of the officers, after firing a warning shot into the air, which went unheeded, took aim at a rear tire of the stolen car. As he fired, the police car struck a bump in the road and the shot hit the driver of the stolen car. He lost control of the vehicle, which struck and killed two persons standing on the sidewalk. The issue in this Court was as to the liability of the police officer who fired the shot to the administrators of their estates.

Unlike the present appeal, in the *Priestman* case the shot was deliberately fired, on a city street, in a populated area, and set in motion events which resulted in the deaths of two innocent people. Nonetheless, the claim against the police officer failed.

Locke J., who delivered the judgment of Taschereau J., as he then was, and himself, said, at p. 620:

> Actionable negligence has been defined in a variety of manners. In *Vaughan v. the Taff Vale Railway Company,* (1860), 5 H. & N. 679 at 688, 157 E.R. 1351, Willes J. said that the definition of negligence is the absence of care according to the circumstances. The concluding words of this short definition are at times lost sight of and are those which must be kept most clearly in mind in considering an action such as the present, which is based on what is said to have been a negligent manner of discharging the duty which rested upon the constables.

At p. 624 he said:

> The difficulty is not in determining the principle of law that is applicable but in applying it in circumstances such as these. In *Rex v. Smith,* (1907), 13 C.C.C. 326, 17 Man. R. 282, Perdue J.A., in charging a jury at the trial of a police officer for manslaughter, is reported to have said that shooting is the very last resort and that only in the last extremity should a police officer resort to the use of a revolver in order to prevent the escape of an accused person who is attempting to escape by flight. With all the great respect that I have for any statement of the law expressed by the late Chief Justice of Manitoba, in my opinion this is too broadly stated and cannot be applied under all circumstances. Applied literally, it would presumably mean in the present case that, being unable to get in front of the escaping car, due to the criminal acts of Smythson, the officers should have abandoned the chase and summoned all the available police forces to prevent the escape. This would have involved ignoring their obligation to endeavour to prevent

[1] [1959] S.C.R. 615, 30 C.R. 209, 124 C.C.C.1, 19 D.L.R. (2d) 1.

injury to other members of the public at the intersections which would be reached within a few seconds by the escaping car.

Police officers in this country are furnished with firearms and these may, in my opinion, be used when, in the circumstances of the particular case, it is reasonably necessary to do so to prevent the escape of a criminal whose actions, as in the present case, constitute a menace to other members of the public. I do not think that these officers having three times attempted to stop the fleeing car by endeavouring to place their car in front of it were under any obligation to again risk their lives by attempting this. No other reasonable or practical means of halting the car has been suggested than to slacken its speed by blowing out one of the tires.

Fauteux J., who also decided in favour of the appellant police officer, adopted the reasons of Laidlaw J.A. in the Court of Appeal[1]. At page 11 Laidlaw J.A. said:

If this Court cannot properly regard the conclusions of the learned trial Judge as including an inference of fact that the respondent Priestman was not negligent, and can properly reach its decision on the basis that no such inference was drawn from the evidence by the learned trial Judge, neverthless, I am not willing to draw that inference. I subscribe without reservation to the view expressed by the learned trial Judge that "it is easy now to sit and speculate in the calm of the Courtroom and say the defendant Priestman might have continued the chase and that eventually Smythson would have been apprehended and no one hurt, but this is not helpful." It is extremely difficult, if not impossible, after an unfortunate happening to blot out from one's mind the wisdom and sense of good judgment acquired from that happening. The tendency by reason of the happening, to criticize or find fault with one or more of the parties involved in it is natural and hard to overcome. A judicial finding as to whether or not there was negligence or misconduct of one or more parties involved in a happening of the kind in question in the instant case, requires that the happening and the unfortunate results therefrom be erased from one's mind as completely as possible. The judicial mind must be carefully directed to the time and place of the happening and the conduct of the parties in the circumstances then existing must be measured by comparing it with the conduct of that fictitious creature of the law,—the reasonable man. With that approach to the question I ask myself, what would a police constable, exercising reasonable care and placed in the position of the respondent Priestman, have done or omitted in the particular circumstances existing at the time of the happening in question?

At page 15 he also said:

Again, it appears to me that if Priestman's arm holding the revolver had not been jolted at the very instant he fired the revolver, by the uneven road surface, there would be no ground of complaint whatsoever as to his conduct. In order to find that he was negligent I think it would be necessary to find that he ought reasonably to have foreseen that his arm might be jolted at the instant he fired, and that the injuries that resulted were such as a reasonable man would contemplate. I am not willing to make that finding. I refer to *Bolton v. Stone,* (1951) A.C. 850 at p. 856, referred to also by my brother Schroeder J.A.

[1] [1958] O.R., 7, 119 C.C.C. 241, 11 D.L.R. (2d) 301.

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The dissenting reasons in the *Priestman* case, delivered by Cartwright J., were based mainly on the fact that the claims involved were by innocent parties, not by the wrongdoer, and that s. 25(4) would not serve as a defence to their claims.

In the present case the respondent was entitled, by reason of s. 25(4), to use as much force as was necessary to prevent the appellant's escape, unless the escape could be prevented by reasonable means in a less violent manner. He was equipped, for the carrying out of his duties, with an offensive weapon, which, within the limits defined in s. 25(4), he was lawfully entitled to use. In fact, as found by the jury, he did not voluntarily shoot at the appellant, but fired his weapon accidentally. As was pointed out by Rinfret J., in the Court below, there was no question of force being applied in the circumstances of this case, let alone excessive force, since the element of intention was wholly lacking.

This being so, I do not see how the jury's answer to question 7 can properly stand. The question, as framed, was a double-barrelled question, but, as pointed out above, force was not intentionally applied, and, apart from the firing of warning shots, it is difficult to see how, on the evidence, the appellant's escape could have been prevented by any means less violent than actually shooting at him.

In connection with this question it should be noted that there was what, in my opinion, was an error in law in the charge to the jury. When dealing with question 7, the learned trial judge read to the jury the headnote in the case of *Robertson v. Joyce*[1], which dealt with the meaning and intention of s. 41 of the old Code, the predecessor of s. 25(4). He went on then to say:

> This was also a case in which the officer claimed that he had stumbled and that his revolver had been discharged accidentally. But the liability, the civil liability would be the same whether he had shot intentionally or by accident through negligence. The criminal liability would be different but civilly the liability for damage done voluntarily or on account of negligence or mishandling of a firearm would be the same.

I think the learned trial judge was wrong, when charging the jury as to the use of force within the meaning of s. 25(4), in suggesting that it did not matter whether the shot was fired intentionally or by accident.

I now turn to consider the issue of negligence and the answer of the jury to question 5, in which the jury found

[1] ([1948] O.R. 696, 92 C.C.C. 382, 4 D.L.R. 436.

that the discharge of the revolver, though accidental, occurred through improper handling by the respondent. When asked to give details, the answer was:

> Carrying a revolver with finger on the trigger while running over rough and stony ground, after having previously fallen a number of times.

When charging the jury in respect of this question, the only instructions given by the learned trial judge were as follows:

> All I can say on this is that in my opinion—and again you do not have to follow it—in my opinion if the revolver was discharged accidentally it would be through the fault and negligence of Defendant Goyer. He had tripped twice before. He was running with a cocked revolver. That is my opinion. Do not follow me if you do not agree.

At the end of his charge, a question was asked by one of the jurors:

> Is there any way of establishing whether a gun can discharge itself accidentally with the finger not on the trigger of the gun?

The respondent was then recalled to the stand, and the following questions were asked by the learned trial judge and answers given by the respondent, all in the French language:

> D. Monsieur Goyer, le Jury veut savoir si votre revolver n'était pas parti accidentellement, auriez-vous tiré volontairement sur le jeune homme? R. Non.
>
> D. Combien d'années d'expérience avez-vous avec des revolvers? R. Depuis mil neuf cent trente-cinq (1935), Votre Seigneurie.
>
> D. Quelle sorte de revolver aviez-vous? R. Un Colt trente-huit (38), Votre Seigneurie.
>
> D. Ce revolver-là peut-il partir si vous n'avez pas le doigt sur le chien? R. Il faut avoir le doigt sur la gâchette pour le partir; lorsque le coup a parti là, j'avais le doigt sur la gâchette; en tirant en l'air . . .

The charge to the jury was all delivered in English and the learned trial judge interpreted the questions and the respondent's answers to the jury as follows:

> Q. How many years experience have you had with a revolver? A. Since 1935.
>
> Q. What kind of revolver did you have? A. A Colt 38.
>
> Q. Can that revolver go off if your finger in not on the trigger? A. I must have my finger on the trigger before it can go off.

It will be noted that the latter portion of the last answer was not translated, and this omission is of importance. The respondent was testifying that the shot which struck the appellant was being fired into the air. There was no evidence that the respondent had his finger on the trigger while

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running over the rough ground. The evidence shows that he had his finger on the trigger when about to fire into the air when he fell and the revolver discharged on his elbow hitting the ground.

In order to find liability on the part of the respondent, on the basis of this evidence, it was necessary to find that it was negligence, on his part, to carry his revolver in his hand when pursuing the appellant and to use it to fire warning shots into the air in the course of that pursuit. In considering whether or not that conduct was negligent, it is essential to consider the nature of the duty owed by the respondent to the appellant, and to bear in mind the relationship between them.

This is not a case of an ordinary citizen being struck by a bullet fired from a revolver carried by another ordinary citizen. It might well be negligent for an ordinary citizen to run with a loaded revolver in his hand when another person might be in the vicinity. This, however, is the case of a person seeking to escape arrest being pursued by a police officer fixed with a legal duty to arrest him and empowered by law to use as much force as necessary to prevent his escape, unless the escape could be prevented by reasonable means in a less violent manner.

The finding made by the jury in its answer to question 5 was not supported by the evidence. At best, it was an inference drawn from an answer given by the respondent which was only partially translated to them. The learned trial judge himself misunderstood this evidence, because, in his judgment given after the jury had answered the questions, he said:

> in addition, this point was later cleared by the constable, when he was reexamined at the request of the jurors and stated that he was carrying the revolver with his finger on the trigger while running over rough and stony ground, and it was precisely that fault which was found by the jurors.

The issue which the jury should have been asked to determine was whether the conduct of the respondent, during his pursuit of the appellant, was negligent, and, in determining that issue, they should have been instructed that such conduct had to be considered in light of the fact that the appellant was seeking to escape arrest, and that the respondent was a peace officer, with the rights defined in s. 25(4) of the *Criminal Code*. They should have been asked to determine whether, under those circumstances, it was negli-

gent for the respondent to carry his revolver in his hand, and whether it was negligent for him to fire a warning shot in the course of pursuit without coming to a halt. Instead of this, the jury was told, in terms, that, in the opinion of the learned trial judge, if the revolver discharged accidentally, it would be through the respondent's fault and negligence.

The real issue in this case was never determined at the trial, and, for that reason, at best, in my opinion the appellant should be entitled to no more than an order for a new trial. No request for a new trial was made by the appellant in this appeal.

In my opinion, however, a decision on the substantial issue holding the respondent to have been negligent would have been erroneous.

When pursuing the appellant, the respondent was properly entitled to have his revolver in his hand. Further, it was proper to seek to prevent the escape, without the use of any force, by the firing of warning shots into the air. I do not think it was negligent to fire those shots while running, for, if the respondent had a duty to stop before firing into the air, the chances of the appellant's escape were enhanced, if he failed to heed the warning, and the likelihood of an arrest being made without actually shooting at him was thereby diminished.

I agree with the views expressed by Rivard J. in the Court below when he said:

> Goyer avait le droit et le devoir de poursuivre le jeune Beim. Il avait également le droit d'être armé. Il avait le droit et le devoir de prendre les moyens nécessaires pour opérer son arrestation. Il avait le droit de tirer en l'air pour lui communiquer le sérieux de ses avertissements. La poursuite de Beim par Goyer, les coups de feu que ce dernier a tirés vers le ciel demeurent dans les limites des droits reconnus par l'article 25 du Code Criminel, à un constable lancé à la poursuite d'un fugitif.
>
> On lui reproche d'avoir couru sur un terrain glissant, rocailleux et partiellement recouvert de neige avec le revolver dans sa main. Si Goyer avait le droit de poursuivre Beim, il fallait nécessairement qu'il emprunte le chemin que Beim avait lui-même choisi. Beim se dirigeait vers un endroit où il y avait une voie ferrée et où il lui aurait été certainement facile de disparaître. Il n'y avait personne dans les environs que Goyer pouvait appeler à son aide. Rien dans la preuve ne suggère un autre moyen de réaliser l'arrestation de Beim. Si Goyer avait le droit de tirer en l'air, en poursuivant Beim, il fallait nécessairement qu'il ait son arme à la main. On ne peut prétendre qu'il devait s'arrêter chaque fois qu'il tirait en l'air, remettre son revolver dans sa gaine et repartir à courir. C'eut été assurer la fuite certaine du fugitif.
>
> Dans les circonstances, je suis convaincu que Goyer n'a pas usé de force excessive et a utilisé les seuls moyens qu'il pouvait prendre pour

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tenter d'opérer l'arrestation de Beim. Beim a été le malheureux artisan de son infortune.

Les faits rapportés par le Jury n'établissent aucune faute chez Goyer, et je crois qu'en conséquence, la motion pour jugement rejetant l'action, malgré le verdict, aurait dû être accordée.

For these reasons I would dismiss this appeal with costs.

RITCHIE J.:—The facts of this case have been thoroughly discussed in the reasons for judgment of other members of the Court and it would be superfluous for me to reiterate them.

I am in agreement with my brothers Abbott and Spence that this appeal should be allowed and only wish to add that the case of *Priestman v. Colangelo*[1] which is referred to in the reasons for judgment of my brother Martland is, in my view, distinguishable on the ground that in finding that under the circumstances there disclosed it was reasonably necessary for the policeman to fire at the tire of a fleeing car, Locke J. predicated his judgment on the fact that the person who had taken flight to avoid arrest was prepared, in order to escape, to jeopardize the lives of two policemen. In the course of his reasons for judgment, Locke J. said:

In considering whether the action of Priestman in firing the second shot was a reasonable attempt by him to discharge his duty, it is to be borne in mind that, as the constables were both aware Smythson was a thief and he had demonstrated *that he was prepared, in order to escape, to jeopardize both of their lives.*

The italics are my own.

No such danger existed in relation to Beim who was unarmed and running away on foot. The standard adopted by Laidlaw J. A. in the *Priestman* case in the Court of Appeal of Ontario[2], appears to me to be appropriate in the present case. Mr. Justice Laidlaw there said of the policeman:

In order to find that he was negligent I think it would be necessary to find that he ought reasonably to have foreseen that his arm might be jolted at the instant he fired, and that the injuries that resulted were such as a reasonable man would contemplate. I am not willing to make that finding.

In the present case, the fact that Goyer had already fallen twice in running over the rough ground in pursuit of the appellant in my opinion created a situation in which he "ought reasonably to have foreseen that his arm might be jolted at the instant he fired. . ." if he should fall again as he was likely to do, and that if he did so while firing a shot he might hit Ralph Beim.

[1] [1959] S.C.R. 615, 30 C.R. 209, 124 C.C.C. 1, 19 D.L.R. (2d) 1.
[2] [1958] O.R. 7 at 15, 119 C.C.C. 241, 11 D.L.R. (2d) 301.

It is apparent that Goyer himself did not consider the circumstances to be such as to make it necessary to fire at the fugitive and I do not think they were such as to justify his taking the risk of firing at him accidentally.

SPENCE J.: I have had the advantage of reading the reasons of my brothers Abbott and Martland and agree with those of the former. I wish to add, however, reference to certain submissions made to this Court.

This is an appeal by the plaintiff from the judgment of the Court of Queen's Bench (Appeal Side) for the Province of Quebec[1] whereby that court by a majority allowed the respondent's appeal from a judgment given by Charbonneau J. after trial by jury. In the judgment at trial, the plaintiff Beim was allowed $32,036.80 against the respondent Goyer and the action was dismissed against the City of Montreal. The defendant Goyer appealed to the Court of Queen's Bench (Appeal Side) and the plaintiff appealed from the dismissal of the claim against the City of Montreal and against the quantum of the damages allowed but both the latter appeals were dismissed and the plaintiff has not further appealed from such dismissals.

The judgment at trial was rendered upon the findings of the jury in answer to certain questions. The important questions and answers are Nos. 5 and 7.

Question 5:

> If you have come to the conclusion that the revolver was on that occasion discharged accidently, state if that discharge occurred, (a) by pure accident, or (b) through improper handling by defendant Joseph Goyer?

The jury answered "No" to sub-part (a) and "Yes" to sub-part (b), and then added this explanation: "Carrying revolver with finger on trigger while running over rough and stony ground after having previously fallen a number of times".

Question 7 read as follows:

> If you have come to the conclusion either that the revolver was discharged voluntarily, or accidentally through neglect or want of skill of defendant Joseph Goyer, was the said constable using an excess of force, and could the escape of Ralph Beim have been prevented by reasonable means in a less violent manner?

The jury answered "Yes".

In argument in this Court, counsel for the respondent took the position that the answer to question No. 5 could

[1] [1964] Que. Q.B. 558, 50 D.L.R. (2d) 550.

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not have been made by a jury properly instructed as there was no evidence that the defendant kept his finger on the trigger of the revolver as he ran across this rough and stony field with the revolver in his hand. Counsel for the respondent objected to Question No. 7 having been put on the ground that the allegation that the arrest of the plaintiff could have been accomplished in a less violent manner was not made by the plaintiff in his pleading.

To deal with the latter objection, I am of the view that the issue dealt with in question No. 7 was sufficiently brought into the plaintiff's pleadings in paragraph 5 of the Declaration, and further that the defendant actually put that point in issue in his particulars to the defence, particularly paras. 29 to 31 of the Particulars.

I am of the opinion that there is a much more effective reply to the defence submission. We are not really concerned at all with the provisions of s. 25 of the *Criminal Code* and the issue of justification. The defendant has always sworn and made his whole defence upon the allegation that the plaintiff was shot accidentally and there was no question of justification for the use of any degree of force. The matter is reduced to a pure question of negligence.

The objection to question No. 5 and its answer seems to be base upon the submission that the trial judge mistranslated to the jury some questions and answers made by the defendant.

What occurred was this: When the judge finished his charge to the jury, juror No. 2 requested that a hypothetical question be put to the defendant. The defendant was asked to re-enter the witness box and was sworn in and asked that hypothetical question. Then juror No. 7 asked the question of the judge, "Is there any way of establishing whether a gun can discharge itself accidentally with a finger not on the trigger of the gun?" By the Court, "As to that I can tell you that there are many hunting accidents—how the gun goes off—if the bullet is in the gun there, a gun must be locked if you walk or run. I can ask the constable. Do you want me to ask the constable as to that particular gun?" By juror No. 7, "If he can give us an authoritative answer".

The questions of the Court to the defendant in the French language and his answers in the French language are set out in the record as follows:

D. Monsieur Goyer, le Jury veut savoir si votre revolver n'était pas parti accidentellement, auriez-vous tiré volontairement sur le jeune homme? R. Non.

D. Combien d'années d'expérience avez-vous avec des revolvers? R. Depuis mil neuf cent trente-cinq (1935), Votre Seigneurie.

D. Quelle sorte de revolver aviez-vous? R. Un Colt trente-huit (38), Votre Seigneurie.

D. Ce revolver-là peut-il partir si vous n'avez pas le doigt sur le chien? R. Il faut avoir le doigt sur la gâchette pour le partir; lorsque le coup a parti là, j'avais le doigt sur la gâchette; en tirant en l'air.

In the transcript of the charge, there is inserted the comment "here there were questions and answers in the French language which were then interpreted by the Court as follows:

Q. How many years experience have you had with a revolver? A. Since 1935.

Q. What kind of revolver did you have? A. A Colt 38.

Q. Can that revolver go off if your finger is not on the trigger? A. I must have my finger on the trigger before it can go off.

Counsel in argument in this Court pointed out that the actual questions put to the witness and his answers should be properly translated as follows:

Q. Mr. Goyer, the jury wish to know if your revolver had not gone off accidentally would you have fired voluntarily on this young man? A. No.

Q. How many years of experience have you with revolvers? A. Since 1935, Your Lordship.

Q. What sort of revolver had you? A. A Colt 38, Your Lordship.

Q. That revolver there, could it go off if you had not your finger on the trigger? A. It is necessary to have one's finger on the trigger for it to go off; when the shot went off there, I had my finger on the trigger; in firing in the air.

It will be seen that the learned trial judge failed to translate the last part of the witness's answer, i.e., "when the shot went off there, I had my finger on the trigger; in firing in the air". We are assured by counsel for the respondent, and counsel for the appellant does not suggest otherwise, that there was no evidence that as the constable ran across the field he had kept his finger on the trigger throughout, only that he had his finger on the trigger when the shot was accidentally fired.

Counsel for the respondent adds that if Goyer had admitted that he had his finger on the trigger as he ran across this rocky field then "he would not be here" which must mean that he would not have appealed to the Court of

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Queen's Bench (Appeal Side) as, of course, he is in this court as a respondent. I am of the opinion that there is no weight to the contention. Even granting that there was no evidence that the defendant constable kept his finger on the trigger as he ran across the rocky field, there was evidence that on two occasions as he ran across the field he fired shots in the air. There was evidence that he twice fell while running across that field before the fall which caused the injuring shot. There is no evidence that on the occasion of either of the previous falls the gun went off. However, a jury certainly was entitled and probably even should have made the inference that the defendant constable had his finger on the trigger throughout. There certainly was no evidence that he stopped on either occasion when he fired a shot in the air and therefore he would have had to have been running with his finger on the trigger when both of those previous shots were fired in the air. It would be foolish to imagine that he took his finger off the trigger and then, continuing to run, on three occasions, put his finger on the trigger and fired the fun. Further, even if the evidence had been that he did not put his finger on the trigger until he actually shot twice purposely in the air and the third time accidentally hitting the plaintiff, there was evidence, and the strongest evidence, of negligence. To have run across that field and then shot in the air while continuing to run was negligence even if he only put his finger on the trigger at the moment he fired the shot. The same result could have occurred on either of those first shots in the air as that which occurred on the third occasion, i.e., he might have fallen and the bullet which he had intended to fire into the air might have hit the plaintiff.

I would allow the appeal with costs against the respondent throughout and restore the verdict of the jury giving the plaintiff the damages as fixed by the jury, $32,036.80 with interest from the 27th of November 1958, the date of the trial.

Appeal allowed, Fauteux, Martland *and* Judson JJ. *dissenting.*

Attorneys for the plaintiff, appellant: L. A. de Zwirey and S. L. Mendelsohn, Montreal.

Attorneys for the defendant, respondent: Berthiaume & MacDonald, Montreal.

EDWARD STEPHEN FRANCIS PATRICKS ..... PETITIONER;

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*June 14, 15
June 24

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

WRIT OF HABEAS CORPUS

Criminal law—Habeas corpus—Whether warrant of committal discloses offence—Criminal Code, 1953-54 (Can.), c. 15, s. 288(d).

The petitioner was convicted of armed robbery. The Court of Appeal increased his sentence from two to six years. His application for leave to appeal to this Court was dismissed. He then applied to this Court for a writ of habeas corpus on the ground that the warrant of committal disclosed no offence known to the law.

Held: The application should be dismissed.

The warrant of committal reading "...unlawfully did steal from employees of the Canadian Imperial Bank of Commerce, while armed with an offensive weapon, thereby committing robbery, contrary to the *Criminal Code*", sufficiently identified the proper grounds for committal, being in the precised wording of s. 288(d) of the *Criminal Code*.

Droit criminel—Habeas corpus—Le mandat de dépôt dévoile-t-il une offense—Code criminel, 1953-54 (Can.), c. 51 art. 288(d).

Le requérant a été trouvé coupable de vol à main armée. La Cour d'Appel a augmenté sa sentence de deux à six ans. Sa requête pour permission d'appeler devant cette Cour a été rejetée. Il présenta alors une requête devant cette Cour pour obtenir un bref d'habeas corpus pour le motif que le mandat de dépôt ne dévoilait aucune offense connue de la loi.

Arrêt: La requête doit être rejetée.

Le mandat de dépôt se lisant «...a illégalement volé des employés de la Banque canadienne impériale de commerce, alors qu'il était muni d'une arme offensive, commettant alors un vol, contrairement au *Code criminel*», identifie suffisamment les motifs de détention, étant la phraséologie précise de l'art. 288(*d*) du Code criminel.

REQUÊTE pour obtenir un bref d'habeas corpus. Requête rejetée.

APPLICATION for a writ of habeas corpus. Application dismissed.

Claude R. Thomson, for the petitioner.

James W. Austin, for the respondent.

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*PRESENT: Cartwright, Abbott, Martland, Judson and Hall JJ.

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The judgment of Cartwright, Abbott, Martland and Judson JJ. was delivered by

JUDSON J.: On June 6, 1963, the applicant Patricks was convicted of armed robbery and sentenced to a term of two years and six months. On an appeal by the Attorney General against this sentence, the Court of Appeal increased it to six years. He is now in prison on a Warrant of Committal reading that he:

At the City of St. Thomas, in the County of Elgin, on the 27th day of November, in the year 1962 unlawfully did steal from employees of the Canadian Imperial Bank of Commerce, while armed with an offensive weapon, thereby committing robbery, contrary to the Criminal Code.

The applicant was represented by counsel at trial. The Court of Appeal dismissed his application for leave to appeal and a further application for leave to appeal to this Court was dismissed. He now applies for a Writ of Habeas Corpus on the ground that the Warrant of Committal discloses no offence known to the law. In my opinion it sufficiently identifies the proper grounds for committal, being in the precise wording of s. 288(*d*) of the Criminal Code which provides that

288. Every one commits robbery who

(d) steals from any person while armed with an offensive weapon or imitation thereof.

I would dismiss the application.

HALL J.:—I agree with my brother Judson that the Warrant of Committal upon which the applicant is being held in custody is sufficient to answer the contention that he is now being held unlawfully and I would dismiss the application.

Application dismissed.

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*June 15
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BRADFORD LEONARD SMITH .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

On appeal from the Court of Appeal for Ontario

Criminal law—Notice of appeal to Court of Appeal expressing appellant's wish to be present and argue orally—Appellant not present and not represented—Jurisdiction of Court of Appeal to hear and dismiss appeal—Criminal Code, 1953-54 (Can.), c. 51, s. 549(1).

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

Following his conviction for the offence of having possession of instruments for house-breaking, the appellant gave notice of his intention to appeal on a printed form in which he expressly stated his wish to be present and to present oral argument. When the matter came before the Court of Appeal, the appellant was not present; he was still in custody; he was not represented by counsel and had not been notified of the date on which the appeal was to be heard. The Court of Appeal nevertheless dismissed his appeal from conviction and increased his sentence from two to five years. He was granted leave to appeal to this Court.

Held: The appeal should be allowed and the record should be referred back to the Court of Appeal for a hearing in accordance with the *Criminal Code.*

Under s. 594(1) of the Code, the appellant had a statutory right to be present and to submit his case by oral argument. When it appeared that he had expressed his desire to be present, that he was not present and that he had received no notice of the date of the hearing, the Court of Appeal had no right to enter upon the hearing and should have adjourned the case to enable the appellant to be present. To proceed in his absence was error in law.

Droit Criminel—Avis d'appel à la Cour d'Appel exprimant le désir de l'appelant d'être présent et de plaider oralement—L'appelant non présent et non représenté—Juridiction de la Cour d'Appel d'entendre et de rejeter l'appel—Code criminel, 1953-54 (Can.), c. 51, art. 549(1).

A la suite de sa condamnation pour l'offense d'avoir eu en sa possession des instruments d'effraction, l'appelant a donné avis de son intention d'appeler sur une formule imprimée dans laquelle il a expressément déclaré son désir d'être présent et de présenter une plaidoirie orale. Lorsque l'appel vint devant la Cour d'Appel, l'appelant n'était pas présent; il était encore sous garde; il n'était pas représenté par un avocat et n'avait pas été notifié de la date que l'appel devait être entendu. La Cour d'Appel a quand même rejeté son appel contre la condamnation et a augmenté sa sentence de deux à cinq ans. Il a obtenu permission d'appeler devant cette Cour.

Arrêt: L'appel doit être maintenu et le dossier renvoyé à la Cour d'Appel pour une audition conformément au *Code criminel.*

En vertu de l'art. 594(1) du Code, l'appelant avait un droit statutaire d'être présent et de soumettre son appel par un plaidoyer oral. Lorsqu'il apparut qu'il avait exprimé le désir d'être présent, qu'il n'était pas présent et qu'il n'avait pas reçu notification de la date de l'audition, la Cour d'Appel n'avait pas le droit d'entendre la cause et aurait dû ajourner l'appel pour permettre à l'appelant d'être présent. Ce fut une erreur de droit que de procéder en son absence.

APPEL d'un jugement de la Cour d'Appel de l'Ontario, confirmant la condamnation de l'appelant. Appel maintenu.

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

B. Carter, for the appellant.

C. Powell, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This appeal from a judgment of the Court of Appeal for Ontario is brought pursuant to leave granted by this court on April 27, 1965, on the following question of law:

Had the Court of Appeal jurisdiction to enter upon the hearing of the application to that Court when the appellant, who had given notice that he desired to be present at the hearing of his appeal, was in custody, was not represented by counsel, was not present at the hearing of the appeal and had not been notified of the time of the hearing of his appeal?

The appellant was convicted before His Honour Judge Moore at Toronto on April 16, 1964, of the offence of having possession of instruments for house-breaking, without lawful excuse, contrary to s. 295 of the *Criminal Code,* and was sentenced on the same day to two years imprisonment.

The appellant who was then in custody in the Toronto jail gave a notice dated May 7, 1964, on a printed form headed: "Form of Notice of Appeal or Application for leave to Appeal."

Following the heading giving the appellant's name and particulars of the conviction and sentence as contemplated by the printed form, the notice reads as follows:

I hereby give you notice that I desire to appeal (or apply for leave to appeal, as the case may be) to the Court of Appeal against *my conviction (or against my sentence)* on the grounds following:—
See Attached sheets.

I desire to present my case and argument "By Oral Argument"
(Fill in either "in writing" or "by oral argument," as the case may be)

If a new trial is directed I "Desire"
("desire" or "do not desire" as the case may be)

that such new trial be before a jury.

My address for service is 550 Gerrard Street East, Toronto, Ontario.
(Fill in carefully, as this is important)

Dated this 7th day of May, 1964.
Bradford L. Smith
(Signature of the appellant or of his solicitor or counsel)

The "Attached sheets" referred to in the notice set out eleven numbered grounds none of which involves a question of law alone.

The matter came before the Court of Appeal on June 23, 1964. The appellant was not present; he was still in custody; he was not represented by counsel and he had been given no notice of the date on which the appeal was to be heard. That this is so was stated before us by counsel for the appellant and by counsel for the Attorney General.

At the conclusion of the hearing the Court of Appeal delivered oral reasons in which no reference is made to the absence of the accused. The formal judgment of the Court reads as follows:

This is to certify that the application for leave to appeal and the appeal in writing of the above named Bradford Leonard Smith against his conviction and sentence, having come on to be heard before this Court this day in the presence of Counsel for the Crown, and upon having read the Notice of Application for leave to appeal and Judge's Report, and upon hearing what was alleged by Counsel for the Crown, aforesaid,

This Court did order that the said appeal against conviction should be and the same was thereby dismissed as frivolous.

And this Court did further order that the application for leave to appeal against sentence should be and the same was thereby granted, and that the sentence of two (2) years be set aside and a sentence of five (5) years in penitentiary substituted therefor.

Rule 16 of the Criminal Appeal Rules in force in Ontario at the time the matter was dealt with by the Court of Appeal, read as follows:

16. If it is not the intention of the appellant to present his case before the Court orally he shall be at liberty to make his argument in writing, in which case notice of his intention shall be embodied in the notice of appeal or notice of application for leave to appeal, and a copy of the written argument shall be left with the Registrar when the appeal is set down or within seven days thereafter.

The appellant's notice quoted above made it clear that he intended to present his case before the Court orally and not to make his argument in writing.

Rule 17 of the same rules read as follows:

17. When the appeal or application for leave to appeal is ready for hearing the Registrar shall give notice to the appellant and to the Attorney General of the date that has been fixed for the hearing of the application and shall place the case upon the list for hearing upon that date.

The Registrar did not give to the appellant the notice required by this rule.

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Section 594 of the *Criminal Code* reads as follows:

594 (1) Subject to subsection (2), an appellant who is in custody is entitled, if he desires, to be present at the hearing of the appeal.

(2) An appellant who is in custody and who is represented by counsel is not entitled to be present

(*a*) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone,

(*b*) on an application for leave to appeal, or

(*c*) on any proceedings that are preliminary or incidental to an appeal,

unless rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives him leave to be present.

(3) A convicted person who is an appellant may present his case on appeal and his argument in writing instead of orally, and the court of appeal shall consider any case or argument so presented.

(4) The power of a court of appeal to impose sentence may be exercised notwithstanding that the appellant is not present.

In the circumstances of this case we are concerned only with subs. (1). Subsection (2) has no application because the accused was not represented by counsel.

Under this section the appellant had a statutory right to be present and to submit his case to the Court by oral argument. When it appeared (i) that he had expressed his desire to be present (ii) that he was not present and (iii) that he had received no notice of the date of the hearing, I think it clear that the Court had no right to enter upon the hearing and should have adjourned the case to enable the appellant to be present. To proceed in his absence was, in my opinion, error in law.

A similar situation arose in England in the case of *The King v. Dunleavey*[1].

Section 11(1) of the *Criminal Appeal Act*, (1907),7 Edward VII, c.23, read as follows:

An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules of Court provide that he shall have the right to be present, or where the Court gives him leave to be present.

The appeal involved questions of fact. The prisoner was unable to be present owing to illness but had stated he desired to be present. The report at pages 200 and 201 reads as follows:

[1] (1909), 1 K.B. 200, 1 Cr. App. R. 212.

F. T. Bingham, for the prisoner. Sect. 11, sub-s. 1, of the Criminal Appeal Act, 1907(1) appears to place a difficulty in the way of the appeal being heard in the absence of the prisoner who desires to be present, unless the Court think that the discretion of the prisoner as to whether he should be present passes to counsel. The presence of the prisoner would not aid the conduct of the appeal. The question is whether counsel can, on behalf of the prisoner, waive the right to be present.

The judgment of the Court (Lord Alverstone C.J. and Phillimore and Walton JJ.) was delivered by

Lord Alverstone, C.J.—The case must stand over. Sect. 11, sub-s. 1, of the Criminal Appeal Act is imperative; the prisoner has a right to be present unless the ground of appeal is on law alone, and in the present case the appeal involves questions of fact.

I agree with this decision and the case for the present appellant is even stronger as he was without counsel.

Under s. 600(1) of the *Criminal Code* this Court may on this appeal make any order that the Court of Appeal might have made. I have already expressed the view that the order it should have made was that the case should stand over to permit the appellant to be present.

I would allow the appeal, set aside the judgment of the Court of Appeal of June 23, 1964, and direct that the record be returned to that Court to set a date for the hearing and to hear and determine the application of the appellant in accordance with the provisions of the *Criminal Code*.

Appeal allowed.

Solicitor for the appellant: R. J. Carter, Toronto.

Solicitor for the respondent: C. Powell, Toronto.

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*Mar. 15
May 25

CORPORATION OF THE COUNTY OF CARLETON (*Plaintiff*) ..... APPELLANT;

AND

CORPORATION OF THE CITY OF OTTAWA (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—County responsible for care of indigent person prior to annexation of certain area by city—Indigent's case inadvertently omitted from list of welfare cases for which city assumed responsibility—Claim by county for moneys expended for indigent's care

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

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subsequent to annexation—Restitution—The Homes for the Aged Act, 1947 (Ont.), c. 46.

On July 31, 1948, one B, an indigent person, was a resident in a part of the Township of Gloucester, in the County of Carleton, which was subsequently annexed by the City of Ottawa. The county was responsible for her care under *The Homes for the Aged Act*, 1947 (Ont.), c. 46. Under an agreement between the County of Carleton and the County of Lanark, B was committed to an institution in the latter county at the expense of the former. B remained in this home until December 11, 1960, when she was removed to a home which had been constructed within the County of Carleton.

The annexation took effect on January 1, 1950, and by an agreement between the City of Ottawa and the Township of Gloucester the city assumed responsibility for welfare cases in that part of the township which was annexed. However, through an oversight, the case of B was not placed on a list of these cases and it was not until some time in December 1960 that the County of Carleton became aware that it had been paying for the maintenance of B from January 1, 1950, while throughout the whole of the period she had been a resident of that part of Gloucester which had become a part of Ottawa. The county took the position that the city was responsible for the payments made by the county on B's behalf from the date of annexation and for maintenance in the home established by the county for such time as she might be left there by the city. The city refused to acknowledge any responsibility for the maintenance or care of B or for the moneys paid out by the County of Carleton to the County of Lanark in the 10-year period from 1950 to 1960 nor for what it had cost to maintain B since December 1960 or would cost in the future. The county's claim was allowed by the trial judge. On appeal, the city was successful and the action was dismissed.

Held: The appeal should be allowed.

The county was responsible for the care of B prior to January 1, 1950, when the area in question was annexed by the city. The city by the act and fact of annexation and by the agreement between it and the township had assumed responsibility for the social service obligations of the county to the residents of the area annexed. The fact that one welfare case was inadvertently omitted from the list of such cases could not permit the city to escape the responsibility for that case. It was against conscience that it should do so. *Brook's Wharf and Bull Wharf Ltd. v. Goodman Brothers,* [1937] 1 K.B. 534; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.,* [1943] A.C. 32; *Deglman v. Guaranty Trust Co. of Canada and Constantineau.* [1954] S.C.R. 725, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Grant J. Appeal allowed.

Mrs. Eileen M. Thomas, Q.C., and *W. D. Baker,* for the plaintiff, appellant.

[1] [1965] 1 O.R. 7, 46 D.L.R. (2d) 432.

R. D. Jennings, Q.C., and *James Reid*, for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—On January 1, 1950, the City of Ottawa annexed certain parts of the Township of Gloucester as well as the Township of Nepean, both areas being in the County of Carleton. The annexation was pursuant to an Order of the Ontario Municipal Board dated December 9, 1949, the opening paragraphs of which read:

Upon the application of the Corporation of the City of Ottawa and of the Corporation of the Township of Gloucester in the presence of counsel for the Applicants, counsel for the Corporation of the County of Carleton, counsel for the Ottawa Public School Board, counsel for the Ottawa Separate School Board, counsel for Uplands Bus Line Limited, counsel for Eastview Bus Service Limited and counsel for certain owners of property within the area proposed to be annexed and of certain property owners and residents of the Township of Gloucester who appeared in person and upon reading By-law Number 138-49 of The Corporation of the City of Ottawa and By-law Number 46-49 of the Corporation of the Township of Gloucester, filed with the Board, authorizing this application and upon hearing evidence adduced at a public hearing held at Ottawa on Thursday, the 10th day of November, 1949 pursuant to notice given in accordance with the direction of the Board, and upon hearing what was alleged by counsel aforesaid and by the said property owners and residents.

THE BOARD ORDERS under and pursuant to section 23 of The Municipal Act (R.S.O. 1937, Chapter 266) (as re-enacted by O.S. 1939, Chapter 30, Section 2 and as amended and re-enacted by O.S. 1947, Chapter 69, Section 2) that that part of the Township of Gloucester described in Schedule "A" hereto be and the same is hereby annexed to the City of Ottawa.

By-law No. 138-49 of the Corporation of the City of Ottawa referred to above reads as follows:

BY-LAW NUMBER 138-49

A By-law of The Corporation of the City of Ottawa respecting annexation of part of the Township of Gloucester.

The Council of The Corporation of the City of Ottawa enacts as follows:

An application to The Ontario Municipal Board pursuant to section 23 of The Municipal Act (R.S.O. 1937, chapter 266 and amendments thereto) for an order annexing to the City of Ottawa on the 1st day of January, 1950, or on such other date as may be named by The Ontario Municipal Board or by Act of the Legislature of Ontario in accordance with the provisions of subsection 14 of said section 23, that part of the Township of Gloucester in the County of Carleton described as follows: (description follows).

GIVEN under the Corporate Seal of the City of Ottawa this 3rd day of October, 1949.

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By-law No. 138-49 had been preceded by negotiations between the Corporation of the City of Ottawa and the Corporation of the Township of Gloucester. An agreement had been reached between the two corporations which was embodied in a Minute of the Ottawa City Council dated September 19, 1949, being Exhibit 11, which shows that the Council of the Corporation of the City of Ottawa approved of Report No. 23 of the Ottawa Board of Control, setting out the terms of the annexation about to be consummated. Exhibit 11 contains in part the following reference:

10. Social Service:

The area of the Township under discussion does not present a particularly difficult or serious problem from the point of view of social service, the population being engaged chiefly in the three categories of civil servants, farmers and market gardeners. However, it is quite likely that expenditures under this heading, including payments to Children's Aid Society and other Institutional costs, will amount to approximately $55,000.00 per year, as compared to a 1948 expenditure in the Township of $22,364.34, to which would be added Children's Aid Society costs now payable through the County.

It may be pointed out that, generally speaking, the expansion of the City—to the extent that it results in the construction of additional low cost housing—will favorably influence the local social service problem.

On July 31, 1948, one Norah Baker, then 42 years of age who was an indigent person incapable of supporting herself because of imbecility, was a resident at Billings Bridge in the Township of Gloucester. She had been a resident there for the preceding seven or eight years. The Billings Bridge area was in that part of Gloucester Township annexed by the City of Ottawa as aforesaid. At that time, the County of Carleton was responsible for her care under *The Homes for the Aged Act,* 1947 (Ont.), c. 46. The County of Carleton, having no institution for indigents of its own, had entered into an agreement on December 27, 1904, whereby the Corporation of the County of Carleton was to be at liberty to send to the institution which had been established in the County of Lanark then known as a House of Refuge all poor and indigent persons of the County of Carleton and the Corporation of the County of Lanark undertook to receive all such persons so sent and to provide them with board, lodging and medical attendance of the same quality and extent as furnished to and for inmates received from the County of Lanark. The agreement provided that the Corporation of the County of Carleton should pay to the Corporation of the County of Lanark for the maintenance of any

person so sent and so received. The agreement was renewed periodically and was in force at the time Norah Baker was committed to the institution. The name of the home was changed from House of Refuge to Home for the Aged by *The Homes for the Aged Act, supra,* but apart from changing the amount which was to be paid for the maintenance of an inmate there were no substantial changes in the basic agreement. Norah Baker became an inmate of the home in Lanark County and the County of Carleton was billed for her maintenance and the County of Carleton paid the County of Lanark the amounts billed as provided for in the said agreement. Norah Baker remained in the home until December 11, 1960, when she was removed to a home which had been constructed that year for the care of patients within the County of Carleton.

At the time of the annexation a list of the welfare cases contemplated by para. 10 of Exhibit 11 previously quoted was prepared by the solicitor for the County of Carleton and delivered to the solicitor for the City of Ottawa. No question arises as to any of these cases. The City of Ottawa assumed responsibility therefor pursuant to the said agreement. However, through an oversight, the case of Norah Baker was not on the list. It was overlooked that Norah Baker had come from the area in Gloucester Township which had been annexed by the City of Ottawa on January 1, 1950, and it was not until some time in December 1960 that the County of Carleton became aware that it had been paying for the maintenance of Norah Baker from January 1, 1950, while throughout the whole of the period she had been a resident of that part of the Township of Gloucester which had become a part of the City of Ottawa. On becoming aware of the true situation as to the residence of Norah Baker, the County of Carleton immediately notified the City of Ottawa and took the position that the City of Ottawa was responsible for the payments made by the County on her behalf from the date of annexation and for maintenance in the home established by the County for such time as she might be left there by the City of Ottawa. The City of Ottawa refused to acknowledge any responsibility for the maintenance or care of Norah Baker or for the moneys paid out by the County of Carleton to the County of Lanark in the 10-year period from 1950 to 1960 nor for

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what it has cost to maintain the said Norah Baker since December 1960 or will cost in the future.

The amounts claimed by the County of Carleton from the City of Ottawa totalling $9,833.01 for the period from January 1, 1950, until October 31, 1962, are not disputed and if the City of Ottawa is liable the County is entitled to judgment for the amount claimed plus the cost for care and maintenance subsequent to October 31, 1962.

It appears to have been clearly established that as between the County of Carleton and the County of Lanark the County of Carleton was under contractual obligation to pay for the maintenance of Norah Baker throughout the period in issue here, namely, from January 1, 1950, until December 11, 1960, and it was established that for that period the County of Carleton paid to the County of Lanark $6,489.65.

The County of Carleton bases its claim against the City of Ottawa on the doctrine of restitution. Lord Wright in *Brook's Wharf and Bull Wharf Ltd. v. Goodman Brothers*[1] discussed this doctrine at p. 544 as follows:

> The principle has been applied in a great variety of circumstances. Its application does not depend on privity of contract. Thus in *Moule v. Garratt,* L.R.7 Ex. 101, which I have just cited, it was held that the original lessee who had been compelled to pay for breach of a repairing covenant was entitled to recover the amount he had so paid from a subsequent assignee of the lease, notwithstanding that there had been intermediate assignees. In that case the liability of the lessee depended on the terms of his covenant, but the breach of covenant was due to the default of the assignee, and the payment by the lessee under legal compulsion relieved the assignee of his liability.
>
> That class of case was discussed by Vaughan Williams L. J. in *Bonner v. Tottenham and Edmonton Permanent Investment Building Society,* [1899] 1 Q.B. 161, where *Moule v. Garrett,* L.R. 7 Ex. 101, was distinguished. The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff. The case is analogous to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal.

And, at p. 545:

> These statements of the principle do not put the obligation on any ground of implied contract or of constructive or national contract. The obligation is imposed by the Court simply under the circumstances of

[1] [1937] 1 K.B. 534.

the case and on what the Court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract.

And again in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*[1], at p. 61.

Lord Wright's statement in *Fibrosa* was approved by Cartwright J. in *Deglman v. Guaranty Trust Company of Canada and Constantineau*[2], where at p. 734 he quotes from *Fibrosa* as follows:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

And again:

> Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort though it resembles contract rather than tort.

Norah Baker was an indigent for whose care the appellant was responsible prior to January 1, 1950, when the area in question was annexed by the respondent. The respondent by the act and fact of annexation and by the terms of said Exhibit 11, para. 10 assumed responsibility for the social service obligations of the appellant to the residents of the area annexed, and the fact that one welfare case was inadvertently omitted from the list cannot permit the respondent to escape the responsibility for that case. To paraphrase Lord Wright, it is against conscience that it should do so.

I am in agreement with the conclusion reached by the learned trial judge that the appellant is entitled to recover from the respondent the sum of $9,833.01, being the amount claimed to October 31, 1962. The appellant is also entitled to recover from the respondent the cost of maintaining the said Norah Baker from November 1, 1962. If the parties are unable to agree on the amount payable for this period, there will be a reference to the Local Master at Ottawa to

[1] [1943] A.C. 32. [2] [1954] S.C.R. 725.

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determine the amount payable. The appeal will, accordingly, be allowed and the judgment of Grant J. varied accordingly. The appellant is entitled to its costs here and in the Courts below.

Appeal allowed with costs; judgment at trial varied.

Solicitors for the plaintiff, appellant: Bell, Baker & Thompson, Ottawa.

Solicitor for the defendant, respondent: D. V. Hambling, Ottawa.

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*May 3, 4
May 25

ROBERT DORSCH (*Plaintiff*) .....APPELLANT;

AND

FREEHOLDERS OIL COMPANY; LIMITED (*Defendant*) ..... RESPONDENT;

AND

SCURRY-RAINBOW OIL (SASK.) LTD. (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Assignment of royalty interest under petroleum and natural gas lease and grant of minerals lease—Plea of non est factum—Claim to rescind on ground of innocent misrepresentation.

Companies—Purchase of shares—Failure to deliver prospectus—Waiver of any right to have allotment of shares rescinded—The Companies Act, R.S.S. 1940, c. 113, ss. 116(1) and 129.

In an action against the defendant company F, the plaintiff D sought a declaration that a certain agreement between them, which related to mines and minerals within, upon or under certain land owned by D, should be declared null and void or should be rescinded. Under the contract D assigned to F a 12½ per cent royalty payable to D under a lease to RB. He also granted to F a lease of all mines and minerals within, upon or under the land for a term of 99 years from the date of the contract which would be operative upon the termination, cancellation, avoidance or expiration of the RB lease. In return D was to receive from F 160 shares of its capital stock, of which one-half would be issued and allotted forthwith as consideration for the assignment of royalty, and one-half would be issued and allotted as consideration for the F lease when that lease took effect. It was also provided that F should pay to D 20 per cent of the benefits received by F from its disposition of gross royalty, or of minerals.

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*PRESENT: Cartwright, Abbott, Martland, Judson and Hall JJ.

The negotiations with D were conducted, on behalf of F, by one M. They had two short meetings, at the second of which M produced the contract. Although there was every opportunity for D to read the contract he did not do so, nor was it read over to him. Prior to its execution by D an explanation as to some of the contents of the document was given to him by M.

The trial judge, in deciding in favour of D, found that there had been unintentional misrepresentation by M both as to the nature and character of the contract and as to its contents. The misrepresentations as to the contents of the lease were in respect of three matters: (1) that the document signed referred only to petroleum, natural gas and related hydrocarbons, whereas the proposed lease in fact included all mines and minerals; (2) that the plaintiff was assigning only 10 per cent of his royalty rights whereas he was in fact assigning the full (12½ per cent) royalty rights to the defendant; (3) that the lease to be granted was for a term of only 10 years, whereas it was in fact for a term of 99 years. The trial judge also held that the allotment of D's shares by F was void under *The Companies Act,* R.S.S. 1940, c. 113, because of non-compliance by F with s. 129 of that Act. The trial judgment having been reversed on appeal by the Court of Appeal, the plaintiff appealed to this Court.

Held: The appeal should be dismissed.

The Court below was correct in its disagreement with the position taken by the trial judge that a confidential or fiduciary relationship existed between M and D, thus involving not merely a duty not to misrepresent, but a duty of complete disclosure of the contents of the contract. The plea of *non est factum* failed. There was no misrepresentation as to the nature of the document which D was asked to sign. It was admitted that he was aware that he was disposing of his royalty under the RB lease and that he was granting, subject to that lease, a further lease to F.

The claim to rescind on the ground of innocent misrepresentation also failed because, accepting D's own evidence, the three misrepresentations found by the trial judge were not substantiated.

Section 116(1) of *The Companies Act, supra,* required the company *to furnish* every person invited by the prospectus to purchase securities offered by it with a copy when the invitation was issued. Section 129 dealt not with the requirement for delivery of prospectuses to individuals, but with the requirement that upon the *issue* of a form of application or subscription for corporate securities offered to the public a prospectus duly filed under s. 114 or s. 131 be issued with it. The failure of M to furnish a prospectus to D may have been a breach of s. 116(1), but was not a breach of s. 129.

The failure to comply with s. 116(1), at the most, might render a purchase of shares voidable by the purchaser. Even if D had the right to avoid his share purchase, he could not exercise it when he purported to do so because, having entered into the contract on August 3, 1950, and having received his share certificate in the following year, he took no step to repudiate until June 21, 1956, and, in the meantime had been in receipt of communications sent to him as a shareholder by F, and had attended and voted at two annual meetings. This was ample evidence of his election to retain the shares, and of his waiver of any right to have the allotment of shares to him rescinded.

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HOLDERS OIL
CO. LTD.
et al.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of Davis J. Appeal dismissed.

C. R. Davidson, Q.C., for the plaintiff, appellant.

E. J. Moss and *S. J. Cameron*, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This case involves a claim made by the appellant (hereinafter referred to as "Dorsch") against the respondent (hereinafter referred to as "Freeholders") seeking a declaration that a certain agreement made between them, dated August 3, 1950, (hereinafter referred to as "the contract"), which related to mines and minerals within, upon or under the South East Quarter of Section 7, Township 7, Range 13, West of the 2nd Meridian, in the Province of Saskatchewan (hereinafter referred to as "the land"), owned by Dorsch, should be declared null and void, or should be rescinded. The learned trial judge granted a declaration that the contract was null and void. This judgment was reversed on appeal by unanimous decision of the Court of Appeal of Saskatchewan[1].

On April 29, 1949, Dorsch entered into a petroleum and natural gas lease with one Bandy Lee in respect of the land. This lease is referred to hereafter as "the Rio Bravo lease". It was for a term of ten years and so long thereafter as the leased substances, or any of them, were produced from the land. Lee assigned his interest under the lease to Rio Bravo Oil Company Limited. The only clause which has particular significance is that dealing with the royalty payable in respect of oil:

> On oil, one-eighth of that produced and saved from the said lands, the same to be delivered at the wells or to the credit of the Lessor into the pipe line to which the wells may be connected; the Lessee may from time to time purchase any royalty oil in its possession, paying the market price therefor prevailing for the field where produced on the date of purchase;

Under the contract Dorsch assigned to Freeholders the royalty payable under the Rio Bravo lease. He also granted to Freeholders a lease of all mines and minerals within, upon or under the land for a term of 99 years from the date of the

[1] (1964), 48 W.W.R. 257, 45 D.L.R. (2d) 44.
[2] (1964), 48 W.W.R. 257, 45 D.L.R. (2d) 44.

contract which would be operative upon the termination, cancellation, avoidance or expiration of the Rio Bravo lease. This lease to Freeholders was renewable by it at its option and was to continue so long as the minerals or any of them were produced from the land. It is hereinafter referred to as "the Freeholders lease".

In consideration for his covenants under the contract Dorsch was to receive from Freeholders 160 shares of its capital stock, with a par value of one dollar each, fully paid and non-assessable, of which one-half would be issued and allotted forthwith as consideration for the assignment of royalty, and one-half would be issued and allotted as consideration for the Freeholders lease when that lease took effect.

The contract also provided, in clause 5, that:

> The GRANTEE shall have the full and absolute right to deal with, or dispose of the gross royalty hereby assigned or any part thereof, and/or the said minerals or any of them, as the case may be, PROVIDED that the GRANTEE shall pay to the GRANTOR twenty percent. (20%) of the benefits received by the GRANTEE from any such disposition whether the same consist of a cash consideration or a royalty interest under a drilling lease, or otherwise.

Dorsch is a farmer who, at the time of the trial, was farming 800 acres of land in Saskatchewan. He had a Grade 9 education. The negotiations with him were conducted, on behalf of Freeholders, by Charles Markle who then, and at the time of the trial, was secretary-treasurer of the Rural Municipality of Weyburn. They had two short meetings at the municipal office. On the occasion of the second meeting Markle produced the contract. Dorsch did not read it, nor was it read over to him. He testified that there was every opportunity for him to read it.

Prior to its execution by Dorsch an explanation as to some of the contents of the document was given to him by Markle. It is contended on behalf of Dorsch that there were misrepresentations made by Markle, but Dorsch conceded in evidence that such misrepresentations as he alleged were not the result of fraud on Markle's part, but were caused by Markle's lack of understanding of the contract. It was contended on behalf of Dorsch that this resulted from the giving of erroneous instructions by Freeholders to Markle.

Both men were found by the learned trial judge to be honest witnesses. In his opinion Dorsch had more reason to remember the events leading up to the execution of the

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contract than Markle, who had handled some eighty like transactions. He found that there was little conflict between them, but did find that there had been unintentional misrepresentation by Markle both as to the nature and character of the contract and as to its contents.

On March 30, 1951, Freeholders filed a caveat against the land to give notice of its interest in the land. On August 17, 1951, Freeholders issued a share certificate in the name of Dorsch for eighty shares in its capital stock, which was received by Dorsch.

Dorsch attended and voted at the annual general meetings of Freeholders on November 27, 1952, and November 20, 1953. An admission to this effect, as well as to his having nominated a director, was filed at the trial. Dorsch was permitted by the learned trial judge to withdraw the admission as to the nomination, after his own evidence had been given, but the other admissions remained. Dorsch did not deny any of the admissions. He was not recalled in rebuttal.

On April 28, 1956, a well was spudded in on the land, which, on completion, was an oil producing well. A second producing well was drilled on the land the following year.

On May 22, 1956, a notice of repudiation of the contract, signed by Dorsch, was sent by his solicitor to Freeholders, along with his share certificate. Freeholders, by letter to Dorsch's solicitor, dated June 21, 1956, returned the certificate and advised that the company had no intention of accepting the repudiation.

Dorsch testified that he had never received a prospectus from Freeholders in respect of the shares in that company, for which, in the contract, he had applied as consideration for the assignment of royalties and for the lease of the land to Freeholders. The contract, which he had executed under seal, contained an acknowledgement of receipt of a prospectus by him. Markle's evidence was that he was instructed to issue a prospectus with the document, *i.e.*, the form of contract. He did so in some instances, as often as he had a supply of them. He could not say whether or not Dorsch received one.

Subsequent to the production of oil being obtained from the land, Dorsch received payments representing one-fifth

of the royalty payable in respect of production by the lessee to the lessor under the terms of the Rio Bravo lease.

Before dealing with the misrepresentations which the learned trial judge found to have been made by Markle to Dorsch, it would be desirable to consider the meaning and effect of clause 5 of the contract, previously quoted.

That clause gave to Freeholders the right to deal with or dispose of the gross royalty assigned to it, and also to deal with or dispose of "the said minerals", which must refer back to the Freeholders lease, which would only take effect after the Rio Bravo lease terminated.

In so far as the gross royalty under the Rio Bravo lease is concerned, it has already been noted that, as to oil, the royalty was due in kind, but with an option to the lessee to purchase the lessor's share of the oil produced. The sale of that oil to the lessee was a disposition of gross royalty by Freeholders.

Clause 5 of the contract provides that Freeholders should pay to Dorsch 20 per cent of the benefits received by Freeholders from its disposition of gross royalty, or of minerals. In my opinion Freeholders was obligated to pay Dorsch 20 per cent of the gross royalties received by it, and that obligation it recognized and performed. Furthermore, if Freeholders' lease came into operation, whether it undertook drilling and production itself, or assigned its rights to another, it would be compelled to account to Dorsch for 20 per cent of the benefits which it received from the disposition of the minerals from the land, whether those benefits took the form of net proceeds from the sale of production from its own wells, a stipulated royalty reserved on the assignment of its rights, or a cash consideration for such assignment.

The learned trial judge found that there had been misrepresentation by Markle to Dorsch in respect of the contents of the lease in respect of three matters, which are summarized by Hall J. A., who delivered the judgment of the Court of Appeal, as follows:

(1) that the document signed referred only to petroleum, natural gas and related hydrocarbons, whereas the proposed lease in fact included all mines and minerals;

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(2) that the respondent was assigning only ten percent of his royalty rights whereas he was in fact assigning the full [12½ per cent] royalty rights to the appellant;

(3) that the lease to be granted was for a term of only ten years, whereas it was in fact for a term of ninety-nine years.

In view of the opinion I have formed as to the meaning of clause 5 of the contract, there can be no basis for finding that there was misrepresentation in respect of the second item. It is true that under the contract Dorsch assigned to Freeholders his 12½ per cent royalty under the Rio Bravo lease, but Freeholders had to account to him for one-fifth of that. In the net result Freeholders only received for its own use a 10 per cent gross royalty.

With respect to the first item mentioned it is clear that there was no active representation by Markle in relation to the Freeholders lease as covering only petroleum, natural gas and related hydrocarbons. Dorsch himself, on examination for discovery, said:

Q. You say that you understood that the lease which would arise after the expiration of the Rio Bravo lease would be a lease of oil and gas only and not of all minerals? A. Yes.

Q. Did Mr. Markle tell you that? A. He didn't tell me anything in that respect.

Q. You just assumed that? A. I assumed it because that is what we were talking about, we were talking about oil.

The case for Dorsch, on this point, was based solely upon non-disclosure.

The same applies to item 3. There was no representation by Markle as to the term of the lease to Freeholders. Dorsch assumed that it would be for ten years. In answer to a question by the learned trial judge, referring to the discussions between Markle and himself, Dorsch said:

No, he didn't say anything about the—I took it for granted it was a ten year lease because I never heard of a 99 year lease.

The position taken by the learned trial judge was that a confidential or fiduciary relationship existed between Markle and Dorsch, thus involving not merely a duty not to misrepresent, but a duty of complete disclosure of the contents of the contract. With respect to this, I agree with what is said by Hall J.A. in the Court below:

The respondent had gone as far as Grade Nine in school and was able to read. He said that he did not read the document before signing it, although he had every opportunity to do so. He glanced at it but did not read it because he did not think he would be capable of understanding it. He says that he relied on Markle to explain to him what was in the

document. The learned trial judge found that Markle undertook to explain the document to the respondent. It would appear from the respondent's evidence, however, that it was only the general outline of the scheme or proposal rather than the details of the document which Markle undertook to explain. The document was not produced until the second discussion and then only after the respondent had consented to sign. It was then presented to the respondent who did not ask for it to be read over to him. At no time was it suggested that the respondent informed Markle that he did not think he would understand the document, or that he was not going to read it, or that he relied upon Markle to explain it to him. There is nothing to indicate that Markle was ever aware that the respondent did not read the document or did not understand. There was no conduct on the part of Markle which would prevent or discourage the respondent from reading it. I therefore cannot agree with the trial judge when he holds that Markle placed himself in a position of trust or that a confidential or fiduciary relationship existed between Markle and the respondent.

In view of the foregoing, it is clear that the plea of *non est factum* must fail. There was clearly no misrepresentation as to the nature of the document which Dorsch was asked to sign. It is admitted that he was aware that he was disposing of his royalty under the Rio Bravo lease and that he was granting, subject to that lease, a further lease to Freeholders.

The claim to rescind on the ground of innocent misrepresentation must also fail because, in my opinion, accepting Dorsch's own evidence, the three misrepresentations found by the learned trial judge are not substantiated.

The other ground upon which the learned trial judge decided in favour of Dorsch was that the allotment of his shares by Freeholders was void under *The Companies Act,* R.S.S. 1940, c. 113 (the statute applicable at the relevant time), because of non-compliance by Freeholders with s. 129 of that Act.

The relevant provisions of that statute are as follows:

3.—(1) In this Act, unless the context otherwise requires, the expression:

15. "Prospectus" means any prospectus, notice, circular, advertisement or other document inviting the public to subscribe for or purchase, or offering to the public for subscription or purchase, any shares or debentures of a company or an intended company;

* * *

116.—(1) The company shall furnish every person who is invited to subscribe for any shares or debentures offered by the prospectus with a copy of the prospectus at the time when the invitation is made.

* * *

125. An allotment made by a company:

(a) to an applicant or allottee in contravention of the provisions of

section 34 or 35 shall be voidable at the instance of the applicant within two months after the holding of the statutory meeting of the company and not later;

(b) in contravention of section 122 or 124 shall be void;

(c) upon an application in contravention of section 129 shall be void;

and every such allotment as is mentioned in clauses (a) and (c) shall be voidable or void, as the case may be, notwithstanding that the company is in course of being wound up.

* * *

129.—(1) It shall not be lawful to *issue* any *form* of application or subscription for shares in or debentures of a company offered to the public unless the *form* is issued with a prospectus filed under section 114 or 131:

Provided that this section shall not apply if it is shown that the form of application was issued either:

(a) in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or

(b) in relation to the shares in or debentures of a company where there is no offer to the public; or

(c) to existing members or debenture holders of a company, whether an applicant for shares or debentures had or had not the right to renounce in favour of other persons.

(2) Every person who acts in contravention of this section shall, without prejudice to any other liability, be guilty of an offence.

(The italics in subs. (1) are my own.)

Both the Courts below held that there had been a breach of s. 129. The Court of Appeal held, however, that, notwithstanding this, subsequent to the allotment, on the basis of Dorsch's subsequent conduct, a new independent contract to accept the shares could be presumed.

The sections which I have quoted (other than s. 3) appear in that portion of the Act which is entitled "Prospectuses". Section 114, the first of the sections under that heading, requires that every prospectus shall be dated and such date, in the absence of proof to the contrary, shall be taken as the date of *issue* of the prospectus. A signed copy is required to be filed with the registrar.

Section 115 contains the requirements as to what is to be stated in a prospectus.

Section 116(1), quoted above, requires the company *to furnish* every person invited by the prospectus to purchase securities offered by it with a copy when the invitation is made.

Section 116 was introduced into *The Companies Act* as a new provision, in 1933, and s. 129 was similarly introduced at the same time (1933 (Sask.), c. 21). Obviously, they were

not intended to cover identical ground. The difference in their wording, in my opinion, indicates the difference of application of each of them.

Section 116(1) requires that each person invited to subscribe for corporate securities offered by a prospectus should receive a copy of it.

Section 129 is dealing, not with the requirement for delivery of prospectuses to individuals, but with the requirement that upon the *issue* of a form of application or subscription for corporate securities offered to the public a prospectus duly filed under s. 114 or s. 131 be *issued* with it. The situation which this section contemplates is, on an offer to the public of corporate securities, the publication and putting into circulation by the company, or by an underwriter, of application or subscription forms. If this is done, then the required form of prospectus, duly filed, must also be published and put into circulation with it. Otherwise, under s. 125(c), an allotment made pursuant to such an application would be void.

In my opinion, what is declared to be unlawful in this section is the issue by or on behalf of a company of any application or subscription form for its shares, unless there is issued at the same time a prospectus filed in conformity with the provision of the Act. Section 116 then applies so as to require that a copy of such prospectus be furnished to each individual who is invited to subscribe for such securities.

In the present case Freeholders complied with s. 129, as it did file and issue the required form of prospectus. Copies were supplied to Markle, who was instructed by Freeholders to give a copy to each person who agreed to take Freeholders' shares, as is shown by the receipt embodied in the contract. His failure to furnish one to Dorsch may have been a breach of s. 116(1), but was not a breach of s. 129.

What is the consequence of a failure to comply with s. 116(1)? Section 125, which deals with the effect of the contravention of certain sections of the Act in rendering an allotment of shares void or voidable, makes no reference to s. 116. In my opinion, at the most, it might render a purchase of shares voidable by the purchaser. Even if Dorsch had the right to avoid his share purchase, he could not exercise it when he purported to do so because, having

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entered into the contract on August 3, 1950, and having received his share certificate in the following year, he took no step to repudiate until June 21, 1956, and, in the meantime, had been in receipt of communications sent to him as a shareholder by Freeholders, and had attended and voted at two annual meetings. This, in my opinion, is ample evidence of his election to retain the shares, and of his waiver of any right to have the allotment of shares to him rescinded.

In view of my conclusion as to the meaning of s. 129 of *The Companies Act*, it is unnecessary for me to express an opinion with respect to the respondent's submission that, for the reasons set forth in the judgment of Wynn-Parry J., in *Government Stock and Other Securities Investment Co. Ltd. v. Christopher*[1], s. 129 is inapplicable in relation to an issue of shares to be allotted for a consideration other than money, and to the members of a restricted class, *i.e.*, owners of mineral rights, and not to the public at large.

For the foregoing reasons, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Davidson, Davidson & Neill, Regina.

Solicitors for the defendant, respondent: Moss & Wimmer, Regina.

[1] [1956] 1 All E.R. 490.

WILLIAM EISENBERG (formerly WILLIAM L. WALTON), Trustee of the Estate of Ridout Real Estate Limited, a bankrupt, (*Plaintiff*) .....APPELLANT;

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*Feb. 19, 22, 23, 24
May 25

AND

THE BANK OF NOVA SCOTIA (*Defendant*) .....RESPONDENT;

AND

GEORGE H. RIDOUT, and GEORGE H. RIDOUT and THE CANADA PERMANENT TRUST COMPANY, Executors of the Estate of Ernest Ridout, deceased, (*Third Parties*) .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Company pledging assets to bank as security for loan to third parties—Transaction admitted to be intra vires—Unanimous consent of all shareholders where given in fact as effective to validate transaction as if given in formal meeting.

The plaintiff as trustee in bankruptcy of R Ltd., a real estate company, brought an action to recover from the defendant bank certain sums realized by the bank from assets which the said company had pledged to the bank as security for a loan to one G R and his brother E R. G R was a director and president and was the sole beneficial owner of all the issued shares in the said R Ltd. E R had been such sole beneficial owner but had transferred his shares to G R and at all relevant times was neither a director nor shareholder of R Ltd.

The action was dismissed at trial and an appeal from the judgment of the trial judge was dismissed in the unanimous judgment of the Court of Appeal. In this Court counsel for the appellant took the position that he was not alleging that the transaction in question was *ulta vires* the real estate company but on the other hand admitted that the transaction was one which could bind the company if it had been unanimously approved by the shareholders in a meeting duly called for such purpose.

Held: The appeal should be dismissed.

When a matter was *intra vires* of a corporation, the corporation could not be heard to deny a transaction to which all the shareholders had given their assent even when such assent was given in an informal manner or by conduct as distinguished from a formal resolution at a duly convened meeting. Since G R not only assented to the transaction but instigated it, his assent, being that of the sole beneficial shareholder, therefore bound the company.

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

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EISENBERG (FORMERLY WALTON) v. BANK OF NOVA SCOTIA AND RIDOUT *et al.*

In re George Newman & Co., [1895] 1 Ch. 674; *Re Publishers' Syndicate, Paton's Case* (1903), 5 O.L.R. 392; *Re Queen City Plate Glass Co.* (1910), 1 O.W.N. 863, not followed; *Attorney-General for Canada v. Standard Trust Company of New York*, [1911] A.C. 498; *Parker and Cooper Ltd. v. Reading*, [1926] Ch. 975, applied; *Salomon v. Salomon & Co.*, [1897] A.C. 22; *In re Express Engineering Works Ltd.*, [1920] 1 Ch. 466; *In re Oxted Motor Co. Ltd.*, [1921] 3 K.B. 32; *In re Almur Fur Trading Co., Bank of United States v. Ross*, [1932] S.C.R. 150; *Allish v. Allied Engineering of B.C. Ltd.* (1957), 9 D.L.R. (2d) 688, considered.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of King J. Appeal dismissed.

Hon. R. L. Kellock, Q.C., and *J. W. Garrow*, for the plaintiff, appellant.

C. F. H. Carson, Q.C., and *Allan Findlay, Q.C.*, for the defendant, respondent.

A. J. C. O'Marra, Q.C., for the third parties, respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] pronounced on March 16, 1964, affirming the judgment at trial pronounced on March 15, 1963.

The action was brought by the appellant as trustee in bankruptcy of Ridout Real Estate Limited to recover from the respondent bank certain sums realized by the bank from assets which the said company had pledged to the bank as security for a loan to one George H. Ridout and his brother Ernest Ridout.

George Ridout was a director and president and was the sole beneficial owner of all the issued shares in the said Ridout Real Estate Limited. Ernest Ridout had been such sole beneficial owner but had transferred his shares to George Ridout and at all relevant times was neither a director nor shareholder of the Ridout Real Estate company.

On July 18, 1955, the said Ernest Ridout arranged with an officer of the defendant bank that it should loan to George Ridout and to him the sum of $100,000 for the purpose of permitting the said Ernest Ridout to obtain a release of his guarantee of the bonds of Taylor Forbes

[1] [1964] 1 O.R. 673, 43 D.L.R. (2d) 611, *sub nom. Walton v. Bank of Nova Scotia; Ridout et al., Third Parties.*

Limited which were then in default. As security for the loan, the bank was given a hypothecation of eleven promissory notes made by the Irmac Construction Company Limited in favour of Ridout Real Estate Limited and an assignment of the interest of Ridout Real Estate Limited in a partnership known as the Town and Country Development. One McIntosh, the supervisor of the Toronto branches of the respondent bank, was directed to carry out the transaction on behalf of the bank.

On the next day, July 19, 1955, Mr. McIntosh met Ernest Ridout and talked over the matter arranging for completion of certain documents which the bank required. After lunch, on the same day, Mr. McIntosh met, by appointment, Miss M. E. MacDonald, who delivered to him an envelope containing the following documents:

(1) Note for $95,000 signed by George Ridout and Ernest Ridout.
(2) Assignment of the interest of Ridout Real Estate Limited in Town and Country Development, executed on behalf of the Ridout company by George Ridout and bearing the corporate seal.
(3) Copy of a resolution authorizing the Ridout company to assign its interest in Town and Country Development as security and authorizing George Ridout to sign the assignment, certified by Miss M. E. MacDonald under the Ridout company's seal, to be a true copy of a resolution of the board of directors of the Ridout company, passed at a meeting of directors on July 19, 1955.
(4) Hypothecation Agreement executed on behalf of the Ridout company by George Ridout and Miss M. E. MacDonald under the seal of the Ridout company, by which hypothecation agreement Ridout Real Estate Limited hypothecated "all notes, cheques, drafts and other bills of exchange now lodged and/or which may hereafter be lodged with the bank and any resultant proceeds".
(5) Copy of a resolution authorizing the Ridout company to pledge the eleven Irmac notes of $10,000 each, and authorizing George Ridout to sign such hypothecation, certified by Miss MacDonald under the seal of the Ridout company to be a true copy of a resolution of the board of directors of the Ridout company, passed at a meeting of the directors.
(6) Direction from George Ridout requesting the bank to issue the cheque for $100,000 to M. H. Roebuck.
(7) The eleven notes of the Irmac company.
(8) Cheque of the Ridout company in favour of the Bank of Nova Scotia for $5,000 signed by George Ridout and Miss M. E. MacDonald.

Mr. McIntosh was familiar with the signatures of George Ridout and Ernest Ridout and was satisfied with their signatures on the document. Miss MacDonald represented

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that she was the secretary of Ridout Real Estate and was entitled under the by-laws to execute the said documents. She was not such secretary but she was the head office manager and was a signing officer of the Ridout company in connection with its business with its ordinary bank which was not the respondent. The secretary-treasurer of the company was one Mr. Muir who was then absent on holidays.

The first three Irmac notes becoming due in August, September and October, were paid and were credited against the loan of $95,000, that is, the $100,000 less the $5,000 cheque.

In November 1955, $45,000 was received in respect of the Ridout Real Estate interests in the Town and Country Development and the respondent bank was also paid a cheque of the Ridout Real Estate Limited for $10,000. This cheque was signed by George Ridout and Mr. Muir. These payments reduced the loan to $10,000. The bank then made a further advance of $70,000 to George Ridout and took another promissory note signed by George Ridout and Ernest Ridout for that amount. This increased the total loan to $80,000 and the bank issued a cheque for the amount of $70,000 to George Ridout who deposited it to the credit of the trust account of Ridout Real Estate Limited in its regular bank. The loan in the sum of $80,000 was discharged by applying against it the proceeds from the eight Irmac notes, and the final payment was on June 5, 1956.

On December 1, 1956, Ernest Ridout deposited to the credit of the trust account of the Ridout company in its regular bank the sum of $58,416.25. A receiving order was made on January 3, 1957. The appellant was appointed trustee in bankruptcy of Ridout Real Estate Limited.

The appellant commenced this action by a writ issued on June 3, 1959.

At trial, the action was dismissed by King J. and the appeal from the judgment of the learned trial judge was dismissed in the unanimous judgment of the Court of Appeal.

In this Court, able argument was made by counsel for both the appellant and the respondent bank, counsel for the third parties adopting the latter argument. Counsel for the

appellant took the firm position that he was not alleging that the transaction was *ultra vires* the real estate company but on the other hand admitted that the transaction was one which could bind the company if it had been unanimously approved by shareholders in meeting duly called for such purpose.

It is admitted that no resolution of directors was passed and that no meeting of directors took place. However, the "inside management rule" enunciated *inter alia* in *The Royal British Bank v. Turquand*[1], would apply to protect an innocent third party dealing with Ridout Real Estate Ltd. without notice of those facts and that Miss MacDonald was not the secretary of the company.

In the Court of Appeal for Ontario, Schroeder J.A. said:

> Since I have come to the decision that the doctrine of estoppel operates in favour of the defendant it follows that I also take the view that the defendant comes within the protection of the principle of *The Royal British Bank v. Turquand* (1856), 6 El. & Bl. 327, and *William Augustus Mahony v. The East Holyford Mining Company (Limited)* (1875), L.R. 7 H.L. 869.

I have come to the conclusion that, in this Court, it is not necessary to investigate whether the respondent bank is entitled to rely on the "inside management rule". Whether or not it were able to do so, it is plain that the transactions were not only approved by the sole beneficial owner but he was the chief instigator of the transactions and directed them throughout. It is true that no meeting of shareholders was ever held to approve the transactions. If there had been a directors' meeting, fully attended, the directors were George Ridout, Mr. Muir and two other employees. None of the latter three held any shares beneficially, and all were mere nominees of George Ridout. Therefore, the result of either the shareholders' meeting or the directors' meeting would have been a foregone conclusion. If any director had seen fit to oppose George Ridout's wishes, he could be removed from his position as director with the utmost celerity and, of course, George Ridout was the sole beneficial owner of all the shares and his wishes would have been the unanimous decision of the shareholders' meeting.

Under these circumstances, the problem of what kind of unanimous authorization of shareholders is sufficient becomes important.

[1] (1855), 5 El. & Bl. 248, affirmed (1856), 6 El. & Bl. 327.

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In re George Newman & Co.[1], in the Court of Appeal, the chairman of a company in which substantially all the shares were held by him and his family, purchased on behalf of the company, the right to a building agreement. Upon the vendor's objection to accepting the company as a tenant, the chairman sold the benefit of the agreement to the company at an advance of £10,000 of which £7,000 was spent on commissions and otherwise to obtain the agreement and £3,000 was applied by the chairman for his own use. A further sum of £3,500 was spent by the chairman out of the assets of the company upon his private home. These payments were made out of money borrowed by the company for the purpose of the business. They were sanctioned by resolutions of the directors and were approved by all the shareholders. Held, that the chairman was liable for the £3,000 out of the purchase price, which he devoted to his own use, and the £3,500 which he took from the company's coffers for repairs to his own home. Held, that there was no power in the shareholders to authorize the making of "presents to directors out of the money borrowed by the company" and if there had been such a power it could only be exercised by general meeting. Lindley J. delivered the judgment of the Court and at p. 685 said:

> But in this case the presents made by the directors to Mr. Newman, their chairman, were made out of money borrowed by the company for the purposes of its business; and this money the directors had no right to apply in making presents to one of themselves. The transaction was a breach of trust by the whole of them; and even if all the shareholders could have sanctioned it, they never did so in such a way as to bind the company. It is true that this company was a small one, and is what is called a private company; but its corporate capacity cannot be ignored. Those who form such companies obtain great advantages, but accompanied by some disadvantages. A registered company cannot do anything which all its members think expedient, and which, apart from the law relating to incorporated companies, they might lawfully do. An incorporated company's assets are its property and not the property of the shareholders for the time being; and, if the directors misapply those assets by applying them to purposes for which they cannot be lawfully applied by the company itself, the company can make them liable for such misapplication as soon as any one properly sets the company in motion. . . . . Directors have no right to be paid for their services and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or *by the shareholders at a properly convened meeting* . . . But to make presents out of profits is one thing and to make them out

[1] [1895] 1 Ch. 674.

of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity. But even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. George Newman desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and to have the benefit of the fact that even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded.

(The italicizing is my own.)

It will be seen, therefore, that Lindley J. finds in favour of the liquidator on two grounds. Firstly, that the transaction was *ultra vires* of the company and could not be validated even by a vote of the shareholders at a meeting, and, secondly, that even if they were not *ultra vires* and could have been validated by such a vote, there must be a meeting and a vote, not a mere approval by individual shareholders.

Re *Salomon v. Salomon & Co.*[1] in the House of Lords. This case turned on the recognition of the corporate identity as distinguished from the identity of the owner of all shares except qualifying shares. But at p. 57, Lord Davey said this:

Nor was the absence of any independent board material in a case like the present. I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter intra vires by the unanimous agreement of its members. In fact, it is impossible to say who was defrauded.

As pointed out by counsel for the appellant, there was in fact a meeting. See *Broderip v. Salomon*[2], per Kay L. J. at p. 343, where he said:

The proceedings were faultless in point of form. On August 2, 1892, all the seven shareholders—i.e., Mr. Salomon, his wife and children—*held a general meeting of the company.* They appointed Mr. Salomon and two of his sons directors, and these directors appointed Salomon managing director with a salary of £500 a year, and two of the sons to other offices with £148 a year each. *They formally adopted the agreement of July 20,* and agreed with the nominal trustee to take over the property on the terms arranged with him. The same day seven shares were allotted to the seven subscribers to the memorandum.

(The italicizing is my own.)

[1] [1897] A.C. 22. [2] [1895] 2 Ch. 323.

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However, Lord Davey's statement quoted above, *supra,* makes no reference to a meeting and it would seem to be a simple statement that in *intra vires* transactions a bare assent by all shareholders is sufficient to validate a transaction as against a company. As I shall show, that view has been taken of Lord Davey's statement in later cases.

The Attorney-General for the Dominion of Canada v. The Standard Trust Company of New York[1]. There, four members of a syndicate purchased the outstanding bonds which were in default of a company known as the Montreal and Sorel Railway Company. The four members then incorporated a company and each of the four subscribed $75,000, *i.e.,* a total of $300,000, being all the issued shares of the company. They then sold to this company (the South Shore Railway Company) the whole of the assets of the Montreal and Sorel Railway Company of which they had taken possession as bond-holders, for $648,000. Of that sum, $300,000 was paid by paying the money subscribed by the four members for the shares and the company acknowledged an indebtedness to the four members of the balance of $348,000. There had been a meeting of the shareholders of the new company (the South Shore Railway Company) at which the directors who were these four members of the syndicate and their three nominees, were authorized to enter into agreements with railway companies and other persons in accordance with the provisions of the Act which had incorporated the company. Shortly thereafter, a meeting of the board of directors agreed to transfer the railway enterprise to the South Shore Railway Company at a purchase price to be settled at a later period. Some three months thereafter, the directors fixed the sale price at $648,000. Viscount Haldane, giving judgment for the Judicial Committee, said at p. 504:

> If, therefore, what the directors did is to be impeached, it must be on the ground, not of its having been ultra vires of the company, but of its having been a breach of duty by the directors. Now, although, the capital of the company was $1,000,000, the only stock issued was to the amount of $300,000, and this was taken up and owned by the members of the syndicate and no one else. They and they alone were interested in the capital of the company. This is not a case of winding up, but even if it were, it would make no difference. In proceedings of the character of the present the title of a liquidator as representing

[1] [1911] A.C. 498.

creditors cannot be higher than the title of the company against whom the creditors claim. In this case the interests of the company and of the syndicate were identical. The only persons beneficially interested in the company were the four members of the syndicate. The law gave them the complete control of its action. Under that control the company gave effect to the policy of the only persons who had any beneficial interest in its capital. The case is not one in which the apparent procedure can be said to have been unreal, or to have been a cloak under which a conspiracy to defraud was concealed. Under these circumstances, their Lordships are of opinion that the company, notwithstanding that no general meeting, apart from the meeting of directors, appears to have been held for the purpose, was completely bound by the transactions sought to be impeached, and that the appellant, who has certainly no title higher than that of the company against the assets of which he claims, is bound likewise.

Viscount Haldane cites *Salomon v. Salomon* in the House of Lords, *supra.*

It will be seen, therefore, that this is an example of a unanimous approval of shareholders where there has been no meeting of shareholders to approve the actual transactions. The shareholders had in meeting, approved generally the entering into of agreements to purchase railways, but the actual agreement to purchase this particular railway and the purchase price at which it had been purchased was made by the action of the directors alone. Those directors were, or represented, all of the shareholders. The case would seem to be of close application to the present.

In re Express Engineering Works Limited[1]. This was a decision of the Court of Appeal. Here, a syndicate of five persons formed a private company of which they were the sole shareholders, and they sold to that private company for £15,000 in debentures property which they had a few days previously purchased for £7,000. The contract for sale and the issue of the debentures for payment was determined upon at a meeting of the same five persons described as a directors' meeting. At the same meeting, they appointed themselves directors. The articles of the company prohibited a director voting in respect of any contract or arrangement in which he might be interested. In an action by the liquidator for a declaration that the issue and transfer of the debentures were invalid and should be set aside, Astbury J. dismissed the action on the ground that every member of the company having assented to the transaction, the company was bound in a matter *intra vires* by the unanimous

[1] [1920] 1 Ch. 466.

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agreement of its members. On appeal, Lord Sterndale, M.R., noting that the appellants relied on *In re George Newman & Co., supra*, said at p. 470:

> There were, however, two differences between that case and the present one. First, the transaction there was ultra vires, and, secondly, in that case there never was a meeting of the corporators. In the present case these five persons were all the corporators of the company and they did all meet, and did all agree that these debentures should be issued. Therefore it seems that the case came within the meaning of what was said by Lord Davey in *Salomon v. Salomon & Co.*, [1897] A.C. 22, 57.
>
> "I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter intra vires by the unanimous agreement of its members."
>
> It is true that a different question was there under discussion, but I am of opinion that this case falls within what Lord Davey said. It was said here that the meeting was a directors' meeting, but it might well be considered a general meeting of the company, for although it was referred to in the minutes as a board meeting, yet if the five persons present had said, "We will now constitute this a general meeting", it would have been within their powers to do so, and it appears to me that that was in fact what they did. The appeal must therefore be dismissed.

This case stands for the validating effect of the approval of all shareholders and limits the *In re Newman* doctrine to *ultra vires* transactions. It seems, however, to stress the necessity of a meeting and simply excused an irregularity, *i.e.*, the failure to designate the meeting as that of shareholders rather than directors. Of course, the directors, as such, could not validly make the agreement as they were interested parties.

In re Oxted Motor Company, Limited[1] was an appeal before Lush and Greer JJ. from the decision of a County Court judge. In this case, there were only two shareholders and the two shareholders were the sole directors. The two shareholders met and passed a resolution that the company should be wound up voluntarily. There had been no notice of intention to propose an extraordinary resolution to such effect given to the shareholders and s. 182(3) of the *Companies (Consolidation) Act*, 1908, provided:

> A company may be wound up voluntarily— * * * (3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

[1] [1921] 3 K.B. 32.

And by s. 69(1):

> A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy . . . at a general meeting of which notice specifying the intervention to propose the resolution as an extraordinary resolution has been duly given.

Lush J. said at p. 37:

> It is contended that unless the notice contemplated by that section has been given a resolution is invalid as an extraordinary resolution; and it is said that notwithstanding that all the shareholders in the company were present and were dealing with a matter which was intra vires, and notwithstanding that there was no fraud, still the resolution was invalid on that account. . . . In my opinion the shareholders are entitled to waive the formality of notice. *In re Express Engineering Works,* [1920] 1 Ch. 466, is an authority in support of the view that the statutory requirements as to notice can be waived.

Greer J. said at p. 39:

> The creditors of the company have no voice in the matter, they cannot object to the validity of a resolution to wind up voluntarily by saying that the proper notice to pass that resolution as an extraordinary resolution has not been given, if all the shareholders have agreed to the resolution and waived the want of notice. This view is supported by the decision of the Court of Appeal in *In re Express Engineering Works,* [1920] 1 Ch. 466.

This case, therefore, is authority for the proposition that the unanimous approval of shareholders, validates the transaction. But again there was a meeting, in this case even a meeting of shareholders, and the only defect alleged was lack of proper notice of that meeting.

In *Parker and Cooper, Limited v. Reading*[1], Astbury J. considered the issuance of a debenture for £2,000 by the company in favour of the director. No fraud was involved. As a matter of fact, the director and secretary of the company had been improperly elected due to failures in procedure by those who had sold their interest in the company to the new group, and then the arrangement was carried out at a board meeting where the improperly elected directors alone were present. There never had been any meeting of shareholders authorizing or approving the transaction. The shareholders, however, of whom there were only four, discussed the matter one with the other and all *individually* assented. Astbury J. held that the company was bound by the transaction and the debenture was valid, citing Lord Davey in *Salomon v. Salomon, supra,* and *In re Express Engineering Works Ltd.* At p. 984, he said:

[1] [1926] Ch. 975.

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All three judges [in the *Express Engineering* case] no doubt refer to the fact that there had been a meeting. But I cannot think that they came to their decision because the five shareholders happened to meet together in one room or one place, as distinct from agreeing to the transaction inter se in such manner as they thought fit. Warrington L.J. said: "It was competent to [the shareholders] to waive all formalities as regards notice of meetings, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question." He is there speaking of the actual facts before him.

Now the view I take of both these decisions is that where the transaction is intra vires and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously.

This action does not seem to have gone farther. It is a valid authority in favour of the approval of all shareholders even if no meeting takes place, and it is exactly applicable to the present situation. It should be noted that the board of directors' meeting cannot be considered as being the same thing as a shareholders' meeting as only two of the four shareholders were present and they were not even properly qualified as directors. The only validating thing must have been the informal approval of the individual shareholders.

In *In re Almur Fur Trading Company, Bank of United States v. Ross*[1], the company was incorporated by Dominion letters patent. All the shares were owned beneficially by one Licht of New York. The president was one Smith of Montreal. When Smith was *en route* to Europe through New York, Licht sent his secretary to see Smith and to present to him for signature five blank promissory note forms. Smith swore that he executed these notes in order to pay for goods which he had already purchased and which would be invoiced to Licht in New York and for further goods which Licht intended to purchase. Licht filled in the name of the payee in the five notes, one as his own company and the others in the name of another company controlled by him. These notes were endorsed to the bank and it was admitted that the bank was the holder in due course. The company's by-law provided that notes should be signed by such officer or officers and in such manner as may be from time to time determined by the resolution of the board of directors. The resolution of the board of directors was to the effect that such notes should be signed by the president and countersigned by the auditor. The notes in question bore no such

[1] [1932] S.C.R. 150.

counter signature by the auditor. Lamont J, giving judgment for the Supreme Court of Canada, held that the notes were made in general in accordance with the authority of the president under the by-law and that it was not necessary for the bank to inquire into the authority of a president to sign as set out in any resolution; that persons who were dealing with a company were presumed to have notice of what was contained in the Act, and in a case like the present where the Act refers specifically to the by-laws were bound to ascertain from the by-laws but were not obliged to go further and inquire into whether the directors passed the resolution giving the one officer specific authority. At p. 158, Lamont J. said, perhaps *obiter*:

> Even if Smith had not any authority to sign the notes who, in this case, can question his right to do so? Certainly not the liquidator, for he stands simply in the place of the company. Now the man who had acquired all the shares in the company at the time the notes were made, and who was in fact the company, not only approved of their being made, but it was at his request and under his direction that they were made. Where all the shareholders of the company have ratified or are estopped from objecting to the making of the notes by the president, it is not, in my opinion, open to the liquidator to question his authority.

This case is indeed like the present one in that there was only one beneficial shareholder in the company and that one shareholder, as did George Ridout in this case, not only approved the transaction but instigated it throughout.

Re *Allish v. Allied Engineering of B.C. Ltd.*[1], B.C. Court of Appeal. In this case, a managing director, upon a new group taking over the company, was discharged and he sued for damages for illegal dismissal. The company counterclaimed for amounts which had been paid to him on account of salary on the ground that such amounts had never been properly authorized. At trial, the action was dismissed and judgment was given upon the counterclaim. The plaintiff appealed. At pp. 693-4, Sheppard J. A. said:

> It is common ground that there was no formal resolution to fix the plaintiff's remuneration. However, the payment of those monies to the plaintiff for his services was an internal matter: *Houston v. Victoria Machinery Depot Ltd.*, [1924] 2 D.L.R. 657 at p. 658, et al. There was no suggestion of fraud and the payment was not out of capital and not *ultra vires* of the company. The payment was an internal matter and was within the powers of the company and although made without the formal resolution required by Arts. 11 and 57, and therefore *ultra vires* of the directors, nevertheless such payment may be ratified by the

[1] (1957), 9 D.L.R. (2*d*) 688.

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majority of the shareholders . . ., and the plaintiff as shareholder is not debarred from using his voting power to carry such resolution . . . . Further, such ratification does not require a formal resolution but may be implied from all the circumstances: *Parker & Cooper Ltd. v. Reading, supra.*

In the case at bar the evidence establishes that the shareholders had full knowledge of all the material facts and that the plan of payment was fully understood by them and approved . . . . The shareholders in taking the benefit of the plaintiff's services with full knowledge of the facts must be taken to have approved of the crediting of such sums to his account and of the placing of such funds at his disposal.

And at p. 695:

Further, as the credits of salary to the plaintiff's account were made with the consent of all the shareholders and with their full knowledge of the material facts, there is applicable the following statement in *A.-G. Can. v. Standard Trust Co. of New York,* [1911] A. C. 498, by Viscount Haldane at pp. 504-5. . .

(See above.)

The learned judge in appeal again distinguished *In re George Newman & Co.* on the ground that it dealt with an *ultra vires* transaction. The counterclaim for return of salary was dismissed.

It is true that in the Courts in Ontario in two cases, *Re Publishers' Syndicate, Paton's Case*[1], and *Re Queen City Plate Glass Co.*[2], the Court held to the principles outlined in *In re George Newman & Co., supra.* Those cases, however, long pre-dated the decision of the English Courts in *Re Express Engineering Works Ltd.* and *Re Oxted Motor Company Ltd. and Parker & Cooper Ltd. v. Reading,* as well as the decision of this Court in *Re Almur Fur Trading Co.* and the Judicial Committee in *Attorney-General for Canada v. Standard Trust Co. of New York.*

Therefore, upon a consideration of the above authorities, I have been led to the conclusion that a corporation, when a matter is *intra vires* of the corporation, cannot be heard to deny a transaction to which all the shareholders have given their assent even when such assent be given in an informal manner or by conduct as distinguished from a formal resolution at a duly convened meeting. Since, of course, George Ridout not only assented to the transaction but instigated it, his assent being, as admitted, that of the sole beneficial shareholder therefore binds the company.

Before parting with the matter, I wish to make it clear that I am not deciding that the transaction between Ridout

[1] (1903), 5 O.L.R. 392. [2] (1910), 1 O.W.N. 863.

Real Estate Limited, hereafter referred to as "the Company", and the respondent bank was one which it was lawful for the company to enter into. It is unnecessary to express an opinion on this question because it was conceded that the transaction was one within the powers of the company and capable of ratification by the shareholders in general meeting. I have already indicated my view that in such circumstances the unanimous consent of all the shareholders given in fact is as effective to validate the transaction as if given in a formal meeting.

It was also conceded (i) that George Ridout was the beneficial owner of every issued share of the capital stock of the company, and (ii) that the appellant did not stand in any position different from that of the company in regard to this transaction. I mention this to make it plain that we were not called upon to decide either of these matters.

The appeal should be dismissed and the judgment of the Court of Appeal for Ontario affirmed. The appellant should pay the costs of the respondent Bank of Nova Scotia. The said respondent the Bank of Nova Scotia should pay the costs of the (Third Parties) respondents George H. Ridout and the Canada Trust Company, executors of the estate of Ernest Ridout, deceased. Upon the respondent the Bank of Nova Scotia paying the said costs of the said (Third Parties) respondents, it should recover such costs from the appellant.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Blake, Cassels & Graydon, Toronto.

Solicitors for the defendant, respondent: Tilley, Carson, Findlay & Wedd, Toronto.

Solicitors for the third parties, respondents: O'Marra & O'Marra, Port Credit.

1965
*April 29, 30
June 24

BANK OF MONTREAL (*Defendant*) ..... APPELLANT;

AND

GRANT BLOOMER (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Banks and banking—Purchaser turning over bank draft to third party to effect payment for shares—Proceeds of draft credited to account of holding company to cover latter's cheque to payee—Bank not liable for conversion.

The plaintiff B and certain other persons connected with N Ltd. became interested in the acquisition of shares in that company, which were owned by a group living in the United States, which controlled 410 out of the 1,000 issued common shares of the company. An arrangement made by Y, the president of the company, involved the sale by one L of a total of 54 shares, and the acquisition of a like number by B. The latter, on March 29, 1962, purchased a draft for $13,500 (U.S.) from the defendant bank in Vancouver and turned it over to Y to effect payment to L.

Unknown to B was the fact that the shares controlled by L in the company were not registered in his own name. The 410 shares of the company controlled by the American group were registered in the name of a holding company, S, incorporated in British Columbia. To avoid a loss on exchange, the procedure which was followed was to have S issue its cheque to L in the amount of $15,000 (U.S.), which L duly cashed. When the S cheque was returned to the bank in Vancouver there was delivered to the bank the bank draft to L, which was applied to cover the payment made by S.

The secretary of the company, by May 9, 1962, had in his possession all the documents necessary to register B as the owner of the 54 shares which he was purchasing from L. However, no share certificate was issued to B at that time and it was not until July 30 that his solicitors were advised that B was recorded on the register of transfers and that share certificates were available for delivery. In the meantime B had repudiated the purchase of shares on the ground that the shares had not been delivered. The company went into liquidation in August 1962.

In an action for damages for conversion of the draft, the trial judge held that there had been such conversion. The Court of Appeal in dismissing an appeal from the trial judgment took the position that B was not obliged to accept company shares from S because his contract with L was for the purchase of shares owned by L.

Held: The appeal should be allowed.

If a contract specifically stipulated for delivery of a specified article, or in a specified manner, a party to it was entitled to insist upon performance in the agreed manner. Here, however, there was no written contract, and no evidence that, in his negotiations with L, B stipulated for the purchase of shares which must have been registered in L's own name.

B knew that Y had negotiated the purchase for B and others from the American group of a block of company shares, and that the draft

* Present: Cartwright, Abbott, Martland, Hall and Spence JJ.

was turned over to Y to pay for those shares which B was to acquire. The draft, while it did not reach L directly, was used to effect that payment. The bank could not be guilty of conversion merely because B was not aware of the actual procedure by means of which the deal was to be finally effected.

Bowes v. Shand (1877), 2 App. Cas 455, distinguished.

APPEAL from a judgment of the Court of Appeal for British Columbia, affirming a judgment of Munroe J. in an action for conversion of a negotiable instrument. Appeal allowed.

F. H. Bonnel, Q.C., and *D. A. Freeman,* for the defendant, appellant.

H. E. Hutcheon, for the plaintiff, respondent.

The judgment of the court was delivered by

MARTLAND J.:—This is an appeal from the Court of Appeal for British Columbia, which affirmed the judgment at trial in an action in which the respondent, Bloomer, was plaintiff and the appellant bank the defendant. Bloomer obtained a judgment for $14,183.44, plus interest and costs, in respect of a claim for conversion by the bank of a bank draft purchased by him from the bank, in the amount of $13,500 U.S. funds, payable to one James C. Lewis and drawn on the United California Bank.

On April 17, 1961, Bloomer became an employee of Nutri-Bio of Canada Ltd. (hereinafter called "the company"), in Vancouver. The company, which was a private company incorporated under the *Canadian Companies Act,* and an affiliated company in the United States of America, Nutri-Bio Corporation, were engaged in the distribution and sale of dietary supplements. In February 1962, Bloomer became the vice-president of the company in charge of distributor relations. The president of the company was Charles W. Young, and he and Bloomer had their offices in the premises of the company in Vancouver.

Bloomer and certain other persons connected with the company became interested in the acquisition of shares in the company, which were owned by a group living in the United States, which controlled 410 out of the 1,000 issued common shares of the company. They were interested in

acquiring the shares because of the likelihood of the company being converted into a public company and making a public issue of its shares.

Bloomer had had some discussion with James C. Lewis, of Los Angeles, regarding the acquisition of some shares from him, in December of 1961. Early in 1962, Young had discussions with Lewis, in Los Angeles, regarding Bloomer acquiring some of Lewis's shares.

The discussions culminated in a meeting held at the offices of the company in March 1962, which is described in the following extract from the evidence of W.R.D. Underhill, the solicitor and secretary of the company:

> Subsequently in 1962 I was advised by Mr. Young in Mr. Bloomer's presence that Mr. Young was engaging in negotiations with certain members of the American group, among them, Lewis, for the sale of shares in Nutri-Bio of Canada Ltd., to a number of Canadian officers of the company, including Bloomer, Strong and Granholme. These negotiations had gone on for some period of time and at the end of March, I was at the office, company offices for business purposes and present at a meeting, at which meeting there was also present Mr. Bloomer, Mr. Young and I believe Mr. Granholme, and I was informed at that meeting that a sale had been negotiated of shares to Bloomer, Strong and Granholme. I was informed of the price and I was informed that Mr. Bloomer's draft in payment for the shares was on Mr. Young's desk. The meeting took place in Young's office. I was asked to attend to the details of effecting the share transfer.

The arrangement made by Young involved the sale by Lewis of a total of 54 shares, and the acquisition of a like number by Bloomer. The draft referred to is the one which is in issue, which Bloomer purchased from the bank on March 29, 1962. After purchasing it, Bloomer had handed it to Young's secretary, saying: "Here is the draft for Mr. Lewis."

As previously noted, Young was conducting the negotiations for the share purchases, including Bloomer's, and in evidence Bloomer stated that Young negotiated the price of the shares and the actual sale of the shares with Lewis on Bloomer's behalf. He was also asked the following question and gave the following answer:

> Q. Now, would it be correct to say, Mr. Bloomer, that you left the question of the acquisition of these shares and the payment of the money entirely in the hands of Chuck Young and Mr. Underhill?
>
> A. In as much as the money to be sent to James C. Lewis when I acquired the shares, yes.

Unknown to Bloomer, but known to Underhill, as secretary of the company, was the fact that the shares controlled by Lewis in the company were not registered in his own name. The 410 shares of the company controlled by the American group were registered in the name of a holding company, Saturn Enterprises Ltd., incorporated in British Columbia. All of the shares in Saturn were registered in the name of another holding company, Mars Holdings Limited, also incorporated in British Columbia, whose shares were owned by the American group in the same proportions as the respective share holdings they had had in the company prior to their transfer to Saturn. These holding companies had been created at the suggestion of Underhill in order to meet certain tax problems in the United States. In the result, however, each of the shareholders of Mars could exercise control over, and could dispose of those shares in the company, now registered in the name of Saturn, which, previously, he had owned in his own name. The procedure followed by a beneficial owner in effecting a sale of shares held on his behalf in the company was to have Saturn effect the sale to the purchaser, the proceeds then being applied by Saturn in the purchase, from the beneficial owner, of a proportionate number of the shares held by him in Mars.

The draft which Bloomer had delivered to Young's secretary to effect payment for the shares to be obtained from Lewis was made payable to Lewis, and not to Saturn, of whose existence Bloomer was not aware. Underhill learned from the bank that if the draft were to be cancelled there would be a loss on exchange. The procedure which was followed was to have Saturn issue its cheque to Lewis in the amount of $15,000 (U.S.), which Lewis duly cashed. When the Saturn cheque was returned to the bank in Vancouver there was delivered to the bank the bank draft to Lewis, which was applied to cover the payment made by Saturn. On April 4 both documents came into the hands of the associate manager of the foreign exchange department of the bank at its main office in Vancouver, and the above procedure was followed. He was not aware that the bank draft had initially been purchased by Bloomer, and assumed that it belonged to Saturn. He marked the draft "Proceeds refunded to Purchaser", and Saturn obtained the credit for it. This occurred on April 4, 1962.

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Prior to that time, Underhill had communicated with Butler, a lawyer in the United States, who acted for Nutri-Bio Corporation (the American company) and who also represented most of the American group who controlled shares in the company, including Lewis, and arranged for the delivery to Butler of Saturn's share certificate for 410 shares in the company, and for payment to those persons who controlled them for those shares which were being sold. The certificate was forwarded to Underhill on April 17, and in the meantime Underhill prepared the directors' resolution approving the transfers from Saturn to the various purchasers. The signed resolution was in Underhill's possession on May 8 or 9. Underhill says he signed this and gave instructions to file it in the minute book and to have the share register noted accordingly.

No share certificate was issued to Bloomer at that time, and in the latter part of June Bloomer inquired about it. Underhill told him the certificates were not prepared, but that he would do so as soon as he could, but that he was pressed with other business, particularly company business.

On June 29 Bloomer was discharged from the service of the company. A few days later he learned that the proceeds of the draft had been received by Saturn.

On July 17 Bloomer wired Lewis to advise that he was repudiating the purchase of shares from him on the ground that the shares had not been delivered and on other grounds, which were not stated. This was confirmed by a letter from Bloomer's solicitors.

On July 30 Underhill wrote to Bloomer's solicitors, advising that Bloomer was recorded on the register of transfers and that the share certificates were available for delivery.

In August 1962, the company made a proposal under the *Bankruptcy Act* and then went into liquidation under the *Winding Up Act*.

On January 18, 1963, Bloomer issued a writ against the bank claiming damages for conversion of the bank draft, on the basis that the bank had wrongfully converted the proceeds of his draft.

The learned trial judge held that there had been a conversion by the bank of Bloomer's draft. He relied upon the statements of the law made in Paget's Law of Banking, 6th ed., p. 303:

A conversion is a wrongful interference with goods, as by taking, using or destroying them, inconsistent with the owner's right of possession. To constitute this injury, there must be some act of the defendant repudiating the owner's right, or some exercise of dominion inconsistent with it.

Intention is no element in conversion.

"Any person who, however innocently, obtains possession of goods the property of another who has been fraudulently deprived of the possession of them, and disposes of them, whether for his own benefit or that of another person, is guilty of a conversion."

He also cited from Salmond on Torts, 13th ed., p. 262:

A conversion is an act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it. Two elements are combined in such interference: (1) a dealing with the chattel in a manner inconsistent with the right of the person entitled to it, and (2) an intention in so doing to deny that person's right or to assert a right which is in fact inconsistent with such right.

He rejected the defence that Young and Underhill had authority to deal with the draft in the way they did, and also the defence that the bank's disposition of the draft had not caused damage to Bloomer.

The Court of Appeal took the position that Bloomer was not obliged to accept company shares from Saturn because his contract with Lewis was for the purchase of shares owned by Lewis. On this point reference was made to *Bowes v. Shand*[1], per Lord Cairns L. C. at p. 463:

My Lords, if that is the natural meaning of the words, it does not appear to me to be a question for your Lordships, or for any Court, to consider whether that is a contract which bears upon the face of it some reason, some explanation why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance, and that alone might be a sufficient answer.

* * *

My Lords, I must submit to your Lordships that if it be admitted, as the Lord Justice is willing to admit, that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers without any real cause would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled.

[1] (1877), 2 App. Cas. 455.

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In the same case Lord Hatherley said at p. 474:

> Now under these circumstances, and with the plain meaning of the contract lying, as it appears to me, on its surface, we are not entitled to speculate on the reasons and motives which have induced those who are engaged in this particular trade, those who have this "usual run," as the witness describes it, of contracts before them from time to time, and who must have pondered upon the matter, to frame their contracts in the manner which pleases them best.

There is no doubt that if a contract specifically stipulates for delivery of a specified article, or in a specified manner, a party to it is entitled to insist upon performance in the agreed manner. In the *Bowes* case there was a written contract for the sale of rice to be shipped in specified months, and the purchaser was held to be entitled to insist upon shipment in that period.

There is no written contract here, and no evidence that, in his negotiations with Lewis, Bloomer stipulated for the purchase of shares which must have been registered in Lewis' own name. The negotiations with Lewis were conducted by Young, who was not Lewis' agent. In his own evidence, in chief, Bloomer was asked: "What were you to get out of the transaction?" and his reply was: "I was to get 54 shares of Nutri-Bio of Canada Ltd. from James C. Lewis transferable to my name." I am satisfied, on reading all the evidence, that this accurately describes the deal between Bloomer and Lewis. The evidence, previously reviewed, shows that Lewis was personally in control of that number of shares in the company through the two holding companies. I am satisfied that, in so far as Lewis was concerned, the contract between him and Bloomer was performed. The secretary of the company had in his possession, by May 9, all the documents necessary to register Bloomer as the owner of the 54 shares which he was purchasing from Lewis. Any delays thereafter in effecting the registration and issuing a share certificate to Bloomer were the responsiblity of the company secretary, and not of Lewis.

In the light of this, I do not see how it can be said that the bank could be made liable for the conversion of Bloomer's draft. That draft was acquired by Bloomer in order to effect payment to Lewis for the shares which Bloomer was purchasing from him. Bloomer, in his evidence, previously cited, said that inasmuch as the money to be sent to Lewis when he acquired the shares was concerned, the payment

was left in the hands of Young and Underhill. The draft was used as the means whereby Lewis received payment for those shares. It is true that it did not reach Lewis directly, but it was used by Young and Underhill to effect that payment. Adopting the statement in Paget's Law of Banking, previously cited, I do not see how it can be said that the act of the bank, in crediting it to Saturn's account to cover Saturn's cheque to Lewis, was an act which repudiated Bloomer's right or an exercise of dominion inconsistent with it. The essential facts are that Bloomer knew that Young had negotiated the purchase for Bloomer and others from the American group of a block of company shares, and that the draft was turned over to Young to pay for those shares which Bloomer was to acquire. When the draft was used for that purpose I cannot see how the bank is guilty of conversion merely because Bloomer was not aware of the actual procedure by means of thich the deal was to be finally effected.

In my opinion the appeal should be allowed and the respondent's action should be dismissed. The bank is entitled to its costs here and in the Courts below.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Freeman, Freeman, Silvers & Koffman, Vancouver.

Solicitors for the plaintiff, respondent: Shakespeare & Hutcheon, Vancouver.

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*May 5, 6, 7
June 24

EDWARD FRANK RADCLYFFE and HELEN RADCLYFFE (*Plaintiffs*) .. ..APPELLANTS;

AND

JAMES W. RENNIE and JOHN H. McBEATH (*Defendants*) ..... .RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Physicians and surgeons—Malpractice action—Piece of gauze found in patient's body—Whether left there during operation performed by second defendant in 1959 or during one performed by first defendant in 1944.

*PRESENT: Cartwright, Abbott, Judson, Ritchie and Spence JJ.

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The plaintiffs, husband and wife, brought an action for malpractice against the defendants, R and McB, both doctors. The judgment of the trial judge dismissing the action was confirmed, by a majority, on appeal to the Court of Appeal. The question for determination was whether McB had left in the female plaintiff's body in an operation on November 19, 1959, gauze which he or others placed there during the operation, or whether such gauze had remained in the plaintiff's body from the time R performed an operation on her in 1944. An action upon the latter operation was statute barred. The plaintiff had a series of other surgical procedures in reference to her kidney area, i.e., an opening of the 1959 operative area on April 5, 1960, and again in November of the same year, but it was agreed that there was no evidence that the gauze could have been left on either of those occasions and in fact both of those surgical procedures were attempts to find the reason for the plaintiff's symptoms which reason was revealed on May 24, 1961, when in the third surgical procedure McB recovered the piece of gauze.

HELD (Cartwright and Judson JJ. dissenting): The appeal should be dismissed.

Per Abbott, Ritchie and Spence JJ. :The argument that R had excluded the possibility of the piece of gauze having been left at the site of the 1944 operation was not accepted. R had no more exact memory of the operation in 1944 than did McB of that in 1959. Both had to depend on their records and the record of the 1944 operation was very incomplete. Moreover, radi-opaque gauze had not been introduced into Canada in 1944 or for many years thereafter and the gauze found in the plaintiff's body in the operation of 1961 was not radi-opaque.

As to the argument that it was highly improbable that the plaintiff could have carried in her body from 1944 to 1959 this piece of gauze and remain symptom free and in good health, it was not plain that the plaintiff had remained absolutely symptom free. There had been expert testimony that a non-metallic foreign body could remain in a human body for such a long period symptom free.

The trial judge was ready to accept the evidence of the head nurse upon the all important subject of the type of gauze available in the operating room during the 1959 operation, and the correctness of the count of material available after the operation, and regarded it as part of the "completely credible evidence" given to indicate the improbability of the particular kind of gauze found in the plaintiff's body being used in an operation in 1959.

The site where the gauze was found was walled off from McB at the time of the 1959 operation by dense tissue through which in 1961 he had to cut in order to discover the gauze. An analysis of X-ray plates taken in 1947 suggested that there was a space-occupying lesion in or close to the exact place where the gauze was found. This lesion could have been the result of surgery, a tumor or foreign material. The operations in 1959 and again in 1961 revealed there was no tumor or abscess.

The conclusion reached, therefore, which was the same as that arrived at by the trial judge, was that not only had the plaintiff failed to prove that this gauze was inserted during the 1959 operation and not removed by McB, but considering all the factors the probabilities were

that the gauze had been left in the plaintiff's body since the operation of 1944 and had remained dormant until the 1959 disturbance.

Clarke v. Edinburgh & District Tramways Co., [1919] S.C. (H.L.) 35, applied.

Per Cartwright and Judson JJ., *dissenting*: The evidence made it clear that after recovering the gauze on May 24, 1961, McB was of the opinion that it had been left in the patient's body at the time of the 1959 operation. The reasonable inference from the whole record in the case was that the theory on which the defence succeeded was first evolved at some time after the examination for discovery. This was a circumstance which supported the view that the probability was that the gauze had been left in the patient's body in 1959 rather than in 1944.

As to the nature of the gauze used in the November 1959 operation, the head nurse had testified not from personal recollection but in reliance on her written record and that document did not indicate that only radi-opaque gauze was used. The allegation that only radi-opaque gauze was used in that operation was made by the defendants in the course of the trial and the onus of proving it would lie upon them not merely because they were asserting it but also because the subject-matter of the allegation lay particularly within their knowledge. This onus was not discharged.

Pleet v. Canadian Northern Quebec R.W. Co. (1921), 50 O.L.R. 223, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Maybank J. Appeal dismissed, Cartwright and Judson JJ. dissenting.

C. V. McArthur, Q.C., and *R. B. McArthur*, for the plaintiffs, appellants.

P. S. Morse, Q.C., and *R. J. Hansell*, for the defendants, respondents.

The judgment of Cartwright and Judson JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The nature of the plaintiff's action and the course of the proceedings in the Courts below are set out in the reasons of my brother Spence.

The question that we are called upon to decide, while sufficiently difficult of solution to have caused differences of opinion in the Court of Appeal and in this Court, is easy to state. It is whether the piece of gauze which was admittedly left in the body of Mrs. Radclyffe was left there during an operation performed by Dr. Rennie in 1944 or during one performed by Dr. McBeath on November 19, 1959.

[1] (1964), 43 D.L.R. (2d) 360.

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The burden resting on the appellants at the trial was to shew that, on the balance of probabilities, it was on the later date that the mishap occurred.

On the hearing of the appeal we had the assistance of full and able arguments in which the evidence and the reasons given in the Courts below were carefully analysed. After deliberating at the conclusion of the argument of counsel for the respondents the Court informed counsel for the appellants that they need not reply on the question of negligence, as we were all of opinion that if it were held that the gauze was left in the patient's body during the operation of November 19, 1959, the appellants were entitled to succeed. Nothing can usefully be added to the reasons of Freedman J.A. on this point.

After an anxious consideration of the record, I find myself in full agreement with the reasons and conclusion of Freedman J.A. who dissented in the Court of Appeal and I wish to make reference to only two matters.

Dr. McBeath is a skilled and experienced surgeon. It was he who performed the operation of November 19, 1959, when the plaintiffs claim that the gauze was left in the patient's body, and the operation of May 24, 1961, when it was removed. He was in a better position than anyone else could be to determine whether or not the mishap had occurred at the November 1959 operation and the evidence makes it clear that after recovering the gauze on May 24, 1961, he was of the opinion that it had been left in at the time of the 1959 operation.

Mr. Radclyffe who was accepted by the learned trial judge as a truthful witness, gave the following answer to a question asking him to tell any conversation he had with Dr. McBeath on May 24, 1961, following the recovery of the gauze.

A. Yes, I had additional conversation with Dr. McBeath at that time and Dr. McBeath said that he had mixed feelings regarding my wife's case. He said he was highly elated for one reason and he was somewhat embarrassed for another reason. He said he was highly elated because he had been able to locate and successfully remove the gauze. He was elated because his diagnosis of the trouble had been correct and that the Mayo Clinic's diagnosis had been wrong but he was embarrassed because the gauze was there in the first place and he said to me "Ted, I take full responsibility for leaving it there".

There was no direct denial of this statement having been made. There was a suggestion in argument that this conversation might have occurred before the operation of May 24, 1961, but that could scarcely be so as it was the actual recovery of the gauze which, for the first time, demonstrated that Dr. McBeath's diagnosis was right and that made by the Mayo Clinic was mistaken.

Of course, I do not regard this statement of Dr. McBeath as a binding admission of liability on his part. Its importance is that it shews his opinion following the recovery of the gauze, an opinion which he would seem to have still held at the time when he was examined for discovery on June 5, 1962.

The statement of defence was delivered on January 30, 1962. It contains no hint that the gauze which it admits was removed from the patient's body on May 24, 1961, had been there since 1944. One of the purposes of pleadings is to define the issues to be tried. I think the reasonable inference from the whole record in this case is that the theory on which the defence succeeded was first evolved at some time after the examination for discovery. I wish to make it perfectly clear that in saying this I am not imputing any lack of good faith to the defendants or to their advisers but it is a circumstance which appears to me to support the view of Freedman J. A. that the probability is that the gauze was left in the patient's body in 1959 rather than in 1944.

The second matter to which I wish to refer is the evidence in regard to the nature of the gauze. The defence was founded to a substantial extent on the supposition that all gauze used in the 1959 operation was radi-opaque, and that no gauze of the kind removed in 1961 was used in the operation of 1959. In regard to this the learned trial judge said:

> Dr. McBeath was positive that he had never used the kind of gauze in question in his life.

With the greatest respect, I think this statement is in error.

Exhibit 3, at the trial, was the gauze which had been removed from the patient's body in May 1961.

At the commencement of the trial counsel for the plaintiffs read some questions and answers from the examination for discovery of the defendants and then called Dr.

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McBeath for cross-examination pursuant to the provisions of Rules 236 and 237 of the King's Bench Rules.

In the course of this cross-examination there are the following questions and answers:

Q. Did you use gauze like Exhibit 3 in your operation on November 19, 1959?

A. Gauze like this?

Q. Yes?

A. Definitely not.

* * *

Q. Now, I would like to ask you what it would be used for. I am talking of Exhibit 3 in this trial. What would it be used for in an operation, a kidney operation?

A. You don't use stuff like this in kidney operations, sir.

It may be observed in passing that the operation in 1944 was also a kidney operation.

If the answers quoted above stood alone they might justify the finding that Dr. McBeath "was positive that he have never used the kind of gauze in question"; but later in the trial when Dr. McBeath was called by the defence and under direct examination by his own counsel we find the following:

Q. Now, I show you Exhibit 3. I think you have seen this before?

A. Yes, sir.

Q. It is in three pieces now and I think the other day when Mr. McArthur was cross-examining you, or Mr. Scarth, I am not sure which, you said that you had not used gauze like that. I am not attempting to repeat exactly what you said but you hadn't used gauze like that in the operation that you performed in November, 1959?

A. That is so, sir.

Q. Why do you say that?

A. From information obtained within the last few days as to which gauzes I used *I don't know of my own memory which gauzes I used,* sir, but from information obtained in the last few days about the gauzes I used, this one—

THE COURT: This is hearsay, isn't it? This is purely hearsay. Your question I don't think can be allowed.

Mr MOFFAT: If it were information that came out here at the trial, my lord, I would think—that is if there is evidence.

THE COURT: What somebody told him either in Court or somewhere else I am quite sure is heresay. That is a ruling that is quite definite.

The words I have italicized in this passage indicate that far from being positive as a matter of his own knowledge or recollection Dr. McBeath was relying on information received from others. The only witness who gave evidence of

any weight to support the contention that only radi-opaque gauze was used at the operation of November 19, 1959, was the nurse Mrs. Woods. It is common ground that she testified not from personal recollection but in reliance on her written record, ex. 19, and that document does not indicate that only radi-opaque gauze was used. I agree with the comments of Freedman J.A. on this evidence.

The allegation that only radi-opaque gauze was used in the operation of November 19, 1959, was made by the defendants in the course of the trial and the onus of proving it would lie upon them not merely because they were asserting it but also because the subject-matter of the allegation lay particularly within their knowledge. In my view this onus was not discharged. On this point it is sufficient to refer to the following passage in the unanimous judgment of the Court of Appeal for Ontario in *Pleet v. Canadian Northern Quebec R.W.Co.*[1]:

> No doubt the general rule is that he who asserts must prove, and that the onus is generally upon the plaintiff, but there are two well-known exceptions:—(1) That where the subject-matter of the allegation lies particularly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character:

I would allow the appeal, set aside the judgments below and direct that judgment be entered against the defendant Dr. McBeath in favour of Mrs. Radclyffe for $15,000 the damages provisionally assessed by the learned trial judge. As the majority of the Court are of opinion that the appeal fails nothing would be gained by determining the amount of damages which should have been awarded to Mr. Radclyffe, to whom leave to appeal was granted at the opening of the argument in this Court. I would have directed that the plaintiffs should recover from Dr. McBeath one set of costs at the trial and in the Court of Appeal and their costs in this Court and that the action against Dr. Rennie should stand dismissed without costs.

The judgment of Abbott, Ritchie and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Manitoba[2] which confirmed, by a majority (Freedman J.A. dissenting), the judgment of the

[1] (1921), 50 O.L.R. 223 at 227. [2] (1964), 43 D.L.R. (2d) 360.

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trial judge, the late Mr. Justice Maybank, dismissing the plaintiffs' action.

The action was one for malpractice against the defendants, both doctors. Although there was an appeal from the dismissal of the action against the defendant Dr. James W. Rennie, that dismissal was confirmed in the Court of Appeal, and at the opening of the argument in this Court counsel for the appellant stated that he did not wish to urge that Dr. Rennie be held liable. Schultz J.A. in his reasons for judgment in the Court of Appeal for Manitoba summarized the plaintiffs' grounds for appeal in four numbered paragraphs. For the purposes of these reasons, I need only consider the first, which was:

> The evidence clearly indicates that the gauze was left by Dr. McBeath in the body of Mrs. Radclyffe on November 19th, 1959.

During the hearing of the appeal in this Court, some argument was directed toward the submission that if the gauze were present in the female plaintiff's body at the time Dr. McBeath operated on November 19, 1959, he should have discovered it and removed it and that his failure to do so would render him liable. Reference was made to paras. 21 to 23 of the statement of claim. It would appear, however, that those paragraphs dealt solely with the allegation that during the operation on November 19, 1959, Dr. McBeath either directly or through the agency of someone for whom he admitted responsibility placed gauze in the plaintiff's body and failed to remove it.

I am of the opinion, therefore, that the plain question which must be decided upon this appeal is whether Dr. McBeath did so or not. As the evidence turned out, this question is really the determination of which of two alternative events occurred, i.e., did Dr. McBeath leave in the plaintiff's body in the operation of November 19, 1959, gauze which he or others had placed there during the operation, or had such gauze remained in the plaintiff's body from the time Dr. Rennie had performed the operation on her in the year 1944? The plaintiff had a series of other surgical procedures in reference to her kidney area, i.e., an opening of the 1959 operative area on April 5, 1960, and again in November of the same year, but counsel were all agreed that there was not the slightest evidence that the

gauze could have been left on either of the two last-mentioned occasions and in fact both of those surgical procedures were attempts to find the reason for the plaintiff's symptoms which reason was revealed on May 24, 1961, when in the third surgical procedure Dr. McBeath recovered the piece of gauze.

The late Mr. Justice Maybank, after a trial which lasted eight days and the transcript of evidence of which occupied 730 pages, gave written reasons for judgment in which he stated that it was not possible for him to give as comprehensive a review of the evidence as was his custom in judgments which he reserved. He did, however, give a judgment of a very considerable extent. The learned trial judge found that the defendants were not liable and in the course of doing so made what was, in my view, a clear finding of fact when he said, in part:

> This case, like all civil cases, has to be decided on the balance of probabilities. The question here is whether on balance of probabilities the piece of gauze was left in the operating wound made in November 1959, or whether, on the balance of probabilities, that gauze was left there in 1944 and remained dormant all of the time until it was disturbed by the 1959 operation. It is the responsibility of the plaintiffs to convince that the former is the more likely probability. I have come to the conclusion that the plaintiffs have not proven their case. In fact, considering all of the factors, I think the probabilities are that the gauze had been left there those 15 or 16 years ago, and had remained dormant until the 1959 disturbance. Hence judgment must be against the plaintiffs with costs to the defendants.

The learned trial judge's judgment was confirmed on appeal in carefully stated reasons given by Schultz and Monnin JJ.A. Freedman J.A. dissented. After quoting the learned trial judge's statement as follows:

> . . . So far as all parties are concerned I was greatly impressed by the moderation of the litigants. I rate the integrity of them all most highly. Similarly with respect to all witnesses I would say that everyone of them was fair and most careful in presenting what he or she considered to be the truth. It is one of those cases in which the presiding judge has no worry whatever about veracity. True, some witnesses gave evidence that such and such things were facts when he or she had concluded those things to be facts only by reason of what was the prevailing practice with regard to the matter at the time under discussion. However it was made clear in such cases that "truth" was so declared because such witnesses were reconstructing a happening by reason of the general practice with reference to same. For instance one nurse gave evidence that certain things were done but promptly admitted that she said so because such things were always done.

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and coming to the conclusion that like the learned trial judge he would not rely on the admission that Dr. McBeath allegedly made, he continued:

This surely is a case for the application of what was so forcibly stressed by the House of Lords in *Benmax v. Austin Motor Co. Ltd.* [1955] 1 All E.R. 326, namely, the distinction between the perception of facts and the evaluation of facts. A trial judge makes a finding that a specific fact occurred. There is universal reluctance on the part of an appellate court to reject such a finding, particularly where it is founded on credibility. But the evaluation of facts is a different matter entirely. That involves no rejection whatever of the trial judge's finding. Rather his finding becomes the essential starting point from which the appellate court carries on its deliberations. Accepting the trial judge's finding, the appellate court then asks itself: what is the effect of this finding? What probative value does it possess? What inferences should fairly be drawn from it? In answering these questions the appellate court is properly entitled to arrive at its own independent opinion, even if it differs from that of the trial judge.

With all respect for the learned justice in appeal, I am of the opinion that this is an over-simplification of the situation. Although the learned trial judge had found in the clearest of terms in favour of the veracity of all witnesses, he was nevertheless required to exercise his critical faculty in weighing not whether they were telling the truth but the many other factors which go to the acceptance of their evidence as proving certain facts. Here I adopt, as did Schultz J.A. in the Court of Appeal for Manitoba, the words of Lord Shaw in *Clarke v. Edinburgh & District Tramways* Co.[1], at p. 36:

'When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not'; and further, after commenting on the type of case and the advantage enjoyed by the trial Judge who hears the witnesses, he adds: 'In my opinion, the duty of an appellate court in those circumstances is for each Judge of it to put to himself . . . the question Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.'

In the particular instance, I think I might well go farther. The allegation made by the defendant McBeath at trial that the gauze was left in the plaintiff's body not during his

[1] [1919] S.C. (H.L.) 35.

operation of November 1959 but during Dr. Rennie's operation of 1944 (an action upon the latter is statute barred) is answered by many arguments. Firstly, Dr. Rennie, in the words used in the appellants' factum in this Court "has excluded the possibility of the piece of gauze having been left at the site of the operation of November 1960, and has to all intents and purposes excluded the possibility of the piece of gauze having been left there in the 1944-45 operation". I am of the opinion that it cannot be said that Dr. Rennie was so successful as to the 1944 operation.

Dr. Rennie's cross-examination as to the latter was, in part, as follows:

> Q. I take it at the time that you performed that operation that you took all of the ordinary precautions, you and Dr. Mackie, the surgeons would in the ordinary way to prevent any error on your part?
>
> A. I am sure I would have taken all the ordinary precautions that were in operation at that time.
>
> Q. And I suggest to you that when you sewed up the wound and the operation was complete that you were certain that there was no foreign material, gauze, in the wound at that time? . . .
>
> A. I was as certain as one could be at that time.

Since Dr. Rennie has no more exact memory of the operation in 1944 than did Dr. McBeath of that in 1959, both had to depend upon their records. The record retained and produced as to the 1944 operation was very incomplete since in the microfilming process only the front page had been copied and not all of the details.

It is moreover quite plain that radi-opaque gauze had not been introduced into Canada in 1944 or for many years thereafter and the piece of gauze found in the plaintiff's body in the operation of May 1961 was not radi-opaque. The second answer is that it was highly improbable that the plaintiff could have carried in her body from 1944 to 1959 a piece of gauze, the size of which was not accurately determined but which would certainly seem to be at least 2″ by 3″, and remain symptom free and in good health throughout.

Firstly, it is not plain that the plaintiff was absolutely symptom free. During the 15-year interval she did see a doctor on many occasions, had some surgical procedures performed which were not in the area in which the gauze was found, but she also did complain on occasion of low-back pain. Much more important, both the defendant Dr.

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McBeath and the five expert witnesses, David Swartz, Albert C. Abbott, Charles B. Stewart, Dr. C. W. Clark, and Dr. C. E. Corrigan, testified that a non-metallic foreign body could remain in a human body for such a long period symptom free and some of these experts gave, from either their personal knowledge or medical reading, graphic examples. It was argued strenuously in this Court that such evidence was largely hearsay. Perhaps some of it was but not all of it, and moreover, as Schultz J.A. pointed out in his reasons in the Court of Appeal for Manitoba, it is in accordance with medical writing, and an instance of it did occur in *Mondot v. Vallejo General Hospital*[1]. Freedman J.A. in his reasons, after referring to this evidence, continued:

> What should a civil court, deciding issues on the balance of probabilities, do in face of this testimony? Shall it conclude that Mrs. Radclyffe's case, characteristic though it is of the pattern, type, and consequences that normally follow the introduction of a foreign body, but yet fail because in the behaviour of foreign bodies there are rare exceptions and hers might be one of them? I say most emphatically that to judge her case in that way would be to require her to satisfy an inordinately high, indeed almost an impossible, standard of proof. Applying the accepted standard of the balance of probabilities, I would hold that what occurred in Mrs. Radclyffe's case was the normal, the usual, the expected consequence of the introduction of a foreign body, rather than something exceptional, bizarre, or freakish. In short, I would find that the gauze in question was introduced during the operation of November, 1959, rather than in that performed 15 years earlier.

However, even granting that the weight of the expert testimony on this subject only reduced the situation from an impossibility, or at any rate a great improbability, to a possibility and certainly not a probability, as Freedman J.A. indicated, there was other evidence which the learned trial judge had to weigh in order to come to his conclusion. Most important upon that issue and, in my view, absolutely decisive is the type of gauze which Dr. McBeath found in the female plaintiff's body in the operation performed in May of 1961. It is admitted by all that that gauze was not radi-opaque and it was admitted by all that no radi-opaque gauze was available in Canada in 1944. What is asserted by the defendants is that only radi-opaque gauze was used in the operating room available for urological surgery in the Misericordia Hospital in November 1959. Freedman J.A.'s statement on this subject is as follows:

[1] [1957], 313 P. 2d 78.

Here certainly is a cogent submission, if it can be proved. Evaluating the evidence as fairly as I can, I am bound to say that it has not been proved. Indeed the evidence on this point is more remarkable for what it does not say than for what it does say. If it were really the case that in 1959, in operations performed at the Misericordia Hospital, nothing but radio opaque gauze was used, it would have been a matter of the utmost simplicity to establish the point. A qualified senior official of the hospital, with knowledge of the facts, could have been brought to the stand to so testify. But no such person was brought. Instead the defendants ask us to conclude from the testimony of other witnesses that only radio opaque gauze was available. . . .

The learned justice in appeal discusses the evidence of those other witnesses. The first one was the officer of the surgical supply firm of Johnson & Johnson who could only testify that in the year 1959 his company sold 35 cases of Raytex (radi-opaque) sponges to this hospital. I am in agreement with Freedman J.A. that such evidence is of negligible value. The second witness, however, Mrs. Christine I. Woods, is in a different category. She was the head nurse in charge of the operating room at the time the operation was performed in November 1959, and she had been such for 18 months prior thereto although not the supervisor of the operating room. She gave evidence from her knowledge of the procedures and techniques in the operating room that during the whole of the period she was in that operating room nothing but radi-opaque gauze was available therein. She further gave exact evidence that as was her duty she had before the operation commenced carefully counted all the "material", i.e., gauze and cotton sponges which were made available for the use of the surgeon, Dr. McBeath, in this operation and she had noted the count thereof in writing at that time on the operating room nurse's record produced at the trial as ex. 19, and then at the end of the operation she had counted the "material" there remaining in the operating room and while counting it had ticked off the entry she had previously made and reported her count to the surgeon as being correct, and then recounted it and then again reported it and finally circled the word "correct" on the said form. She swore that the material on that operating nurse's record was radi-opaque and she described in detail the radi-opaque feature of each type of it.

Now it is true that this evidence was given not as a first-hand memory of what had occurred because, of course, that head nurse like all the surgeons, had appeared in and

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taken part in very many operations between November 1959 and the date of the trial but she had available to her her own written record she could read and interpret and she knew the exact practice in the operating room. It is also true that the same written record, ex. 19, shows opposite the typed words "First Assistant" her hand-writing of the words "Dr. Rennie" and that she swore that she would not have written those words in the report unless Dr. Rennie had been the assistant. The witness even went further and swore that she had seen Dr. Rennie insert sponges in the plaintiff's body, yet it was proved adequately and accepted by the learned trial judge that in fact Dr. Rennie was not even scrubbed for this operation and that all he did was to enter the room when the operation was well-nigh complete, inquire as to progress, and then retire so that he could report to the male plaintiff. That obvious error undoubtedly shook the learned trial judge's reliance on Mrs. Woods' testimony and resulted in Freedman J.A. remarking "clearly she lacked the necessary qualifications to establish what was the precise policy of the hospital on the matter in question". The precise policy of the hospital was a relevant consideration but not the one of first importance. What was the one of first importance was what gauze was used in this operation. Here, Mrs. Woods had available her knowledge of general practice and her own written record checked at the time the operation ended and signed by her.

Although the learned trial judge had remarked during the course of the trial, "I would not pay too much attention to the nurse because she said, 'I am reconstructing' ", he also did say, "Credible evidence, completely credible evidence, was given to indicate the improbability of this particular kind of gauze being used in an operation in 1959 . . ."

As did Schultz J. A. in the Court of Appeal, I have come to the conclusion that the late Mr. Justice Maybank was ready to accept the evidence of the nurse Mrs. Woods upon the all important subject of gauze available in the operating room during the November 1959 operation, and the correctness of the count of material available after the operation, and regarded it as part of the "completely credible evidence".

Another important consideration in the determination of whether the gauze could have been left in the female

plaintiff's body in 1959 is its position when it was recovered in the operation of May 1961, some 19 months later. Dr. McBeath swore that although the incision made in 1959 was close to the incision made in 1944 on the surface of the female plaintiff's body, the course of his approach to the definitive operative site thereafter differed from the course of the approach to the definitive operative site of the 1944 operation and that the former could be described as "down and away from the site where the gauze was found in 1961". The surgeon's operative record was produced at trial and marked as ex. 18. Dr. McBeath read and interpreted that report and pointed out that he had noted that there was a sufficient degree of fixity of the posterior aspect of the kidney to prevent fully exposing the renal pelvis but that he had been able to expose sufficient of the renal pelvis to permit him to perform the "Y-V" Foley reconstructive pyeloplasty which was in essence an enlarging of the junction between the renal pelvis and the ureter. Dr. McBeath testified, and the many expert surgeons who were called as defence witnesses agreed, that if the capsule of the kidney had been incised in the 1944 operation for the removal of the kidney stone the fatty liquid inside the capsule and surrounding the kidney proper would be drained away so that the capsule would fasten itself to the posterior tissues. The process was even described as "cementing" itself. It was this fixity of the capsule to the posterior tissues which Dr. McBeath encountered and through which he incised only sufficiently to get to the junction of the pelvis and ureter. Dr. McBeath, therefore, swore that he never was at the exact site where the gauze was found in 1961, during the 1959 operation, and that in fact before he found it in the 1961 operation, he had to further incise through hard tissue in order to expose the gauze cemented between the capsule of the kidney and the posterior tissue. Schultz J. A., in the Court of Appeal, cites this evidence as supporting Dr. McBeath's position that he could not have left the gauze in the female plaintiff's body in the 1959 operation. I agree, as it would appear from this evidence, which is uncontradicted, that the site where the gauze was found 19 months later was walled off from Dr. McBeath by dense tissue through which in 1961 he had to cut in order to discover the gauze. It was emphasized by counsel for the appellant in argument made

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in this Court that this position taken by Dr. McBeath would seem to be a last minute revision of his evidence, as in examination for discovery he never outlined this defence. That might be true, but finding as the trial judge did, that there was complete veracity in all the testimony, the allegation can go no further than that Dr. McBeath only later realized the effect of the dense tissue affixation of the capsule to the posterior wall. There is no doubt that in his report made contemporaneously with the November 1959 operation he had noted that fixity. There was a good deal of other evidence which I need not detail but which certainly should have been considered, and I have no doubt was considered, by the learned trial judge in coming to his conclusion that the plaintiffs had not proved that the gauze was left in the body of the female plaintiff in the November 1959 operation. Much of that evidence consisted of the production and analysis of x-ray films. The position taken by counsel for the plaintiffs during evidence was that no x-ray film had revealed the possibility that a foreign body might be present in the plaintiff's kidney region prior to that of March 29, 1960, and that such x-ray only revealed an unfilled space. In the subsequent x-ray tests done by injection of fluid into the sinus in April 1961, a cloudy appearance on the film of that unfilled space prompted the radiologist to speculate that there might have been a gauze left in that area.

Since the failure of all x-ray films prior to 1959 to reveal any sign of this foreign body was emphasized, Dr. McBeath was moved to reconsider all the data including x-ray films which was available to him prior to the November 1959 operation. Amongst those he found one series consisting of four plates taken in 1947 and which had been analyzed by a Dr. McPherson. Dr. McBeath did this during the course of the trial. Dr. McPherson was absent in the Near East and an associate of his, Dr. Arthur Childe, was called to analyze the plates. He swore that these plates taken only three years after the 1944 operation and 12 years before the 1959 operation exhibited that the upper calyces on the right side of the kidney were displaced, the organ being slightly

distorted, and that there was some tissue displacement of some of the pelvis of the right kidney and he further gave as his opinion that there was a space-occupying lesion in or close to the upper pole of the right kidney, i.e., the exact place where the gauze was found in 1961. He said that the space-occupying lesion might have been distortion as a result of surgery or a tumor or foreign material adjacent to the upper pole of the right kidney. When confronted with Dr. McPherson's report and when it was pointed out to him that that report mentioned the possibility only of previous surgery or a tumor he observed that that difference was a matter of semantics as the space-occupying lesion could be a tumor or could be a foreign body.

It would appear that this evidence is most persuasive and is a very convincing answer to the argument of the appellant that no x-ray prior to 1959 ever gave any ground for ever suspecting the presence of foreign material. In argument in this Court, it was attacked as being altogether inadmissible. I do not think the evidence was inadmissible. The real evidence was there and unquestioned, i.e., the four pieces of x-ray film. The qualification of the radiologist who examined them whether he had seen them only a few minutes before or years before was undoubted and was in fact admitted by counsel for the plaintiff. His report was, as he pointed out, essentially the same as that made by the original radiological examination by Dr. McPherson in 1947. The operations in 1959 and again in 1961 revealed there was no tumor and no abscess, so certainly the existence of a space-occupying lesion of some kind in 1947 is of the greatest significance.

For these reasons, I am of the opinion that I am able to conclude, as did the learned trial judge, that not only has the plaintiff failed to prove that this gauze was inserted during the 1959 operation and not removed by the defendant Dr. McBeath but "considering all the factors I think the probabilities are that the gauze had been left there those 15 or 16 years and had remained dormant until the 1959 disturbance". I have used the learned trial judge's exact words.

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I would dismiss the appeal with costs.

Appeal dismissed with costs, Cartwright and Judson JJ. dissenting.

Solicitors for the plaintiffs, appellants: McArthur, McArthur & Gillies, Winnipeg.

Solicitors for the defendants, respondents: Aikens, MacAulay and Co., Winnipeg.

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*May 27
June 24

THE CITY OF MONTREAL (*Defendant*) ...APPELLANT;

AND

WESTON BAKERIES LIMITED (*Plaintiff*) .....RESPONDENT.

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

Municipal corporations—Bakery having place of business outside city limits—Products sold at wholesale to merchants and distributed by trucks inside city limits—Whether exemption from having to pay for permits and licences—Action to recover moneys so paid—Municipal Tax Exemption Act, R.S.Q. 1941, c. 221, s. 6.

The plaintiff carried on a bakery business in the town of Jacques-Cartier. It had no property or place of business in the city of Montreal. Its products were sold and distributed exclusively to merchants in the ordinary course of their business, and were sold at wholesale only. During the years 1949, 1950 and 1951, the plaintiff paid over $900 to obtain licences and permits for the purpose of distributing its products in the city of Montreal. This action, which was dismissed by the trial judge, was brought by the plaintiff to recover this money. The Court of Appeal reversed the judgment at trial and maintained the action. The defendant municipality was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

Section 6 of the *Municipal Tax Exemption Act,* R.S.Q. 1941, c. 221, provides that no municipality shall oblige a person not having a place of business in the municipality to procure a licence in order to take orders for, and to sell and deliver merchandise, if these operations are only carried on with merchants in the ordinary course of their business. The plaintiff clearly came within the provisions of that section and was entitled to the protection which it afforded.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Ralston J. Appeal dismissed.

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*PRESENT: Taschereau C. J. and Fauteux, Abbott, Ritchie and Hall JJ.

[1] [1962] Que. Q.B. 52.

Jean Mercier, Q.C., for the defendant, appellant.

P. E. Kierans, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal by leave, from a majority judgment of the Court of Queen's Bench[1], rendered October 2, 1961, which reversed a judgment of the Superior Court dated May 2, 1955 and maintained respondent's action in the sum of $926.10 with interest from December 4, 1951, and costs.

Respondent is a corporation carrying on the bakery business in the Town of Jacques Cartier in the Province of Quebec.

On November 12, 1951, respondent took action against the appellant to recover $926.10 paid by respondent to appellant during the years 1949, 1950 and 1951 for permits and licenses in accordance with certain by-laws of appellant, as having been paid in error.

Respondent has no property or place of business in the City of Montreal. Its products are sold and distributed exclusively to merchants, traders or manufacturers in the ordinary course of their business, and are sold at wholesale only. Respondent's products are not sold directly to consumers, but are distributed in the City of Montreal by its driver-salesmen who load their vehicles at respondent's place of business in the Town of Jacques Cartier. The driver-salesmen maintain a record of the inventory of each of their customers and order their requirements from respondent two days in advance on the basis of the customers' previous sales record for each particular week-day.

All vehicles used by respondent in the distribution of its products are registered in respondent's name at its place of business in the Town of Jacques Cartier.

Appellant sought to oblige respondent to obtain licenses and permits for the purpose of distributing its products in the City of Montreal and to pay the fees imposed therefor under ss. 3 and 5 of appellant's by-law No. 1862. Subsidiarily, appellant has also invoked its by-laws No. 926 and No. 283.

The principal point in issue in the present appeal relates to the application of s. 6 of the *Municipal Tax Exemption Act*, R.S.Q. 1941, c. 221, as amended, which reads:

[1] [1962] Que. Q.B. 52.

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6. Notwithstanding any other general law or special act, no municipal corporation shall oblige a person not having a place of business in the municipality to pay or to procure a license in order to take orders for, and to sell and deliver mechandise, if these operations are only carried on with merchants, traders or manufacturers in the ordinary course of their business.

This section, which had its origin in the statute 50 Vict., c. 15, has undergone a series of amendments over the years, by which the exemption provided for has been extended. The most recent amendment prior to these proceedings was made by the statute 4 Geo. VI, c. 48, s. 1.

In my opinion the respondent clearly comes within the provisions of the said s. 6 of the *Municipal Tax Exemption Act* as amended, and is entitled to the protection which it affords.

I adopt as my own the following statement of Bissonnette J. in the Court below:

Si l'on faisait la genèse de cette loi qui remonte à 50 Vict. chap. 15, on y relèverait plusieurs tempéraments que le législateur y a apportés. D'une loi qui sur les refontes de 1888, 1909 et 1925 ne se rapportait qu'à l'exemption des commis voyageurs de certaines taxes, on en étendit les cadres de façon quasi-illimitée pour les non-résidents d'une corporation municipale. En effet, la loi 4, Geo. VI, chap. 48, art. 1, a substitué le mot 'personne' à la locution 'commis voyageurs', de sorte que, selon le texte de l'art. actuel ci-haut reproduit, une corporation municipale, en dépit de sa charte, ne peut obliger une personne (ceci comprend une société ou une compagnie) 'n'ayant pas de place d'affaires à payer des taxes ou à se munir d'un permis' quand elle ne fait que le commerce de gros. Or, tel est là le genre d'affaires exercées par l'appelante. D'où il faut conclure que celle-ci a été illégalement taxée.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Parent, McDonald and Mercier, Montreal.

Attorneys for the plaintiff, respondent: Senecal, Turnbull, Mitchell, Stairs, Kierans, and Claxton, Montreal.

CROWN TRUST COMPANY (Estate of Kenneth J. McArdle) ..... APPELLANT:

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*May 25
June 24

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Refund of pension fund contributions upon death of employee—Whether taxable as income of estate or as income of deceased—Income Tax Act, R.S.C. 1952, c. 148, s. 6(1) (a) (iv), 63(1), (4), 64(2), 139(1)(ar).

The deceased died in 1957 and left a will in which he bequeathed the usufruct of his estate to his wife. In 1958, his executor received the sum of $13,844.20, being a refund of contributions made by the deceased and his employer to an employees pension fund, and interest earnings. It was admitted that this sum was received during the 1959 taxation year and was taxable. The Minister added this amount to the income of the estate. The executor contended that it was income of the deceased as the value of "rights or things" under s. 64(2) of the *Income Tax Act,* R.S.C. 1952, c. 148. The executor also contended before this Court that if the amount was income of the estate it was deductable under s. 63(4) of the Act as payable to a usufructuary. A further contention was that credit had not been given to the executor for an amount of $2,728.59 paid in respect of taxes owed by the deceased. The Exchequer Court set aside the decision of the Income Tax Appeal Board and upheld the Minister's contentions. The executor appealed to this Court.

Held: The appeal should be dismissed.

The amount received from the pension fund could never have become payable in the lifetime of the deceased, and it was clearly a death benefit under the articles of the pension plan. There was no difference in principle between this payment and any other pension benefit payable after death from a pension fund or plan to which a deceased person had contributed. Consequently, the right to such payment was not a right or thing "the amount whereof when realized or disposed of would have been included in the deceased's income", had he lived, within the meaning of s. 64(2) of the Act.

As to the other two contentions raised by the executor, the assessment should be referred back to the Minister in order that consideration be given to the possible application of s. 63(4) of the Act and to the payment of $2,728.59 said to have been made by the executor.

Revenu—Impôt sur le revenu—Remboursement de contributions faites à un fonds de retraite lors de la mort d'un employé—Ce montant est-il taxable comme impôt de la succession ou comme impôt du défunt—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 6(1), (a)(iv), 63(1), (4), 64(2), 139(1)(ar).

*PRESENT: Fauteux, Abbott, Martland, Hall and Spence JJ.

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Le défunt est décédé en 1957 et par son testament a légué l'usufruit de sa succession à son épouse. En 1958, son exécuteur a reçu la somme de $13,844.20, comme étant un remboursement de contributions faites à un fonds de pension par le défunt et par son employeur, ainsi que les intérêts. Il est admis que cette somme a été reçue durant l'année d'imposition 1959 et était imposable. Le Ministre a ajouté ce montant au revenu de la succession. L'exécuteur a prétendu que c'était un revenu du défunt comme étant la valeur «de droits ou de choses» sous le régime de l'art. 62(2) de la *Loi de l'Impôt sur le Revenu,* S.R.C. 1952, c. 148. L'exécuteur a aussi soutenu devant cette Cour que si le montant était un revenu de la succession, il était déductible en vertu de l'art. 63(4) de la loi comme payable à un usufruitier. Une autre prétention de l'exécuteur était à l'effet qu'un paiement de $2,728.59 qui avait été payé en rapport avec les taxes dues par le défunt n'avait pas été crédité. La Cour de l'Echiquier a mis de côté la décision de la Commission d'Appel de l'Impôt et a maintenu les prétentions du Ministre. L'exécuteur en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le montant reçu du fonds de pension n'aurait jamais pu devenir payable durant la vie du défunt, et il était clairement un bénéfice résultant de la mort en vertu des articles du plan de pension. En principe il n'y avait aucune différence entre ce paiement et tout autre bénéfice de pension payable après décès venant d'un fonds ou plan de pension auquel un défunt avait contribué. En conséquence, le droit à un tel paiement n'était pas un droit ou chose «dont le montant obtenu lors de la réalisation ou disposition eut été inclus dans le calcul du revenu du défunt», s'il avait vécu, dans le sens de l'art. 64(2) de la loi.

Quant aux deux autres points soulevés par l'exécuteur, la cotisation devait être retournée au Ministre pour que considération soit donnée à l'application possible de l'art. 63(4) de la loi et au paiement de $2,728.59 qui aurait été fait par l'exécuteur.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada[1], renversant une décision de la Commission d'Appel de l'Impôt. Appel rejeté.

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

Robert H. E. Walker, Q.C., for the appellant.

Paul Ollivier, QC., and *Paul Boivin, Q.C.*, for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal from a judgment of the Exchequer Court of Canada[1], setting aside a decision of the Income Tax Appeal Board and confirming an assessment of the

[1] [1964] Ex. C.R. 941, 64 D.T.C. 5104.

Minister whereby a pension benefit in the sum of $13,844.20 was added to the income of the estate of the late Kenneth J. McArdle for the taxation year 1959.

The facts are not in dispute. The late Mr. McArdle died on February 7, 1957, leaving a will in which he bequeathed the usufruct of his estate to his wife, during her lifetime, and the capital to his three children. His solicitor and the Crown Trust Company were appointed executors.

At the time of his death, McArdle was an officer of Public and Industrial Relations Limited and, as such, was a participant in a pension plan set up in 1946 under an Agreement between (1) Vickers & Benson Limited and its subsidiary Public and Industrial Relations Limited, (2) the employees of these two companies, and (3) R. H. Vickers and others as Trustees, which is hereinafter referred to as "the Agreement". The Agreement related to both insurance and pension benefits but we are here concerned with the pension benefits alone.

Upon McArdle's death, his executors became entitled to receive, and did receive on April 9, 1958, under the terms of the Agreement, the said sum of $13,844.20.

For the purposes of this appeal it is admitted that this sum was received during the 1959 taxation year and that it is taxable. The question at issue is whether the amount is taxable as income of the estate or as income of the deceased.

By Notice of Re-Assessment dated January 31, 1961, the Minister added the amount in question to the income of the estate. The appellant filed a Notice of Objection on the ground that the money received was income of the deceased by virtue of subs. 2 of s. 64 of the *Income Tax Act*. That was the sole point in issue before the Income Tax Appeal Board and the Exchequer Court.

Under the terms of the Agreement, the deceased, during his lifetime, had two principal rights namely (1) to receive a pension if he continued in the employ of the company and reached the stipulated retirement age and (2) to elect, if he left the employ of the company prior to reaching retirement age, to receive a lump sum payment "equal to the aggregate of all *his* contributions or to the cash surrender value at the date of termination of employment of that portion of the contract or contracts paid for by *his* contributions".

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Employer and employee contributed equally to the premiums required under the Agreement. The pension benefit, which is in issue here, was bound to be greater than the lump sum payable on leaving the employ of the company, since under the Agreement such pension benefit was equivalent to the "aggregate of premiums paid prior to death" which would include the contributions made by both employer and employee.

The $13,844.20 received by appellant was clearly an amount "received out of or under a superannuation or pension fund or plan" and as such was income by definition, under the provisions of ss. 6(1)(a)(iv) and 139 (1)(ar) of the Act. Indeed this is conceded by appellant.

Appellant's submission however, both here and below, has been that the amount should have been taxed as income of the late Kenneth J. McArdle under the provisions of subs. 2 of s. 64 of the Act, and not as income of his legal representatives.

The general rule under the *Income Tax Act* is that tax is payable on income actually *received* by the taxpayer during a taxation period. There are exceptions to this general rule and one of them is to be found in s. 64(2) which reads:

> Where a taxpayer who has died had at the time of his death rights or things (other than an amount included in computing his income by virtue of subsection (1)), the amount whereof when realized or disposed of would have been included in computing his income, the value thereof at the time of death shall be included in computing the taxpayer's income for the taxation year in which he died, unless his legal representative has, before the tax for the year of death has been assessed, elected that one of the following rules be applicable thereto:
>
> (*a*) one-fifth of the value shall be included in computing the taxpayer's income for each of his last 5 taxation years including the year of death but the resulting addition in the amount of tax payable for any year other than the year in which he died is payable 30 days from the day of mailing of the notice of assessment for the year in which he died; or
>
> (*b*) a separate return of the value shall be filed and tax thereon shall be paid under this Part for the taxation year in which the taxpayer died as if he had been another person entitled to the deductions to which he was entitled under section 26 for that year,

in which event, the rule so elected is applicable.

The said $13,844.20 unquestionably became payable by reason of covenants contained in the pension plan Agreement but it was not received nor was it receivable prior to McArdle's death and indeed the amount could be definitely

ascertained only upon the happening of that contingency. In fact, the amount was not paid to the appellant until April 9, 1958. The sum involved was derived from three sources namely, payments made to the trustees by (1) the deceased (2) his employer and (3) interest earnings. It could never have become payable in the lifetime of the deceased and in my view it was clearly a death benefit under article XI of the Agreement. I can see no difference in principle between such payment and any other pension benefit payable after death from a pension fund or plan to which a deceased person has contributed.

It follows that in my opinion the right to such payment was not a right or thing "the amount whereof when realized or disposed of would have been included in his (McArdle's) income", had he lived, within the meaning of s. 64 (2).

Counsel for appellant made another submission before this Court, which he stated had not been raised before the Income Tax Appeal Board or the Exchequer Court, and which is not referred to in his factum. It was based upon s. 63 (4) of the *Income Tax Act* which reads:

> For the purposes of this Part, there may be deducted in computing the income of a trust or estate for a taxation year such part of the amount that would otherwise be its income for the year as was payable in the year to a beneficiary or other person beneficially interested therein or was included in the income of a beneficiary for the year by virtue of subsection (2) of section 65.

I find it difficult to understand this submission. The T-3 Income Tax Return filed by appellant as executor, for the taxation year February 8, 1958, to February 7, 1959, reported all the net income of the estate as having been allocated to the widow. This return, of course, did not report the sum of $13,844.20 as income. That amount was added by the assessment of January 31, 1961, which is in issue on this appeal.

In paragraph 10 of its Reply to the Notice of Appeal to the Exchequer Court, when dealing with the said assessment, appellant stated:

> 10. Later, the appellant (the Minister) issued an assessment in respect of the taxation year 1958 claiming tax on the said refund as pertaining to the income of Mary I. McArdle, widow of the deceased and income beneficiary under his Will. On Notice of Objection, the Appellant decided, amongst other things, that said refund, as income of the said Mary I. McArdle, appertained to her income for the 1959 taxation year instead of 1958. A new, similar assessment was then issued in respect.

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Abbott J.

of the year 1959. Notice of Objection was rejected, but was maintained by a judgment of the Tax Appeal Board, which judgment is the subject of the present appeal to this honourable Court.

It would seem therefore that the provisions of s. 63 (4) were recognized. Under the terms of that section, income payable in a given year by the executor to a beneficiary is not of course taxable in the hands of the executor.

Appellant also stated that credit had not been given to the executor for a payment of $2,728.59 made in August 1957 with a return of income of the late Kenneth J. McArdle for the period from January 1, 1957, to February 7, 1957, the date of his death. This return was not produced. The payment is not dealt with in the judgment below and is not referred to in the assessment of January 31, 1961, in issue on this appeal. The record does not contain tax returns made by the executor on behalf of the estate for the years 1957 or 1958 or any of the personal returns of the income beneficiary. It does indicate that another appeal with respect to 1958 income is pending before the Income Tax Appeal Board.

It is impossible to say on this record what person, if any, is entitled to a tax credit or refund. The payment should, of course, be taken into account in assessing interest or penalties and I have no doubt the Minister will do so. In my view however, it has no bearing on the issue to be determined in this appeal.

I would dismiss the appeal with costs and confirm the assessment of the sum of $13,844.20 as being income of the estate and not income of the late Kenneth J. McArdle. In the circumstances however, and particularly with respect to the possible application of s. 63(4) of the *Income Tax Act,* I would refer the assessment of January 31, 1961, back to the Minister in order that consideration may be given to the effect of the present judgment and the payment of $2,728.59 said to have been made by appellant in August 1957.

Appeal dismissed with costs.

Solicitors for the appellant: Martineau, Walker, Allison, Beaulieu, Tetley & Phelan, Montreal.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

THE ATTORNEY GENERAL OF QUEBEC AND THE MINISTER OF ROADS FOR QUEBEC .... APPELLANTS:

1965
*May 20
June 24

AND

CANADIAN PACIFIC RAILWAY COMPANY .... RESPONDENT.

APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Railways—Inadequate railway subway—Application by municipality to enlarge—Proposal by company that highway be diverted to pass under existing bridge—Whether Board of Transport has power to authorize grant from Railway Grade Crossing Fund—Railway Act, R.S.C. 1952, c. 234, s. 265(1)(b).

The County of P applied to the Board of Transport Commissioners for Canada for an order authorizing the enlargement of a railway subway on the ground that it was inadequate for highway traffic. The railway company submitted that the subway should be closed and the highway diverted to pass under a nearby existing railway bridge. The Province, having taken over the responsibility for the highway, agreed to this. The Board authorized the diversion of the highway and held that it had no jurisdiction to authorize a contribution to the project from the Railway Grade Crossing Fund. The Province was assessed the full cost with the exception of $5,000 offered by the railway company. The Province was granted leave to appeal to this Court.

Held: The appeal should be allowed.

The existing subway facilities had become inadequate. The proposed diversion was more efficient and less costly than it would have been to enlarge the existing subway. This diversion was an improvement of an existing grade separation within the meaning of s. 265(1)(*b*) of the *Railway Act,* and consequently, the Board was empowered to authorize a grant from the railway Grade Crossing Fund towards the cost of the work.

Chemins de fer—Viaduc insuffisant—Requête par la municipalité pour élargir—Contre-proposition par la compagnie que la voie routière soit détournée pour passer sous un pont existant—La Commission des Transports du Canada a-t-elle le pouvoir d'autoriser un octroi de la Caisse des passages à niveau de chemins de fer—Loi sur les chemins de fer, S.R.C. 1952, c234, art. 265(1)(b).

Le comté de P fit une requête auprès de la Commission des Transports du Canada pour obtenir l'autorisation d'élargir un viaduc pour la raison qu'il ne répondait plus aux besoins de la circulation routière. La compagnie de chemin de fer proposa que le viaduc soit fermé et que la voie routière soit détournée pour passer sous un pont de chemin de

*PRESENT: Taschereau C.J. and Abbott, Judson, Hall and Spence JJ.

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fer qui se trouvait non loin. La province, qui avait assumé la responsabilité pour la voie routière, donna son consentement. La Commission autorisa le détournement de la voie routière et adjugea qu'elle n'avait pas la jurisdiction pour autoriser une contribution à ce projet de la part de la Caisse des passages à niveau de chemins de fer. La province a donc été cotisée pour le plein montant des frais à l'exception de $5,000 qui avaient été offerts par la compagnie de chemins de fer. La province a obtenu la permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être maintenu.

Le viaduc ne répondait plus aux besoins de la circulation. Le détournement proposé était plus efficace et moins dispendieux que si on élargissait le viaduc. Ce détournement était une amélioration de croisements de voies superposées en existence dans le sens de l'art. 265(1)(*b*) de la *Loi sur les chemins de fer,* et en conséquence, la Commission avait le pouvoir d'autoriser une contribution à ce projet de la part de la Caisse des passages à niveau de chemins de fer.

APPEL d'une décision de la Commission des Transports du Canada. Appel maintenu.

APPEAL from an order of the Board of Transport Commissioners for Canada. Appeal allowed.

Jean Turgeon, Q.C., for the appellants.

K. D. M. Spence, Q.C., for the respondent.

M. M. Goldberg, for the Board.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal by leave, from Order No. 114705 of the Board of Transport Commissioners dated June 12, 1964, apportioning the cost of construction of a deviation of a highway and the closing of a subway under the tracks of the respondent. *Inter alia,* the said order had the effect of dismissing the application of the appellant, the Minister of Roads of the Province of Quebec, for a contribution from the Railway Grade Crossing Fund under s. 265 of the *Railway Act,* R.S.C. 1952, c. 234, towards the cost of the said work. No appeal has been taken against that part of the said order directing the respondent to pay $5,000 towards the cost of the said work and to close the subway at its own expense.

By Order No. 33284 dated January 8, 1923, upon application of the Village of Pont Rouge in the County of Portneuf, Province of Quebec, the Board of Railway

Commissioners for Canada ordered the railway company to construct a subway under its tracks to eliminate a level highway crossing in the said Village.

In 1958 the County of Portneuf, finding the subway inadequate for highway traffic, applied to the Board of Transport Commissioners for an order authorizing the enlargement of the subway. The railway company submitted that instead of the subway being enlarged it should be closed and the highway diverted some five hundred feet, to pass under a nearby railway bridge which crossed the Jacques Cartier river.

The Department of Roads of the Province, having taken over from the County the responsibility for the highway, agreed to this proposal, and asked the Board to authorize the project. The Department estimated the cost of the diversion at $113,190, and it asked that this be paid 50 per cent by the Railway Grade Crossing Fund, 15 per cent by Canadian Pacific Railway Company and the remainder by the Department of Roads, with costs of maintenance of the new road to be the responsibility of the Department.

By Order No. 111583 dated June 28, 1963, the Board authorized the Department of Roads to construct and maintain the said deviation of the highway, and reserved the question of allocation of cost for further consideration and order of the Board.

In subsequent correspondence between the parties and the Board upon the question of allocation of cost the railway company stated its willingness to contribute the full value of the benefit that it would receive from the project. This benefit consisted of relief from the future cost of maintenance of the subway that was to be closed, which the railway company estimated at a capitalized amount of $5,000. In this correspondence the Board also questioned its own authority under s. 265 of the *Railway Act* to authorize a contribution to the project from the Railway Grade Crossing Fund, but as this point did not involve the railway company the respondent made no submissions thereon.

The matter of apportionment of the cost of the project was set down for public hearing and heard by the Board in Quebec City on May 5, 1964.

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On June 12, 1964, concurrently with Order No. 114705 which is the subject of this appeal, Deputy Chief Commissioner Dumontier delivered reasons for judgment concurred in by Commissioner Woodard. After an examination of the relevant facts, the nature of the project, the provisions of s. 265 and the arguments of the parties, he held, (1) that he was unable to find in the Railway Act the power and jurisdiction to authorize a grant from the Railway Grade Crossing Fund and (2) that the offer of the railway company to contribute $5,000 representing the value of its relief from the cost of future maintenance of the subway was fair and reasonable, and that the remainder of the cost should be paid by the Department of Roads.

Upon application of the Attorney General of Quebec and the Minister of Roads for leave to appeal, counsel for the applicants stated that the proposed appeal was directed only to the question of the Board's power to authorize a contribution from the Railway Grade Crossing Fund, and that no appeal was proposed against the amount ordered by the Board to be paid by the railway company. Counsel for the railway company thereupon stated that as the railway company was not involved in the issue to be raised it would have no purpose or interest in opposing the appeal and would not do so.

Leave to appeal to this Court was granted by Hall J. upon the following question of law:

"Did the board of Transport Commissioners for Canada err in holding, as it did by its judgment of June 12, 1964, that it had neither the power nor the jurisdiction under section 265 (1)(*b*) of the Railway Act to authorize a grant from the Railway Grade Crossing Fund towards the cost of the work authorized by its Order 111583?"

The relevant portions of s. 265 of the *Railway Act* are as follows:

265. (1) The sums heretofore or hereafter appropriated and set apart to aid actual construction work for the protection, safety and convenience of the public in respect of crossings shall be placed to the credit of a special account to be known as "The Railway Grade Crossing Fund", and shall, insofar as not already applied, be applied by the Board in its discretion, subject to the limitations set forth in this section, solely towards the cost, not including that of maintenance and operation, of

(*a*) work actually done for the protection, safety and convenience of the public in respect of existing crossings at rail level,

(*b*) work actually done in respect of reconstruction and improvement of grade separations that are in existence at crossings upon the

coming into force of this subsection and that, in the opinion of the Board, are not adequate, by reason of their location, design or size, for the highway traffic using them, and

(*c*) placing reflective marking on the sides of railway cars.

* * *

(9) In this section, "crossing" means any railway crossing of a highway, or any highway crossing of a railway, and every manner of construction of the railway or of the highway by the elevation or the depression of the one above or below the other, or by the diversion of one or the other, and any work ordered or authorized by the Board to be provided as one work for the protection, safety and convenience of the public in respect of one or more railways of as many tracks crossing or so crossed as the Board in its discretion determines.

The sole issue in this appeal is whether the highway diversion referred to, was an improvement of an existing grade separation within the meaning of s. 265 (1) (*b*) of the *Railway Act*.

Under the provisions of ss. 39 and 266 of the said Act, the Board is vested with exclusive authority to authorize grade crossing changes and to apportion the cost of making such changes.

The "Railway Grade Crossing Fund" consists of monies voted from time to time by Parliament. The Fund was established to provide financial assistance to the railways and to local authorities towards the cost of the construction, reconstruction and improvement of grade crossings, required for the protection, safety and convenience of the public and made necessary by changing traffic conditions. Within the limits set by the Act the contribution, if any, to be made out of the Fund to the cost of a particular work, is fixed by the Board.

In the present case the existing subway facilities at Pont Rouge admittedly had become inadequate. The diversion proposed by the railway company was more efficient and less costly than it would have been to enlarge the existing underpass. In my opinion this diversion is an improvement of an existing grade separation within the meaning of s. 265 (1) (*b*) and that in consequence the Board is empowered to authorize a grant from the Railway Grade Crossing Fund towards the cost of the work authorized by its Order No. 111583.

I would allow the appeal and answer the question submitted in the affirmative. That portion of Order No. 114705 requiring that the cost of constructing the work in question

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Abbott J.

in excess of $5,000 be paid by appellant, is therefore set aside and the matter referred back to the Board.

The appeal was argued immediately after another appeal in which the same parties were involved. In the circumstances, there should be no order as to costs.

Appeal allowed; no order as to costs.

Attorney for the appellants: J. Turgeon, Quebec.

Attorney for the respondent: K. D. M. Spence, Ottawa.

1965
*June 11
June 24

ULTRAVITE LABORATORIES LIMITED ..... APPELLANT;

AND

WHITEHALL LABORATORIES LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade marks—Registration—"Resdan" and "Dandress"—Whether confusing—Whether distinctive—Trade Marks Act, 1952-53 (Can.), c. 49, ss. 6(2), (5), 12(1)(d), 37(2)(d).

The Registrar of Trade Marks allowed the application of the appellant to register the trade mark "Dandress" over the opposition of the respondent which alleged that it was confusing with its already registered trade mark "Resdan". The Exchequer Court rejected the registration on the grounds that it was confusing and was not distinctive. The appellant appealed to this Court.

Held: The appeal should be allowed.

The first impression test is the test which should be used in determining the issue of whether a trade mark is confusing, but it should not be applied by separating the syllables and finding that there is in each of them the same syllable without referring to the variations between the two marks and the order in which that syllable appears in each mark to determine whether they are phonetically confusing. Applying this test, the average person, not skilled in semantics, going into the market to purchase a dandruff remover and hair tonic, could not be phonetically confused.

Both the words "Resdan" and "Dandress" adopt a part of the word "dandruff" and, nothing could be more ordinary in the trade than the word "dandruff". The opposition by the respondent to the use of the syllable "dand" would effect the wholesale appropriation of the only apt language available. *General Motors Corpn. v. Bellows,* 10 CPR. 101. Under the circumstances, the proposed trade mark was distinctive.

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*PRESENT: Taschereau C.J. and Abbott, Martland, Ritchie and Spence JJ.

Marques de commerce—Enregistrement—«Resdan» et «Dandress»—Ces deux mots créent-ils de la confusion—Sont-ils distinctifs—Loi sur les Marques de Commerce, 1952-53 (Can.), c. 49, arts. 6(2), (5), 12(1)(d), 37(2)(d).

Le registraire des marques de commerce a maintenu la requête de l'appelante pour faire enregistrer la marque de commerce «Dandress» malgré l'opposition de l'intimée qui avait allégué que cette marque créait de la confusion avec la marque «Resdan» qu'elle avait déjà enregistrée. La Cour de l'Échiquier a rayé l'enregistrement pour les motifs que la marque créait de la confusion et n'était pas distinctive. L'appelante en appela devant cette Cour.

Arrêt: L'appel doit être maintenu.

Le critère de la première impression est le critère dont on doit se servir pour déterminer la question de savoir si une marque de commerce crée de la confusion, mais on ne doit pas s'en servir en séparant les syllabes de telle sorte que l'on trouve qu'il y a dans chacune la même syllabe sans se référer aux variations entre les deux marques et à l'ordre dans lequel cette syllabe apparaît dans chacune pour déterminer si phonétiquement elles créent de la confusion. Appliquant ce critère, l'homme moyen, non qualifié en science sémantique, achetant un produit pour enlever les pellicules du cuir chevelu et un tonique pour les cheveux, ne pourrait pas être phonétiquement porté à la confusion.

Les deux mots «Resdan» et «Dandress» adoptent une partie du mot «dandruff» et on ne peut trouver aucun mot dans ce commerce qui soit plus ordinaire que le mot «dandruff». L'opposition de l'intimé à l'usage de la syllabe «dand» effectuerait une prise de possession complète du seul langage approprié qui soit disponible. *General Motors Corpn. v. Bellows,* 10 C.P.R. 101. Dans les circonstances, la marque de commerce était distinctive.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada[1], infirmant une décision du Registraire des marques de commerce. Appel maintenu.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], reversing a decision of the Registrar of Trade Marks. Appeal allowed.

W. B. Williston, Q.C., for the appellant.

Cuthbert Scott, Q.C., and *D. W. Scott* for the respondent.

The judgment of the Court was delivered by

SPENCE J.:— This is an appeal from the judgment of the Exchequer Court[1] delivered by Dumoulin J. on March 11, 1964, allowing an appeal from the decision of the Registrar of Trade Marks made on February 7, 1962, and rejecting the application of the appellant for registration of a trade mark.

[1] [1964] Ex C.R. 913, 26 Fox Pat. C. 177, 42 C.P.R. 3.

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ULTRAVITE LABORATORIES LTD. v. WHITEHALL LABORATORIES LTD.
Spence J.

William Sorokolit had applied to the Registrar of Trade Marks for the registration of the word "DANDRESS" as a proposed trade mark in association with a dandruff remover, hair dressing and conditioner. Sorokolit subsequently assigned the application for the registration to the appellant. The respondent Whitehall having received notice of the said application, filed opposition thereto.

The Registrar, in his decision, said:

> I have considered the evidence on file, there being no oral Hearing and, having regard to all the circumstances, I have arrived at the decision that the two marks in their totalities are not confusing and that their concurrent use in the same area would not be likely to lead to the inference that the wares emanate from the same person.

From this decision, the respondent appealed to the Exchequer Court. Dumoulin J., in his reasons for judgment, considered the attack upon the proposed trade mark under two headings. Firstly, that it was confusing with a registered trade mark, and secondly, that it was not distinctive.

Section 37(2) of the *Trade Marks Act*, Statutes of Canada, 1952-1953, c. 49, provides:

> 37. (2) Such opposition may be based on any of the following grounds:
>
> * * *
>
> (*b*) that the trade mark is not registerable;
>
> * * *
>
> (*d*) that the trade mark is not distinctive.

Section 12(1) of the *Trade Marks Act* provides:

> 12. (1) Subject to section 13, a trade mark is registerable if it is not
>
> * * *
>
> (*d*) confusing with a registered trade mark;
>
> * * *

And section 6(2) of the statute provides 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 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.

Subsection (5) of the same section directs the Court or the Registrar that in determining whether trade marks or trade names are confusing to 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.

Dumoulin J. referred to the said s. 6, subs. (5), and dealt particularly with para. (*e*) thereof, being of the opinion that for the purpose of determining whether the degree of resemblance between the proposed trade mark and the existing trade mark with which it was alleged to be confusing in appearance or sound, or in the idea suggested by them, was largely a matter of first impression, citing Kerwin J. in *Battle Pharmaceuticals v. British Drug Houses Ltd.*[1], and used what he described as that touchstone to determine that "RESDAN", the trade mark which was the property of the respondent, and "DANDRESS", the trade mark proposed by the appellant, sound phonetically confusing, at least on first impression. I agree that the first impression test is the test which should be used in determining the issue of whether the trade mark is confusing, but I am of the opinion that it should not be applied by separating the syllables and finding that there is in each of them the same syllable without referring to the variations between the two marks and the order in which that syllable appears in each mark to determine whether they are phonetically confusing. I adopt here the view of Thorson P. in *Sealy Sleep Products Ltd. v. Simpson's-Sears Ltd.*[2], as follows:

> The principle thus stated is as applicable in cases under the Trade Marks Act as it was in cases under the Unfair Competition Act. And its converse is equally true. It is not a proper approach to the determination of whether one trade mark is confusing with another to break them up into their elements, concentrate attention upon the elements that are similar and conclude that, because there are similarities in the trade marks, the trade marks as a whole are confusing with another. Trade marks may be different from one another and, therefore, not confusing with one another when looked at in their totality, even if there are similiarities in some of the elements when viewed separately. It is the combination of the elements that constitutes the trade mark and it is the effect of the trade mark as a whole, rather than that of any particular part in it, that must be considered.

If one avoids slicing up the two words, presuming they may be considered words, and speaks each so-called word then, in my view, there can be no phonetic confusion. I come to this conclusion realizing that the test to be applied is with

[1] [1946] S.C.R. 50 at 53, 5 Fox Pat. C. 135, 5 C.P.R. 71, 1 D.L.R. 289.
[2] (1960), 33 C.P.R. 129 at 136, 20 Fox Pat. C. 76.

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ULTRAVITE LABORATORIES LTD. v. WHITEHALL LABORATORIES LTD.

Spence J.

the average person who goes into the market and not one skilled in semantics. In expressing my view, I am putting myself in the position of the average person going into the market to purchase a dandruff remover and hair tonic.

Is the proposed trade mark "DANDRESS" distinctive? Section 2(f) defines "distinctive" as follows:

> (*f*) "distinctive" in relation to a trade mark means a trade mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so to distinguish them;

Rand J., in giving the judgment of the majority in *General Motors Corporation v. Bellows*[1], approved of the submission by Mr. Fox that when a trader adopts words in common use for his trade name some risk of confusion is inevitable. It is quite evident that both the words "RES-DAN" and "DANDRESS" adopt a part of the word "dandruff" and, of course, nothing can be more ordinary in the trade than the word "dandruff". I am of the opinion that the opposition by the respondent to the use of the syllable "dand" would, in the language of Rand J. in *General Motors v. Bellows, supra,* "effect the wholesale appropriation of the only apt language available". I am, therefore, of the opinion that under the circumstances the proposed trade mark "DANDRESS" is distinctive.

I would allow the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: R. H. Saffrey, Toronto.

Solicitors for the respondent: Scott & Aylen, Ottawa.

[1] [1949] S.C.R. 678, 10 C.P.R. 101 at 116.

REGINALD JOHN COLPITTS .....APPELLANT;

1965
*June 2, 3
June 24

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal law—Capital murder—Misdirection by trial judge—Theory of the defence not put to the jury—Canada Evidence Act, R.S.C. 1952, c. 307, s. 12(1)—Criminal Code, 1953-54 (Can.), c. 51, s. 592(1)(b)(iii).

Following the slaying of a guard at a prison where he was an inmate, the appellant was convicted of capital murder. On the morning immediately following the slaying, he called for the mounted police and made a series of statements in which he made a complete and detailed confession of the crime. At the trial, the appellant gave evidence on his own behalf and claimed that the statements made immediately after the crime were false, that they had been made to protect a friend and that he had not killed the guard. His conviction was affirmed by a majority judgment in the Court of Appeal. All the members of the Court were of the opinion that the judge's charge to the jury was inadequate, but the majority was of the opinion that there had been no substantial wrong or miscarriage of justice and applied s. 592(1)(*b*)(iii) of the *Criminal Code*. The appellant appealed to this Court.

Held (Taschereau C.J. and Abbott and Judson JJ. dissenting): The appeal should be allowed and a new trial directed.

Per Cartwright and Hall JJ.: The trial judge failed to present the theory of the defence to the jury, and the verdict could not be upheld by the application of s. 592 (1)(*b*)(iii) of the Code. The onus was upon the Crown to satisfy the Court that the verdict would necessarily have been the same if the errors had not occurred. The construction of s. 592 (1)(*b*)(iii) of the Code contended for by the Crown in this case would transfer from the jury to the Court of Appeal the question whether the evidence established the guilt of the accused beyond a reasonable doubt. It was impossible to affirm from a reading of the written record that the testimony of the accused might not have left a properly instructed jury in a state of doubt.

In this view of the case it was not necessary to consider the ground of appeal which was based on the allegedly improper cross-examination of the accused.

As to the first two grounds of appeal, they were properly rejected by the Court of Appeal.

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*PRESENT: Taschereau C.J. and Cartwright, Abbott, Judson, Ritchie, Hall and Spence JJ.

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THE QUEEN

Per Ritchie J.: The trial judge erred in failing to fairly put to the jury the defence made by the accused. It was impossible to say that the verdict would necessarily have been the same if the charge had been correct and, applying the test established in the authorities, this was not a case in which the provisions of s. 592(1)(*b*)(iii) of the Code should be invoked. The errors in this case were not of a minor character.

Per Spence J.: The first ground of appeal that the trial judge erred in allowing the trial while the accused was dressed as a prison inmate, and the second ground that the trial judge should not have admitted in evidence a tape recording, were both properly rejected by the Court of Appeal.

As to the ground that the trial judge had erred in allowing the admission, on cross-examination of the accused, of evidence of his previous conduct and criminal offences, there had been no prejudice to the accused. Even if the questions put upon cross-examination were inadmissible and prejudicial, the answers resulted in the only evidence being that the accused had never been convicted or charged with a crime in which he carried or wielded a knife.

The ground of appeal that the trial judge failed to fairly put to the jury the defence made by the accused should be upheld. It is the duty of the trial judge to outline to the jury the theory of the defence and to give to the jury matters of evidence essential in arriving at a just conclusion in reference to that defence. The charge in the present case, in its failure to state the theory of the defence, and particularly in the partial statement of it accompanied by the inferential disbelief of it and not accompanied by any reference to evidence which bore upon it, was a failure to properly instruct the jury and was prejudicial to the accused.

Under s. 592(1)(*b*)(iii) of the *Criminal Code,* the onus was on the Crown to satisfy the Court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than to find the appellant guilty. This Court could not place itself in the position of a jury and weigh the various pieces of evidence which it was the duty of the trial judge to submit to the jury and which he failed to do. There was a possibility that the jury, properly charged, would have had a reasonable doubt as to the guilt of the accused. Therefore, this Court could not apply the provisions of s. 592 (1)(*b*)(iii) to affirm the conviction.

Per Taschereau C.J. and Abbott and Judson JJ., *dissenting*: The charge to the jury was adequate in the circumstances of this case. The defence which was merely that the accused had lied in his confessions and had told the truth at the trial, was put to the jury and they were fully instructed on the subject of reasonable doubt. Such error as there may have been in the conduct of the trial was of a minor character, and the Court of Appeal was justified in applying s. 592 (1)(*b*)(iii) of the Code.

Droit criminel—Meurtre qualifié—Mauvaise direction par le juge au procès—Théorie de la défense non présentée au jury—Loi sur la Preuve au Canada, S.R.C. 1952, c. 307, s. 12(1)—Code Criminel, 1953-54 (Can.), c. 51, art. 592(1)(b)(iii).

A la suite du meurtre d'un gardien de la prison où l'appelant était détenu, ce dernier fut trouvé coupable de meurtre qualifié. Le matin immédiatement après le meurtre, il a demandé à voir la police et a fait plusieurs déclarations avouant le crime d'une façon complète et détaillée. Lors du procès, l'appelant a témoigné en sa propre faveur, et a allégué que les déclarations qu'il avait faites immédiatement après le crime étaient fausses, qu'il les avait faites pour protéger un ami et qu'il n'avait pas tué le gardien. Le verdict de culpabilité fut confirmé par un jugement majoritaire de la Cour d'Appel. Tous les membres de la Cour furent d'opinion que l'adresse du juge au jury avait été inadéquate, mais la majorité fut d'opinion qu'il n'y avait eu aucun tort important ou erreur judiciaire grave et appliquèrent l'art. 592(1)(*b*)(iii) du *Code criminel.* L'appelant en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et un nouveau procès doit être ordonné, le Juge en Chef Taschereau et les Juges Abbott et Judson étant dissidents.

Les Juges Cartwright et Hall: Le juge au procès n'a pas présenté au jury la théorie de la défense, et le verdict ne pouvait pas être maintenu en appliquant l'art. 592(1)(*b*)(iii) du *Code criminel.* La Couronne avait le fardeau de satisfaire la Cour que le verdict aurait été nécessairement le même si des erreurs n'avaient pas été commises. L'interprétation que la Couronne veut donner à l'art. 592 (1)(*b*)(iii) du Code aurait pour effet de transférer du jury à la Cour d'Appel la question de savoir si la preuve établit la culpabilité de l'accusé hors de tout doute raisonnable. Il était impossible d'affirmer à la lecture du dossier que le témoignage de l'accusé n'aurait pas laissé un jury, régulièrement instruit, dans un état de doute, et en conséquence le verdict devait être mis de côté.

Dans ces vues, il n'était pas nécessaire de considérer le grief d'appel qui était basé sur le contre-interrogatoire illégal de l'accusé.

Quant aux deux premiers griefs d'appel, ils avaient été correctement rejetés par la Cour d'Appel.

Le Juge Ritchie: Le juge au procès a erré en n'exposant pas équitablement au jury la défense soumise par l'accusé. Il était impossible de dire que le verdict aurait été nécessairement le même si l'adresse du juge avait été équitable et, appliquant le critère établi par les autorités, cette cause n'était pas de celles où les dispositions de l'art. 592 (1)(*b*)(iii) du Code devaient être invoquées. Les erreurs dans cette cause n'avaient pas un caractère mineur.

Le Juge Spence: La Cour d'Appel a eu raison de rejeter le premier grief d'appel à l'effet que le juge au procès avait erré en permettant le procès alors que l'accusé était habillé comme un détenu de prison

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et le second grief que le juge au procès n'aurait pas dû permettre la preuve d'un enregistrement sur magnétophone.

Quant au grief que le juge au procès a erré en permettant l'introduction, sur contre-interrogatoire de l'accusé, d'une preuve de sa conduite et de ses offenses criminelles antérieures, il n'y a eu aucun préjudice pour l'accusé. Même si les questions posées en contre-interrogatoire n'étaient pas admissibles et étaient préjudiciables, la seule preuve qui a résulté de ces réponses fut que l'accusé n'avait jamais été trouvé coupable ou accusé d'un crime pour lequel il aurait porté ou manié un couteau.

Le grief d'appel que le juge au procès n'a pas mis adéquatement devant le jury la défense faite par l'accusé doit être maintenu. Il est du devoir du juge au procès d'exposer au jury la théorie de la défense et de donner au jury tous les extraits de la preuve qui sont essentiels pour arriver à un conclusion juste concernant cette défense. L'adresse du juge dans la présente cause, dans son défaut d'énumérer la théorie de la défense et particulièrement dans son exposé partiel accompagné d'une inférence d'incrédibilité et non accompagné des références à la preuve portant sur cette défense, a été un manque d'instruire régulièrement le jury et a été préjudiciable à l'accusé.

En vertu de l'art. 592(1)(*b*)(iii) du *Code criminel,* la Couronne avait le fardeau de satisfaire la Cour que le jury, instruit comme il devait l'être, n'aurait pu, comme hommes raisonnables, faire autre chose que de trouver l'accusé coupable. Cette Cour ne peut pas se placer dans le position du jury et évaluer les différents renvois à la preuve qu'il était du devoir du juge au procès de soumettre au jury et qu'il n'a pas fait. Il y avait une possibilité que le jury régulièrement instruit aurait eu un doute raisonnable sur la culpabilité de l'accusé. En conséquence, cette Cour ne pouvait pas se servir des dispositions de l'art. 592 (1)(*b*)(iii) pour confirmer le verdict.

Le Juge en Chef Taschereau et les Juges Abbott et Judson, *dissidents*: L'adresse au jury était adéquate dans les circonstances. La défense qui était simplement que l'accusé avait menti lorsqu'il avait fait ses aveux et qu'il avait dit la vérité au procès, a été mise devant le jury qui a été instruit complètement sur le doute raisonnable. S'il y avait eu des erreurs dans la conduite du procès ces erreurs avaient un caractère mineur, et la Cour d'Appel était justifiée d'avoir appliqué l'art. 592(1)(*b*)(iii) du Code.

APPEL d'un jugement majoritaire de la Cour suprême du Nouveau-Brunswick, confirmant un verdict de culpabilité pour meurtre qualifié. Appel maintenu, le Juge en Chef Taschereau et les Juges Abbott et Judson étant dissidents.

APPEAL from a judgment of the Supreme Court of New Brunswick, affirming a conviction of capital murder. Appeal

allowed, Taschereau C.J. and Abbott and Judson JJ. dissenting.

P. S. Creaghan, for the appellant.

L. D. D'Arcy, for the respondent.

The judgment of Taschereau C.J. and Abbott and Judson JJ. was delivered by

ABBOTT J. (*dissenting*):—With deference to those who hold the opposite view, in my opinion the charge to the jury was adequate in the circumstances of this case.

The theory of the defence was a simple one. It was merely that the accused had lied in the three confessions made by him and had told the truth in his evidence at the trial. That defence was put to the jury and they were fully instructed on the subject of reasonable doubt.

Such error as there may have been in the conduct of the trial was of a minor character and for the reasons given by Bridges C.J., the Appeal Division of the Supreme Court of New Brunswick, in my opinion, was justified in applying the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code.*

I would dismiss the appeal.

The judgment of Cartwright and Hall JJ. was delivered by

CARTWRIGHT J.:—The relevant facts and the course of the proceedings in the courts below are set out in the reasons of my brother Spence. I agree with his conclusion that the learned trial judge failed to present the theory of the defence to the jury and with his reasons for reaching that conclusion; but since we are differing from the opinion of the majority in the Court of Appeal I propose to set out shortly in my own words my reasons for holding that in this case the verdict of guilty cannot be upheld by the application of s. 592(1)(*b*)(iii) of the *Criminal Code.*

Section 592(1)(*a*)(ii) of the *Criminal Code* reads:

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 . . . .

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or . . . .

Section 592(1)(b)(iii) reads:

(*b*) may dismiss the appeal where . . . .

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (ii) of paragraph (*a*) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;

A number of authorities which should guide the Court of Appeal in deciding whether, misdirection having been shewn, it can safely be affirmed that no substantial wrong or miscarriage of justice has occurred are quoted in the reasons of my brother Spence. Upon reading these it will be observed that, once error in law has been found to have occurred at the trial, the onus resting upon the Crown is to satisfy the Court that the verdict would necessarily have been the same if such error had not occurred. The satisfaction of this onus is a condition precedent to the right of the Appellate Court to apply the terms of the subsection at all. The Court is not bound to apply the subsection merely because this onus is discharged.

Under our system of law a man on trial for his life is entitled to the verdict of a jury which has been accurately and adequately instructed as to the law. The construction of s. 592(1)(*b*)(iii) contended for by the Crown in this case would transfer from the jury to the Court of Appeal the question whether the evidence established the guilt of the accused beyond a reasonable doubt. To adapt the words of Lord Herschell in *Makin v. Attorney General for New South Wales*[1], the judges would in truth be substituted for the jury, the verdict would become theirs and theirs alone, and would be arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

[1] [1894] A.C. 57 at 70.

In the case at bar every judge in the Court of Appeal was of the same opinion as my brother Spence that the charge of the learned trial judge to the jury was inadequate. The evidence of the accused given at the trial, if it were believed by the jury, established his innocence; if it left the jury in a state of doubt it necessitated his acquittal. I find it impossible to affirm from a reading of the written record that the testimony of the accused might not have left a properly instructed jury in a state of doubt, and consequently, in my view, the verdict must be set aside.

The conclusion at which I have arrived on this ground of appeal renders it unnecessary for me to consider the fourth ground of appeal, which was based on the allegedly improper cross-examination of the accused, and I express no opinion upon it.

I agree with my brother Spence that grounds (1) and (2), set out at the commencement of his reasons, were properly rejected.

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

RITCHIE J.:—I have had the benefit of reading the reasons for judgment of my brothers Cartwright and Spence and I agree with them that this appeal should be allowed on the ground that "the learned trial judge erred in failing to fairly put to the jury the defence made by the accused".

Even if it be conceded to be improbable that the decision of any juror was affected by the errors which all the judges of the court of appeal have found to have existed in the charge of the learned trial judge, I am nevertheless unable to say that the verdict would *necessarily* have been the same if the charge had been correct and, applying the test established in the authorities referred to by my brother Spence, I do not consider this to be a case in which the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code* should be invoked. I do not share the view that the errors referred to were of a minor character.

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I would accordingly dispose of this appeal as proposed by my brother Spence.

SPENCE J.:—This is an appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick which, by a majority of two to one, dismissed the appeal of the appellant from his conviction upon a charge of capital murder. The appellant in this Court submitted in his notice of appeal five grounds as follows:

(1) The learned Trial Judge erred in allowing the Trial to commence and proceed while the accused was present before the Jury attired and identifiable as a convicted criminal or a person of bad repute.

(2) The learned Trial Judge erred in allowing to be admitted in evidence a tape recording allegedly reproducing a confession made by the accused and solicited by the police.

(3) The learned Trial Judge erred in failing to fairly put to the Jury the defence made by the accused.

(4) The learned Trial Judge erred in allowing the admission, on cross-examination of the accused, of evidence of his previous conduct and criminal offences.

(5) The Supreme Court of New Brunswick, Appeal Division, erred in dismissing the appeal by the appellant herein to that Honourable Court.

The first four of those grounds were presented to the Appeal Division of the Supreme Court of New Brunswick. As to grounds 1 and 2, the judgment of Limerick J.A., although dissenting on other grounds, was adopted by the majority of the Court, and I am of the opinion that I need not add anything to the very convincing reasons delivered by the learned justice in appeal in reference to those grounds.

I turn next to consider ground 4, i.e.:

The learned Trial Judge erred in allowing the admission, on cross-examination of the accused, of evidence of his previous conduct and criminal offences.

The appellant's objection is to his cross-examination. Since it is very short, it is my intention to quote it completely:

Q. Now how long have you been in the — how many times have you been in the — an inmate at the penitentiary? A. This is the second time.

Q. The second time? A. Yes.

Q. And what are you in for this time? A. Armed robbery.

Q. Armed robbery? A. Right.

Q. And how were you armed on that occasion? A. With a gun.

Q. And what was the first time you served penitentiary — what was that for? A. For escaping gaol, car theft, and breaking and enter.

Q. And had you served any sentence besides penitentiary? A. Yes.

Q. And where did you serve these? A. County Gaol.

Q. When did you first serve time in the County Gaol? A. 1962.

* * *

Q. Did you use a knife in any offence before? A. No.

Q. Were you not involved in the Friar's hold-up? A. Mmmm.

Q. Was not a knife used there? A. Prove I used it.

Q. Pardon? A. Prove I used it. I didn't use it.

Q. Did you have a knife? A. No.

Q. What weapon did you have? A. I had nothing.

Q. Did you plead guilty to a charge of armed robbery? A. Mmmm, but I didn't plead guilty to having a knife.

Q. What were you armed with? A. I was armed with nothing. My accomplice was armed.

The *Canada Evidence Act,* R.S.C. 1952, c. 307, provides in s. 12(1):

A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

Here counsel for the Crown went much farther.

Cartwright J. in *Lizotte v. The King*[1], quoted with approval the judgment of the Judicial Committee in *Noor Mohamed v. The King*[2], as follows:

In *Makin v. Attorney General for New South Wales* (1894) A.C. 57, 65, Lord Herschell L.C. delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these the first was that "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his

[1] [1951] S.C.R. 115 at 126, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754.
[2] [1949] A.C. 182 at 190, 1 All E.R. 365.

criminal conduct or character to have committed the offence for which he is being tried". In 1934 this principle was said by Lord Sankey L.C., with the concurrence of all the noble and learned Lords who sat with him, to be "one of the most deeply rooted and jealously guarded principles of our criminal law" and to be "fundamental in the law of evidence as conceived in this country". (*Maxwell v. The Director of Public Prosecutions* [1935] A.C. 309, 317, 320.)

That statement, however, was made in reference to cross-examination by the Crown counsel of a defence witness who was not the accused person.

In *Rex v. MacDonald*[1], the Ontario Court of Appeal was considering an appeal from the conviction of the appellant for murder. Objection was made to the Crown's examination-in-chief of a Crown witness who was a person closely associated with the accused and who had, after the accused was alleged to have committed the crime, given the accused shelter in his residence. It was objected that such examination was irrelevant and that it was harmful to the appellant in that it tended to show that the appellant was associated with confirmed criminals. Robertson C.J.O. said at pp. 196-7:

> With respect to all the evidence of the kind objected to, the rules are well established. On the trial of a criminal charge the character and record in general of the accused are not matters in issue, and are not proper subjects of evidence against him. If evidence of good character is given on behalf of the accused, then certain evidence of bad character may be given, but that is not of importance in this case for the appellant offered no evidence of good character.
>
> Further, if the accused becomes a witness, as he has the right to do, he may be cross-examined as to any previous conviction, and if he does not admit it, it may be proved against him. As a witness, the accused is also subject to cross-examination as to matters affecting his credibility in the same way as another witness. Except for this, the character and record of the accused are not proper subjects of attack by the Crown, and it is clearly improper for the Crown to adduce evidence, by cross-examination or otherwise, with a view to putting it before the jury that the accused has been "associated with others in a long and serious criminal career". The accused person is to be convicted, if at all, upon evidence relevant to the crime with which he is charged, and not upon his character or past record.

It must be noted that this statement was made not upon an occasion when the cross-examination of the accused

[1] (1939) 72 C.C.C. 182, [1939] O.R. 606.

person was being considered but rather when the examination-in-chief of a Crown witness was being considered and, with respect, I view the learned Chief Justice's inclusion of the former situation by his words "by cross-examination or otherwise" as being obiter. I am further of the opinion that a cross-examination of an accused person which indicated that he had been "associated with others in a long and serious criminal career" would be perfectly admissible cross-examination upon the issue of the credibility of that accused person. However, I am of the opinion that permission to cross-examine the accused person as to his character on the issue of the accused person's credibility is within the discretion of the trial judge and the trial judge should exercise that discretion with caution and should exclude evidence, even if it were relevant upon the credibility of the accused, if its prejudicial effect far outweighs its probative value.

I am further of the opinion that in the particular case the issue does not arise for the reason that even if the questions put upon cross-examination by the Crown counsel were inadmissible and prejudicial the answers resulted in the only evidence being that the accused man had never been convicted or charged with a crime in which he carried or wielded a knife and, further, the accused man invited the Crown to prove otherwise, an invitation which the Crown did not deem it advisable to accept. There was, therefore, in the particular case, no prejudice to the accused.

The third ground of appeal:

> The learned Trial Judge erred in failing to fairly put to the jury the defence made by the accused.

is a much more substantial one. The appellant, on the morning immediately following the slaying of the prison guard for which he was charged with capital murder, had called for the attendance of the Royal Canadian Mounted Police and had made a series of statements, some in his own handwriting, some in answer to questions, and one, the tape recording, which was the subject of ground of appeal no. 2. In these statements, the appellant had made a complete and detailed confession of the crime in such a fashion that if these statements were not explained, they would constitute

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a sound basis for his conviction upon the offence as charged. The appellant gave evidence at trial on his own behalf, under circumstances to which I shall refer hereafter. In that evidence, he admitted the voluntary nature of all the statements aforesaid. But he denied their truth. In reply to questions by his own counsel, he said that he had not killed the guard and that he had given the statements "to protect a friend", and continued, "and that certain friend gave evidence against me and I don't see no reason for protecting him now. I seen that certain person do that. I was standing no more than four feet away from him at the time". In cross-examination, the accused repeated that explanation and gave great detail saying, inter alia, "I was going to protect him even to the point of hanging for him until he tried to hang me".

Although the appellant refused to name that other person, it would appear from his evidence, taken with the other evidence at trial, that it could only have been his fellow inmate Westerberg, who had testified as a Crown witness.

Upon the cross-examination of the appellant having been completed, the trial was adjourned from 5.49 p.m. until 10.00 a.m., the next morning. At that time counsel for the appellant addressed the jury and in a very brief address mentioned that the appellant denied killing the prison guard but would not incriminate others. He failed to make any reference to the appellant's explanation of his confessions to the police. The Crown counsel followed with an address in which he analyzed the evidence in very considerable detail but again I find no reference to the reasons assigned by the appellant in his evidence for what he alleged in that evidence were the false confessions he had given to the police officers.

The learned trial judge in his charge to the jury dealt with the theory of the defence in the following fashion:

> I take it, as one of the theories of the defence anyway, that the accused does not wish you to believe these statements as being true. That is what he said on the stand—he denies them; he said he was not telling the truth when he gave those statements.

And:

In other words all the statements he made, including the tape recording—and this is in the evidence as well—the oral statements that he made to the R.C.M.P., according to the evidence that Colpitts gave yesterday if you believe it,—all this is a pack of lies, according to Colpitts.

Now gentlemen, it is up to you, because you are the sole masters of the facts. You use your good judgment that the Lord gave you, your knowledge of human nature, to say which of the two alternatives is the more logical one, in order to ascertain if Colpitts was lying yesterday on the stand or if he was lying when he made those statements in a continuous operation the very morning after the stabbing of the guard.

And further:

And the Crown prosecutor has asked you—is it logical to believe that, after having called for the Mounted Police, as you know he did—if you believe the evidence—that he would lie, and lie, and lie throughout these written statements, throughout the tape recording, throughout the oral statements, throughout the visit he made to the prison yard when he showed the constables those details of the occurrence. Well, it is for you to say, gentlemen, if it is logical or not. Isn't it more logical that he would have told the truth on that occasion and that after two months of deliberation he would have concocted the story that he insisted on telling you yesterday? I am not going to give you my opinion on it. You are the men to decide which is the more logical of those two alternatives. You are the twelve men who will decide this.

To summarize the above, the learned trial judge put it as the theory of the appellant that he had made a false confession, and never mentioned the reason which the appellant gave in his evidence for having done so, a reason to which the appellant held fast through a vigorous cross-examination. It must be remembered that counsel for the appellant, before calling the appellant as the only witness for the defence, stated to the learned trial judge, in the presence of the jury:

MR. O'NEILL: My Lord, yes, I am going to call one witness for the defence; and that will be Reginald Colpitts, the accused. And, Sir, I must—as a matter of professional ethics—do assert that this is going to happen against my better judgment and counsel. But Mr. Colpitts has decided to take the stand, and I—of couse—will act as examiner.

THE COURT: All right. I understand your position.

As I have pointed out above, the learned trial judge in his charge gave to the jury two conclusions suggesting that they

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choose the more logical, and one of them was framed in the words "and that after two months of deliberation he would have *concocted* the story that he *insisted* on telling you yesterday". I am of the opinion that that portion of the charge, when considered in the light of the remarks of the then counsel for the appellant which I have quoted, could only suggest, and strongly suggest, to the jury that they could place no reliance upon the evidence given by the appellant in his defence. Moreover, the learned trial judge failed to discuss any of the evidence adduced by the Crown which might be related to that defence. As Limerick J.A. in his reasons has referred to the many instances of evidence which are related to the theory of the defence, I need not repeat them. None of these instances were discussed in that light in the charge of the learned trial judge.

It is trite law that it is the duty of the trial judge to outline to the jury the theory of the defence and that even in cases where the accused person does not give evidence on his own behalf: *Kelsey v. The Queen*[1], where it was held that the trial judge had done so; *Derek Clayton-Wright*[2], per Goddard L.C.J. at 29.

Recent decisions in this Court and elsewhere have also emphasized the duty of the trial judge in his charge to go further and to not only outline the theory of the defence but to give to the jury matters of evidence essential in arriving at a just conclusion in reference to that defence.

In *Lizotte v. The King*[3], Cartwright J., giving judgment for the Court, said at p. 131:

> I do respectfully venture to suggest that in this case it would have been well to follow the usual practice of indicating to the jury the nature of the evidence put forward in support of the alibi and telling them that, even if they are not satisfied that the alibi has been proved, if the evidence in support of it raises in their minds a reasonable doubt of the appellant's guilt, it is their duty to acquit him.

In *Azoulay v. The Queen*[4], the present Chief Justice of this Court said:

[1] [1953] 1 S.C.R. 220, 16 C.R. 119, 105 C.C.C. 97.
[2] (1948), 33 Cr. App. R. 22 at 29.
[3] [1951] S.C.R. 115, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754.
[4] [1952] 2 S.C.R. 495, at 497, 15 C.R. 181, 104 C.C.C. 97.

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 appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them.

In *Lizotte v. The Queen*[1], the present Chief Justice of this Court said:

> Au cours de sa charge aux jurés, le juge présidant au procès, après avoir récité certains faits saillants de cette triste aventure, semble avoir omis quelques éléments de preuve, essentiels pour arriver à une juste conclusion. Sans doute, il n'est pas impératif que le juge décrive en détail toutes et chacune des circonstances qui ont entouré un crime, mais encore faut-il qu'il place devant le jury tout ce qui est révélé par les témoignages, soit de la Couronne ou de la défense, qui peut être un moyen sérieux de disculper l'accusé. (*Le Roi v. Azoulay,* [1952] 2 S.C.R. 495); (*Le Roi v. Kelsey,* [1953] 1 S.C.R. 220); (Vide Lord Goddard in *Dereck Clayton-Wright* (1948), 33 C.A.R. 22 at 29.)

In *Regina v. Hladiy*[2], Pickup C.J.O. said:

> The learned trial judge then went on to discuss the evidence as to motive and also discussed the statements made by the accused, but nowhere in his charge, in discussing that evidence, did he put it plainly to the jury that, in considering the statements made by the accused, or such of them as the jury believed, they should consider whether they had any reasonable doubt as to whether or not what actually took place that night before the body was thrown into the water was murder.

In *Markadonis v. The King*[3], Davis J. said at p. 665:

> Moreover, I cannot escape from the view that the charge of the learned trial judge did not present certain aspects of the case in favour of the accused that should have been dealt with and considered.

In the light of these authorities, I agree with the contention of counsel for the appellant that the charge by the learned trial judge, in its failure to state the theory of the defence, and particularly in the partial statement of it accompanied by the inferential disbelief of it and not accompanied by any reference to evidence which bore upon it, was a failure to properly instruct the jury and was prejudicial to the accused. All the members of the Supreme

[1] [1953] 1 S.C.R. 411 at 414, 16 C.R. 281, 106 C.C.C. 1.
[2] (1952), 15 C.R. 255 at 260, [1952] O.R. 879, 104 C.C.C. 235.
[3] [1935] S.C.R. 657, 64 C.C.C. 41, 3 D.L.R. 424.

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Court of New Brunswick, Appeal Side, were of the same view. Bridges C.J., said:

> The instructions which the learned judge gave to the jury to use their good judgment in deciding which of two alternatives was the more logical, namely, whether the defendant told the truth in his statements and on the tape recording or in his evidence at the trial, did not put the defence properly before the jury as such direction did not make it clear to them that if they were in doubt or believed the testimony of the defendant might reasonably be true they should acquit him.

Ritchie J.A. said:

> I also am of the opinion the theory of the defence as expressed in the appellant's evidence at trial was not adequately put to the jury . . .

And Limerick J.A. said:

> This would seem to be a very inadequate presentation of the defence as well as a very negative approach thereto. Use of the words "does not wish you to believe" thereby, by inference, implying he, the learned Judge, thought the statements were true constitutes an opinion of guilt not a presentation of the defence.

The first two named justices, however, were of the opinion that the provisions of s. 592(1)(b)(iii) of the Criminal Code should be applied and that there had been "no substantial wrong or miscarriage of justice" and therefore that the appeal should be dismissed.

It is the contention of the appellant in his fifth ground of appeal that that decision was not a correct one. The application of the subsection, as pointed out by the learned justice in appeal, has been considered frequently in this Court and I think it may be said that the decisions in *Allen v. The King*[1], *Gouin v. The King*[2], *Brooks v. The King*[3], *Lizotte v. The King*[4], and *Schmidt v. The King*[5], are authoritative.

The proposition in *Allen v. The King* as stated by Sir Charles Fitzpatrick, C.J., at p. 339, in reference to the section of the Code then if effect, was:

> I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregulari-

[1] (1911), 44 S.C.R. 331.
[2] [1926] S.C.R. 539, 46 C.C.C. 1, 3 D.L.R. 649.
[3] [1927] S.C.R. 633, [1928] 1 D.L.R. 268.
[4] [1951] S.C.R. 115, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754
[5] [1945] S.C.R. 438, 83 C.C.C. 207, 2 D.L.R. 598.

ties are so trivial that it may safely be assumed that the jury was not influenced by it.

That proposition has been considered in subsequent authorities.

In *Brooks v. The King, supra,* in the judgment of the Court at p. 636, it is said:

> Misdirection in a material matter having been shewn, the onus was upon the Crown to satisfy the Court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty.

In *Schmidt v. The King, supra,* Kerwin J., at p. 440, put it this way:

> The meaning of these words has been considered in this Court in several cases, one of which is *Gouin v. The King* [1926] S.C.R. 539, from all of which it is clear that the onus rests on the Crown to satisfy the Court that the verdict would necessarily have been the same if the charge had been correct or if no evidence has been improperly admitted.

In *Lizotte v. The King, supra,* Cartwright J. giving the judgment for the Court, held that it was within the jurisdiction of this Court to allow an appeal and refuse to apply the provisions of the present s. 592(1)(*b*)(iii) despite the fact that the Court of Appeal in the province had dismissed the appeal from the conviction upon the application of the said subsection.

Therefore, this Court must apply the test set out in the aforesaid cases and, to quote again from *Brooks v. The King:*

> The onus is upon the Crown to satisfy the Court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty.

In an attempt to persuade this Court that upon such a test being applied the Court could not do otherwise than to find that a jury properly charged would hold the appellant guilty, counsel for the respondent cited many pieces of evidence which would tend to show that the appellant had told the truth when he made the statements to the police and had lied when he testified in court. As pointed out by the various learned justices in appeal in the Supreme Court of New Brunswick, this, even if true, would not be sufficient

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because if the evidence of the appellant at trial, although the jury is not convinced of its truth, raises a reasonable doubt in their minds, that reasonable doubt must be resolved in favour of the accused. Moreover, as pointed out by Limerick J.A. in his dissenting judgment in the Supreme Court of New Brunswick, Appeal Division, there are a very considerable number of items of evidence which point toward the possibility that the appellant might be telling the truth in his evidence at trial. In my view, it was the duty of the judge to submit all that evidence, not only that in favour of the accused but that against him, to the jury so that they might weigh it and come to the conclusion whether, on all of the evidence, they had any reasonable doubt of the guilt of the appellant.

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.

I am of the opinion that there is such a possibility and I, therefore, would allow the appeal, set aside the judgment of the Supreme Court of New Brunswick, Appeal Division, and direct a new trial of the appellant upon the charge of capital murder.

Appeal allowed, new trial directed, Taschereau C.J. *and* Abbott *and* Judson JJ. *dissenting.*

Solicitor for the appellant: P. S. Creaghan, Moncton.

Solicitor for the respondent: L. D. D'Arcy, Fredericton.

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*Mar. 25
June 24

RE THE ESTATE OF CATHERINE AGNES MARTIN, DECEASED. STEWART MACGREGOR ..... APPELLANT;

AND

DAVID STEWART RYAN, surviving Executor of the Estate of Catherine Agnes Martin and Executor of the Last Will and Testament of Maud Ryan ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Validity—Allegation that testatrix lacked testamentary capacity—Alternative allegation of undue influence—Whether suspicion raised by circumstances surrounding execution of will dispelled—Onus of proof.

The validity of the will of the testatrix, the effect of which was to revoke a prior will, was put in issue by the appellant filing a caveat alleging that the deceased was at the time of her death and at the time of making the will without testamentary capacity or, in the alternative, that she was procured to make her last will by undue influence. By the judgment of the Surrogate Court it was found that the will was duly executed, that the testatrix had testamentary capacity and the allegation of undue influence was dismissed. An appeal from that judgment was dismissed by the Court of Appeal. On the appeal to this Court, the appellant's main contention was that in dismissing the allegation of undue influence on the ground that the caveator had not discharged the burden of proving it, the trial judge failed to give due consideration to the heavy burden resting on the proponents of the will to prove affirmatively the righteousness of the transaction having regard to the fact that the executor R was instrumental in the preparation and execution of the will of a woman over 90 and that he was one of the executors of that will while his wife, who was herself over 80 years of age, was the sole beneficiary.

Held (Judson J dissenting): The appeal should be dismissed.

Per Cartwright, Martland, Ritchie and Spence: There was ample evidence to support the trial judge's finding of fact, confirmed by the Court of Appeal, that the testatrix had testamentary capacity. Such finding should not be disturbed.

The finding of the Courts below that the burden of proving that there was undue influence had not been discharged was valid. But there was a distinction between producing sufficient evidence to satisfy the Court that a suspicion raised by the circumstances surrounding the execution of the will had been dispelled and producing the evidence necessary to establish an allegation of undue influence. The former task lay upon the proponents of the will, the latter was a burden assumed by those who attacked the will.

The evidence supported the finding that this will was the free act of a competent testatrix and having regard to the fact that there were con-

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

current findings of two Courts to the effect that there was no "undue influence" which were based on a careful and accurate review of the evidence called for the attacker as well as for the proponents of the will, there was no room for the suggestion that the Court was not "vigilant and jealous" in examining the evidence so as to satisfy itself that any suspicion to which the circumstances might give rise was dispelled.

Barry v. Butlin (1838), 2 Moo. P.C.C. 480; *Fulton v. Andrew* (1875), L.R. 7 H.L. 448; *Riach v. Ferris,* [1934] S.C.R. 725; *Tyrrell v. Painton,* [1894] P. 151; *Leger et al. v. Poirier,* [1944] S.C.R. 152; *Craig v. Lamoureux,* [1920] A.C. 349; *Wintle v. Nye,* [1959] 1 All E.R. 552; *Paske v. Ollat* (1815), 2 Phillim. 323, referred to.

Per Judson J., *dissenting:* The conclusion of the Surrogate Court Judge and the evidence on which it was based did not indicate anything more than that the testatrix was able to understand questions put to her as to ordinary and usual matters. There was no basis for any finding that she had testamentary capacity in the sense ascribed in *Leger et al. v. Poirier, supra.*

The suspicion concerning this will as a valid testamentary document permeated the whole case and could not be removed by a judicial preference for the evidence given by group A witnesses as against that of group B.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Fingland J. Appeal dismissed, Judson J. dissenting.

W. B. Williston, Q.C., and *J. Sopinka,* for the appellant.

J. D. Arnup, Q.C., for the respondent.

D. S. Murphy, for D. S. Ryan, surviving executor.

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

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario dismissing an appeal from a judgment of the Surrogate Judge for the County of Huron whereby that judge had ordered that the last will of the late Catherine Agnes Martin was duly executed, that the testatrix possessed testamentary capacity and that an allegation of undue influence made by the present appellant, Dr. MacGregor, the nephew of the testatrix, was to be dismissed.

The validity of the will in question was put in issue by Dr. MacGregor filing a caveat alleging that "the deceased was at the time of her death and at the time of making the will dated on or about the 13th of January 1961 without

testamentary capacity or, in the alternative, the said Stewart Alan MacGregor has reason to fear and does fear that the said Catherine Agnes Martin was procured to make her last will and testament dated on or about the 13th of January 1961 by undue influence".

By order of the acting Surrogate Judge, it was directed that the following were the issues to be tried:

1. David Stewart Ryan and Maud Ryan affirm and Stewart MacGregor denies that the will was duly executed by Catherine Agnes Martin;

2. David Stewart Ryan and Maud Ryan affirm and Stewart MacGregor denies that Catherine Agnes Martin possessed testamentary capacity;

3. Stewart MacGregor affirms and David Stewart Ryan and Maud Ryan deny that the making of the will was procured by undue influence.

The findings of the learned trial judge as to execution, testamentary capacity and undue influence are findings of fact based on a careful review of the evidence and a firm assessment as to the credibility of all the important witnesses. These findings were affirmed by the Court of Appeal and I am not prepared to reverse them or to substitute my assessment for that of the trial judge as to the character, motives, ability and integrity of the various witnesses who appeared before him.

I did not understand counsel for the appellant to question the fact that the will was duly executed, nor did I understand him to take direct issue with the finding as to the testatrix' capacity. His main contention as I understood it was that in dismissing the allegation of undue influence on the ground that the caveator had not discharged the burden of proving it, the learned trial judge failed to give due consideration to the heavy burden resting on the proponents of the will to prove affirmatively the righteousness of the transaction having regard to the fact that Mr. Ryan was instrumental in the preparation and execution of the will of a woman over 90 and that he was one of the executors of that will while his wife, who was herself over 80 years of age, was the sole beneficiary.

The principle which is here invoked on behalf of the appellant is most frequently referred to in the language in

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which it was stated by Baron Parke in *Barry v. Butlin*[1], where his Lordship formulated the following rules:

(1) The onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator, and

(2) If a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

The second of these rules was stated with added force by Lord Hatherley in *Fulton v. Andrew*[2], where he referred to the nature of the onus lying upon the proponents of a will under such circumstances in the following terms:

But there is a farther onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown on them the onus of shewing the righteousness of the transaction.

The same rule has been restated in a number of cases, most of which are referred to in the judgment of Crocket J. in *Riach v. Ferris*[3], in which case Sir Lyman Duff expressly adopted and approved the principle as stated by Davey L.J. in *Tyrrell v. Painton*[4], where it is stated in this form:

. . . the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed.

If a will has been shown to have been duly executed after having been read over to or by a testator who appears to understand it, then it will generally be presumed that he had testamentary capacity at the time of its execution but if, in the course of proving the will, it becomes apparent that there are circumstances raising a well-grounded suspicion as to whether the document indeed expresses the true will of the deceased, then a heavy burden lies on the Court to look beyond the presumption created by compliance with these formalities and be satisfied that the will was the free act of a testator who at the time had a "disposing mind and memory" in the sense defined by Rand J. in *Leger et al. v. Poirier*[5], where he said:

[1] (1838), 2 Moo. P.C.C. 480.
[2] (1875), L.R. 7 H.L. 448 at 471-2
[3] [1934] S.C.R. 725.
[4] [1894] P. 151 at 159-60.
[5] [1944] S.C.R. 152 at 161.

A 'disposing mind and memory' is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like; . . .

At the time when the present will was executed the testatrix, who was then 91, had been in the hospital for sixteen days suffering from a combination of infirmities common to a person of her advanced years. She was however, according to the evidence of the nurses, which was believed by the trial judge, alert in her mind, tidy in her habits, determined in whatever course of action she wished to take and quite aware of what she was doing.

In 1948 Miss Martin and her sister Maud started to live together but in 1951, when she was 78 years of age, Maud married a Mr. David Ryan with whom she later purchased a house in Seaforth where the testatrix came to live in 1953. On the afternoon of January 13, 1961, David Ryan came to visit the testatrix in hospital and upon his arrival her first remark to him appears to have been:

I want to change my will and I want to leave everything to Maud and I want you to take care of things for me.

to which Mr. Ryan is said to have replied that he would look after it and that he would get Mr. Sillery for her. Mr. Sillery is a local lawyer who was well known to the testatrix and it is clear that Mr. Ryan went directly from the hospital to Mr. Sillery's office where he said:

Catherine wants you to go up to the hospital and see you sometime. She wants to make out a new will. She said she wanted to be cremated and she wants to leave it all to her sister Maud Ryan.

and he also said she:

. . . wants Maud and I to be executors.

Mr. Sillery at once procured a will form and had a will typed by his wife which incorporated these instructions. Taking the will with them, Mr. Sillery and Mr. Ryan then went back to the hospital. It is perhaps well to point out that the somewhat undue haste in carrying out the testatrix' instructions is attributable to Mr. Sillery and not to Mr. Ryan. In the course of his evidence Mr. Sillery was asked concerning the drawing and execution of the will:

Q. Why did you do this immediately, when she used the words she wanted to see you one of these days—Any reason why you did it right then?

A. I never like to see anything such as instructions to draw a Will from a hospital not carried out as efficiently and effectively as possible.

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In his evidence Mr. Sillery describes the conversation which he then had with the testatrix as follows:

Q. In any event, when you did arrive, who spoke first?

A. I said to Miss Martin 'I understood you want to do some business with me.' So I said 'How are you feeling?' And she said, pointing to her head, 'All right up here.' Then down to her abdomen, 'but not down here.'

Q. You said 'How are you feeling?' She said 'All right up here, but not down here?'

A. That's right.

Q. What is the next conversation?

A. She said 'I want to change my Will.' I said 'Mr. Ryan gave me the instructions, so I prepared one.' She said 'I have changed my mind about that cremation; strike that one out.'

Q. You said you had prepared one. Did you read it or show it to her?

A. I put it right in front of her, and then read it to her.

Q. You read it to her, and you said you put it right in front of her and then read it to her. Did she have an opportunity or did she to your notice also read the will?

A. Yes, sir.

JUDGE FINGLAND: But more especially, did she read it or did she have the opportunity to read it?

A. I presume she would read it as I was going along, because she got to the cremation clause and she said she changed her mind about that, cancel that, strike that out.

TO MR. MURPHY: Q. You don't know for sure then whether she actually read the Will?

A. No, no.

Q. When you read it to her, where was the Will in relation to where she was?

A. Immediately in front of her on the bed.

Q. In other words, while you were reading, did she have the opportunity to read it with you?

A. Yes, she even asked to have the light turned on.

JUDGE FINGLAND: She asked the nurse to have the light turned on?

A. Yes.

TO MR. MURPHY: Q. In any event, you finished reading it. I think you said she wanted something changed?

A. *She said that she was leaving Sandy out of the Will.*

Q. You said she said 'I have changed my mind about this cremation?'

A. Yes.

Q. I show you the Will. There is apparently a line struck out on Page 1, paragraph 1. Can you tell me what paragraph 1 said before the alteration?

A. It starts out the figure 1 and a period. 'I direct that my body shall be cremated.' There's a name written over it 'Catherine'.

Q. When was this change made in relation to when the Will was signed, before or after?

A. Prior to the signing of the Will.

Mr. Sillery says that Ryan, who was present throughout this conversation and the execution of the will took no part in either.

When the will had been executed it was duly witnessed by Mr. Sillery and the nurse in attendance, both of whom initialled the change which the testatrix had made. The effect of this will was to revoke a prior will of May 21, 1951, by the terms of which the residue of the estate was given to the Toronto General Trust Corporation as sole executor and trustee upon trust to pay the income to the sister Maud during her lifetime with power to encroach on the capital for her care and maintenance whenever requested to do so by her and provided the trustees considered it necessary and desirable and on the sister's death to transfer and make over the whole of the residue of the estate to Dr. Stewart A. MacGregor. Dr. MacGregor was a nephew of the testatrix to the cost of whose education she had contributed and to whom she always referred as Sandy. By January 1961 Dr. MacGregor was a successful dentist and, agreeing as I do with the learned trial judge in accepting the evidence of Mr. Sillery, I am satisfied that Miss Martin was fully aware of the fact that the effect of the will in question was "to cut Sandy out" and to leave her estate absolutely to Maud because "she had lived with her". This appears to me to be made doubly clear in the following excerpt from Mr. Sillery's cross-examination:

Q. And what was said about Dr. —

A. 'I'm going to cut Sandy —' She always called him Sandy — 'I'm going to cut Sandy out of this Will.'

Q. Dr. MacGregor or Sandy that you are referring to, he's the Caveator in these proceedings?

A. Yes, I presume so.

Q. Did she give any reason for cutting Dr. MacGregor out?

A. No, she said she was going to leave it to her only sister.

Q. That is the only reason she gave?

A. That's the only reason— 'I have lived with her.'

Mr. Sillery does not appear to have asked the testatrix anything about the extent of her estate or the members of her family for whom she might wish to provide, nor did he give her any advice respecting succession duties, but he does testify to having had the following conversation respecting the revocation of her former will:

Q. So then after the Will was signed was there any further conversation with Miss Martin?

A. Yes. She did say 'I have another Will in the Toronto General Trust.'

Q. She said she had another will in the Toronto General Trust?

A. 'I want to get that.' And I advised her there was a revocation clause in the Will which would revoke the previous Will.

It was contended on behalf of the appellant that the instructions which David Ryan gave to Mr. Sillery concerning cremation indicated that Mr. Ryan had discussed the making of a new will and its terms with Miss Martin before coming to the hospital on January 13 as there is no evidence of that matter having been discussed between them in the hospital. This was cited in support of the contention that the will was the product of Ryan's advice and influence, but I do not think that it supports any such inference as Miss Martin had apparently discussed the question of cremation informally with others, notably Mr. Sillery, at an earlier date.

It is apparent from the evidence of Anny Coyne, who was a witness to the will, that the testatrix had perfectly rational thoughts on the subject of cremation and valid reasons for deciding not to be cremated. In this regard Miss Coyne's evidence is as follows:

Q. Now you have already described to us what occurred while the Will was being signed. What is your opinion as to whether Miss Martin knew what she was doing when she signed that Will? You were there. What was your impression?

A. I'd say yes, she knew what she was doing. She knew what she wanted to do and she was doing it . . .

Q. Would you have witnessed this Will if you had any doubt about that?

A. No.

Q. Now after Mr. Sillery and Mr. Ryan left did you have any conversation with Miss Martin?

A. Yes.

Q. What did you discuss?

A. Immediately after, she brought up the subject of cremation and anointing.

Q. What did she say about cremation?

A. She said if she was in Montreal she would be cremated. As I took it, she would request that she be cremated. But as she was living away far and it wasn't readily available that she wasn't just going to bother about it.

It was contended also that the fact that the family doctor had prepared a certificate dated January 13, which he later

repudiated, to the effect that he had found the testatrix that day to be in sound mind and aware of her own affairs, was a highly suspicious circumstance because the certificate was in fact not made out until January 17 and the doctor had made no such examination on the 13th of that month. It is true that such a certificate was requested by Mr. Ryan but he was no party to it being falsely dated and it is clear that it was sought by him at the suggestion of Mr. Sillery. The trial judge expressly rejected this doctor's evidence saying "I place no credibility on the doctor's testimony".

The question of whether or not the testatrix had a "disposing mind and memory" is a question of fact and the issue as to testamentary capacity stated in the order of the acting Surrogate Judge places the burden of proof in this regard on the executors. This question has been decided in the affirmative by the learned trial judge and has been confirmed by the Court of Appeal and the rule established in this Court by a long series of cases is that such a concurrent finding should not be disturbed unless it cannot be supported by the evidence. In my view there is ample evidence upon which to base this finding.

As to the question of whether the execution of this will was the "free act" of the testatrix, the learned trial judge and the Court of Appeal have both found that there was no undue influence. This is also a question of fact the burden of proving which rested on the caveator. I am equally satisfied as to the validity of the finding that this burden has not been discharged, but as I have stated, what is put forward by appellant's counsel is that even if this be so, the conclusion of the trial judge is still open to objection on the ground that he misdirected himself and failed to take into account the burden resting on the proponents of the will to dispel the suspicion created by the fact that Mr. Ryan was instrumental in obtaining it.

There is a distinction to be borne in mind between producing sufficient evidence to satisfy the Court that a suspicion raised by the circumstances surrounding the execution of the will have been dispelled and producing the evidence necessary to establish an allegation of undue influence. The former task lies upon the proponents of the will, the latter is a burden assumed by those who are attacking the will and can only be discharged by proof of the existence

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of an influence acting upon the mind of the testator of the kind described by Viscount Haldane in *Craig v. Lamoureux*[1], at p. 357 where he says:

> Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean.

The distinction to which I have referred is well described by Crocket J. in *Riach v. Ferris, supra,* at p. 736 where he says:

> Assuming that in the case in behalf of a plaintiff seeking to establish the validity of a will, there may be such circumstances of apparent coercion or fraud disclosed as, coupled with the testator's physical and mental debility, raise a well-grounded suspicion in the mind of the court that the testator did not really comprehend what he was doing when he executed the will, and that in such a case it is for the plaintiff to remove that suspicion by affirmatively proving that the testator did in truth appreciate the effect of what he was doing, there is no question that, once this latter fact is proved, the onus entirely lies upon those impugning the will to affirmatively prove that its execution was procured by the practice of some undue influence or fraud upon the testator.

In the case of *Barry v. Butlin, supra,* and in most of the cases which have followed it, including the case of *Wintle v. Nye*[2], upon which much reliance was placed by the appellant, the circumstances giving rise to suspicion were that a person who benefited under the will in question had actually prepared the document, but it is apparent from the decision in *Tyrrell v. Painton, supra,* that any well-grounded suspicion is sufficient to put the Court on its guard to scrutinize the circumstances so as to ensure that it has been put at rest before deciding in favour of the will.

Counsel for the appellant contended that in all cases where the circumstances surrounding the preparation or execution of the will give rise to a suspicion, the burden lying on the proponents of that will to show that it was the testator's free act is an unusually heavy one, but it would be a mistake, in my view, to treat all such cases as if they called for the meeting of some standard of proof of a more than ordinarily onerous character. The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case. It is true that there are expressions in some of the

[1] [1920] A.C. 349. [2] [1959] 1 All E.R. 552.

judgments to which I have referred which are capable of being construed as meaning that a particularly heavy burden lies upon the proponents in all such cases, but in my view nothing which has been said should be taken to have established the requirements of a higher degree of proof than that referred to by Sir John Nicholl in *Paske v. Ollat*[1], where he said at p. 324:

> . . . the law of England requires, in all instances of the sort, that the proof should be clear and decisive;—the balance must not be left in equilibrio; the proof must go not merely to the act of signing, but to the knowledege of the contents of the paper. In ordinary cases this is not necessary; *but where the person who prepares the instrument, and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person;*—propriety and delicacy would infer that he should not conduct the transaction; . . .

The italics are my own.

This is not a case in which the will was prepared by a beneficiary and it appears from the evidence that the first suggestion as to its preparation was made by the testatrix herself, but the age of the testatrix, the haste with which the instructions were carried out, the absence of Mr. Ryan from the witness stand and the failure of Mr. Sillery to discuss the changes made from the former will or to give any advice concerning them, are circumstances which standing alone might well constitute grounds for a suspicion that "undue influence" had been exercised, and there can be no doubt that Mr. Ryan was an "interested person". I am, however, of opinion that the evidence supports the finding that this will was the free act of a competent testatrix and having regard to the fact that there are concurrent findings of two Courts to the effect that there was no "undue influence" which are based on a careful and accurate review of the evidence called for the attacker as well as for the proponents of the will, I am unable to see that there is any room for the suggestion that the Court was not "vigilant and jealous" in examining the evidence so as to satisfy itself that any suspicion to which the circumstances might give rise was dispelled.

I would accordingly dismiss this appeal and I direct that the costs of the surviving executor as between solicitor and client be paid out of the estate. In view of all the circumstances, I would also direct that the costs of the caveator on a party and party basis be paid from the same fund.

[1] (1815), 2 Phillim. 323.

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JUDSON J. (*dissenting*):—My opinion is that this will should not have been admitted to probate. The principle on which the Surrogate Court should have acted in this case is not in doubt and is authoritatively stated in a judgment of this Court in *Riach v. Ferris*[1]. There was failure in that Court to examine the evidence in the light of that case. The Court of Appeal, however, corrected the omission and decided that the burden of establishing testamentary capacity when the circumstances were suspicious had been met, and, further, that there was no evidence of undue influence. Consequently, the judgment of the Surrogate Court was affirmed.

Counsel for the appellant in this Court did not argue undue influence but confined himself to the one point that an examination of the evidence could not indicate that the suspicion had been removed.

I take the principle to be applied from the concurring judgment of Duff C. J. in *Riach v. Ferris:*

> I entirely agree in the conclusions of my brother Crocket as well as in the reasons by which those conclusions are supported. My purpose in adding what I am now saying is merely to note that the law is well established and well known and that, as applicable to this appeal, it is best, as well as completely, stated in this passage from the judgment of Lord Davey (then Davey L.J.) in his judgment in *Tyrrell v. Painton* (L.R. [1894] P. 151, at 159-160):
>
> > ". . . the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed."

I do not think that the conclusion of the Surrogate Court Judge and the evidence on which it was based indicates anything more than this, that the testatrix was able to understand questions put to her as to ordinary and usual matters. To me there is no basis for any finding that she had testamentary capacity in the sense ascribed in *Leger et al. v. Poirier*[2]:

> But there is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A "disposing mind and memory" is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like; this has been recognized in many cases.

* * *

[1] [1934] S.C.R. 725. [2] [1944] S.C.R. 152.

Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole, and this I am satisfied was not present here.

I turn now to a consideration of the suspicious circumstances on which the appellant relies for the invalidation of this will. The testatrix, Catherine Martin, was born on February 2, 1870. She made this will on January 13, 1961, when she was in hospital during her last illness. She died on February 4, 1961. The will came into being as a result of instructions given by her to her brother-in-law, David Ryan. According to Mr. Ryan's report to a solicitor, she wanted to leave the whole estate to her sister Maud, who was Ryan's wife. Ryan himself did not give evidence. We have Ryan's instructions only through the mouth of the solicitor. The solicitor prepared the will immediately without first consulting Miss Martin. He then took it to the hospital, accompanied by Ryan, and had it executed. He then delivered the will to Ryan. Ryan then obtained a false certificate from the doctor who was in attendance on Miss Martin to the effect that she knew what she was doing. This certificate was dated January 13, 1961, the date of the execution of the will. It was, in fact, signed four days later, on January 17. It is in these terms:

Jan. 13/61

To Whom it may Concern:

This is to certify that I have this day examined Miss Catherine A. Martin and find her to be in sound mind and aware of her own affairs.

The testatrix, her sister Maud and her sister's husband had been living together in Seaforth since the year 1953. David Ryan was a second husband of Maud Ryan. They were married in 1951. Maud Ryan did not survive her sister very long. She died on December 10, 1963, in her eighties. Her husband was, at the date of the trial, also in his eighties.

There is nothing in any of the evidence to explain a sudden, precipitate revocation of a previous will which had been twice confirmed by the testatrix when she was undoubtedly of sound mind. This will had been executed in 1951 and left to the sister a life interest with power to the trustees to encroach on capital in case of need. It was a rational will and made adequate provision for the sister. If in 1951 she had decided to leave everything to the sister

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absolutely, there could have been no issue. I recognize that the sister was a natural object of the bounty of the testatrix, perhaps more so than Dr. MacGregor. However, in 1951, Dr. MacGregor had been left the residue after the life interest of the sister and after any necessary encroachment. We do not know why, three weeks before her death, the testatrix changed her mind and departed from these well-thought-out plans for her sister.

The circumstances in which the will was prepared and executed give rise to suspicion. The solicitor took his instructions from an intermediary. He immediately prepared a will according to these instructions and took it for execution. He made no effort to ascertain by independent inquiry from the testatrix what her instructions were. The extent of these instructions depends entirely on what Ryan told the solicitor. This solicitor cannot be regarded as an independent adviser chosen by the testatrix. Ryan was in the room when the will was executed. The solicitor did no more than read over the will to her and made the change when she said that she had decided against being cremated. If the solicitor decided to draw the will on Ryan's instructions, he should have interviewed Miss Martin in the absence of Ryan. He should have made some independent attempt to ascertain testamentary capacity, her reasons for the change, her knowledge and appreciation of the extent of her property, and of her former will, and why she was cutting out Dr. MacGregor, if he knew that. What a prudent, careful and competent solicitor would do in circumstances such as these is fully discussed in what I regard as the leading case in Ontario on this subject, *Murphy v. Lamphier*[1].

The obtaining of the medical certificate is significant. It was falsely dated. The doctor said that he gave it to Ryan, who was also his patient, because he did not wish to upset him. Later, when there was a prospect of litigation, he told Ryan that the certificate was in error and that he would not stand behind it. The doctor's evidence at the trial was that the testatrix was often confused, that she could not answer questions correctly and was mixed up as to day and night.

[1] (1914), 31 O.L.R. 287 (Boyd C.), affirmed (1914), 32 O.L.R. 19.

The irresistible conclusion from his evidence, if it is to be accepted, is that the testatrix was not in complete possession of her faculties and that there was grave doubt about her mental capacity. The learned trial judge chose to disregard this evidence in its entirety, but the fact remains that he was the one best qualified to know. He was correcting his error and, in my opinion, it was no solution to the difficult problem before the learned trial judge to disregard entirely the only professional evidence on the subject.

There was other evidence confirming the doctor's evidence, as well as evidence against it. The evidence against it is that of two private nurses, the hospital superintendent and a minister who thought that the testatrix knew what she was doing. I do not know that any of this evidence touches on testamentary capacity. A night nurse thought that the testatrix was confused and talked irrationally. On January 14, the day after the will-making, the appellant and his wife visited the testatrix when they found her lying with her mouth open, staring at the ceiling, making a gurgling noise, unable to recognize them and unable to conduct any conversation. Another witness, who became a fellow patient in the same room with the testatrix on January 14, said that this was the condition in which she found the testatrix during her stay in the hospital.

Finally, it was of the utmost significance in this case that Ryan did not give evidence. We know nothing of his instructions beyond what he repeated to the solicitor and what the solicitor reported back to the testatrix. Ryan's evidence was absolutely essential to any proper appreciation of what had gone on between him and the testatrix leading up to the making of this will. It is true that he was an old man at the time of the trial, a year or two older than he was when the will was made, but he was in Court on the opening of the trial. He was present when some of the evidence was given. He was a surviving executor of the will and yet he did not give evidence. How can it be said in those circumstances that the suspicion concerning this will as a valid testamentary document has been removed? The suspicion permeates the whole case and cannot be removed by a judicial prefer-

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ence for the evidence given by group A witnesses as against that of group B.

I would allow the appeal and dismiss the application for probate made in the Surrogate Court of the County of Huron. The appellant should have his costs throughout. I would make no order for costs in favour of the executors of the will offered for probate.

Appeal dismissed, JUDSON J. *dissenting.*

Solicitors for the appellant: Fasken, Calvin, Mackenzie, Williston & Swackhamer, Toronto.

Solicitors for the respondent, D. S. Ryan, surviving executor: Donnelly, Donnelly & Murphy, Goderich.

Solicitors for the respondent, D. S. Ryan, executor of Maud Ryan: Anderson, Neilson, Ehgoetz, Bell, Dilks & Misener, Stratford.

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*Fév. 2, 3, 4
Juin 24

RENVOI TOUCHANT LA CONSTITUTIONNALITÉ DE LA LOI CONCERNANT LA JURIDICTION DE LA COUR DE MAGISTRAT

LE PROCUREUR GÉNÉRAL DE LA PROVINCE DE QUÉBEC ..... APPELANT;

ET

LE BARREAU DE LA PROVINCE DE QUÉBEC ET LE PROCUREUR GÉNÉRAL DU CANADA (Intervenants en Cour du banc de la reine) ..... INTERVENANTS;

ET

LE PROCUREUR GÉNÉRAL DE LA PROVINCE DE SASKATCHEWAN INTERVENANT.

EN APPEL DE LA COUR DU BANC DE LA REINE
PROVINCE DE QUÉBEC

Droit constitutionnel—Cour de Magistrat de Québec—Limite pécuniaire portée de $200 à $500—Constitutionnalité de la Loi concernant la juridiction de la Cour de Magistrat, 11-12 Éliz. II, c. 62—Acte de l'Amérique du Nord britannique, 1867, c. 3, art. 96.

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*CORAM: Le juge en Chef Taschereau et les Juges Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall et Spence.

Le 22 mai 1963, la législature du Québec adoptait la *Loi concernant la juridiction de la Cour de Magistrat,* 11-12 Eliz. II, c. 62, dont l'objet était de porter de $200 à $500 la limite pécuniaire de la juridiction de cette Cour. Par un arrêté-en-conseil en date du 22 janvier 1964, le lieutenant-gouverneur ordonna que soit soumise à la Cour du banc de la reine, juridiction d'appel, la question de savoir si cette loi était inconstitutionnelle en tout ou en partie. La Cour d'Appel exprima l'avis que la Cour de Magistrat, avec toute la juridiction qui lui est conférée non pas seulement par la loi sous étude mais par toutes les lois présentement en vigueur, avait changé de caractère et était devenue une Cour visée par l'art. 96 de l'*Acte de l'Amérique du Nord britannique.* La Cour d'Appel adjugea que vu que les magistrats n'étaient pas nommés conformément à l'art. 96, la loi sous étude était alors inconstitutionnelle. Le procureur général de la province en appela devant cette Cour.

Arrêt: La *Loi concernant la juridiction de la Cour de Magistrat,* 11-12 Eliz. II, c. 62, n'est pas inconstitutionnelle.

La juridiction de la Cour d'Appel ainsi que la juridiction de cette Cour étaient délimitées par la question telle que posée par l'arrêté-en-conseil et la Cour d'Appel devait s'en tenir à la question spécifique sur laquelle son avis avait été demandé. Dans le cas présent, l'avis recherché par le Conseil exécutif ne visait d'autre loi que la loi qui était spécifiquement mentionnée et n'avait d'autre fin que celle de savoir si, en raison du changement de la limite pécuniaire, cette loi était inconstitutionnelle. On ne peut trouver dans l'arrêté-en-conseil aucune intention expresse ou implicite de livrer indirectement à l'examen des tribunaux les diverses lois de la province attribuant une compétence à la Cour de Magistrat présidée par des juges nommés par le lieutenant-gouverneur-en-conseil. L'unique point que soulève la question se résume à savoir si le fait d'augmenter de $200 à $500 la limite pécuniaire de la juridiction de la Cour de Magistrat était un fait qui, en soi et sans plus, était apte à changer le caractère de cette Cour pour en faire une Cour au sens de l'art. 96 ou analogue à celles qui y sont mentionnées. Une Cour inférieure validement constituée et non visée par l'art. 96 ne perd pas son caractère initial du fait que par une législation provinciale on prétend lui conférer une juridiction qui est propre aux Cours visées par cet article. Une telle législation est invalide; mais la Cour demeure et retient son statut de Cour inférieure échappant aux dispositions de l'art. 96. En l'espèce, l'extension, par l'augmentation du nombre de dollars, de cette juridiction de la Cour de Magistrat, considérée à la lumière de la valeur courante du dollar, n'a pas en soi pour effet, lorsque ajoutée à la juridiction qui lui est propre comme Cour inférieure non visée par l'art. 96, de faire de cette Cour une Cour tombant sous cet article. Il s'ensuit que la loi sous étude n'était pas inconstitutionnelle.

Constitutional law—Magistrate's Court of Quebec—Pecuniary limits raised from $200 to $500—Constitutionality of an Act concerning the jurisdiction of the Magistrate's Court, 11-12 Eliz. II, c. 62—B.N.A. Act, 1867, c. 3, s. 96.

On May 22, 1963, the Quebec Legislature passed an *Act concerning the jurisdiction of the Magistrate's Court,* 11-12 Eliz. II, c. 62, whose

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object was to raise the pecuniary limits of the jurisdiction of that Court from $200 to $500. On January 22, 1964, by Order-in-Council, the Lieutenant-Governor ordered that the question as to whether that statute was unconstitutional in whole or in part be submitted to the Court of Queen's Bench, Appeal Side. The Court of Appeal expressed the opinion that the Magistrate's Court, with all the jurisdiction which has been conferred upon it not only by the statute in question but also by all the statutes presently in force, had changed its character and had become a Court within the meaning of s. 96 of the *B.N.A. Act.* The Court of Appeal ruled that since the magistrates were not appointed pursuant to s. 96, the statute in question was therefore unconstitutional. The Attorney General of the province appealed to this Court.

Held: The *Act concerning the jurisdiction of the Magistrate's Court,* 11-12 Eliz. II, c. 62, was not unconstitutional.

The jurisdiction of the Court of Appeal as well as the jurisdiction of this Court were limited to the question submitted by the Order-in-Council, and the Court of Appeal should have dealt only with the specific question upon which its opinion was asked. In the present instance, the opinion sought by the Executive Council referred only to the statute which was specifically mentioned and had no other object than the one as to whether, in view of the change in the pecuniary limits, that statute was unconstitutional. There is no intention express or implicit in the Order-in-Council to place indirectly under the scrutiny of the Courts the numerous statutes of the province attributing a competence to the Magistrate's Court presided over by judges appointed by the Lieutenant-Governor in Council. The only issue raised is as to whether the changing of the pecuniary limits of the jurisdiction of the Magistrate's Court from $200 to $500 was a fact which, by itself and without more, was apt to change the character of that Court so as to make it a Court within the meaning of s. 96 or analogous to those therein mentioned. An inferior Court validly constituted and outside the scope of s. 96 does not lose its initial character because a provincial legislation purports to confer upon it a jurisdiction which is proper to the Courts within the scope of that section. Such a legislation is invalid; but the Court retains its status of inferior Court outside the provisions of s. 96. In this particular case, the extension of the jurisdiction of the Magistrate's Court, by the raising of the pecuniary limits, considered in the light of the value of the dollar, did not have by itself the effect, when added to its jurisdiction as an inferior Court outside s. 96, to make of that Court a Court within the scope of that section. It follows that the statute in question was not unconstitutional.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], on a reference by the Lieutenant-Governor in Council. Appeal allowed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], sur une question soumise par le Lieutenant-Gouverneur en conseil. Appel maintenu.

[1] [1965] B.R. 1.

Laurent E. Bélanger, C.R., Roger Thibodeau, C.R., et *Gérald E. LeDain, C.R.,* pour le procureur général de Québec.

Jean Turgeon, C.R., et *Jules Deschênes, C.R.,* pour le Barreau de Québec.

Rodrigue Bédard, C.R., et *Gérard Beaudoin* pour le procureur général du Canada.

W. G. Doherty, Q.C., pour le procureur général de Saskatchewan.

Le jugement de la Cour fut rendu par

Le JUGE FAUTEUX:—Le 22 mai 1963, la législature du Québec adoptait la *Loi concernant la juridiction de la Cour de Magistrat,* 11-12 Eliz. II, c. 62. L'objet de cette loi modifiant le Code de Procédure Civile est de porter de $200 à $500 la limite pécuniaire touchant la juridiction de cette Cour. La date d'entrée en vigueur de cette loi demeure sujette à détermination par une proclamation du Lieutenant-Gouverneur en conseil.

Avant que ne soit lancée cette proclamation, la législature, ainsi qu'il appert du préambule d'une autre loi sanctionnée le même jour, 11-12 Eliz. II, c. 61, considéra qu'il importait d'obtenir, par un renvoi à la Cour d'Appel de la province susceptible d'appel au plus haut tribunal du pays, la certitude que la constitutionnalité de la loi concernant la juridiction de la Cour de Magistrat est indiscutable. Aussi bien l'art. 1 du c. 61 prescrit-il que:

> 1. L'avis qui sera prononcé par la Cour du banc de la reine sur toutes questions qui lui seront soumises par le lieutenant-gouverneur en conseil, touchant la constitutionnalité de la Loi concernant la juridiction de la Cour de magistrat, devra être considéré comme un jugement de la dite Cour et on pourra en interjeter appel comme d'un jugement dans une action.

La question que le Lieutenant-Gouverneur en conseil jugea par la suite à propos de soumettre à la Cour du Banc de la reine appert à l'arrêté en conseil suivant, qu'il importe de citer au texte vu le désaccord des parties sur la véritable portée de cette question:

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ARRÊTÉ EN CONSEIL
CHAMBRE DU CONSEIL EXÉCUTIF

Numéro 99 Québec, le 22 janvier 1964

PRÉSENT:

Le Lieutenant-gouverneur en conseil
CONCERNANT un renvoi à la Cour du Banc de la Reine

ATTENDU QU'à sa dernière session régulière, la Législature a adopté la Loi concernant la juridiction de la Cour de magistrat (11-12 Elizabeth II, chapitre 62) à l'effet de donner juridiction à cette cour sur toute demande dans laquelle la somme demandée ou la valeur de la chose réclamée est inférieure à cinq cents dollars, sauf les demandes de pension alimentaire et celles réservées à la Cour de l'Échiquier du Canada et sur toute demande en résiliation de bail lorsque le montant du loyer et des dommages réclamés n'atteint pas cinq cents dollars;

ATTENDU QUE cette loi n'entrera en vigueur que sur proclamation du lieutenant-gouverneur en conseil et qu'avant de lancer cette proclamation, il importe d'obtenir la certitude que la constitutionnalité de cette législation est indiscutable;

ATTENDU QUE pour obtenir cette certitude, il y a lieu de soumettre la question à la Cour du banc de la reine, suivant la Loi des renvois à la Cour du banc de la reine (Statuts refondus, 1941, chapitre 8);

ATTENDU QUE, pour le cas où il y aurait lieu, pour statuer sur cette question, de tenir compte de la fluctuation de la valeur de la monnaie depuis 1867, les faits suivants doivent être signalés:

La statistique officielle ne contient qu'un seul indice calculé pour toutes les années à partir de 1867, savoir: l'indice général des prix de gros présentement établi sur les bases 1935-1939=100.

Cet indice s'établissait au mois de mai 1963 à 244.4 alors que pour l'année 1867, on l'a fixé à 80.2.

Quant à l'indice des prix à la consommation, il est présentement calculé sur la base 1949=100 et des indices antérieurs du coût de la vie ont été calculés sur les bases 1925-1939=100, 1926=100 et 1913=100.

Au mois de mai 1963, il s'établissait à 132.3 sur la base actuelle, alors que le chiffre de 1913, par conversion arithmétique à la base actuelle, équivaudrait à 49.2.

Pour fins de comparaison, l'indice général des prix de gros pour la même année s'établit à 83.4.

IL EST ORDONNÉ en conséquence, sur la proposition du Procureur général:—

QUE la question suivante soit soumise à la Cour du banc de la reine, juridiction d'appel, savoir:

> La Loi concernant la juridiction de la Cour de magistrat, 11-12 Elizabeth II, chapitre 62, est-elle inconstitutionnelle en tout ou en partie?

Avant l'audition en Cour d'Appel, il est apparu que le Procureur Général du Canada, tout comme le Procureur Général de la Province de Québec, soutiendrait—comme

d'ailleurs ce fut le cas—la constitutionnalité de la loi. Dès lors, il y avait danger que, personne n'argumentant la thèse opposée, la question ne soit pas éventuellement portée devant la Cour suprême du Canada. C'est dans ces circonstances, décrites au factum du Barreau de la Province de Québec, que le Conseil du Barreau décida d'intervenir pour soutenir, en Cour du banc de la reine, la thèse opposée à celle défendue par l'appelant et le Procureur Général du Canada et ce, ajoute-t-on au factum, «non pas afin de combattre à outrance une législation que tous souhaitent voir entrer en vigueur le plus tôt possible,» mais afin d'assurer que tous les aspects du problème soient présentés et qu'éventuellement la question soit portée devant la Cour suprême du Canada.

Après avoir entendu les arguments de part et d'autre et délibéré, la Cour d'Appel[1] (M. le Juge en chef Tremblay, MM. les Juges Rinfret, Choquette, Montgomery et Rivard) exprima son avis dans les termes suivants:

La loi concernant le juridiction de la Cour de Magistrat, 11-12 Elizabeth II, chapitre 62, est inconstitutionnelle en autant que les juges de la Cour visée par cette loi ne sont pas nommés conformément à l'article 96 de l'Acte de l'Amérique Britannique du Nord.

Le Procureur Général de la Province de Québec en appelle maintenant à cette Cour, ainsi que le permet l'art. 37 de la *Loi sur la Cour suprême du Canada.* Dans cet appel, le Procureur Général du Canada et celui de la Province de Saskatchewan sont intervenus pour soutenir la constitutionnalité de la loi en question alors que, toujours dans le même esprit, le Barreau de la Province de Québec est intervenu pour soumettre les arguments militant en faveur de la thèse opposée.

Il convient de citer les articles de la loi dont la constitutionnalité fait l'objet de cette référence:

1. L'article 54 du Code de procédure civile, remplacé par l'article 12 de la loi 1-2 Elizabeth II, chapitre 18, est modifié en remplaçant les paragraphes 1 et 4 par les suivants:

«1. De toute demande dans laquelle la somme demandée ou la valeur de la chose réclamée est inférieure à cinq cents dollars, sauf les demandes de pension alimentaire et celles réservées à la Cour de l'Échiquier du Canada;»

«4. De toute demande en résiliation de bail lorsque le montant réclamé pour loyer et dommages n'atteint pas cinq cents dollars.»

2. Le dit code est modifié en insérant, après l'article 58, le suivant:

[1] [1965] B.R.1.

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«58*a*. Sauf dans les causes où l'objet du litige est d'une valeur inférieure à deux cents dollars, un juge de la Cour du banc de la reine peut, en la manière prévue à l'article 1211, accorder la permission d'interjeter appel de tout jugement final de la Cour de magistrat.

Cet appel est régi par toutes les dispositions relatives à l'appel des jugements interlocutoires de la Cour supérieure.

Il ne permet de soulever que les questions de droit qui peuvent être décidées au vu du jugement, des actes de procédure et des écrits versés au dossier.»

3. Du consentement des parties, toute cause qui a été intentée devant la Cour supérieure avant l'entrée en vigueur de la présente loi et qui, par l'article 1, est maintenant de la compétence de la Cour de magistrat est déférée à cette Cour pour y être instruite et jugée, comme si elle y avait été intentée et tous les jugements interlocutoires y avaient été rendus.

4. La présente loi entrera en vigueur à la date qui sera fixée par proclamation du lieutenant-gouverneur en conseil.

En somme, l'art. 1 porte de $200 à $500 la limite pécuniaire de la compétence de la Cour de Magistrat; l'art. 2 donne à la Cour du banc de la reine une juridiction d'appel d'un jugement de la Cour de Magistrat, sauf dans le cas où la valeur de l'objet en litige est inférieure à $200; l'art. 3 contient une disposition transitoire relative aux causes pendantes, et enfin, l'art. 4 statue sur la date d'entrée en vigueur de la loi. Ainsi donc, c'est l'art. 1 qui dénonce l'objet véritable de la loi et qui donne une raison d'être aux autres articles. Seul à modifier la compétence de la Cour de Magistrat, l'art. 1 est aussi le seul article de cette loi auquel peut vraiment se rapporter la question soumise par l'arrêté en conseil.

En Cour d'Appel, cependant, on a jugé que cette question soumise par le Lieutenant-Gouverneur en conseil n'est pas, comme l'ont prétendu l'appelant et le Procureur Général du Canada, de savoir si le fait d'augmenter la juridiction de la Cour de Magistrat de $200 à $500 a pour effet d'en faire une Cour visée par l'art. 96 de l'*Acte de l'Amérique du Nord Britannique,* c'est-à-dire une Cour dont les Juges contrairement à ce qui s'est fait jusqu'à maintenant, doivent être nommés par le Gouverneur général en conseil. On a plutôt jugé que la question, ainsi que l'a suggéré le Barreau de la Province de Québec, est de savoir si la Cour de Magistrat, avec toute la juridiction qui lui est conférée, non pas seulement par la loi sous étude mais par toutes les lois présentement en vigueur, est une Cour visée par l'art. 96. C'est donc en donnant à la question soumise une interprétation extensive dont la validité est mise en question dans cet

appel, et en faisant entrer particulièrement dans la considération de la question ainsi interprétée l'historique de la Cour de Circuit et de la Cour de Magistrat, les nombreuses lois attribuant une compétence à la Cour de Magistrat, la comparaison de cette Cour avec la Cour de Circuit et les «District and County Courts» mentionnées en l'art. 96, qu'on est arrivé à former l'opinion que si, lors de son établissement en 1869, la Cour de Magistrat n'était pas une des Cours visées par l'art. 96, la législature en a graduellement changé le caractère, au cours des années, au point d'en faire, éventuellement et à un moment qu'on ne peut déterminer, une Cour visée par cet article, tout en retenant, par ailleurs, le contrôle sur la nomination de ses Juges. Et dès lors, la Cour d'Appel a conclu que la loi sous étude «était inconstitutionnelle en autant que les juges de la Cour visée par cette loi ne sont pas nommés conformément à l'article 96».

En droit, il était parfaitement loisible au Lieutenant-Gouverneur en conseil de soumettre l'une ou l'autre des questions que la Cour d'Appel a ainsi mises en contraste pour ensuite écarter la première et retenir la seconde comme étant, à ses vues, celle qui lui était référée. En effet, l'art. 2 de la *Loi concernant les questions soumises à la Cour du banc de la reine par le Lieutenant-Gouverneur en conseil* S.R.Q. 1941 c. 8, sur lequel se fonde le pouvoir du Lieutenant-Gouverneur en conseil de référer des questions à la Cour d'Appel, édicte que:

> 2. Le Lieutenant-Gouverneur en conseil peut soumettre à la Cour du banc du roi, juridiction d'appel, pour audition et examen, *toute question quelconque qu'il juge à propos,* et, sur ce, la Cour les entend et les examine.

Le Lieutenant-Gouverneur en conseil a donc l'exclusive et la plus grande discrétion en ce qui concerne le choix et la définition des questions qu'il désire soumettre; et il s'ensuit que la décision qu'il prend à cet égard délimite la juridiction de la Cour d'Appel aussi bien que la juridiction de cette Cour. Le judiciaire n'a pas la responsabilité de sonder les desseins de l'exécutif; il doit s'en tenir à la question spécifique sur laquelle on requiert son avis. Il n'est pas sans à propos de référer ici à l'extrait suivant du jugement du Comité Judiciaire du Conseil Privé dans *Lord's Day Alliance of Canada v. Attorney-General for Manitoba (Attorney-*

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General for Canada, Intervener)[1], qui apparaît au bas de la page 226:

> The Lieutenant-Governor in Council expresses a desire to be informed as to the legality of the excursions to which he refers only on the assumption that that Act has been made operative, and no question as to their legality apart from the Act is propounded. Their Lordships were, however, strongly urged by the appellants to deal with and dispose of the view that such excursions were lawful in Manitoba independently of the Act altogether—a view expressed by some of the learned Judges of the Court of Appeal in this case and foreshadowed in an earlier decision of the same Court.
>
> Their Lordships will refrain from taking this course, for one compelling reason, which they name out of several which would justify reserve in this matter.
>
> Statutes empowering the executive Government, whether of the Dominion of Canada or of a Canadian province, to obtain by direct request from the Court answers to questions both of fact and law, although *intra vires* of the respective Legislatures, impose a novel duty to be discharged, but not enlarged, by the Court. See *Attorney-General for Ontario v. Attorney-General for Canada* (28 *The Times* L.R., 446; (1912) A.C. 571). It is more than ordinarily expedient in the case of such references that a Court should refrain from dealing with questions other than those which on executive responsibility are in express terms referred to it, and their Lordships will here act upon that view.

Je dirais donc, et ce avec le plus grand respect pour la Cour d'Appel, qu'à mon avis, le texte des considérants sur lesquels se fonde l'ordonnance de l'arrêté en conseil, aussi bien que le texte de la question définie en cette ordonnance manifestent que l'avis recherché par le conseil exécutif ne vise d'autre loi que la loi qui y est spécifiquement mentionnée et n'a d'autre fin que celle de savoir si, en raison de l'objet qui lui est propre—soit le changement de la limite pécuniaire—cette loi serait inconstitutionnelle en autant que les Juges de la Cour visée par cette loi ne sont pas nommés conformément à l'art. 96 de l'*Acte de l'Amérique du Nord Britannique*. Nulle part en l'arrêté en conseil peut-on trouver, à mon avis, une intention expresse ou implicite de la part du Conseil Exécutif de livrer indirectement à l'examen des tribunaux, en bloc et sans les spécifier, pour en mettre la constitutionnalité en question, les diverses lois de la province attribuant une compétence à la Cour de Magistrat présidée par des Juges nommés par le Lieutenant-Gouverneur en conseil. La nature et les dimensions d'une telle référence seraient pour le moins inusitées et encore aurait-il fallu, si vraiment c'était là l'intention du Conseil

[1] (1924-25), 41 T.L.R. 225, [1925] A.C. 384.

Exécutif, que cette intention apparaisse clairement des termes de la référence. Mais, soumet-on, on ne peut présumer que le Conseil Exécutif ait posé une question dont la réponse est élémentaire et tel serait le cas si on assigne à la question la portée que lui donne l'appelant. La facilité de la réponse ne justifie pas *per se* l'extension de la question au-delà des termes de la référence; d'autant plus que la véritable raison de cette référence apparaît du préambule et de l'art. 1 de la *Loi,* 11-12 Eliz. II, c. 61, *supra,* et du texte de l'arrêté en conseil. Ce que la législature a voulu, c'est de conditionner la mise en vigueur de la loi sous étude à l'obtention d'un avis des tribunaux en affirmant la validité, afin de prévenir qu'une fois en force, la validité de cette loi soit mise en question et que, par suite, son opération et la bonne administration de la justice en soient gênées. L'arrêté en conseil donne effet à cette intention de la législature.

En terminant ces considérations sur la véritable portée de la question soumise par le Conseil Exécutif, il convient d'ajouter qu'il se peut qu'avec toute la juridiction que lui confèrent les lois provinciales, la Cour de Magistrat soit devenue une Cour au sens de ou analogue à celles qui sont décrites en l'art. 96 du statut impérial et que, par suite, la loi sous étude soit *ultra vires* de la législature en autant que les Juges de la Cour visée par cette loi ne sont pas nommés conformément à cet article. Il se peut aussi qu'en raison de la matière sur laquelle elles confèrent une juridiction à la Cour de Magistrat, tel par exemple les injonctions, certaines de ces lois soient *ultra vires* de la législature et ce toujours en autant que les Juges de la Cour visée par ces lois ne sont pas nommés conformément à l'art. 96. Autant de questions non comprises dans le cadre de cette référence et auxquelles, en conséquence, il ne nous est pas loisible de répondre en l'espèce.

Au mérite, l'unique point, que soulève la question ainsi replacée dans les limites que lui assigne l'arrêté en conseil, se résume à savoir si le fait d'augmenter de $200 à $500 la limite pécuniaire de la juridiction de la Cour de Magistrats —Cour qui était incontestablement une Cour échappant aux dispositions de l'art. 96 lors de sa création en 1869 et qui a été considérée comme telle jusqu'à ce jour—est un fait qui, en soi et sans plus, soit apte à changer le caractère de cette Cour pour en faire une Cour au sens de l'art. 96 ou analogue

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à celles qui y sont mentionnées. C'est là l'un des aspects du problème classique né de la conjoncture des dispositions des arts. 92(14) et 96, qui accordent respectivement, d'une part, à la législature de la province la compétence législative relativement à l'administration de la justice dans la province, y compris la création, le maintien et l'organisation des tribunaux de justice pour la province, ayant juridiction civile et criminelle, et y compris aussi la procédure civile dans ces tribunaux, et, d'autre part, au Gouverneur Général, le droit de nommer les Juges des Cours Supérieures, de District et de Comté, dans chaque province. Ce problème a été considéré par cette Cour dans *Re Adoption Act*[1]. Et l'autorité de cette décision a été maintes fois reconnue et nulle part en des termes plus positifs qu'au jugement du Conseil Privé dans *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*[2], alors que, parlant au nom du Comité Judiciaire, Lord Simonds s'exprima comme suit à la page 152:

> But before parting with the case their Lordships think it proper to observe on two cases which have recently come before them, *O. Martineau v. City of Montreal* ((1932) A.C. 113) and *Toronto Corporation v. York Corporation* ((1938) A.C. 415), of which passing mention has already been made, and more particularly also upon *Re Adoption Act of Ontario* ((1938) S.C.R. (Can.) 398), in which will be found a judgment of Sir Lyman Duff, lately Chief Justice of Canada, so exhaustive and penetrating both in historical retrospect and in analysis of this topic, that their Lorships would respectfully adopt it as their own, so far as it is relevant to the present appeal.

Dans *Re Adoption Act of Ontario, supra,* on a jugé que la juridiction des Cours inférieures, qu'il s'agisse de Cours visées ou non par l'art. 96, n'est pas à jamais figée par l'*Acte de l'Amérique du Nord Britannique* à ce qu'elle était à la date de la Confédération; que la prétention qu'une législation provinciale est incompatible avec les dispositions de l'art. 96 si, sous quelque aspect que ce soit, cette législation augmente la juridiction des Cours de juridiction sommaire existant à la date de la Confédération est une prétention inadmissible en principe aussi bien qu'incompatible avec la pratique et les autorités depuis la Confédération; et, enfin, que l'augmentation de la limite pécuniaire affectant la juridiction d'une de ces Cours inférieures n'a pas, en soi, pour effet de transformer le caractère de cette Cour.

[1] [1938] S.C.R. 398, 71 C.C.C. 110, 3 D.L.R. 497.
[2] [1949] A.C. 134.

Dans le cas qui nous occupe, la Cour d'Appel paraît avoir accepté comme prémisse que la Cour de Magistrat, reconnue lors de son établissement en 1869 comme une Cour inférieure échappant aux dispositions de l'art. 96, est devenue par suite d'une série de lois provinciales, dont chacune en a étendu la juridiction, une Cour au sens de ou analogue à celles indiquées à l'art. 96 dont les Juges doivent être nommés par le Gouverneur Général. On a dès lors conclu qu'une législation qui étend encore la juridiction d'une telle Cour, dont les Juges ne sont pas actuellement nommés par le Gouverneur Général, est inconstitutionnelle.

En toute déférence, je dirais qu'à mon avis une Cour inférieure validement constituée et non visée par l'art. 96 ne perd pas son caractère initial du fait que par une législation provinciale on prétend lui conférer une juridiction qui est propre aux Cours visées par cet article. Une telle législation est invalide; mais la Cour demeure et retient son statut de Cour inférieure échappant aux dispositions de l'art. 96.

En l'espèce, et à cela se limite mon opinion, l'extension, par l'augmentation du nombre de dollars, de cette juridiction de la Cour de Magistrat, considérée à la lumière de la valeur courante du dollar n'a pas en soi pour effet, lorsque ajoutée à la juridiction qui lui est propre comme Cour inférieure non visée par l'art. 96, de faire de cette Cour une Cour tombant sous cet article. Il s'ensuit que la loi sous étude n'est pas inconstitutionnelle. De cette conclusion, on ne doit pas inférer que je tienne comme constitutionnellement valides les diverses lois provinciales qui étendent—sauf par l'augmentation du nombre de dollars—la juridiction de la Cour de Magistrat, lois que la Cour d'Appel a considérées. Sur les opinions données à ce sujet en Cour d'Appel, je n'exprime ici aucune dissidence et aucun accord.

Je maintiendrais l'appel, infirmerais le jugement de la Cour du banc de la reine, Division d'Appel, et répondant à la question soumise par le Lieutenant-Gouverneur en conseil, je dirais que la *Loi concernant la juridiction de la Cour de Magistrat,* 11-12 Eliz. II, c. 62, n'est pas inconstitutionnelle.

Appel maintenu.

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*Oct. 27, 28, 29
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June 24

JEWISH NATIONAL FUND (Keren Kayemeth Le Israel) Inc. (*Defendant*) — APPELLANT;

AND

THE ROYAL TRUST COMPANY, Executor of Frank Schechter, deceased (*Plaintiff*) ..... — RESPONDENT;

AND

CLARA SCHECHTER RICHTER, ERWIN SCHECHTER, ANNA SCHECHTER ROSENZWEIG (individually and as representing Dora Goldreyer or Waldman, a person of unsound mind) PAULINE SCHECHTER HOROWITZ, IRVING G. SCHECHTER, FRANK WENDRUCK, SAMUEL WENDRUCK, DAVID WENDRUCK, ROSE WENDRUCK YOUNG, ANN WENDRUCK TAYLOR, ALBERT WENDRUCK, ALEXANDER WENDRUCK, JAMES P. WENDRUCK and PAULINE WALDMAN (*Defendants*) ..... — RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Wills—Charities—Testator domiciled in British Columbia—Residuary estate to Jewish National Fund in New York as a trust for purchase of lands in designated countries and establishment thereon of Jewish colonies—Whether a valid charitable bequest—Law of which jurisdiction applicable.

A British Columbia testator left his residuary estate to be used by the trustees of the Jewish National Fund Inc., New York, as a continuing and separate trust for the purchase of the best lands available in Palestine, the United States of America or any British Dominion, and the establishment thereon of a Jewish colony or colonies, the land to be rented on such terms as might be decided on by the Jewish National Fund and the proceeds of the rentals to be used for the purchase of further lands on the basis outlined above. It was also provided that the receipt of the moneys by the Jewish National

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

Fund from the Royal Trust Co. (the executor and trustee under the will) was to release them from any further responsibility.

On a motion for construction of the will, the Court held that this was a valid charitable disposition. The Court of Appeal was unanimously of the opposite opinion. The Jewish National Fund appealed to this Court and sought to have the judgment of the judge of first instance restored. The respondents were the next-of-kin of the testator and were interested in an intestacy.

In this Court the appellant, for the first time, took the position (i) that in the law of British Columbia the rule against perpetuities is one based on considerations of internal policy and does not apply to invalidate a trust of movables created by a testator domiciled in British Columbia if the trust is to be administered outside that province, (ii) that the trust created by the residuary clause was to be administered in the State of New York, (iii) that the question before the Court should be determined according to the law of that state, and (iv) that by that law the trust was charitable and valid.

Held (Judson and Spence JJ. dissenting): The appeal should be dismissed.

Per Cartwright, Martland and Ritchie JJ.: *Prima facie* the applicable law was that of British Columbia, the general rule being that the essential validity of a gift of movables is to be determined by the law of the testator's domicile. If the applicable law was that of British Columbia the bequest was invalid. The residuary clause did not require the trustees to devote the fund or its proceeds to purposes which were charitable in law and the trust was void as offending the rule against perpetuities. Unless the contrary was alleged and proved the presumption was that the law of all the other countries in which the trustees might decide to purchase was the same as that of British Columbia. A trust of movables void under the law of the testator's domicile and under that of many other countries in which the trustees were authorized to carry it out could not be rendered valid by the circumstance that the trustees were permitted, but not required, to carry it out in a country in which it would be regarded as valid.

In the circumstances of this case the place of administration would be the country in which the lands were purchased and managed; the place of residence of the trustees was irrelevant. To hold that the validity of a trust of personalty to be laid out in the purchase of land created by the will of a testator should be determined not by the law of his domicile or by the law of the situs of the land directed to be purchased (or perhaps by application of both) but by the law of the residence or the domicile of the trustee appointed to make the purchase would be contrary to authority and productive of uncertainty and inconvenience in the administration of estates.

Fordyce v. Bridges (1848), 2 Ph. 497; Re *Mitchner; Union Trustee Co. of Australia v. The Attorney-General for Australia (No. 2)*, [1922] St. R. Qd. 252; *Dunne v. Byrne*, [1912] A.C. 407, applied.

Per Judson and Spence JJ., *dissenting:* If a gift was valid by the perpetuities law of the place of administration but invalid by the perpetuities law of the testator's domicile, the governing law should be that of the place of administration. In the case at bar, the British Columbia executorship had ended. The residue was to be turned over to New York trustees upon clearly defined trusts which were recognized as valid by the law of that state. At that moment it became a New

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York trust to be administered there according to the law of the state. What difficulties of administration, if any, might be encountered outside the boundaries of that state were of no further concern to the Court of the domicile. The testator had directed the delivery of the residue to trustees in a foreign jurisdiction where the trust was valid. The administration of the trust from then on was controlled by the laws of a jurisdiction which recognized its validity. Accordingly, the appeal should be allowed.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Wootton J. on a motion for construction of a will. Appeal dismissed, Judson and Spence JJ. dissenting.

J. J. Robinette, Q.C., and *L. F. Lindholm,* for the appellant.

D. G. Cameron, for the respondent, Royal Trust Company.

D. M. Gordon, Q.C., and *J. C. Cowan,* for the respondents, Clara Richter *et al.*

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

CARTWRIGHT J.:—This is an appeal from a unanimous decision of the Court of Appeal for British Columbia[1] allowing an appeal from a judgment of Wootton J. and declaring that the residuary bequest to the appellant contained in the will of the late Frank Schechter is invalid and that his executor holds the property comprised in that bequest in trust for the next-of-kin of the testator.

Frank Schechter, hereinafter referred to as "the testator", died in Victoria, British Columbia, on May 2, 1961, domiciled in British Columbia. He was unmarried. He left a will dated September 17, 1932, probate of which was granted to the Royal Trust Company, the executor named in the will, on October 13, 1961.

The scheme of the will is simple. The testator appoints his executor, gives directions as to his funeral, gives legacies to two charities, gives seven legacies to relatives and then disposes of the residue of his estate in the following words:

I give and devise and bequeath all the residue of my real and personal estate unto my Trustees upon trust, to sell, call in and convert the same into money, and subject to the payments of my debts, funeral and

[1] (1964), 46 W.W.R. 577, 43 D.L.R. (2d) 417.

testamentary expenses, legacies and any duties payable on any legacies bequeathed or any real property devised by me herein, as to both capital and income to pay the same to the Jewish National Fund (Keren Kayemeth Le-Israel) Inc., 111 Fifth Avenue, New York, U.S.A. to be used by the trustees of the said Jewish National Fund as a continuing and separate trust apart from all other funds, for the purchase of a tract or tracts of the best lands obtainable, in Palestine, the United States of America or any British Dominion, and the establishment thereon of a Jewish colony or colonies, to be known as the Frank Schechter Colony or Colonies, the land to be rented on such terms as may be decided on by the Jewish National Fund, the proceeds of the said rentals to be used for the purchase of further lands on the basis outlined above, and that the receipt of such monies by the said Jewish National Fund to the Royal Trust Company, to release them from any responsibility of the said monies.

The net value of the estate after payment of debts was $351,153.53 of which $9,250 was realty and the balance personalty. The total of the pecuniary legacies mentioned above was $14,300.

The validity of the residuary bequest having been questioned by some of the next-of-kin, the executor applied to the Court by way of originating notice to have the matter determined.

In the Courts below it was the contention of the next-of-kin that the residuary clause was void for uncertainty and alternatively that it created a perpetual trust which was not charitable and therefore void. For the appellant it was argued that the residuary bequest constituted an absolute gift to it and alternatively that it was not void for uncertainty and created a good charitable trust.

After stating these submissions, Lett C.J.B.C. continued as follows:

There was no suggestion in argument that the construction of the will is governed by any law other than that of British Columbia, since the testator was domiciled in this province prior to and at the time of his death. No argument was advanced on any question relating to the conflict of laws.

In this Court, in addition to the grounds on which it had relied below, the appellant, for the first time, took the position (i) that in the law of British Columbia the rule against perpetuities is one based on considerations of internal policy and does not apply to invalidate a trust of movables created by a testator domiciled in British Coumbia if the trust is to be administered outside that province, (ii) that the trust created by the residuary clause is to be administered in the State of New York, (iii) that

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the question before us should be determined according to the law of that state, and (iv) that by that law the trust is charitable and valid.

In my opinion, the argument that there was an absolute gift to the appellant cannot be supported; it was rejected by each of the members of the Court of Appeal and there is nothing that I can usefully add to their reasons on this point.

If the question is to be determined in accordance with the law of British Columbia I agree with the conclusion of the Court of Appeal that the residuary clause does not require the trustees to devote the fund or its proceeds to purposes which are charitable in law and that the trust is void as offending the rule against perpetuities. On this branch of the matter I am content to adopt the reasons of Davey J. A.

Turning now to the appellant's argument summarized above which was advanced for the first time in this Court it would seem that *prima facie* the applicable law is that of British Columbia. The general rule is stated in Dicey's Conflict of Laws, 7th ed. at p. 609 as follows:

> The material or essential validity of a will of movables or of any particular gift of movables contained therein is governed by the law of the testator's domicile at the time of his death.

In commenting on this rule the learned author says at pp. 610 and 611:

> It is well settled that the material or essential validity of a will of movables or of any particular gift of movables contained therein is governed by the law of the testator's domicile at the date of his death. That law determines such questions as whether the testator is bound to leave a certain proportion of his estate to his wife and children, whether legacies to charities are valid, to what extent gifts are invalid as infringing the rule against perpetuities or accumulations, whether substitutionary gifts are valid, whether gifts to attesting witnesses are valid, and so on.
>
> If the will bequeaths movables on trusts which are void for remoteness under the rule against perpetuities in force in the country of the testator's last domicile, but the movables are situated and the trust is to be administered in another country by the law of which it is valid, it has been suggested that the law of the place of administration should govern and that the trust should be valid. There is some British authority which supports this suggestion, and it seems reasonable in principle. In the United States the trust appears to be valid if it complies with the rule against perpetuities in force in either the place of administration or the testator's last domicile. The same principle should no doubt be applied to the question whether gifts to charities are valid.

In Morris and Leach, The Rule Against Perpetuities, 2nd ed., at pp. 22 and 23, the effect of the American authorities

is stated to be that a gift of movables which infringes the rule against perpetuities in force in the country of the testator's domicile does not fail if it is valid under the law of the place of administration and a gift which infringes the perpetuities law of the place of administration does not fail if it is valid under the law of the testator's domicile. This statement is followed by the following comment at p. 23:

> This may be an acceptable result if the two laws agree in general policy and differ only in detail. It might well not be acceptable to an English court if a testator domiciled in some country where there is no Rule against Perpetuities attempted to create a trust of English property, to be administered in England, which infringed the Rule.

In Cheshire, Private International Law, 6th ed. the matter is considered at pp. 573 to 577. The learned author says at p. 575:

> It should not be assumed that because a testator dies domiciled in England his will is therefore inevitably subject to all the rules of English domestic law concerned with essential validity. This fact has not always been admitted. It has been said, for instance, that whether a restraint upon marriage or a gift for masses, or a gift to a charity is valid, or whether a limitation is void as infringing the rule against perpetuities, must be determined by the *lex domicilii* of the testator no matter what the domicile of the beneficiary may be. It is submitted that this view is neither consonant with principle nor warranted by the authorities. It entirely ignores the essential difference between the right to give and the right to receive. The two are not necessarily *in pari materia*. The right of a testator to give, as for example whether he is free to bequeath the whole of his property as it pleases him or on the contrary whether he must reserve a legitimate portion for his children, is *ex necessitate* governed by the English *lex successionis* from which his testamentary power of disposition is derived. But there is no reason why this law should restrict the right of a foreign legatee to enjoy a gift in accordance with the terms of the will, provided that the legacy is valid according to his personal law and provided that the limitations imposed upon its enjoyment do not offend some rule of public policy so sacred in English eyes as to demand extra-territorial application.

and at pp. 576 and 577:

> Suppose that a testator, domiciled in England, leaves a sum of money in trust that the income thereof shall be used for purposes most conducive to the good of religion in a certain diocese in country X, and that persons domiciled in X are appointed to administer the trust. The trust is invalid by English law as not being charitable, but, if it is valid by the law of X, must the court forbid payment of the money to the trustees? Such a ruling would be indefensible. English law confines the definition of a charity within comparatively narrow limits, presumably with the object of restricting the amount of money that may be withdrawn from circulation, but it cannot justifiably claim to impose this policy upon foreign countries. The decisive factor is the law of the country where the trust is to be administered, not the law that governs the instrument of gift. No doubt, three conditions must be satisfied

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before transfer of the money to the foreign country will be authorized.

Firstly, the charitable bequest must be valid according to the law of the country where it is to be administered.

Secondly, there must be persons in that country willing and competent to undertake the task of administration.

Thirdly, the purposes for which the bequest is to be employed must not conflict with some rule of English public policy intended to operate extra-territorially. It can scarcely be maintained that a rule which confines within narrow limits the possible beneficiaries of a charitable gift is intended to be anything more than local in its operation.

For the purposes of this appeal I am prepared to assume, without finally deciding, that if the testator had directed that his residuary estate be paid to the appellant to be used by its trustees for the purchase of a tract or tracts of the best land obtainable in the State of New York to be held for the purposes set out in the residuary clause the validity of the clause should be determined by the law of the State of New York, and it would have been necessary to consider whether that law has been sufficiently proved.

But this is not what the testator has done. He has given to the trustees the choice of purchasing lands in Palestine, the United States of America or any British Dominion. I have already indicated my agreement with the conclusion of the Court of Appeal that if the applicable law is that of British Columbia the bequest is invalid. Unless the contrary is alleged and proved the presumption is that the law of all the other countries in which the trustees might decide to purchase is the same as that of British Columbia. It seems to me that a trust of movables void under the law of the testator's domicile and under that of many other countries in which the trustees are authorized to carry it out cannot be rendered valid by the circumstance that the trustees are permitted, but not required, to carry it out in a country in which it would be regarded as valid. To hold otherwise would, in my opinion, be an extension of the exception to the general rule, that the essential validity of a gift of movables is to be determined by the law of the testator's domicile, unwarranted by the two cases of *Fordyce v. Bridges*[1] and *Re Mitchner; Union Trustee Co. of Australia v. The Attorney-General for Australia (No. 2)*[2], which were chiefly relied on in support of the appellant's argument. Such an extension does not appear to me to be justified by any decision to which we have been referred. It would be

[1] (1848), 2 Ph. 497.

[2] [1922] St. R. Qd. 252.

productive of inconvenience and uncertainty and would be inconsistent with the underlying rule that a trust is not a valid charitable trust unless the trustees are obligated, not merely permitted, to devote the trust funds to a purpose which is charitable in law.

I agree with the submission of counsel for the next-of-kin that in the circumstances of this case "the place of administration" of the trust would be the country in which the lands were purchased and managed and that the place of residence of the trustees would be irrelevant. I find nothing in the two cases last referred to which is contrary to this view.

In *Fordyce v. Bridges, supra,* it would seem from the report that the testator was domiciled in England, that the trustees resided there and that the personal estate was situate there. By the will the trustees were given a discretion to invest the personal estate either in the purchase of lands in England on specified limitations which were valid by the law of England or in the purchase of lands in Scotland in a regular Scotch entail the limitations of which were valid by the law of Scotland but would have been void as a perpetuity by the law of England. It was held that the personal estate could be validly invested in the purchase of lands in Scotland. It was the law of the situs of the lands purchased that governed not the law of the residence of the trustees. The will did not give the trustees any power to invest the personal estate in the purchase of lands in England subject to the limitations of a regular Scotch entail, which purchase would have been invalid by the law of England. In the case at bar, the trustees in New York are authorized to purchase lands in British Columbia on trusts invalid by the law of that province.

In *Re Mitchner, supra,* the testator, domiciled in Queensland, directed his executors to pay part of his residuary trust funds to named persons in Germany who were to deal with such funds on certain trusts. The Supreme Court of Queensland held that this direction was void as offending the rule against perpetuities; see *Re Mitchner; Union Trustee Co. of Australia v. The Attorney-General of Australia*[1].

This decision was varied by the High Court of Australia by a judgment which declared that the gifts did not infringe

[1] [1922] St. R. Qd. 39.

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the law against perpetuities and referred the questions back to the Supreme Court. What occurred at the second hearing in the Supreme Court is summarized in the head-note at p. 253 as follows:

> Held, that the bequest was a valid bequest according to Queensland law; but that the Court would not pronounce finally on its validity until informed whether it was practical to give effect in Germany to the trusts declared, and whether the law of Germany would allow them to be carried into effect, because if they could not be carried into effect in Germany, the Queensland Court could not administer cy pres, and the bequest would fail.

It would appear that the law first applied was that of the testator's domicile which governed subject to ascertaining that the trusts could be lawfully carried out in Germany.

To hold that the validity of a trust of personalty to be laid out in the purchase of land created by the will of a testator should be determined not by the law of his domicile or by the law of the situs of the land directed to be purchased (or perhaps by application of both) but by the law of the residence or the domicile of the trustee appointed to make the purchase would, in my opinion, be contrary to authority and productive of uncertainty and inconvenience in the administration of estates. What, it may be asked, would be the result if the trustee at the date of the testator's death resided in a jurisdiction by the laws of which the trust was invalid and a year later moved into a jurisdiction by the laws of which the trust was valid? The difficulty suggested by this question is only one of several which would result from attaching importance to the residence or domicile of the trustee.

While that case was in no way concerned with the geographical location of the trustee or with the conflict of laws, the following words used by Lord Macnaghten in *Dunne v. Byrne*[1] appear to me to be appropriate:

> It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee.

For the above reasons I would reject this argument of the appellant, even on the assumption that it has been proved that the trust created by the residuary clause would have been regarded as a valid charitable trust under the law of

[1] [1912] A.C. 407 at 410.

the State of New York. This renders it unnecessary for me to decide whether the law of New York was sufficiently proved. It also becomes unnecessary for me to consider the argument of the respondents, which found favour with Lett C. J. B. C., that the trust was void for uncertainty and I express no opinion upon it.

In the result I would dismiss the appeal but would direct that the costs of all parties in this Court, those of the executor as between solicitor and client, be paid out of the residuary estate of the testator.

The judgment of Judson and Spence JJ. was delivered by

JUDSON J. (*dissenting*):—The testator left his residuary estate to be used by the trustees of the Jewish National Fund Inc., New York, as a continuing and separate trust for the purchase of the best lands available in Palestine, the United States of America or any British Dominion, and the establishment thereon of a Jewish colony or colonies, the land to be rented on such terms as might be decided on by the Jewish National Fund and the proceeds of the rentals to be used for the purchase of further lands on the basis outlined above. It was also provided that the receipt of the moneys by the Jewish National Fund from the Royal Trust Company (the executor and trustee under the will) was to release them from any further responsibility.

On a motion for construction of the will, Wootton J., the judge of first instance, held that this was a valid charitable disposition. The Court of Appeal[1] was unanimously of the opposite opinion. The Jewish National Fund is the appellant in this Court and seeks to have the judgment of Wootton J. restored. The respondents are the next-of-kin of the testator and are interested in an intestacy.

The Jewish National Fund is a corporation which was incorporated in 1926 under the laws of the State of New York. Its principal objects are to collect gifts to be devoted to the purchase of land in Palestine for the purpose of promoting and furthering the religious, cultural, physical, social, agricultural and general welfare of Jewish settlers and inhabitants of Palestine now or hereafter residing there, and to aid, encourage and promote the development of Jewish life in Palestine. There is evidence in the record that

[1] (1964), 46 W.W.R. 577, 43 D.L.R. (2d) 417.

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a gift to this corporation would be recognized as a valid charitable gift under the laws of the State of New York.

The agent of the New York Fund in Israel, Keren Kayemeth Le Israel, is recognized as a charitable organization by the State of Israel. On the other hand, the English counterpart of the New York Fund, Keren Kayemeth Le Jisroel, Limited, when it sought exemption from income tax in England, was held not to be "a body of persons...established for charitable purposes only" and, as such, entitled to exemption from income tax[1].

I do not think that any valid distinction can be drawn between the objects of the English Fund and the New York Fund. The English Fund was incorporated in 1907 and acquired power to purchase lands in Palestine, Syria and any other parts of Turkey in Asia and the Peninsula of Sinai, for the purpose of settling Jews on these lands. The New York Fund can purchase lands in Palestine, the United States of America, or any British Dominion. Both Funds have many objects ancillary to the main object, and, indeed, the New York Fund until shortly after the death of the testator, confined its activities to acting as a collecting agent for the English Fund. In 1961 it severed its connection with the English Fund and provided for the sending of its moneys direct to Israel. This change of powers came after the death of the testator and nothing decisive can come from the fact that at the date of his death there was some dependent relation of one Fund to the other. Under the terms of this trust, it is the New York Fund that is to administer this residuary gift through its trustees in the manner specified in the will.

It is, however, of significance that when the English Fund was litigating with the Inland Revenue Commissioners in 1932, it was held not to be a charitable organization. It was rejected as a trust for religious purposes, as a trust for the relief of poverty and as a trust for other purposes beneficial to the community. The House of Lords was unable to say that there was any identifiable community to be benefited. The British Columbia Court of Appeal adopted this reasoning as the foundation of their judgment.

[1] *Keren Kayemeth Le Jisroel, Ld. v. Inland Revenue Commissioners,* [1932] A.C. 650.

The only function of the Royal Trust Company under this will as executor and trustee is to convert the estate into money and after payment of debts, funeral and testamentary expenses and legacies and duties, to pay the residue to the New York fund. It has no function in the administration of the trust which the will attempts to set up. The release of the New York Fund for these moneys is a complete release to the Royal Trust Company. Nothing is to be done by the Royal Trust Company in the administration of the trust in British Columbia. The trust sought to be set up here is a foreign trust to be administered in a jurisdiction where, according to the evidence, it is a valid charitable trust. Assuming that in British Columbia the trust is not recognized as charitable and that it is a trust the administration of which may last beyond the perpetuity period, the first question is whether the rule against perpetuities applies to a trust of movables created by a person domiciled in British Columbia if the trust is to be administered outside British Columbia in a jurisdiction which recognizes its validity. It has been said that the object of the perpetuity rule is to restrict the withdrawal of property from channels of commerce, a purpose which is purely local.

Both in Cheshire Private International Law, 6th ed., p. 576, and less emphatically in Morris and Leach, The Rule Against Perpetuities, 2nd ed., p. 22, the opinion is expressed that if the gift is valid by the perpetuities law of the place of administration but invalid by the perpetuities law of the place of the testator's domicile, the governing law should be that of the place of administration.

The beginning of the authority on which this opinion is founded is in *Fordyce v. Bridges*[1]. Here an English testator left the residue of his estate to trustees upon trust to convert it into money and lay it out in the purchase of land in England or Scotland according to the limitations of a Scottish entail. A purchase of land in England according to these limitations would offend the rule against perpetuities. On a bill being filed to test the propriety of purchases in Scotland, it was held that the legacy to be expended in Scotland in a manner permissible by Scottish law was valid. The *ratio* is in the following extract from the judgment of Lord Cottenham:

[1] (1848), 2 Ph. 497.

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An objection was made that the bequest of a fund to be invested in a regular Scotch entail was void as a perpetuity. The rules acted upon by the Courts in this country with respect to testamentary dispositions tending to perpetuities relate to this country only. What the law of Scotland may be upon such a subject, the Courts of this country have no judicial knowledge, nor will they, I apprehend, inquire: the fund being to be administered in a foreign country is payable here though the purpose to which it is to be applied would have been illegal if the administration of the fund had been to take place in this country. This is exemplified by the well established rule in cases of bequests within the statute of Mortmain. A charity legacy void in this country under the statute of Mortmain is good and payable here if for a charity in Scotland.

This case was followed in a Queensland case *Re Mitchner; Union Trustee Co. of Australia v. The Attorney-General of Australia (No. 2)*[1] in which a testator domiciled in Queensland bequeathed movables to trustees resident in Germany to be applied on trusts which infringed the rule against perpetuities in force in Queensland but which were valid by German law. The trusts were held to be valid.

There is more authority in the United States beginning with *Chamberlain v. Chamberlain*[2], at p. 434, where it is said:

But so far as the validity of bequests depends upon the general law and policy of the State affecting property and its acquisition generally, and relating to its accumulation and a suspension of ownership and the power of alienation, each State is sovereign as to all property within its territory, whether real or personal.

It is no part of the policy of the State of New York to interdict perpetuities or gifts in mortmain in Pennsylvania or California. Each State determines those matters according to its own views of policy or right, and no other State has any interest in the question; and there is no reason why the courts of this State should follow the funds bequeathed to the Centenary Fund Society to Pennsylvania, to see whether they will be there administered in all respects in strict harmony with our policy and our laws. The question was before the court in *Fordyce v. Bridges* (2 Phillips, 497), upon the bequest of a fund in England, to be invested in a Scotch entail.

This case was followed in the following four cases: *Robb v. Washington and Jefferson College*[3]; *In re Chappell's Estate*[4]; *Amerige v. Attorney General*[5]; *In re Grant's Will*[6].

To the same effect is Gray, The Rule Against Perpetuities, 4th ed., p. 288:

[1] [1922] St. R. Qd. 252.
[2] (1871), 43 N.Y. 424.
[3] (1905), 103 App. Div. (N.Y.) 327, 93 N.Y.S. 92.
[4] (1923), 213 P. 684, 124 Wash. 128 (S.C.).
[5] (1949), 88 N.E. 2d 126, 324 Mass. 648 (S.C.)
[6] (1950), 101 N.Y.S. 2d 423.

263. 3 *Influence of Law of Place of Administration.* If a legacy is given on a charitable trust which is to be carried out in another jurisdiction where it would be valid, sometimes the law of the domicil forbids such a legacy absolutely, and in that case the legacy is void; but sometimes the law only forbids such trusts within the state of the domicil, and then the legacy is good. And in this latter case it seems that the trust will be subject to the law of the other jurisdiction in matters of administration.

The next-of-kin say that the law of the State of New York has nothing to do with the administration of this trust, that the law of the situs of the purchase of land will govern and that the will permits the trust to be administered in a multitude of places and that the trust fails if it would be non-charitable in any of them. I think that the first assertion is erroneous and that the rest falls with it. The British Columbia executorship has ended. The residue is to be turned over to New York trustees upon clearly defined trusts which are recognized as valid by the law of that state. At that moment it becomes a New York trust to be administered there according to the law of the state. What difficulties of administration, if any, may be encountered outside the boundaries of that state are of no further concern to the Court of the domicile. The testator has directed the delivery of the residue to trustees in a foreign jurisdiction where the trust is valid. The administration of the trust from then on is controlled by the laws of a jurisdiction which recognizes its validity.

I would allow the appeal on this ground alone. However, the reasons delivered in the Court of Appeal indicate that this point was not taken before that Court. For this reason I think that we should order that all parties should have their costs out of the estate, those of the executor, between solicitor and client.

It is only necessary to mention briefly the other grounds of appeal that were argued. The first was that as a matter of construction, it should have been held that this was an absolute gift of residue. To me, this was clearly a gift in trust and I think that both Courts in British Columbia have correctly rejected this submission.

The other argument was that the Court of Appeal should have held, as did Wootton J., that this was a valid charitable trust in British Columbia. The Court of Appeal thought that this course was not open in view of the decision of the

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House of Lords in the *Keren* case, *supra*. It is clear that Wootton J. did not think that this decision concluded the matter for all time. He was sitting in 1963. A lot had happened in the world since 1932. He felt that this enabled him to find that there was an identifiable world community to be benefited by this disposition. In so finding I think that he was right but I recognize that my opinion on this branch of the case is *obiter*.

I would allow the appeal and direct that all parties to these proceedings should have their costs throughout, those of the executor as between solicitor and client.

Appeal dismissed, JUDSON *and* SPENCE JJ. *dissenting.*

Solicitors for the appellant: Pearlman & Lindholm, Victoria.

Solicitors for the respondent, Royal Trust Company: Cameron & Cameron, Victoria.

Solicitors for the respondents, Clara Richter et al.: Crease & Co., Victoria.

MOSES McKAY AND SARAH McKAY ..APPELLANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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*Feb. 18, 19
June 24

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Zoning by-law prohibiting signs on private property—Applicability to federal election signs—Canada Elections Act, 8-9 Eliz. II (1960), c. 39, ss. 2(4), 49, 71, 100—B.N.A. Act, 1867, c. 3, ss. 41, 91, 92.

The appellants were convicted by a Justice of the Peace on a charge of unlawfully maintaining a sign on their premises contrary to a municipal zoning by-law. This sign, which was not within the type of signs specifically permitted by the by-law, was displayed during the period of a federal election and urged the people to vote for a certain candidate. The validity of the by-law or of the enabling provincial legislation was not raised, but the appellants contended that on its true construction the by-law was not intended to have the effect of forbidding the use of such a sign during the actual period of an election to the federal parliament. The conviction was quashed by a judge of the Supreme Court of Ontario, but it was restored by the Court of Appeal. The appellants were granted leave to appeal to this Court.

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*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

Held (Fauteux, Martland, Ritchie and Hall JJ. dissenting): The appeal should be allowed and the conviction set aside.

Per Taschereau C.J. and Cartwright, Abbott, Judson and Spence JJ.: It could not have been the intention of the municipal council to enact a prohibition of the sort which the by-law, as construed by the Court of Appeal, contains, nor could it have been the intention of the legislature to empower it to do so. The legislature had no power to enact such a prohibition as it would be a law in relation to proceedings at a federal election and not in relation to any subject matter within the provincial power. The subject matter of elections to parliament appears to be from its very nature one which could not be regarded as coming within any of the classes of subjects assigned to the legislatures of the provinces by s. 92 of the *B.N.A. Act.* Consequently, on their proper construction, the general words of the by-law, which in their natural meaning do not merely regulate but forbid the display of signs at all times, were not intended to have effect so as to forbid during the actual period of an election to parliament the display of a sign of the sort described in the charge on which the appellants were convicted.

Per Fauteux, Martland, Ritchie and Hall JJ., *dissenting:* The contention of the appellant that the by-law was not intended to have the effect of forbidding the use of such a sign during the period of a federal election, could not be supported. There is nothing in the provisions of the by-law which runs counter to any of the provisions of the *Canada Elections Act.* The contention that the field of proceedings at federal elections is one of federal jurisdiction and cannot be affected by provincial legislation, even though only incidentally, could not be supported. There is no general field of legislation on this subject assigned to the federal parliament under s. 91 of the *B.N.A. Act* to which the proviso of that section can attach. Therefore, provincial legislation in relation to the use of property, which, in its pith and substance, is in relation to property and civil rights in the province, and which is of general application, as in the present case, is not only valid, but can apply even though incidentally it may affect the means of propaganda used by an individual or by a political party during a federal election campaign.

Nor could the contention of the appellant be supported upon the ground that the displaying of the sign was the exercise of a political right in a federal election which could not be affected by any legislation other than federal. The provinces, legislating within their allotted sphere, may affect the carrying on of activities connected with federal elections. In the present case the proposition that, because a by-law of general application incidentally prevented a particular form of political propaganda from being used in a particular area, this constituted a substantial interference with the working of the parliamentary institutions of Canada, could not be supported.

Droit constitutionnel—Règlement de zonage défendant les enseignes sur les propriétés privées—Applicabilité aux enseignes pour les élections fédérales—Loi électorale du Canada, 8-9 Eliz. II (1960), c. 39, arts.

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2(4), 49, 71, 100—L'Acte de l'Amérique du Nord britannique, 1867, c. 3, arts. 41, 91, 92.

Les appellants furent trouvés coupables par un juge de paix sur une accusation d'avoir gardé illégalement sur leur propriété une enseigne contrairement à un règlement municipal de zonage. Cette enseigne, qui n'était pas du type spécifiquement permis par le règlement, avait été exhibée durant la période d'une élection fédérale et exhortait les gens à voter pour un certain candidat. La validité du règlement ainsi que de la législation provinciale l'autorisant n'a pas été soulevée, mais les appelants ont prétendu que le règlement n'était pas destiné à avoir pour effet de défendre l'usage d'une telle enseigne durant la période actuelle d'une élection au parlement fédéral. Le verdict de culpabilité fut cassé par un juge de la Cour suprême de l'Ontario, mais il fut remis en vigueur par la Cour d'Appel. Les appelants ont obtenu la permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être maintenu et le verdict de culpabilité mis de côté, les Juges Fauteux, Martland, Ritchie et Hall étant dissidents.

Le Juge en Chef Taschereau et les Juges Cartwright, Abbott, Judson et Spence: Le conseil municipal n'a pas pu avoir eu l'intention de décréter une prohibition du genre contenu dans le règlement, tel qu'interprété par la Cour d'Appel, et la législature n'a pas pu avoir eu l'intention de lui conférer le pouvoir de le faire. La législature n'avait aucun pouvoir de décréter une telle prohibition parce que cela aurait été un statut se rapportant au mode de procéder aux élections fédérales et ne se rapportant pas à aucun sujet de la compétence provinciale. Le sujet des élections au parlement semble être de par sa propre nature un sujet qui ne peut pas être considéré comme faisant partie des catégories de sujets assignés aux législatures des provinces par l'article 92 de l'*Acte de l'Amérique du Nord britannique*. Par conséquent, le langage général du règlement, qui dans son sens naturel non seulement réglemente mais défend l'affichage des enseignes en tout temps, n'était pas destiné à avoir pour effet de défendre durant la période actuelle d'une élection au parlement l'affichage d'une enseigne de la sorte décrite à la charge sur laquelle les appelants ont été trouvés coupables.

Les Juges Fauteux, Martland, Ritchie et Hall, *dissidents:* La prétention des appelants que le règlement n'était pas destiné à avoir pour effet de défendre l'usage d'une telle enseigne durant la période d'une élection fédérale, ne peut pas être supportée. Il n'y a rien dans les dispositions du règlement qui va à l'encontre des dispositions de la *Loi électorale du Canada*. La prétention que le domaine du mode de procéder aux élections fédérales appartient à la juridiction fédérale et ne peut pas être touché par une législation provinciale, même seulement incidemment, ne peut pas être supportée. Il n'y a aucun domaine général de législation sur ce sujet assigné au parlement fédéral de par l'article 91 de l'*Acte de l'Amérique du Nord britannique* auquel la stipulation au début de cet article peut s'attacher. En conséquence, une législation provinciale relative à l'usage d'une propriété, qui, dans son essence, est relative à la propriété et les droits civils dans la province, et qui est d'application générale, comme dans le cas présent, est non seulement valide, mais peut s'appliquer quoique, incidemment, elle peut affecter les moyens de propagande dont peut se servir un individu ou un parti politique durant une campagne d'élections fédérales.

La prétention des appelants ne peut pas être non plus supportée pour le motif que l'affichage de l'enseigne était le résultat de l'exercice d'un droit politique durant une élection fédérale qui ne pouvait pas être affecté par une législation autre que fédérale. Les provinces, légiférant dans leur propre sphère, peuvent affecter la poursuite d'activités ayant rapport aux élections fédérales. Dans le cas présent, la proposition que, parce qu'un règlement d'application générale empêchait incidemment l'usage dans un endroit particulier d'une forme particulière de propagande politique, cela constituait une interférence substantielle avec les institutions parlementaires du Canada, ne peut pas être supportée.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], infirmant une décision du Juge Hughes. Appel maintenu, les Juges Fauteux, Martland, Ritchie et Hall étant dissidents.

APPEAL from a judgment of the Court of Appeal for Ontario[1] reversing a judgment of Hughes J. Appeal allowed, Fauteux, Martland, Ritchie and Hall JJ., dissenting.

A. Brewin, Q.C., and *Miss Ruby Campbell,* for the appellants.

John S. Herron, for the respondent.

The judgment of Taschereau C.J. and of Cartwright, Abbott, Judson and Spence JJ. was delivered by

Cartwright J.:—This appeal is brought, pursuant to special leave granted by this Court, from an order of the Court of Appeal for Ontario[1] reversing an order of Hughes J. and affirming the conviction of the appellants by a Justice of the Peace which conviction had been quashed by the order of Hughes J.

The appellants were convicted before W. H. Williams Esquire, a Justice of the Peace, on November 2, 1962, on the charge that they during the two weeks preceding June 12, 1962, at the Municipality of Metropolitan Toronto in the County of York, unlawfully did maintain a sign on the premises municipally known as 70 Roxaline Street in the Township of Etobicoke other than those permitted under Sections 9.3.1.7. and 6.14(e) of the Township of Etobicoke Zoning By-law 11737 contrary to Township of Etobicoke Zoning By-law 11737.

The relevant facts are not in dispute.

[1] [1964] 1 O.R. 641, 43 D.L.R. (2) 401.

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The appellants are the owners of the premises known as Street number 70 Roxaline Street in the Township of Etobicoke. During the period set out in the charge they attached to the railing of the verandah forming part of their residence an election sign measuring 14 inches by 16 inches bearing the words:—"Vote David Middleton, New Democratic Party". David Middleton was a candidate for election to the House of Commons at the general election which was held on June 18, 1962. He was a candidate for the electoral district in which 70 Roxaline Street is situate. It will be observed that the whole of the period during which the sign was displayed by the appellants was "during an election" as that phrase is defined in the *Canada Elections Act,* 8-9 Elizabeth II, c. 39, s. 2(4).

The relevant provisions of by-law No. 11737 are as follows:

Section 9.3.—Subject to compliance with the regulations under section 6, the following regulations shall apply in an R2 zone.

Section 9.3.1.—USE: No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged or maintained except for the following uses:

Section 9.3.1.7.—SIGNS: Signs in accordance with the regulations in section 6.14(e).

Section 6.14(e)—SIGNS: Residential—one non-illuminated real estate sign not exceeding four square feet in area, advertising the sale, rental or lease of any building, structure or lot and/or one non-illuminated trespassing, safety or caution sign not exceeding one square foot in area, and/or one sign indicating the name and profession of a physician shall be permitted. Bulletin boards advertising sub-divisions in which lots are for sale and/or advertising building projects.

In the case of an apartment not more than one bulletin board not exceeding twelve square feet in area shall be permitted, provided that all such signs are located on the lot to which they relate.

70 Roxaline Avenue is in an R2 zone.

On June 29, 1959, by-law 11737 was approved by order of the Ontario Municipal Board.

No question is raised by counsel for the appellants as to the validity either of this by-law or of the enabling legislation of the Province of Ontario pursuant to which it was passed. His submission is that, on its true construction, it does not forbid the conduct which the learned Justice of the Peace held to be an offence.

In framing those portions of the by-law with which we are concerned the Council has not enumerated the classes of signs the display of which on residential property is prohib-

ited. It has taken the permissible course of forbidding the display of all signs except those few described in regulation 6.14(e). It results from this that the words of prohibition are extremely wide.

In construing the by-law two rules of construction are of assistance. The first is that conveniently expressed in the maxim, *Verba generalia restringuntur ad habilitatem rei vel personae* (Bac. Max. reg. 10) Broom's Legal Maxims, 10th ed., 438. The rule was regarded as already well established when *Stradling v. Morgan*[1] was decided in 1560 and it is scarcely necessary to quote authority in support of it. It is expressed as follows in Maxwell on Interpretation of Statutes, 11th ed., at pages 58 and 59:

> It is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter with reference to which the words are used finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject-matter. While expressing truly enough all that the legislature intended, they frequently express more in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular, that is, they must be understood as used with reference to the subject-matter in the mind of the legislature, and limited to it.

An example of the application of the rule is the case of *Cox v. Hakes*[2], in which it was held by the House of Lords that the words of the statute there under consideration:

> The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order of Her Majesty's High Court of Justice, or any judges or judge thereof.

did not give a right of appeal from an order discharging a prisoner under a writ of *habeas corpus,* although, as was pointed out by Lord Halsbury at page 517, the words literally construed were sufficient to comprehend such an order.

The second applicable rule of construction is that if an enactment, whether of Parliament or of a legislature or of a subordinate body to which legislative power is delegated, is capable of receiving a meaning according to which its operation is restricted to matters within the power of the

[1] (1560), 1 Plowd. 199, 75 E.R. 308. [2] (1890), 15 App. Cas. 506.

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enacting body it shall be interpreted accordingly. An alternative form in which the rule is expressed is that if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result the former is to be adopted. If authority is required in support of this rule, on which we have acted repeatedly, it may be found in the judgment of Duff C.J. in *Reference as to the validity of section 31 of the Municipal District Act Amendment Act, 1941, of Alberta*[1] and in *Attorney General for Ontario v. Reciprocal Insurers*[2].

A municipal corporation which derives its legislative power from an act of the Provincial Legislature, of course, cannot have power to enact a provision which would be *ultra vires* of that legislature.

In the case at bar the learned Justice of the Peace and the Court of Appeal have given effect to the by-law as if it provided:

> During an election to Parliament no owner of property in an R2 zone in Etobicoke shall display on his property any sign soliciting votes for a candidate at such election.

I cannot think that it was the intention of the Council to so enact or that it was the intention of the Legislature to empower it to do so. Such an enactment would, in my opinion, be *ultra vires* of the provincial legislature. The power of the legislature to enact such a law, if it exists, must be found in s. 92 of the *British North America Act*. It is argued for the respondent that it falls within head 13, "Property and Civil Rights in the Province." Whether or not the right of an elector at a federal election to seek by lawful means to influence his fellow electors to vote for the candidate of his choice is aptly described as a civil right need not be discussed; it is clearly not a civil right in the province. It is a right enjoyed by the elector not as a resident of Ontario but as a citizen of Canada.

A political activity in the federal field which has theretofore been lawful can, in my opinion, be prohibited only by Parliament. This rule is, I think, implicit in every judgment delivered in this Court in the recent case of *Oil*

[1] [1943] S.C.R. 295 at 302, 3 D.L.R. 145.
[2] [1924] A.C. 328 at 345, 2 W.W.R. 397, 1 D.L.R. 789.

Chemical and Atomic Workers International Union Local 16-601 v. Imperial Oil Ltd. et al.[1] The division of opinion in that case was not as to the soundness of the rule but as to whether the legislation there in question infringed it. The reasons of the majority, who upheld the provincial legislation which was under consideration, were given by Martland J. and by Ritchie J. Martland J. said, at page 594:

> The legislation, however, does not affect the right of any individual to engage in any form of political activity which he may desire. It does not prevent a trade union from engaging in political activities.

Ritchie J. said at page 608:

> The impugned legislation does not, in my view, have the effect of in any sense precluding any trade union from indulging in political activity or from collecting political party funds from its members.

If by-law 11737 is construed as it has been by the learned Justice of the Peace and by the Court of Appeal, it does not merely affect, it destroys the right of the appellants to engage in a form of political activity in the federal field which has heretofore been possessed and exercised by electors without question.

I incline to agree with Mr. Brewin's submission that Parliament has "occupied the field" in enacting *The Canada Elections Act* and particularly s. 71 which reads as follows:

> 71. Every printed advertisement, handbill, placard, poster or dodger having reference to any election shall bear the name and address of its printer and publisher, and any person printing, publishing, distributing or posting up, or causing to be printed, published, distributed or posted up, any such document unless it bears such name and address is guilty of an offence against this Act punishable on summary conviction as provided in this Act, and if he is a candidate or the official agent of a candidate is further guilty of an illegal practice.

This indicates that Parliament contemplates that persons other than candidates may post up placards and posters having reference to an election and subjects the practice to a limited form of regulation. The impugned by-law forbids such posting up altogether on residential property, which will often be the only place on which the owner of that property has the right to post up such a placard. However, I do not find it necessary to reach a definite conclusion on this branch of Mr. Brewin's argument. In my opinion, the

[1] [1963] S.C.R. 584, 45 W.W.R. 1, 41 D.L.R. (2d) 1.

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legislature has no power to enact a prohibition of the sort which by-law 11737, as construed by the Court of Appeal, contains as such a prohibition would be a law in relation to proceedings at a federal election and not in relation to any subject-matter within the provincial power. As was said by Lord Watson in *Union Colliery v. Bryden*[1]:

> The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

While that case dealt with an attempted invasion by the provincial legislature of a field exclusively reserved to Parliament by head 25 of s. 91 of the *British North America Act,* the subject matter of elections to Parliament appears to me to be from its very nature one which cannot be regarded as coming within any of the classes of subjects assigned to the legislatures of the provinces by section 92. As to this I agree with the following statement of Taschereau J., as he then was, in *Valin v. Langlois*[2]:

> It is admitted, and is beyond doubt, that the Parliament of Canada has the exclusive power of legislation over Dominion controverted elections. By the *lex Parliamentaria,* as well as by the 41st, 91st, and 92nd sections of the *British North America Act,* this power is as complete as if it was specially and by name contained in the enumeration of the federal powers of section 91, just as promissory notes, Insolvency, &c., are.

It will be noted that the Judicial Committee in refusing leave to appeal stated that, although the questions dealt with in the judgment of this Court were undoubtedly of great importance, leave should be refused because the judgment sought to be appealed was clearly right; see *Valin v. Langlois*[3], particularly at page 122.

It is scarcely necessary to add that, just as the legislature cannot do indirectly what it cannot do directly, it cannot by using general words effect a result which would be beyond its powers if brought about by precise words. An enactment in general words which, if literally construed, would bring about such a result is one to which the maxim, *Verba generalia restringuntur ad habilitatem rei vel personae,* is peculiarly applicable.

Earlier in these reasons I have stated that counsel for the appellants did not question the validity of the by-law or of the enabling provincial legislation. I should make it plain

[1] [1899] A.C. 580 at 588. [2] (1879), 3 S.C.R. 1 at 71.
[3] (1879), 5 App. Cas. 115 at 122.

that this admission on his part depended upon the acceptance of his argument that on its proper construction the by-law did not prohibit the display of the sign in regard to which the appellants were convicted. It was implicit in his argument that if the by-law should be construed so as to prohibit that display it would be *pro tanto* invalid.

For these reasons I agree with the conclusion of Hughes J. that on its proper construction by-law number 11737 does not prohibit the display of the sign displayed by the appellants during the period mentioned in the charge against them.

Before parting with the matter I wish to emphasize, perhaps needlessly, the limited scope of the question we are called upon to decide. The constitutional validity of any provincial legislation is not directly impugned; were it otherwise it would have been necessary to give the notices required by Rule 18. The discussion of the extent to which provincial legislation may affect the carrying on of a political activity in the federal field was raised by counsel and has been pursued in these reasons merely to assist in arriving at the true construction of the by-law. That question of construction is in turn confined to ascertaining whether the general words used, which in their natural meaning do not merely regulate but forbid the display of signs at all times, were intended to have effect so as to forbid during the actual period of an election to Parliament the display of a sign of the sort described in the charge on which the appellants were convicted.

I would allow the appeal with costs in this Court and in the Court of Appeal, set aside the order of the Court of Appeal and restore the order of Hughes J.

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

Martland J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario[1], which reversed the decision of Hughes J., and affirmed the conviction of the appellants by a Justice of the Peace, for having unlawfully maintained a sign upon premises owned by them contrary to the provisions of By-law 11737 of the Township of Etobicoke. The by-law in question is a zoning by-law,

[1] [1964] 1 O.R. 641, 43 D.L.R. (2d) 401.

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which, inter alia, forbade the use of a building, structure or land within the area in which the appellants' land was situated for signs, save those for certain specified purposes. The sign in question, attached to the railing of the verandah of a residence, and which read: "Vote Middleton, New Democratic Party", was not within the specified permitted types of sign.

It was admitted, in argument, that the by-law in question was intra vires of the municipality. The contention of the appellants is that the by-law was not intended to have the effect of forbidding the use of such a sign during the actual period of an election to the federal Parliament.

This contention was supported upon two grounds:

1. That the displaying of such a sign was subject exclusively to federal legislation, as being in relation to "Proceedings at Elections", within the meaning of s. 41 of the *British North America Act;* and
2. That the displaying of the sign was a political right of the appellants which was not affected by the by-law.

As to the first point, s. 41 was an interim provision of the *British North America Act,* which provided that certain then existing provincial laws should apply to the election of members to serve in the House of Commons from the several provinces, until the Parliament of Canada otherwise provided. Parliament did so provide, and the effect of s. 41 has been exhausted. The law relating to proceedings at federal elections is now to be found in the *Canada Elections Act,* Chapter 39, Statutes of Canada, 1960.

The appellants contended that certain provisions in that Act recognized implicitly the right to erect signs.

The sections relied upon were the following:

49. (3) No person shall furnish or supply any loud speaker, bunting, ensign, banner, standard or set of colours, or any other flag, to any person with intent that it shall be carried, worn or used on automobiles, trucks or other vehicles, as political propaganda, on the ordinary polling day; and no person shall, with any such intent, carry, wear or use, on automobiles, trucks or other vehicles, any such loud speaker, bunting, ensign, banner, standard or set of colours, or any other flag, on the ordinary polling day.

(4) No person shall furnish or supply any flag, ribbon, label or like favour to or for any person with intent that it be worn or used by any person within any electoral district on the day of election or polling, or within two days before such day, or during the continuance of such election, by any person, as a party badge to distinguish the wearer as the supporter of any candidate, or of the political or other opinions enter-

tained or supposed to be entertained by such candidate; and no person shall use or wear any flag, ribbon, label, or other favour, as such badge, within any electoral district on the day of any such election or polling, or within two days before such day.

* * *

71. Every printed advertisement, handbill, placard, poster or dodger having reference to any election shall bear the name and address of its printer and publisher, and any person printing, publishing, distributing or posting up, or causing to be printed, published, distributed or posted up, any such document unless it bears such name and address is guilty of an offence against this Act punishable on summary conviction as provided in this Act, and if he is a candidate or the official agent of a candidate is further guilty of an illegal practice.

* * *

100. (1) When any election officer is by this Act authorized or required to give a public notice and no special mode of notification is indicated, the notice may be by advertisement, placard, handbill or otherwise as he considers will best effect the intended purpose.

(2) Notices and other documents required by this Act to be posted up may, notwithstanding the provisions of any law of Canada or of a province or of any municipal ordinance or by-law, be affixed by means of tacks or pins to any wooden fence situated on or adjoining any highway, or by means of tacks, pins, gum or paste on any post or pole likewise situated, and such documents shall not be affixed to fences or poles in any manner otherwise.

I cannot find in any of these provisions any recognition by Parliament, express or implied, of an overriding right to erect anywhere a sign for purposes of political propaganda.

Subsections (3) and (4) of s. 49 contain prohibitions against the supplying and use of certain kinds of election propaganda on polling day, and during certain other periods.

Section 71 requires printed advertisements, handbills, placards, posters or dodgers having reference to an election to carry the name and address of the printer and publisher.

Section 100 is the only one of the provisions mentioned which contains enabling, rather than restrictive, provisions. It deals with the posting of official notices required under the Act. It authorizes their posting in certain ways and in certain places. It is significant that subs. (2) contains the words "notwithstanding the provisions of any law of Canada or of a province or of any municipal ordinance or by-law", thereby recognizing that, in the absence of the authority of this section, even the posting of official notices in certain places might properly be forbidden by a provincial statute or a municipal by-law.

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In my opinion there is nothing in the provisions of the by-law relating to the erection of signs which runs counter to any of the provisions of the *Canada Elections Act*.

It is, however, contended that, even though Parliament has not legislated on this subject, the field of proceedings at federal elections is one of federal jurisdiction and cannot be affected by provincial legislation, even though it is so affected only incidentally. Reliance is placed upon the statement of Lord Watson in *Union Colliery v. Bryden*[1]:

> The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

In that case the issue was as to the validity of a provision regarding Chinese men in a British Columbia statute which provided that:

> no boy under the age of twelve years, and no woman or girl of any age, and no Chinaman, shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground.

The Privy Council held that the provision relating exclusively to Chinese men, who are aliens or naturalized subjects, was within exclusive federal jurisdiction under s. 91(25), and was ultra vires of the British Columbia Legislature.

The basis of the decision is set forth by Lord Watson at p. 587:

> But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.

This legislation was held to be bad in so far as Chinese men were concerned because the provincial legislature had singled out for its legislation a group within the heading "naturalization and aliens". It is, however, implicit in the reasons that provincial legislation dealing with coal mines, applicable to men in a certain age group, would not only be valid but would apply to Chinese men within that group. There was no suggestion that the provision in issue was not valid in relation to boys, or that it could not apply to Chinese boys under the age of twelve years.

[1] [1899] A.C. 580 at 588.

It should also be noted that the statement of Lord Watson cited by the appellants, deals with those legislative powers conferred upon the federal Parliament under the specifically enumerated heads of s. 91 of the *British North America Act,* which section concludes with the provision, relied upon by Lord Watson in his reasons (at p. 585), that

> any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

There is no class of subject within the enumerated heads of s. 91 which deals with "proceedings at elections". That phrase appears in s. 41. It was there used as a description of a subject matter already covered by certain existing provincial laws; i.e., "proceedings at elections" was defined by the terms of those provincial statutes.

Undoubtedly the federal Parliament can legislate and has legislated respecting federal elections. To the extent that it has legislated, such legislation governs and would override any provincial enactment which ran counter to it. The point which I make is that there is no general field of legislation on this subject assigned to the federal Parliament under an enumerated class in s. 91 to which the proviso at the conclusion of that section can attach.

That being so, in my opinion, provincial legislation in relation to the use of property, which, in its pith and substance, is in relation to property and civil rights in the province, and which is of general application, is not only valid, but can apply even though, incidentally, it may affect the means of propaganda used by an individual or by a political party during a federal election campaign.

The only authority to which we were referred in support of this doctrine of non-applicability was the *Reference regarding the Minimum Wage Act of Saskatchewan*[1]. That was a reference to determine whether *The Minimum Wage Act,* R.S.S. 1940, c. 310, applied to the employment of Leo Fleming in the post office at Maple Creek, Saskatchewan. Fleming had been employed temporarily by the postmistress of a revenue post office in December, 1946, and she had been charged with a breach of that Act. There was no suggestion that the Act purported to be applicable generally

[1] [1948] S.C.R. 248, 91 C.C.C. 366, 3 D.L.R. 801.

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to federal civil servants. The decision that it did not apply to Fleming's employment was that, though he was paid by the postmistress out of her postal revenues, he was employed in the business of the Post Office of Canada and was a part of the postal service. That being so, the terms of his employment were the subject matter of federal legislation. In essence, the decision was that provincial legislation as to wages did not apply to federal Crown servants, even though not paid directly by the Crown. It does not support the very wide proposition urged by the appellants in the present case.

In *Attorney-General for Alberta v. Attorney-General for Canada*[1], the Bill entitled "An Act respecting the Taxation of Banks" was held to be ultra vires of the Alberta Legislature, not because a provincial taxing statute could not apply to banks, but because it applied only to banks and because its true purpose was not taxation to raise provincial revenue but the prevention of the operation of banks in the province.

In *Great West Saddlery Company Limited v. The King*[2], the questions in issue involved the validity of certain provincial statutes affecting the position of companies incorporated under the provisions of the *Canadian Companies Act*. One of the statutes under consideration was the *Ontario Mortmain and Charitable Uses Act*. It was held that a federal company was subject to the provisions of this Act, because it was one of general application.

This, I think, is an answer to the suggestion that, if the municipality could not have enacted a by-law aimed exclusively at federal election signs, then a general by-law could not be applicable to them. The essential feature of the by-law in question here is that it is of general application and, admittedly, valid.

I turn now to deal specifically with the second head of the appellants' argument, although what has already been said is, in part, applicable to that submission. The contention is that the displaying of the sign by the applicants was the exercise of a political right in a federal election which would not be affected by any legislation other than federal.

[1] [1939] A.C. 117, [1938] D.L.R. 433.
[2] [1921] 2 A.C. 91, 1 W.W.R. 1034, 58 D.L.R. 1.

The appellants relied mainly upon the decisions of this Court in *Saumur v. The City of Quebec*[1]; *Switzman v. Elbling*[2]; and the reasons of Chief Justice Duff in the *Reference re Alberta Statutes*[3].

The first case involved an attack by a member of Jehovah's Witnesses upon the validity of a by-law of the City of Quebec, which forbade distribution in the streets of the City of books and pamphlets without permission of the Chief of Police of the City. Four of the members of the Court who found the by-law to be invalid were of the view that the true purpose of the by-law was not in relation to the administration of streets, but to exercise censorship, interfering with freedom of religious worship, a subject matter of federal legislation.

Kerwin J. held that the by-law could not operate to prevent the distribution of the literature of Jehovah's Witnesses because of the protection afforded to freedom of religious worship by a pre-Confederation statute of 1852 and by the *Freedom of Worship Act* of the Province of Quebec.

Four members of the Court would have held the by-law to be valid.

In the present case, however, the by-law is admittedly valid and there has been no suggestion that its aim and purpose was anything other than the maintenance of certain standards of amenity in residential areas in the Township. This being so, I would adopt, in relation to this issue, what was said by Cartwright J. in the *Saumur* case respecting provincial legislation which might affect religion. At p. 387 he said:

> It may well be that Parliament alone has power to make laws in relation to the subject of religion as such, that that subject is, in its nature, one which concerns Canada as a whole and so cannot be regarded as of a merely local or private nature in any province or as a civil right in any province; but we are not called upon to decide that question in this appeal and I express no opinion upon it. I think it clear that the provinces, legislating within their allotted sphere, may affect the carrying on of activities connected with the practice of religion. For example, there are many municipal by-laws in force in cities in Ontario, passed pursuant to powers conferred by the Provincial Legislature, which provide that no buildings other than private residences shall be erected on certain streets. Such by-laws are, in my opinion, clearly valid although they prevent any

[1] [1953] 2 S.C.R. 299, 106 C.C.C. 289.
[2] [1957] S.C.R. 285, 117 C.C.C. 129, 7 D.L.R. (2d) 337.
[3] [1938] S.C.R. 100, 2 D.L.R. 81.

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religious body from building a church or similar edifice on such streets. Another example of Provincial Legislation which might be said to interfere directly with the free exercise of religious profession is that under which the by-law considered in *Re Cribbin v. The City of Toronto,* (1891) 21 O.R. 325, was passed. That was a by-law of the City of Toronto which provided in part:—

> No person shall on the Sabbath-day, in any public park, square, garden, or place for exhibition in the city of Toronto, publicly preach, lecture or declaim.

The by-law was attacked on the ground, inter alia, that it was unconstitutional but it was upheld by Galt C.J. and in my opinion, his decision was right. No useful purpose would be served by endeavouring to define the limits of the provincial power to pass legislation affecting the carrying on of activities connected with the practice of religion. The better course is, I think, to deal only with the particular legislation now before us.

Switzman v. Elbling also involved the question of constitutional validity of legislation, in this case the *Quebec Act respecting Communistic Propaganda.* The majority of the Court held that the statute was legislation in respect of criminal law. Three members of the Court held that it was not within any of the powers specifically assigned to the provinces and that it constituted an unjustifiable interference with freedom of speech.

In each of these cases some of the reasons have recognized the existence of fields of federal legislative jurisdiction in relation to freedom of religion (Saumur) and freedom of speech (Switzman). In each of these cases this view was expressed in relation to legislation which the judges expressing that view had found not to fall within any head of s. 92.

The source of this opinion as to such fields of federal jurisdiction is the judgment of Chief Justice Duff in the *Reference re Alberta Legislation.* He was dealing with Bill No. 9, passed by the Alberta Legislature, but which had not received royal assent, "To Ensure the Publication of Accurate News and Information". This bill would have required newspapers which published material criticizing the provincial government to publish a corrective or amplifying statement if required by a government board.

Chief Justice Duff held that this Bill presupposed, as a condition of its operation, that the *Alberta Social Credit Act* was valid, and, since that Act was held to be ultra vires of the Province, the ancillary and dependent legislation fell with it.

In his reasons, however, he suggested another ground on which it might be contended that the Bill was invalid, but

expressed no view as to whether or not it would be unconstitutional as offending against that proposition.

His well known statement is as follows, at p. 134:

> The question, discussed in argument, of the validity of the legislation before us, considered as a wholly independent enactment having no relation to the *Alberta Social Credit Act,* presents no little difficulty. Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of *The British North America Act* and the statutes of the Dominion of Canada.

It is significant that this statement clearly recognizes that a province has a right to regulate newspapers. Any such regulation must, to some extent, be a curtailment of unlimited freedom of discussion. Chief Justice Duff said that such provincial control could not go beyond a certain point, which he defined.

His views were concurred in by Davis J. Cannon J. was of the view that a province could not curtail free discussion of public affairs, this being within the federal field of criminal law. The other three members of the Court expressed no view regarding this point.

Assuming the correctness of the proposition stated by Chief Justice Duff and the existence of federal legislative powers in the field of freedom of religion and freedom of discussion, there is no case as yet which has ruled that provincial legislation not directed at those fields, but validly enacted in relation to property and civil rights, cannot, incidentally, effect any curtailment of the same.

Earlier in his reasons, Chief Justice Duff said, at p. 133:

> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth,* (1936) A.C. 578, at 627, "freedom governed by law."

It is significant that of the two examples which he chose, one, the law of defamation, was a provincial matter, the other, sedition, a federal one.

Freedom of discussion is not an unlimited right to urge views, political or other, at any time, in any place, and in

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any manner. It is a freedom subject to law, and, depending on the nature of the legislation involved, may be subject to certain restrictions, whether federal or provincial.

In *Oil, Chemical and Atomic Workers International Union v. Attorney-General of British Columbia*[1], the appellant urged that provincial legislation preventing the use of union dues, paid as a condition of membership, for contribution to a political party, or candidate, was not within any head of s. 92 and interfered with freedom of political activity. The majority of this Court held that the legislation was in pith and substance labour legislation and within provincial powers.

Counsel for the appellant in that case placed reliance on the passage quoted from the judgment of Chief Justice Duff and urged that the legislation in question effected such a curtailment of the right of association for political purposes as to fall within the proposition there stated.

Dealing with that submission I said, at p. 594:

> The legislation, however, does not affect the right of any individual to engage in any form of political activity which he may desire. It does not prevent a trade union from engaging in political activities. It does not prevent it from soliciting funds from its members for political purposes, or limit, in any way, the expenditure of funds so raised. It does prevent the use of funds, which are obtained in particular ways, from being used for political purposes.

In the same case Ritchie J. said, at p. 608:

> Even if it could be said that the legislation under attack (s. 9(6), (c) and (d)) had any effect on political elections such an effect could, in my view, only be characterized as incidental and this would not alter the fact that the amendment in question is a part and parcel of legislation passed "in relation to" labour relations and not "in relation to" elections either provincial or federal.

The test stated by Chief Justice Duff, assuming it is a sound proposition of constitutional law, is one for the determination of the validity of provincial legislation. That issue is not before us here. This by-law is admittedly valid. There is no suggestion in the reasons of Chief Justice Duff that, if provincial legislation regulating newspapers did not go beyond the limit which he defined, the legislation would be inapplicable in so far as it effected any curtailment of public discussion during a federal election.

Furthermore, applying his test to the circumstances of the present case, I would not accept the proposition that,

[1] [1963] S.C.R. 584, 45 W.W.R. 1, 41 D.L.R. (2d) 1.

because a by-law of general application incidentally prevented a particular form of political propaganda from being used in a particular area, this constituted a substantial interference with the working of the parliamentary institutions of Canada.

In my opinion the appeal fails and should be dismissed with costs.

Appeal allowed with costs, Fauteux, Martland, Ritchie *and* Hall JJ. *dissenting.*

Solicitors for the appellants: Cameron, Brewin, McCallum & Scott, Toronto.

Solicitors for the respondent: McMaster, Montgomery & Co., Toronto.

1965
*Mar. 22, 23
June 24

NATIONAL TRUST COMPANY LIMITED, executor of the last will and testament of Marguerite W. Fleury, deceased ..... APPELLANT;

AND

WILLIAM E. FLEURY AND ELINOR M. CAMERON AND NATIONAL TRUST COMPANY LIMITED, HAROLD LEAROYD STEELE AND WILLIAM ERIC FLEURY, trustees of the last will and testament and codicils of Herbert W. Fleury, deceased ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Construction—Bequest to testator's daughter for life with direction for distribution upon her decease to those persons entitled as if testator had died intestate—Whether next-of-kin to be determined at date of testator's death or at date of death of life tenant.

The testator, by para. 11(a) of his will, directed that the remainder of his estate was to be incorporated in a trust fund to be held by his trustees with direction to pay his daughter at least $5,000 a year from the income and if necessary from the capital and to the capital of which she could only otherwise have access if the trustees in their absolute discretion considered the sum of $5,000 annually to be insufficient for her proper support and maintenance. It was provided, by

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

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para. 11(c), that upon her decease a specified amount was to be divided among nephews and nieces of the testator and the remainder of the corpus was to be divided as follows: one-half to the testator's brother or his heirs, and the remaining one-half "to such persons as will be entitled thereto according to the Statute of Distribution in force in the Province of Ontario as if I had died intestate in respect thereto." The question raised was whether the statutory next-of-kin were to be determined at the date of death of the testator, in which event the executor of the estate of the daughter was solely entitled, or whether they were to be determined at the date of the death of the daughter, in which event four nephews and three nieces would take.

On a motion for construction the judge of first instance applied the general rule (established in *Bullock v. Downes* (1860), 9 H.L.C. 1) that the class is determined at the date of death of the testator unless a contrary intention appears from the will. He was unable to find a contrary intention. The Court of Appeal did find a contrary intention and held that the class was to be ascertained at the date of the death of the life tenant. The executor of the daughter's estate appealed to this Court.

Held (Judson J. dissenting): The appeal should be dismissed.

Per Cartwright and Martland JJ.: The authority of the rule of construction stated in *Bullock v. Downes,* applied by this Court in *Thompson v. Smith* (1897), 27 S.C.R. 628, was not impaired by subsequent decisions in Ontario. That rule, however, would yield to a sufficient indication in the words of the will that the next-of-kin were to be ascertained not at the death of the testator but at the time fixed by the will as the period of distribution. In the case at bar a sufficient indication that the testator intended that his next-of-kin should be ascertained at the death of his daughter was to be found in the clauses of para. 11 of the will.

Per Martland, Ritchie and Spence JJ.: In the construction of wills, the primary purpose was to determine the intention of the testator and it was only when such intention could not be arrived at with certainty by giving the natural and ordinary meaning to the words used by him that resort was to be had to the rules of construction developed by the Courts in the interpretation of other wills.

It was apparent that the testator intended the whole of the corpus of his estate to be preserved intact during the lifetime of his daughter subject to the payments which the trustees were authorized to make. The result of applying the rule in *Bullock v. Downes* to this will was to ignore the carefully drawn provisions setting up the trust and to attribute to the testator the contrary intention to provide for his daughter in such manner as to enable her to obtain a substantial part of the fund for her own use absolutely without the exercise of any authority or discretion by the trustees and whether or not the whole fund produced an income of $5,000 a year.

The inconsistency which resulted from the application of this rule to the language used in paras. 11(a) and 11(c) of the will was itself a sufficient indication that the testator did not intend the ultimate beneficiaries under para. 11(c) to be those entitled under *The Devolution of Estates Act* at the date of his death, but rather that he intended one-half of the remainder of the corpus of his estate to be divided amongst the persons so entitled at the date of the death of his daughter.

Hutchinson v. National Refuges for Homeless and Destitute Children, [1920] A.C. 794; *Lucas-Tooth v. Lucas-Tooth,* [1921] 1 A.C. 594, referred to.

Per Judson J., *dissenting:* The reasoning which led the judge of first instance to find that there was no contrary intention was sound and should be accepted. He thought that the testator meant what he said and that he intended to die intestate with respect to one-half of the residue; that he did not know whether or not his daughter would be living at his death, nor could he tell who his next-of-kin might be at that time. Whoever they were, they were the ones to take.

The mere fact that the life tenant and the person who would take if the class were ascertained as of the date of death of the testator were one and the same person was not an indication of a contrary intention.

Re Young (1928), 62 O.L.R. 275; *Jones v. Colbeck* (1802), 8 Ves. 38; *Thompson v. Smith, supra; Hutchinson v. National Refuges for Homeless and Destitute Children, supra,* discussed; *Re Allen,* [1939] O.W.N. 1; *Re Campbell* (1928), 63 O.L.R. 36; *Re Hughson,* [1955] O.W.N. 541; *Re Jones,* [1955] O.R. 837; *Re Colby,* [1957] O.W.N. 517, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Hughes J. on a motion for construction of a will. Appeal dismissed, Judson J. dissenting.

John D. Arnup, Q.C., for the appellant.

Terence Sheard, Q.C., and *R. Hull,* for the respondents: William E. Fleury and Elinor M. Cameron.

George W. Collins-Williams, Q.C., for the respondents: National Trust Co. Ltd., Harold Learoyd Steele and William E. Fleury.

Martland J. concurred with the judgment delivered by

CARTWRIGHT J.:—The question raised on this appeal and the relevant provisions of the will of the late Herbert W. Fleury are set out in the reasons of other members of the Court.

I have reached the conclusion that the appeal fails but, in view of some of the expressions used in the reasons of the Court of Appeal[1] as to the effect of the decisions there discussed, I propose to state shortly my opinion as to the present state of the law in Ontario on the point with which we are concerned.

[1] [1964] 2 O.R. 129, 44 D.L.R. (2d) 393.

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In my view the authority of the rule of construction stated by Lord Campbell in *Bullock v. Downes*[1], at p. 11, quoted by my brother Ritchie and applied by this Court in *Thompson v. Smith*[2], is not impaired by the subsequent decisions in Ontario. That rule, however, will yield to a sufficient indication in the words of the will that the next-of-kin are to be ascertained not at the death of the testator but at the time fixed by the will as the period of distribution.

For the reasons given by my brother Ritchie I agree with his conclusion that a sufficient indication that the testator intended that his next-of-kin should be ascertained at the death of his daughter is to be found in the clauses of para. 11 of the will. I am somewhat fortified in this view by the use of the plural number and the future tense in the words which I have italicized in the following extract from that paragraph:

> (c) Upon the decease of my daughter Marguerite W. Fleury to distribute the corpus of my estate as follows: . . . and the remaining one-half to such *persons* as *will be entitled* thereto according to the Statute of Distribution in force in the Province of Ontario as if I had died intestate in respect thereto.

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

JUDSON J. (*dissenting*):—The testator directed by para. (11)(c) of his will that the remainder of his estate should be disposed of as follows:

> (c) Upon the decease of my daughter Marguerite W. Fleury to distribute the corpus of my estate as follows: The sum of Eighty Thousand Dollars ($80,000.00) shall be divided amongst, between or to the first cousins of my said daughter, being Nephews and Nieces of mine, or their children, per stirpes in being at the decease of my daughter.
>
> The remainder of the corpus of my estate to be divided as follows:—One-half to my brother William J. Fleury or his heirs; and the remaining one-half to such persons as will be entitled thereto according to the Statute of Distribution in force in the Province of Ontario as if I had died intestate in respect thereto.

It is common ground that the gift under consideration in this litigation is to the next-of-kin determined in accordance with *The Devolution of Estates Act,* and the whole question is whether the statutory next-of-kin are to be determined at the date of the death of the testator, in which event National Trust Company Limited, as executor of the estate

[1] (1860), 9 H.L.C. 1. [2] (1897), 27 S.C.R. 628.

of the daughter, is solely entitled, or whether they are to be determined at the date of death of the daughter, in which event four nephews and three nieces would take.

On a motion for construction the judge of first instance, Hughes J., applied the general rule that the class is determined at the date of the death of the testator unless a contrary intention appears from the will. He was unable to find any contrary intention. The Court of Appeal[1] did find a contrary intention and held that the class was to be ascertained at the date of the death of the life tenant. The executor of the daughter's estate now appeals to this Court.

To me, the scheme of the will is uncomplicated and I do not think that any help can be derived from any of its terms until the testator comes to the disposition of the residue. The daughter was to have the net income from the estate for life with the provision that if this did not produce $5,000 per year, the trustees were to encroach on the residue in order to produce this sum. There was a further direction that if the trustees did not think that $5,000 per year was enough for the proper support and maintenance of the daughter, they were again to encroach on capital as they deemed necessary or advisable. They were told that in exercising their discretion that the testator wished them to treat the daughter generously. Then he came to the disposition of the residue, which I have set out above. The $80,000, which was first to be taken out of the residue to be divided among nephews and nieces, was reduced by two subsequent codicils, first, to $60,000, and then to $40,000.

The Court of Appeal, in determining the class at the date of distribution, said that the testator must have assumed that his daughter, his only next-of-kin at the date of the will, would survive him and that the wording of the residuary clause was an inappropriate expression of an intention to benefit his only child or her estate. With respect, I cannot reach the same conclusion. The testator made provision for his daughter during her lifetime and for his nieces and nephews who at the date of the will were known to him as being his probable next-of-kin if his daughter were not, and he used language which would cover all eventualities. He chose to benefit as to one-half of the residue his next-of-kin, whoever they might be. A contrary intention does not

[1] [1964] 2 O.R. 129, 44 D.L.R. (2d) 393.

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sufficiently appear merely from the fact that by the will a prior particular estate is limited to a particular person who presumably would and, in fact, did turn out to be the person satisfying the definition.

The Court of Appeal also found a contrary intention in the fact that the daughter, being entitled to the life interest and one half of the residue, might have been in a position to demand immediate payment of this half of the residue. If this is the result of the dispositions in the will, it flows from the law and not from any expression used by the testator. In most cases where a beneficiary of income has been held entitled to demand immediate transfer of the corpus of the fund, the testator has not contemplated this result but principles of law have caused it to happen.

Nor do I think that a contrary intention is indicated by the use of words of futurity in the concluding clause of para. (11)(*c*) "and the remaining one-half to such persons as will be entitled thereto according to the Statute of Distribution in force in the Province of Ontario as if I had died intestate in respect thereto." The words of futurity, in my opinion, refer to the time when this one-half of the residue will come into possession and do not determine when the class is to be ascertained.

Nor can I see any significance in the fact that the persons who take under the will of the deceased daughter are strangers in blood to the testator. The claimant is the estate of the daughter as next-of-kin of the father and what she may have chosen to do with her own estate can have nothing to do with the interpretation of her father's will.

In my opinion, the reasoning which led Hughes J. to find that there was no contrary intention is sound and should be accepted. He thought that the testator meant what he said and that he intended to die intestate with respect to this half of the residue; that he did not know whether or not his daughter would be living at his death, nor could he tell who his next-of-kin might be at that time. Whoever they were, they were the ones to take.

Hughes J. also noted that the testator directed his attention to his nephews and nieces, who are the alternative claimants here. He divided $80,000 among them *per stirpes* and then reduced that sum by two separate codicils. It was a significant fact that he specifically ascertained this class of

nephews and nieces at the death of the daughter and that he refrained from making such an ascertainment with respect to the second half of the estate.

The course of litigation in Ontario on this type of problem has been full of meaning and should determine the construction of this will in the way in which Hughes J. construed it.

The Court of Appeal took as its starting point the decision of Middleton J. A., sitting in Weekly Court, in *Re Young*.[1] It is a convenient starting point because of its review of the litigation in the first half of the 19th century in England. The review of the English cases begins with *Jones v. Colbeck*[2], where there was a residuary bequest to a daughter for life, then to her children at the ages of 21, and after the death of the daughter and of her children under that age, the residue was to be distributed among the testator's relations in due course of administration. The daughter, who was a widow, died after the death of the testator without leaving issue. Great-nephews and nieces claimed in competition with the estate of the daughter and the result of the judgment was that the class of relations was ascertained at the date of the death of the daughter. I note that Theobald on Wills, 12th ed., has this comment on the case:

> The term relations, however, has not the same direct reference to the death of the *propositus* as heirs or next-of-kin. Therefore, where there is a gift either to A for life with remainder to her children, or to A absolutely followed by a gift over, if A dies without issue, to the testator's relations, and A is the sole next-of-kin at the date of the will and death, the class will be ascertained at A's death.

This case and those that purported to follow it cannot be cited for any general proposition that where the life tenant is also the same person as the next-of-kin if ascertained at the date of death of the testator, this is an indication that the next-of-kin are to be ascertained at the date of death of the life tenant because the testator could not mean by his next-of-kin the very person to whom he was giving the life interest.

In *Thompson v. Smith*[3], Chancellor Boyd applied *Jones v. Colbeck* literally where a testator gave a life interest to his daughter and her mother for their joint lives and to the survivor of them, and directed that at the death of both

[1] (1928), 62 O.L.R. 275, 2 D.L.R. 966.
[2] (1802), 8 Ves. 38, 32 E.R. 264. [3] (1894), 25 O.R. 652.

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"the residue of my real and personal property shall be enjoyed by and go to the benefit of my lawful heirs". Both survived the testator, the daughter surviving the mother. At the date of death of the testator the daughter was his only heir.

Chancellor Boyd excluded the estate of the daughter and held that the class of heirs was to be ascertained at the date of death of the daughter. This was rejected both on appeal in Ontario[1], and on appeal to this Court[2], where Sedgewick J. said:

> I take it to be reasonably clear that this contention cannot prevail. The rule established in *Bullock v. Downes,* 9 H.L. Cas. 1, is that where in a case like the present the testator uses the word "heirs", he must be taken to mean heirs at the time of his death unless the contrary contention is apparent from the will. This rule was subsequently followed and applied in *Mortimore v. Mortimore,* 4 App. Cas. 448, and in *Re Ford; Patten v. Sparks,* 72 L.T.N.S., 5.

I take this to be an accurate and binding statement of what has been referred to as the rule established in *Bullock v. Downes*[3]. Nevertheless, Middleton J. A., p. 280, said that both the Court of Appeal and the Supreme Court of Canada proceeded

> entirely upon the theory that *Bullock v. Downes,* particularly as expounded in *Mortimore v. Mortimore* (1879), 4 App. Cas. 448, and *Re Ford, Patten v. Sparks* (1895), 72 L.T.R. 5, had established an inflexible rule that in all these cases the date of the testator's death could be alone regarded.

I do not think that any such inflexible rule was either established or applied in either Court.

There is no conflict between the rule stated in this Court and the way it was expressed in *Hood v. Murray*[4], and in *Hutchinson v. National Refuges for Homeless and Destitute Children*[5]. In the latter case, at p. 801, Lord Finlay said:

> *Bullock v. Downes,* 9 H.L.C. 12, 13, therefore decides that, prima facie, the next of kin are to be ascertained at the death of the testator, but, that if there is a sufficient indication to that effect in the words of the will, the time for ascertaining the class may be the time fixed by the will as the period of distribution. The question in this as in every other case of the kind must be whether there is in the will a sufficient indication that the period of distribution is the time at which the class is to be ascertained.

Under this will, who are the persons who will be entitled to the second half of the estate "according to the Statute of

[1] (1896), 23 O.A.R. 29.
[2] (1897), 27 S.C.R. 628 at 632.
[3] (1860), 9 H.L.C. 1, 11 E.R. 627.
[4] (1889), 14 App. Cas. 124.
[5] [1920] A.C. 794.

Distribution in force in the Province of Ontario as if I had died intestate in respect thereto"? There can only be one meaning to this, that is, the daughter, the sole next-of-kin and the one entitled under *The Devolution of Estates Act*. The question is whether the testator by the terms of this will was thinking of an artificial class of persons who would be entitled as next-of-kin if he, the testator, had survived to the date of distribution. I cannot see on the face of this will that he was thinking of any such artificial class and there are no other indications external to the residuary disposition that throw any light on this subject one way or the other. The mere fact that the life tenant and the person who would take if the class is ascertained as of the date of the death of the testator are one and the same person, is not an indication of a contrary intention.

This artificial class of persons was found to be indicated in the *Hutchinson* case and it is well, in considering the reasons for judgment, to look at the disposition that was under consideration. The testator gave his residuary personal estate upon trust after the death or remarriage of his wife for his three daughters and their respective children in equal shares with cross limitations among them. He also directed:

> that on failure of all the trusts hereinbefore declared of the residue of my personal estate such residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin and entitled to my personal estate under the Statutes for the Distribution of Estate of Intestates, such persons if more than one to take distributively according to the said Statutes.

For myself, I think that there is a plain indication in this will that the next-of-kin would be ascertained only when it became apparent that the trusts had failed, and not on the date of the death of the testator. I cannot see this case as a new point of departure in the consideration of this problem. It is no more than a finding of a contrary intention on the wording of the will.

Rose C.J.H.C. considered this problem again ten years after *Re Young* in *Re Allan*[1]. I quote from his judgment at pp. 2 and 3:

> It is suggested that the testatrix cannot have intended that upon the death of Frederick Hugh Allan without issue any portion of the part of the estate set aside for him should descend to his representatives. Attention is directed to the fact that one one-fourth part of the estate of the testatrix is given outright to her son Thomas Martin Livingstone Allan

[1] [1939] O.W.N. 1.

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if he survives, whereas in the case of the parts set aside for other children (including Frederick Hugh Allan) the income only is given to the child; and it is suggested that a construction which vests in Frederick Hugh Allan an interest in remainder in the part given to him for life will place him to a certain extent upon an equal footing with his brother Thomas Martin Livingstone Allan. It is also to be noted that the testatrix makes no provision for the widow of a son, or the surviving husband of a daughter, for whom a part of her estate is set aside, and it is suggested that a construction which will cause a portion of the part set aside for Frederick Hugh Allan to descend to his widow is a construction which may defeat the wishes of the testatrix. The learned Chief Justice said that he could not find in any of this a sufficient indication that the testatrix intended that the ordinary rule should not be followed. Certainly the mere fact that the heirs, if the class is ascertained as at the date of the death of the testatrix, will include the life tenant is not sufficient. This is made plain by the text writers and the cases cited by them. Thus in Theobald on Wills, 7th ed., 340, it is said: "If the gift is to the heir of the testator, the heir must be ascertained at the death of the testator, though the gift to the heir is after a life interest to the person who is the heir." And in Jarman on Wills, 7th ed., 1551, it is said: "And since a departure from the rule leads to frequent inconveniences, slight circumstances or conjectural probability will not prevent an adherence to it. Thus it is not enough that the heir has an express estate in the same property limited to him in a previous part of the will."

Re Campbell[1], *Re Hughson*[2], *Re Jones*[3] and *Re Colby*[4] are all uniform and in line to the effect that identity of the life tenant with the person who would be the next-of-kin at the date of death of the testator is not in itself an indication of a contrary intention. *Re Pennock*[5] seems to be out of line with these decisions. It is important for the orderly administration of the law of property, where the problem is so clearly identifiable, that the mode of approach which was stated in this Court and in the Ontario Court of Appeal over seventy years ago should be adhered to.

I would allow the appeal and restore the judgment of Hughes J. The trustees of the will of Marguerite Fleury and the trustees of the will of William E. Fleury should have their costs out of this part of the residue on a solicitor and client basis both here and in the Court of Appeal. There should be no order for costs for the individual respondents in either Court.

Martland and Spence JJ. concurred with the judgment delivered by

[1] (1928), 63 O.L.R. 36. [2] [1955] O.W.N. 541. [3] [1955] O.R. 837.
[4] [1957] O.W.N. 517.
[5] [1936] O.R. 1, affirmed on appeal [1936] 2 D.L.R. 192.

RITCHIE J.:—This appeal is concerned with the true construction to be placed on the provision made by the late Herbert W. Fleury in para. 11(c) of his will for the disposition of one-half of the remainder of the corpus of his estate on his daughter's death.

By the terms of para. 11 of his will, the late Mr. Fleury gave, devised and bequeathed all the rest, residue and remainder of his estate unto his trustees, upon and subject to the following trusts:

(a) To pay the net income to my daughter, MARGUERITE W. FLEURY, during the remainder of her life, such payments to be made in half-yearly payments or oftener as my Trustees may deem advisable. Should such income payable under this clause in any year amount to less than Five Thousand Dollars ($5,000.00) my Trustees shall pay out of the residue of my estate to my said Daughter the difference between the amount of the said income and Five Thousand Dollars ($5,000.00) it being my intention that my said Daughter shall receive not less than Five Thousand Dollars ($5,000.00) each year. Should the amount so to be paid to my Daughter be in the absolute discretion of my Trustees insufficient for the proper support and maintenance of my said Daughter, my Trustees are hereby authorized to pay to or for my said Daughter such part of the corpus of the said residue of my estate as they shall deem necessary or advisable. In exercising their discretion under this clause, it is my desire that my Trustees shall deal with my said Daughter generously.

(b) I GIVE AND BEQUEATH the following Charitable bequests:

(It is unnecessary to set out these bequests).

(c) Upon the decease of my daughter Marguerite W. Fleury to distribute the corpus of my estate as follows:

The sum of Eighty Thousand Dollars ($80,000.00) shall be divided amongst, between or to the first cousins of my said daughter, being Nephews and Nieces of mine, or their children, per stirpes in being at the decease of my daughter.

The remainder of the corpus of my estate to be divided as follows:—One-half to my brother William J. Fleury or his heirs; and the remaining one-half to such persons as will be entitled thereto according to the Statute of Distribution in force in the Province of Ontario as if I had died intestate in respect thereto.

The question to be determined on this appeal is whether "the remaining one-half" of the corpus of the estate, consisting of securities having a par value of $338,000 is to be paid to the person or persons who would have been entitled according to *The Devolution of Estates Act* at the time of the testator's death, or to those who were so entitled at the date of the death of his daughter Marguerite W. Fleury. The learned judge of first instance, Mr. Justice Hughes, decided that upon the true construction of the will, the testator intended that the fund should go to such persons as would

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have been entitled at the date of his death if he had died intestate and in so doing he relied upon the rule of construction which was stated by Lord Campbell L.C. in *Bullock v. Downes*[1], at p. 12 where he said:

> Generally speaking, where there is a bequest to one for life, and after his decease to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker. Gifts to a class following a bequest of the same property for life vest immediately upon the death of the testator. Nor does it make any difference that the person to whom such previous life interest was given is also a member of the class to take on his death.

The late Marguerite Fleury was the only person entitled under the statute at the date of the testator's death and the result of applying the rule in *Bullock v. Downes, supra,* to the language of the present will is that her personal representative becomes entitled to the fund in question.

In the reasons for judgment delivered on behalf of the Court of Appeal[2] by Schroeder J.A. he has, however, found that the rule in *Bullock v. Downes, supra,* does not apply under the present circumstances and that the class of beneficiary is to be determined as at the date of the death of the life tenant so that the nephews and nieces of the testator are entitled to the fund.

Both of the judgments in the Courts below contain an extensive review of the authorities and I have now had the benefit of reading the reasons for judgment of my brother Judson who has also made an analysis of many of the cases. I do not think that any useful purpose will be served by my retracing the ground which has been covered so well.

I think that the true meaning of *Bullock v. Downes, supra,* is that described by Viscount Finlay in *Hutchinson v. National Refuges for Homeless and Destitute Children*[3], at p. 801 where he says:

> *Bullock v. Downes* therefore decides that, prima facie, the next of kin are to be ascertained at the death of the testator, but, that if there is a sufficient indication to that effect in the words of the will, the time for ascertaining the class may be the time fixed by the will as the period of distribution. The question in this as in every other case of the kind must be whether there is in the will a sufficient indication that the period of distribution is the time at which the class is to be ascertained.

[1] (1860), 9 H.L.C. 1.
[2] [1964] 2 O.R. 129, 44 D.L.R. (2d) 393.
[3] [1920] A.C. 794.

In the construction of wills, the primary purpose is to determine the intention of the testator and it is only when such intention cannot be arrived at with reasonable certainty by giving the natural and ordinary meaning to the words which he has used that resort is to be had to the rules of construction which have been developed by the Courts in the interpretation of other wills. It is to be remembered that such rules of construction are not rules of law and that if their application results in attributing to the testator an intention which appears inconsistent with the scheme of the will as a whole, then they are not to prevail.

An interesting discussion of the scope and purpose of rules of construction in the interpretation of wills is to be found in a note in 4 Law Quarterly Review (which was then under the editorship of Frederick Pollock) where it is said at p. 488:

> A rigid rule of construction is a contradiction in terms. If it does not yield to an evident contrary intention, it is a rule of law not of construction, as Mr. Vaughan Hawkins pointed out many years ago. A rule of construction merely means that the Court has, in a series of cases, attached a particular meaning to a word or collocation of words, and will do so again if there is no reasonable ground for distinguishing the former cases. The Court does so because such meaning is probably the true one. . . . The difficulty is to give due weight to this probability consistently with a proper regard to the terms of the whole instrument, and to the other evidence (where there is other admissible evidence) of the intention of the settlor or testator.

As has been pointed out in the Courts below, Lord Birkenhead L.C. in *Lucas-Tooth v. Lucas-Tooth*[1], after commenting on *Hutchinson's* case, *supra,* had occasion to say at p. 601:

> Indeed, in approaching a problem of this kind it is important never to lose sight of the true principle of construction in such cases—that it is the duty of the Court to discover the meaning of the words used by the testator, and, from them and from such surrounding circumstances as it is permissible in the particular case to take into account to ascertain his intention. For this purpose, it is important to have regard not only to the whole of the clause which is in question, but to the will as a whole which forms the context to the clause.
>
> Unless this is done, there is a grave danger that the canons of construction will be applied without due regard to the testator's intention, tending thereby to ascertain his wishes by rules which, in the particular case, may produce consequences contrary to that intention.

In this regard I would adopt the comment of the learned judge of first instance where he says of the cases subsequently decided in Ontario:

[1] [1921] 1 A.C. 594.

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RITCHIE J.

It seems to me that looking at all the authorities cited to me in the courts of this province since that time and including *Re Young* the principle of *Bullock v. Downes* has been applied in the sense stated by Lord Birkenhead, some cases having yielded indications from the wording of the will that the ascertainment of the class should be made with the time of the testator's death in mind and others with that of the time of distribution and that the former will result in the absence of indications of a contrary intention.

The whole scheme of the residuary clause in the present will appears to me to be predicated on the assumption that the testator's daughter would survive him and I agree with Schroeder J.A. that he must also be deemed to have known that in that event she would be his only next-of-kin at the date of his death. This being the case, to interpret the terms of para. 11(c) as being a gift of the income from "the remaining one-half" of the corpus to the daughter for life and after her death of the capital to the next-of-kin of the testator at the date of his death, is to attribute to the testator an intention to give his daughter a vested interest in this fund at his death. It appears to me, however, that such a construction runs contrary to the clear provisions of para. 11(a) of the will whereby the testator expressly directed that this part of his estate was to be incorporated in a trust fund to be held by his trustees with direction to pay his daughter at least $5,000 a year from the income and if necessary from the capital and to the capital of which she could only otherwise have access if the trustees in their absolute discretion considered the sum of $5,000 annually to be insufficient for her proper support and maintenance. In my view this makes it apparent that the testator intended the whole of the corpus of his estate to be preserved intact during the lifetime of his daughter subject to the payments which the trustees were authorized to make. It seems to me that the result of applying the rule in *Bullock v. Downes* to this will is to ignore the carefully drawn provisions setting up this trust and to attribute to the testator the contrary intention to provide for his daughter in such manner as to enable her to obtain a substantial part of the fund for her own use absolutely without the exercise of any authority or discretion by the trustees and whether or not the whole fund produced an income of $5,000 a year.

In my opinion the inconsistency which results from the application of this rule to the language used in paras. 11(a) and 11(c) of the will is of itself a sufficient indication that

the testator did not intend the ultimate beneficiaries under para. 11(c) to be those entitled under *The Devolution of Estates Act* at the date of his death, but rather that he intended one-half of the remainder of the corpus of his estate to be divided amongst the persons so entitled at the date of the death of his daughter. Such a construction does no violence to the language by which the trust fund was created under para. 11(a) and is not inconsistent with the natural and ordinary meaning attributable to the words used in para. 11(c).

For these reasons I am of opinion that the class entitled to the remaining one-half of the corpus of the estate is to be ascertained at the time of the death of Marguerite Fleury. I would therefore dismiss this appeal.

The costs of all parties throughout will be paid out of the estate. Those of the executors and trustees as between solicitor and client.

Appeal dismissed, JUDSON J. *dissenting.*

Solicitors for the appellant: Mason, Foulds, Arnup, Walter, Weir and Boeckh, Toronto.

Solicitors for the respondents, W. E. Fleury and E. M. Cameron: Lash, Johnston, Sheard and Pringle, Toronto.

Solicitors for the respondents, National Trust Co. Ltd., H. L. Steele and W. E. Fleury: McMaster, Montgomery and Co., Toronto.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

ROBERT CECIL MACDONALD .....RESPONDENT.

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*May 17, 18
June 24

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Appeals—Jurisdiction—Finding of habitual criminal affirmed in Court of Appeal, but sentence of preventive detention set aside—Whether Supreme Court of Canada has jurisdiction to entertain appeal by Crown—Criminal Code, 1953-54 (Can.), c. 51, s. 667—Supreme Court Act, R.S.C. 1952, c. 259, s. 41.

Following his conviction on a charge of theft, the respondent was found to be an habitual criminal, and a sentence of preventive detention

*PRESENT: Taschereau C.J. and Cartwright, Abbott, Martland, Judson, Ritchie and Hall JJ.

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was imposed in lieu of the sentence imposed for the substantive offence. The Court of Appeal affirmed the finding that the respondent was an habitual criminal, but set aside the sentence of preventive detention and restored the sentence of one year imposed upon him by the Magistrate. The Crown was granted leave to appeal to this Court. The only question raised was whether a sentence of preventive detention should be imposed. At the hearing of the appeal the question of the jurisdiction of this Court was raised for the first time from the Bench. The contention of the Crown was that there was an appeal to this Court under the provisions of s. 41 of the *Supreme Court Act.*

Held (Taschereau C.J. and Martland J. dissenting): The appeal should be quashed.

Per Cartwright J.: Since the decisions of this Court in *Brusch v. The Queen,* [1953] 1 S.C.R. 373 and *Parkes v. The Queen* [1956] S.C.R. 134, it could not be said that any right of appeal to this Court was conferred by the *Criminal Code.* An order made under Part XXI of the Code is neither a conviction nor an acquittal of an indictable offence. If the Crown has a right of appeal it must be found in s. 41(1) of the *Supreme Court Act.* However, the power to grant the right of appeal sought by the Crown in this case is not conferred by the general words of s. 41(1) although on their literal meaning they would appear wide enough to comprehend it. The construction of s. 41(1), for which the Crown contends in this case would result in an incongruity. The case of *The King v. Robinson (or Robertson),* [1951] S.C.R. 522, could not now be regarded as an authority for the existence of jurisdiction in this Court to entertain an appeal by the Crown from a judgment of a Court of Appeal setting aside a sentence of preventive detention.

Per Abbott, Judson, Ritchie and Hall JJ.: This Court was without jurisdiction to entertain the appeal. Neither the Crown nor the accused is given any right under the *Criminal Code* to appeal to this Court from the disposition made of an application for preventive detention by the Court of Appeal of a province. The sentence of preventive detention could only have been imposed on a man who had been found to have the status of an habitual criminal, but it was the conviction of an indictable offence which afforded the occasion for its imposition and as this appeal is from the sentence—the finding as to status not being an issue—it is governed by the decision of this Court in *Goldhar v. The Queen,* [1960] S.C.R. 60, where it was held that this Court has not jurisdiction to entertain an appeal against sentence. Parliament could not have intended the anomaly which would result from the provisions of s. 667(2) of the *Criminal Code* and s. 41(1) of the *Supreme Court Act,* if there was an appeal to this Court at the instance of the Crown from an order of the Court of Appeal setting aside a sentence of preventive detention.

Per Taschereau C.J. and Martland J., *dissenting:* It is clear that no appeal lies to this Court from a sentence imposed under s. 660 of the *Criminal Code* by virtue of the provisions of the *Criminal Code* governing appeals in respect of indictable offences, for such appeals are limited to judgments respecting convictions or acquittal of an indictable offence. However, all the necessary elements of s. 41(1) of the *Supreme Court Act* are met in this case. The decisions in *Goldhar v. The Queen, supra,* and in *The Queen v. Alepin Frères Ltée,* [1965] S.C.R. 359, do not preclude an appeal in the present case. A sentence under s. 660 is not imposed as a punishment for the indictable offence, but

is imposed because the accused is an habitual criminal and it is expedient that the public be protected from him. The contention that, while an appeal to this Court might lie in relation to the finding that the accused is an habitual criminal, it could not lie in respect of the question as to whether it was expedient for the protection of the public that he be sentenced, could not be supported. There is no incongruity in permitting an appeal by the Crown in this case. Section 41(1) of the *Supreme Court Act* was a means provided by Parliament to enable this Court to deal with a situation such as the one in this case. There is no valid reason for reading into s. 41(1) of the *Supreme Court Act* a limitation as to an appeal by the Crown when a right of appeal by the accused is well recognized. Leave having been granted, this Court did have jurisdiction to entertain the present appeal.

As to the merits, the Court of Appeal erred when it ruled that it could not impose a preventive sentence unless there was evidence on which a magistrate could find beyond a reasonable doubt that it was expedient for the protection of the public to so sentence the accused. A standard which is applied in weighing proof of the guilt of the accused has no application to the formulation of an opinion as to what is expedient to protect the public.

Droit criminel—Appels—Juridiction—Déclaration que l'accusé est un repris de justice confirmée par la Cour d'Appel, mais sentence de détention préventive mise de côté—La Cour suprême du Canada a-t-elle juridiction pour entendre l'appel de la Couronne—Code criminel, 1953-54 (Can.), c. 51, art. 667—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41.

Ayant été trouvé coupable de vol, l'intimé a été subséquemment reconnu repris de justice et une sentence de détention préventive lui fut imposée au lieu de la sentence qui avait été imposée pour l'infraction dont il avait été déclaré coupable. La Cour d'Appel confirma la déclaration que l'intimé était un repris de justice, mais mit de côté la sentence de détention préventive et rétablit la sentence d'un an qui avait été imposée par le magistrat. La Couronne a obtenu permission d'en appeler devant cette Cour. La seule question soulevée était de savoir si une sentence de détention préventive pouvait être imposée. Lors de l'audition de l'appel, la question de la juridiction de cette Cour a été soulevée pour la première fois par la Cour. La prétention de la Couronne était qu'il y avait appel devant cette Cour en vertu des dispositions de l'art. 41 de la *Loi la Cour suprême.*

Arrêt: L'appel doit être rejeté, le Juge en Chef Taschereau et le Juge Martland étant dissidents.

Le Juge Cartwright: Depuis les jugements de cette Cour dans *Brusch v. The Queen,* [1953] 1 R.C.S. 373 et *Parkes v. The Queen,* [1956] R.C.S. 134, on ne peut pas dire qu'un droit d'appel devant cette Cour est attribué par le *Code criminel.* Une ordonnance passée en vertu de la partie XXI du Code est ni une déclaration de culpabilité ni un acquittement d'un acte criminel. Si la Couronne a un droit d'appel, ce droit doit se trouver dans l'art. 41(1) de la *Loi sur la Cour suprême.* Cependant, le pouvoir d'accorder le droit d'appel recherché par la Couronne dans cette cause ne se trouve pas dans les mots

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généraux de l'art. 41(1) quoique en regard de leur sens littéral ces mots semblent avoir une étendue assez grande pour englober ce pouvoir. L'interprétation de l'art. 41(1) telle que soutenue par la Couronne dans cette cause aurait le résultat de créer une incongruité. La cause de *The King v. Robinson (or Robertson),* [1951] R.C.S. 522, ne peut pas maintenant être considérée comme une autorité pour l'existence de la juridiction de cette Cour d'entendre un appel par la Couronne d'un jugement de la Cour d'Appel mettant de côté une sentence de détention préventive.

Les Juges Abbott, Judson, Ritchie et Hall: Cette Cour n'avait pas la juridiction d'entendre l'appel. Le *Code criminel* ne donne ni à la Couronne ni à l'accusé le droit d'en appeler devant cette Cour de la disposition faite par la Cour d'Appel d'une province de la demande pour détention préventive. La sentence de détention préventive ne peut être imposée qu'à une personne dont la statut a été déclaré être celui d'un repris de justice, mais c'est la déclaration de culpabilité d'un acte criminel qui donne ouverture à l'imposition de cette sentence, et comme cet appel est de la sentence—la déclaration relativement au statut n'étant pas en litige—l'appel est gouverné par la décision de cette Cour dans *Goldhar v. The Queen,* [1960] R.C.S. 60, où il a été jugé que cette Cour n'avait pas juridiction d'entendre un appel de la sentence. Le parlement n'a pas pu avoir eu l'intention de créer l'anomalie qui résulterait des dispositions de l'art. 667(2) du *Code criminel* et de l'art. 41(1) de la *Loi sur la Cour suprême,* s'il existait un appel devant cette Cour de la part de la Couronne d'une ordonnance de la Cour d'Appel mettant de côté une sentence de détention préventive.

Le Juge en Chef Taschereau et le Juge Martland, *dissidents:* Il n'existe aucun appel devant cette Cour d'une sentence imposée en vertu de l'art. 660 du *Code criminel* en vertu des dispositions du *Code criminel* gouvernant les appels relativement aux actes criminels, de tels appels étant limités aux jugements relativement à une déclaration de culpabilité ou un acquittement d'un acte criminel. Cependant, tous les éléments nécessaires de l'art. 41(1) de la *Loi sur la Cour suprême* se rencontrent dans cette cause. Les décisions de *Goldhar v. The Queen, supra,* et de *The Queen v. Alepin Frères Ltée,* [1965] R.C.S. 359, n'empêchent pas un appel dans cette cause. Une sentence en vertu de l'art. 660 n'est pas imposée comme punition pour un acte criminel, mais est imposée parce que l'accusé est un repris de justice et qu'il est opportun que le public soit protégé contre lui. La prétention à l'effet que, quoiqu'un appel puisse exister relativement à une déclaration que l'accusé est un repris de justice, un appel ne peut exister relativement à la question de savoir s'il est opportun pour la protection du public qu'une sentence soit imposée, ne peut pas être supportée. Il n'y a aucune incongruité de permettre un appel par la Couronne dans cette cause. L'art. 41(1) de la *Loi sur la Cour suprême* est un moyen prévu par le parlement pour permettre à cette Cour de disposer d'une situation telle que celle qui se présente dans cette cause. Il n'y a en conséquence aucune raison valide pour voir dans l'art. 41(1) de la *Loi sur la Cour suprême* une restriction quant à un appel par la Couronne lorsqu'un droit d'appel par l'accusé est reconnu. Permission d'appeler ayant été accordée, cette Cour avait juridiction d'entendre l'appel.

Quant aux mérites, la Cour d'Appel a erré quand elle a décidé qu'elle ne pouvait imposer une sentence préventive à moins qu'elle ne trouve une preuve sur laquelle un magistrat pourrait déclarer hors de tout doute raisonnable qu'il était opportun pour la protection du public que l'accusé reçoive une telle sentence. On ne peut se servir pour formuler une opinion relativement à l'opportunité de protéger le public d'une norme dont on se sert pour évaluer la preuve relativement à la culpabilité de l'accusé.

APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique, mettant de côté une sentence de détention préventive. Appel rejeté, le Juge en Chef Taschereau et le Juge Martland étant dissidents.

APPEAL from a judgment of the Court of Appeal for British Columbia, setting aside a sentence of preventive detention. Appeal quashed, Taschereau C.J. and Martland J. dissenting.

W. G. Burke-Robertson, Q.C., for the appellant.

Angus Carmichael, Q.C., for the respondent.

The judgment of Taschereau C.J. and of Martland J. was delivered by

MARTLAND J. (*dissenting*):—This is an appeal, brought by the Crown, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for British Columbia, which reversed the decision of a magistrate, who had imposed a sentence of preventive detention on the respondent pursuant to s. 660 of the *Criminal Code*, which provides:

660. (1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention 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.

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(3) At the hearing of an application under subsection (1), the accused is entitled to be present.

This section deals exclusively with the matter of sentence, as is made clear by the opening words of s. 667(1), which deals with the right of appeal of the accused:

A person who is sentenced to preventive detention under this Part may appeal to the court of appeal. . . .

Before a sentence of preventive detention can be imposed the court must reach a decision on two matters, defined in paras. *(a)* and *(b)* of subs. (1); i.e.,

(a) That the accused is an habitual criminal; and

(b) That because of that fact, it is expedient for the protection of the public that he should be sentenced to preventive detention.

A decision in favour of the accused on each of these matters was the basis of the dissenting judgment of MacQuarrie J., in the Supreme Court of Nova Scotia, in *Mulcahy v. The Queen*[1], which was adopted by this Court[2] when the appeal of the accused was allowed.

These matters are, I think, of importance in considering the first issue raised by the respondent as to the jurisdiction of this Court to hear this appeal.

It is clear that no appeal lies to this Court from a sentence imposed under s. 660 by virtue of the provisions of the *Criminal Code* governing appeals in respect of indictable offences, for such appeals are limited to judgments respecting conviction or acquittal of an indictable offence.

Appeals to this Court, in respect of a sentence under s. 660, have been brought, with leave pursuant to s. 41(1) of the *Supreme Court Act*, which provides:

41. (1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

As my brother Cartwright points out, in the present case, all of the necessary elements of that subsection are here met. The judgment of the Court of Appeal is a final judgment, and it is the judgment of the highest court of final resort in which judgment could be had in this case.

[1] (1964), 42 C.R. 1. [2] (1964), 42 C.R. 8.

This being so, on what basis can it be contended that this Court lacks jurisdiction? In my opinion the decisions in *Goldhar v. The Queen*[1] and in *The Queen*[1] *v. Alepin Frères Ltée and Clément Alepin*[2] do not preclude an appeal in the present case. Each case was concerned solely with the matter of sentence in respect of an offence imposed in consequence of a conviction of such offence. A sentence under s. 660, while it is made following conviction of an indictable offence, is not imposed as a punishment for that offence, but is imposed because the accused is an habitual criminal and it is expedient that the public be protected from him. In *Parkes v. The Queen*[3], Cartwright J., who delivered the judgment of the Court, said, at p. 135:

> It appears to me that the majority of this Court decided in *Brusch v. The Queen,* (1953) 1 S.C.R. 373, that the "charge" of being an habitual criminal is not a charge of an offence or crime but is merely an assertion of the existence of a status or condition in the accused which, if established, enables the Court to deal with the accused in a certain manner. In so deciding the majority followed the reasoning of the English courts in *Rex v. Hunter,* (1921) 1 K.B. 555, approved by a court of thirteen judges precided over by Lord Hewart L.C.J. in *Rex v. Norman,* (1924) 18 Cr. App. R. 81.

It is, therefore, established that a sentence under s. 660 is not one which is imposed in relation to a charge of an offence or crime, but is a disposition which may be made by the court, if it is expedient for the protection of the public, with relation to a person in a particular status or condition.

Appeals from a sentence under s. 660 have been determined in this Court on a number of occasions, one of the most recent being the *Mulcahy* case previously mentioned, in which Chief Justice Taschereau commenced his judgment with the words: "We are all of the opinion that the appeal against sentence of preventive detention should be allowed . . ."

It is contended that, while an appeal to this Court might lie in relation to the finding of the accused to be an habitual criminal, it could not lie in respect of the question as to whether it was expedient for the protection of the public that he be sentenced. If a finding as to the status of the accused, on the first point, is not a judgment acquitting or convicting or setting aside or affirming a conviction or

[1] [1960] S.C.R. 60, 31 C.R. 374, 125 C.C.C. 209.
[2] [1965] S.C.R. 359, 46 C.R. 113, 3 C.C.C. 1, 49 D.L.R. (2d) 220.
[3] [1956] S.C.R. 134.

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acquittal of an indictable offence, within s. 41(3) of the *Supreme Court Act,* as was held in the *Parkes* case, I find it hard to understand how the decision on the second point as to expedience can fall within it. Furthermore, I do not agree that the appeal to this Court respecting matters under s. 660 can be arbitrarily divided in respect of the two items under paras. *(a)* and *(b)* of subs. (1). Any appeal in relation to s. 660 is an appeal from sentence, but it is not within s. 41(3) of the *Supreme Court Act* because, as was said in *Parkes,* it does not relate to conviction or acquittal of an indictable offence, but to a method of dealing with people of a particular status.

Another ground for contending that no appeal lies in the present case is because this appeal is by the Crown, and the Crown is limited, in respect of its right of appeal to the court of appeal, to matters of law, and consequently the general words of s. 41(1) of the *Supreme Court Act* should be narrowed in respect of the nature of this subject-matter. It is said that it would be incongruous to permit an open appeal by the Crown to this Court, when it has only a limited right in the court below.

The Crown's right to appeal to the court of appeal, while limited to a question of law, is absolute, whereas there is no appeal to this Court under s. 41(1) without leave.

The limitation upon the position of the Crown in the court of appeal is only in those cases in which the accused has succeeded in the court of first instance. In a case of that kind, if the Crown's appeal to the court of appeal failed, it is clear that, if it were to obtain leave to appeal to this Court, its appeal, of necessity, could only lie in relation to the question of law which had been determined adversely to it in the court of appeal. Under s. 46 of the *Supreme Court Act,* this Court could only dismiss the appeal or give the judgment which should have been given in the court below, i.e., on a question of law.

In the case of an appeal to the court of appeal by an accused who has been sentenced under s. 660, it would be open to the Crown to raise any ground for contending that the initial decision should be maintained, and in respect of that kind of an appeal the position of the Crown is unrestricted. That being so, I do not find it incongruous that it

should be entitled to seek leave to appeal to this Court on any ground taken by it before the court of appeal.

In the present case, the ground for seeking leave was solely with respect to an important question of law on which it was contended that the Court of Appeal had erred. If the Crown can appeal on a matter of law to the Court of Appeal, and if the accused can seek leave to appeal to this Court upon any ground, I see no basis for limiting the words of s. 41(1) of the *Supreme Court Act* so as to preclude any right of appeal by the Crown to this Court, upon a question of law. To deny such a right is to make it possible for differing applications of s. 660 in different provinces, with no power in this Court to determine the matter. Section 41(1) was a means provided by Parliament to enable this Court to deal with a situation of that kind.

I can, therefore, see no valid reason for reading into s. 41(1) of the *Supreme Court Act* a limitation as to an appeal by the Crown when a right of appeal to this Court by the accused is well recognized.

I am, therefore, of the opinion that this Court does have jurisdiction to entertain the present appeal, leave having been granted.

The decision of the Court of Appeal, that, although the respondent was an habitual criminal, yet it was not expedient for the protection of the public to sentence him to preventive detention, was stated to be based on the proposition that a court, under s. 660, cannot impose that sentence unless there is evidence "on which a magistrate could find beyond a reasonable doubt that it was expedient for the protection of the public to sentence him to preventive detention."

Proof beyond reasonable doubt is the well-recognized standard applied in the criminal law in respect of the establishing of the guilt of an accused person. In my opinion it has no application to the matter of the imposition of sentence. A court, under s. 660, having determined that an accused person is an habitual criminal, is required to exercise its judgment as to whether it is expedient for the protection of the public to impose a sentence of preventive detention. Section 660(1)(*b*) states specifically that this is a matter of opinion. That opinion must be as to expediency for public protection. In my view, a standard which is

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applied in weighing proof of a fact, i.e., guilt of the accused, has no application to the formulation of an opinion as to what is expedient to protect the public.

I would allow the appeal and restore the judgment of the magistrate.

CARTWRIGHT J.:—An account of the proceedings in the courts below is given in the reasons of my brother Ritchie.

On March 15, 1965, an order was made by this Court the operative part of which reads as follows:

> THIS COURT DID ORDER AND ADJUDGE that leave to appeal from the Judgment of the Court of Appeal for the Province of British Columbia pronounced on the 24th day of February, 1965 be and the same is granted.

No question as to the jurisdiction of this Court was raised or considered when this order granting leave was made. The question of our jurisdiction was raised for the first time from the bench during the argument of the appeal.

It is well settled that a person who has been sentenced to preventive detention and whose appeal against that sentence has been dismissed by the Court of Appeal may be granted leave to appeal to this Court under s. 41(1) of the *Supreme Court Act*. On this point it is sufficient to refer to the unanimous judgment of the Court in *Parkes v. The Queen*[1]. As is pointed out by my brother Ritchie, a number of such appeals have been allowed by this Court.

As far as I am aware, subject to something to be said later as to *Robinson's* case, *infra,* the question whether this Court has jurisdiction to grant leave to the Attorney General to appeal to this Court against the dismissal of an application for an order that a person be sentenced to preventive detention has not previously been considered by this Court. The answer to this question depends upon the proper construction of the relevant statutory provisions.

Little assistance is to be found in the comparatively short history of the legislation in this country relating to preventive detention. The predecessors of the group of sections which now form Part XXI of the *Criminal Code* were first enacted by Statutes of Canada, 1947, 11 Geo. VI, c. 55 and

[1] [1956] S.C.R. 134.

were numbered 575A to 575H. Section 575E corresponded to the present s. 667, which is set out in full in the reasons of my brother Ritchie. It was silent as to any right of the Attorney General to appeal. It read as follows:

575E. A person convicted and sentenced to preventive detention, may appeal against his conviction and sentence, and the provisions of this Act relating to an appeal from a conviction for an indictable offence shall be applicable thereto.

The first alteration in the provisions as to appeal was made when the present *Criminal Code,* 2-3 Eliz. II, c. 51, came into force on April 1, 1955, at which time s. 667 read as follows:

667(1) A person who is sentenced to preventive detention under this Part may appeal to the Court of Appeal against the sentence.

(2) The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part.

(3) The provisions of Part XVIII with respect to procedure on appeals apply, *mutatis mutandis,* to appeals under this section.

Section 667, in its present form was enacted by Statutes of Canada, 1960-61, 9-10 Eliz. II, c. 43, s. 40.

It is clear that the provisions quoted above deal only with the right of appeal to the Court of Appeal from a decision of the tribunal of first instance. It cannot be said that sub-section (3) of s. 667, providing that "the provisions of Part XVIII with respect to procedure on appeals apply, *mutatis mutandis* to appeals under this section", has the effect of conferring jurisdiction on this Court. Part XVIII deals only with appeals in regard to convictions or acquittals of indictable offences.

Since the decisions of this Court in *Brusch v. The Queen*[1] and *Parkes v. The Queen*[2], it cannot be said that any right of appeal to this Court is conferred by the *Criminal Code.* An order made under Part XXI is neither a conviction nor an acquittal of an indictable offence. If the Attorney General has a right of appeal to this Court it must be found in s. 41(1) of the *Supreme Court Act.* It is clear that if on its true construction subs. (1) confers the right of appeal which the Attorney General seeks to assert that right is not taken

[1] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.
[2] [1956] S.C.R. 134.

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away by the terms of subs. (3) for we are not here concerned with the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or of any offence.

Section 41(1) reads a follows:

> 41(1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

Applying these words to the circumstances of the case before us it appears: (i) that the judgment from which the Attorney General appeals is a final judgment, it finally determines that the sentence of preventive detention imposed upon the respondent by the learned Magistrate is set aside; and (ii) that it is a judgment of the highest court of final resort in the Province of British Columbia in which judgment can be had in this particular case. That being so, the application for leave to appeal made by the Attorney General would appear to be warranted by the literal meaning of the words of the sub-section and *prima facie* this Court would seem to have jurisdiction to entertain the appeal unless it appears by the application of the rules which guide the Court in the interpretation of statutes that Parliament did not intend to confer a right of appeal from a judgment such as that pronounced by the Court of Appeal in this case.

The words of s. 41(1) are general and it is necessary to consider the possible application of the rule expressed in the maxim "*Verba generalia restringuntur ad habilitatem rei vel personae*" (Bac. Max. reg. 10) Broom's Legal Maxims, 10th ed. 438. The maxim was applied in *Cox v. Hakes*[1]. It was held in that case by the House of Lords that the following words in s. 19 of the *Judicature Act,* 36 and 37 Vict., c. 66:

> 19. The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order . . . of Her Majesty's High Court of Justice, or of any Judges or Judge thereof

[1] (1890), 15 App. Cas. 506.

did not confer a right of appeal from an order of the High Court directing the discharge of a prisoner on *habeas corpus*, although as was said by Lord Herschell at page 428:

> It cannot be denied that an order for the discharge of a person in custody, such as was made in the present case, is, *prima facie*, an order to which this section applies.

Lord Bramwell, at page 527, concluded his speech with the following sentence:

> I think if an order of discharge is a judgment or order of judicature, and so within the very words of section 19, a limitation must be put upon them to avoid futility, inconvenience, and incongruity which would otherwise result.

The construction of s. 41(1), for which the Attorney General contends in the case at bar would result in an incongruity pointed out in the reasons of my brother Ritchie to which further reference will be made.

I am able to derive little assistance in the solution of the question before us from the judgments of this Court in *Goldhar v. The Queen*[1] or in *The Queen v. Alepin Frères Ltée and Clément Alepin*[2]. They establish only that this Court is without jurisdiction to entertain an appeal, even on a question of law in the strict sense, against a judgment of the Court of Appeal affirming or quashing a sentence imposed following conviction of an indictable offence or of an offence other than an indictable offence; and it is well settled that this Court has jurisdiction to entertain an appeal against the imposition of a sentence of preventive detention. There is something to be said for the view that the Court should have a corresponding jurisdiction to entertain an appeal against an order dismissing an application for the imposition of such a sentence, but in dealing with a similar argument in *Cox v. Hakes, supra,* Lord Herschell said at pages 535 and 536:

> It will be seen that the reasoning which has led me to the conclusion that an appeal will not lie from an order discharging a person from custody under a writ of habeas corpus has no application to an appeal from an order refusing to discharge the applicant. I intend to express no opinion whether there is an appeal in such a case. That question does not arise here, and any opinion expressed upon it would be extra-judicial. I refer

[1] [1960] S.C.R. 60, 31 C.R. 374, 125 C.C.C. 209.

[2] [1965] S.C.R. 359, 46 C.R. 113, 3 C.C.C. 1, 49 D.L.R. (2d) 220.

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to it only because it was suggested that if there was an appeal in the one case, it was scarcely to be conceived that there should not be an appeal in the other. I do not think so. There would be to my mind nothing surprising if it should turn out that an appeal lay by one whose discharge had been refused, but that there was no appeal against a discharge from custody. It would be in strict analogy to that which has long been the law. The discharge could never be reviewed or interfered with; the refusal to discharge, on the other hand, was always open to review; and although this review was not properly speaking, by way of appeal its practical effect was precisely the same as if it had been.

My brother Ritchie points out that if we should uphold the Attorney General's right of appeal in this case it would have the anomalous result which he describes as follows:

> It would mean that although the Crown is restricted to "any ground of law" when appealing to the Court of Appeal of a province against the dismissal of an application for preventive detention by a trial judge, it can obtain access to this Court on unrestricted grounds when appealing from a judgment of the Court of Appeal which has the same effect.

The unlikelihood of Parliament intending such a result appears to me to be a sufficient reason for applying the maxim quoted above and holding that power to grant the right of appeal sought by the Attorney General in this case is not conferred by the general words of s. 41(1) although on their literal meaning they would appear wide enough to comprehend it.

Before parting with the matter I wish to refer to the case of *The King v. Robinson (or Robertson)*[1], which, on its face, appears inconsistent with the conclusion at which I have arrived. The respondent in that case was found to be a habitual criminal and was sentenced by Whittaker J. to preventive detention. On appeal to the Court of Appeal for British Columbia[2] the sentence of preventive detention was set aside. The Attorney General applied to a single judge of this Court under s. 1025 of the *Criminal Code* then in force for leave to appeal on a question of law. Leave was granted and the full Court allowed the appeal, set aside the judgment of the Court of Appeal and referred the matter back to that Court to deal with other grounds which had been raised in the notice of appeal but which the Court had found it unnecessary to consider in view of its decision on the point

[1] [1951] S.C.R. 522, 12 C.R. 101, 100 C.C.C. 1.
[2] (1950), 2 W.W.R. 1265, 11 C.R. 139, 99 C.C.C. 71.

of law. I was a member of the Court which heard the appeal and took part in the judgment allowing the appeal of the Attorney General. I have confirmed my recollection by examining the record and consulting the Judge who gave leave and it is clear that our jurisdiction was not questioned at any stage of the proceedings in this Court. The Court and all counsel concerned appear to have proceeded on the view that an appeal to this Court lay as if the finding that the respondent was a habitual criminal was tantamount to his conviction of an indictable offence. This view may have been induced by the following expressions found in the sections then in force which no longer appear in Part XXI: in s. 575 C(3) "unless he thereafter pleads guilty to being a habitual criminal"; in s. 575 C.(4) "A person shall not be tried on a charge of being a habitual criminal unless"; in s. 575 E, "a person convicted and sentenced to preventive detention, may appeal against his conviction and sentence, and the provisions of this Act relating to an appeal from a conviction for an indictable offence shall be applicable thereto"; and in s. 575 G(1) "The sentence of preventive detention shall take effect immediately on the conviction of a person on a charge that he is a habitual criminal".

It is, I think, a tenable view that under the wording of the relevant sections then in force the procedure followed in *Robinson's* case was correct. The question of a right of appeal to this Court was not discussed in *Brusch v. The Queen, supra,* and by the time *Parkes v. The Queen, supra,* was decided Part XXI had been enacted in substantially its present form. In view of the changes in wording made when the new Code came into force and the decision of this Court in *Parkes v. The Queen, supra,* it is my opinion that *Robinson's* case cannot now be regarded as an authority for the existence of jurisdiction in this Court to entertain an appeal by the Attorney General from a judgment of a Court of Appeal setting aside a sentence of preventive detention.

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

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

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RITCHIE J.:—This is an appeal brought at the instance of Attorney General of British Columbia and with leave of this Court from a judgment of the Court of Appeal for British Columbia. The order for judgment of that court reads, in part, as follows:

> THIS COURT DOTH ORDER AND ADJUDGE that the Appeal of the above-named Appellant from the finding that the Appellant is an habitual criminal be and the same is hereby dismissed, the Appeal of the above-named Appellant from the sentence of preventive detention imposed on him be and the same is hereby allowed, the sentence of preventive detention imposed on him as aforesaid be and the same is hereby set aside, and pursuant to section 667 of the Criminal Code, a sentence of imprisonment in Oakalla Prison Farm, Burnaby, British Columbia, for a term of one year be and the same is hereby imposed in respect of the said conviction by Magistrate L. H. Jackson entered on the 20th day of May 1964 on the above-described charge, such sentence to run from the 20th day of May, 1964.

No appeal has been asserted from the finding that the respondent, Robert MacDonald is an habitual criminal and the Crown seeks to confine its appeal to that part of the judgment which allowed the appellant's appeal from the sentence of preventive detention imposed on him by Magistrate Cyril White of Vancouver on December 29, 1964.

Robert MacDonald was tried and convicted before Magistrate Jackson on the charge that he "unlawfully did commit theft of one case containing 50 cartons of DuMaurier cigarettes of a value in excess of $50.00 . . ." and for this crime he was sentenced to imprisonment for a term of one year. Having regard to the respondent's past criminal record, an application was made with the consent of the Attorney General of British Columbia for the imposition of a sentence of preventive detention in lieu of the sentence imposed upon him by Magistrate Jackson.

Applications for preventive detention are governed by s. 660 of the *Criminal Code* which reads as follow:

> 660. (1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention 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.

It is to be observed that the finding that an accused is an habitual criminal is a necessary prerequisite to the imposition of a sentence of preventive detention but that it does not result in the imposition of such a sentence unless the court is of opinion that it is expedient for the protection of the public that it should be imposed. As has been indicated, the only question raised on this appeal is whether a sentence of preventive detention should have been imposed in the present case.

The only provision in the *Criminal Code* for an appeal from the disposition of an application made under s. 660 is contained in s. 667 and it was pursuant to the provisions of this section that the respondent appealed to the Court of Appeal of British Columbia. This section reads as follows:

667.(1) A person who is sentenced to preventive detention under this Part may appeal to the court of appeal against that sentence on any ground of law or fact or mixed law and fact.

(2) The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part on any ground of law.

(2a) On an appeal against a sentence of preventive detention the court of appeal may

(*a*) quash such sentence and impose any sentence that might have been imposed in respect of the offence for which the appellant was convicted, or

(*b*) dismiss the appeal.

(2b) On an appeal against the dismissal of an application for an order under this Part the court of appeal may

(*a*) allow the appeal, set aside any sentence imposed in respect of the offence for which the respondent was convicted and impose a sentence of preventive detention, or

(*b*) dismiss the appeal.

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(2c) A judgment of the court of appeal imposing a sentence pursuant to this section has the same force and effect as if it were a sentence passed by the trial court.

(3) The provisions of Part XVIII with respect to procedure on appeals apply, *mutatis mutandis,* to appeals under this section.

Under this section the right of the Attorney General to appeal against the dismissal of an applicaiton for preventive detention is strictly limited to "any ground of law" and it is to be observed also that neither the Crown nor the accused is given any right under the *Criminal Code* to appeal to the Supreme Court of Canada from the disposition made of such an application by the Court of Appeal of a province. It is contended, however, on behalf of the Attorney General of British Columbia that an appeal lies to this Court under the provisions of s. 41 of the *Supreme Court Act* which reads, in part, a follows:

41(1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

* * *

(3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

Counsel for the appellant concedes that it has been decided in the case of *Goldhar v. The Queen*[1] that criminal offences and sentences imposed therefor are excluded from the operation of s. 41(1) by the terms of s. 41(3), but he contends that a sentence of preventive detention is imposed as a result of a finding that the accused has the status of an habitual criminal which this Court has held not to be a criminal offence (see *Brusch v. The Queen*[2]). It is therefore argued that the judgment of the Court of Appeal setting aside the sentence of preventive detention is unaffected by s. 41(3) and is a judgment of the highest court of final resort in a province determining the rights of an individual and

[1] [1960] S.C.R. 60, 31 C.R. 374, 125 C.C.C. 209.
[2] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.

accordingly a proper subject for appeal under section 41(1).

There have been a number of cases in this Court in which leave to appeal has been granted pursuant to s. 41(1) from the granting of an application for the imposition of a sentence of preventive detention under s. 660, but each of these cases involved an appeal from the finding that the person seeking leave to appeal was an habitual criminal, and that finding was in each instance set aside with the result that the sentence of preventive detention for which it was a prerequisite was also set aside. As has been indicated, it is upon the ground that the finding that a man is an habitual criminal is a determination of status and not a conviction of a criminal offence that leave to appeal has been granted in the past and counsel were unable to cite any case except the present one in which the finding of status was not in issue and the entire appeal has been limited to the question of sentence.

Reference was made to the case of *Mulcahy v. The Queen*[1] where the judgment of this Court is reported as follows:

> We are all of opinion that the appeal against the sentence of preventive detention should be allowed for the reasons given by MacQuarrie J. and that the record should be returned to the Supreme Court of Nova Scotia *in banco* to impose a sentence for the substantive offence of which the appellant was convicted.

It must be noted, however, that in that case MacQuarrie J. had concluded his reasons for judgment by saying:

> I would allow the appeal, *quash the finding that the appellant was an habitual criminal* and the sentence that he be held in preventive detention, and impose a sentence of three years in Dorchester Penitentiary for the substantive offence".

The italics are my own.

It is true that the finding of the appellant's status in the present case was not a conviction of a criminal offence, but the sentence of preventive detention imposed by Magistrate White was "in lieu of the sentence of one year imposed earlier upon the said Robert Cecil MacDonald . . ." upon his conviction for an indictable offence. The sentence of preventive detention could only have been imposed on a man who had been found to have the status of an habitual criminal,

[1] (1964), 42 C.R. 1 and 8.

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but it was the conviction of an indictable offence which afforded the occasion for its imposition and as this appeal is from the sentence and the finding as to status is not an issue, it is, in my opinion, governed by the decision of this Court in *Goldhar v. The Queen, supra.*

The effect of the *Goldhar* case is summarized in the judgment of Taschereau J., as he then was, in *Paul v. The Queen*[1], where he says at 457 speaking of s. 41(3):

> In matters of indictable offences, it confers no jurisdiction on this Court, and we must find in the *Criminal Code* the rules that govern such appeals. In summary matters, on the other hand, jurisdiction to appeal to this Court is given in s. 41(3). It was held in *Goldhar v. The Queen* that if an appeal from a sentence was not given by 41(3), nor the *Criminal Code,* we could not find any authority in 41(1) to review a sentence imposed by the Courts below. In that case it was stated by Fauteux J. with whom all the members of the Court agreed, Cartwright J. dissenting, that in order to determine if a convicted person could appeal against a sentence in a matter of indictable offence, it was not permissible to look to s. 41(1) for the authority to intervene, but only in the *Criminal Code* which does not permit an appeal against a sentence.

In the recent case of *Her Majesty the Queen v. J. Alepin Frères Ltée and Clément Alepin*[2], the Crown sought to appeal the quashing of a sentence by the court below on jurisdictional grounds and Fauteux J., speaking on behalf of the Court, had occasion to comment on the effect of s. 41(1) and 41(3) of the *Supreme Court Act,* saying:

> It is clear from the terms of subsection (3) that, unless the judgment sought to be appealed is a judgment "acquitting or convicting or setting aside or affirming a conviction or acquittal" of either an indictable offence or an offence other than an indictable offence, there is no jurisdiction in this Court under that subsection to entertain this appeal. The judgment here sought to be appealed does not come within that description. It is not a judgment related to an acquittal or a conviction of an offence and, while an important question of jurisdiction is involved therein, *this question does not relate to an acquittal or a conviction within the meaning of subsection (3) but to sentence.* Neither can jurisdiction of this Court be found in subsection (1). The general proposition that matters which are not mentioned in s. 41(3) must be held to be comprised in s. 41(1), with the consequence that this Court would have jurisdiction to entertain an appeal from a judgment of a nature similar to the one here considered, is ruled out by what was said by this Court in *Goldhar v. The Queen* and *Paul v. The Queen.* It may be a matter of regret that this Court has no jurisdiction to decide the important question which gave rise to conflicting

[1] [1960] S.C.R. 452, 34 C.R. 110, 127 C.C.C. 129.
[2] [1965] S.C.R. 359, 46 C.R. 113, 3 C.C.C. 1, 49 D.L.R. (2d) 220.

opinions in the Court below, but strong as my views may be with respect to that question, I am clearly of opinion that this Court has no jurisdiction to entertain this appeal.

The italics are my own.

As has been pointed out, the *Criminal Code* makes express provision under s. 667 for appealing to the court of appeal of a province from the disposition made by a trial judge of an application for preventive detention and by s. 667(2) the Attorney General is limited to "any ground of law" in appealing from the dismissal of such an application. If counsel for the appellant were right in his contention that an appeal can be had to this Court under s. 41(1), at the instance of the Crown, from an order of the court of appeal setting aside a sentence of preventive detention, it would mean that although the Crown is restricted to "any ground of law" when appealing to the Court of Appeal of a province against the dismissal of an application for preventive detention by a trial judge, it can obtain access to this Court on unrestricted grounds when appealing from a judgment of the Court of Appeal which has the same effect. I cannot think that Parliament intended such an anomaly to result from the provisions of s. 667(2) of the *Criminal Code* and s. 41(1) of the *Supreme Court Act*.

The limitation to "any ground of law" of the right of the Attorney General to appeal to the Court of Appeal was first enacted by Chapter 43 of the *Statutes of Canada,* 1960-61, and s. 667(2) in its present form has not been previously considered by this Court.

In view of the above, I am of opinion that this Court is without jurisdiction in the circumstances and I would accordingly quash this appeal.

Appeal quashed, TASCHEREAU C.J. *and* MARTLAND J. *dissenting.*

Solicitor for the appellant: R. D. Plommer, Vancouver.

Solicitor for the respondent: A. Carmichael, Vancouver.

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1. Agreement between subcontractors to undertake highway contract—Subsequent agreement of contractor with one of the subcontractors to perform the contract—Whether contractor entitled to enforce provisions of agreement between itself and one of the subcontractors as against the other subcontractor—Counterclaim for arrears of equipment rental—Claim for damages flowing from interim injunction preventing subcontractor removing machinery.

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8. Habitual criminal—Procedure—County Court Judges' Criminal Court—Application for sentence of preventive detention—Application traversed to next sittings of Court in January—Application finally heard in June—No adjournments meanwhile—Whether proceedings had come to an end because of postponements and delay—Whether County Court Judges' Criminal Court a continuing Court.

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1. Indian lands—Right of Indian Band to possession of Reserve Land—Right of lawful possessee to give by devise possession to non-Indian—Action by Crown for possession on behalf of Band—Indian Act, R.S.C. 1952, c. 149, ss. 20, 82, 31(1), 50.

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1. *See—Voir*: CONFLICT OF LAWS.

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3. Cour de Magistrat de Québec—Limite pécuniaire portée de $200 à $500—Constitutionnalité de la Loi concernant la juridiction de la Cour de Magistrat, 11-12 Eliz. II, c. 62—Acte de l'Amérique du Nord britannique, 1867, c. 3, art. 96.
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1. Meurtre qualifié—Verdict de culpabilité affirmé par la Cour suprême du Canada—Ministre déférant la cause à la Cour d'Appel pour nouvelle audition—Nouvel appel à la Cour suprême du Canada—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 55—Code criminel, 1953-54 (Can.), c. 51, arts. 596, 597.
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4. Repris de justice—Procédure—County Court Judges' Criminal Court—Demande pour imposer une sentence de détention préventive—Demande remise à la session suivante de la Cour en janvier—Demande finalement entendue en juin—Aucun ajournement durant cette période—Est-ce que les procédures avaient pris fin à cause de ces retards et délais—Est-ce que la County Court Judges' Criminal Court est une Cour continuelle.

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6. Meurtre non qualifié—Preuve—Poids—Aveu fait à des amies—Suffisance de l'adresse du juge au jury.

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9. Meurtre qualifié—Mauvaise direction par le juge au procès—Théorie de la défense non présentée au jury—Loi sur la Preuve au Canada, S.R.C. 1952, c. 307, s. 12(1)—Code criminel, 1953-54 (Can.), c. 51, art. 592 (1)(b)(iii).

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10. Appels — Juridiction — Déclaration que l'accusé est un repris de justice confirmée par la Cour d'Appel, mais sentence de détention préventive mise de côté—La Cour suprême du Canada a-t-elle juridiction pour entendre l'appel de la Couronne—Code criminel, 1953-54 (Can.), c. 51, art. 667—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41.

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1. *See—Voir*: APPELS.

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2. *See* also—*Voir* aussi: CRIMINAL LAW.

3. *See* also—*Voir* aussi: LABOUR.

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1. Arbitration—Appointment of arbitrator by Labour Relations Board—Application for writ of certiorari to quash appointment—Labour Relations Act, R.S.B.C. 1960, c. 205, s. 22(3)(a) [enacted 1961 (B.C.), c. 31, s. 17(b)].

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1. Negligence—Car owned by insurance company in collision with train—Passenger and driver fellow servants of company and acting in course of their employment as such servants—Driver negligent—Liability of company for injuries to passenger—Driver immune from liability—The Highway Traffic Act, R.S.O. 1950, c. 167, s. 50(2) [now R.S.O. 1960, c. 172, s. 105(2)]—The Workmen's Compensation Act, R.S.O. 1960, c. 437, ss. 123-125.

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1. Explosion—Gasoline livrée à un garage—Surplus de gasoline déversé dans la neige et pénétrant dans le garage—Défaut de fermer les valves—Responsabilité du livreur—Code civil, arts. 1053, 1054.

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3. *See* also—*Voir* aussi: DAMAGES.

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1. Compulsory licence—Restricted to sale "to be used in Canada"—Infringement—Sale by licensee to related Canadian company—Sale by purchaser to third related Canadian company with resale to customer outside Canada—Whether infringement—Patent Act, R.S.C. 1952, c. 203, ss. 41(3), 46.

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4. *See* also—*Voir* aussi: PRACTICE AND PROCEDURE.

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1. Examination—Bankruptcy—Crown privilege—Public policy—Attorney General's

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certificate—No reference to specific facts—Whether invalid for vagueness—Whether Court can go behind certificate—Code of Civil Procedure, art. 332.

GAGNON v. COMMISSION DES VALEURS MOBILIÈRES DU QUÉBEC et al., 73.

2. *See* also—*Voir* aussi: CONSTITUTIONAL LAW.

3. *See* also—*Voir* aussi: CRIMINAL LAW.