1933

CANADA
LAW REPORTS

Supreme Court of Canada

REPORTERS
ARMAND GRENIER, K.C.
S. EDWARD BOLTON

PUBLISHED PURSUANT TO THE STATUTE BY
J. F. SMELLIE, K.C., Registrar of the Court

OTTAWA
J. O. PATENAUDE
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1933

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. FRANCIS ALEXANDER ANGLIN, C.J., P.C., G.C.St.G.
" " LYMAN POORE DUFF, C.J., P.C.
" THIBAUDEAU RINFRET J.
" JOHN HENDERSON LAMONT J.
" ROBERT SMITH J.
" LAWRENCE ARTHUR CANNON J.
" OSWALD SMITH CROCKET J.
" FRANK JOSEPH HUGHES J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. HUGH GUTHRIE K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:
The Hon. MAURICE DUPRÉ K.C.

70887—1½

MEMORANDA

On the second day of March, 1933, the Right Honourable Francis Alexander Anglin, Chief Justice of the Supreme Court of Canada, died.

On the seventeenth day of March, 1933, the Right Honourable Lyman Poore Duff, Puisne Judge of the Supreme Court of Canada, was appointed Chief Justice of the Supreme Court of Canada, in the room and stead of the Right Honourable Francis Alexander Anglin, deceased.

On the seventeenth day of March, 1933, Frank Joseph Hughes, one of His Majesty's King's Counsel, was appointed a Puisne Judge of the Supreme Court of Canada, in the room and stead of the Right Honourable Francis Alexander Anglin, deceased.

On the seventh day of December, 1933, the Honourable Robert Smith, Puisne Judge of the Supreme Court of Canada, retired from the bench, pursuant to section 9 of the Supreme Court Act, 1927, c. 35.

ERRATA

Page 434, at the 18th line, "rate of level" should be "rate level of".

Page 555, at the third line of outline of case, "indemnity" should be "immunity".

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

Bell Telephone Co. of Canada v. *Can. Nat. Rys.* ([1932] S.C.R. 222). Appeals dismissed with costs, 15th May, 1933.

Canadian Electrical Association v. *Can. Nat. Rys.* ([1932] S.C.R. 451). Leave to appeal granted, 4th April, 1933.

Colonial Fastener Co. v. *Lightning Fastener Co.* ([1933] S.C.R. 363). Leave to appeal granted, 11th July, 1933.

Consolidated Distilleries Ltd. v. *The King* ([1932] S.C.R. 419). Appeal allowed, 10th April, 1933.

Curran v. *Davis* ([1933] S.C.R. 283). Leave to appeal refused in both appeals, 27th July, 1933.

Electric Chain Co. of Canada v. *Art Metal Works Inc.* ([1933] S.C.R. 581). Leave to appeal refused, 27th July, 1933.

King, The, v. *Dominion Building Corporation Ltd.* ([1932] S.C.R. 511). Appeal allowed, 9th May, 1933.

Lightning Fastener Co. v. *Colonial Fastener Co.* ([1933] S.C.R. 371). Leave to appeal refused, 11th July, 1933.

London Loan and Savings Co of Canada v. *Brickenden* ([1933] S.C.R. 257). Leave to appeal granted 20th October, 1933.

Minister of National Revenue v. *Holden* ([1932] S.C.R. 655). Judgment of the Supreme Court of Canada varied, 10th April, 1933.

Nixon v. *The Ottawa Electric Ry. Co.* ([1933] S.C.R. 154). Leave to appeal refused, 9th March, 1933.

O'Connor v. *Waldron* ([1932] S.C.R. 183). Leave to appeal granted, 18th May, 1933.

Reilly v. *The King* ([1932] S.C.R. 597). Leave to appeal granted 9th March, 1933. Appeal dismissed, 13th December, 1933.

Spooner v. *Minister of National Revenue* ([1931] S.C.R. 399). Appeal dismissed, 27th July, 1933.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

ST. GEORGE P. BALDWIN AND ANOTHER (PLAINTIFFS) ..... } APPELLANTS;

AND

JOHN W. BELL AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

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*Oct. 4.
*Nov. 28.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Damages—Collision between automobiles—Narrow bridge—Duty of drivers—Proof of negligence—B.C. Highways Act, section 19.

On a foggy night, at about seven o'clock, the appellant's minor son in a roadster (about 5 feet, 10 inches wide), and the respondent's employee (the other respondent) in an auto truck with an overhanging rack (about 7 feet wide), approached a small bridge or culvert on a highway from opposite directions. The bridge was twelve feet long having 4 x 4 rails on each side, four feet high and its width between the railings on each side was seventeen feet, the floor or travelled part consisting of 3-inch planking and being 14½ feet wide. The respondent's truck reached the bridge first and when somewhere on the bridge the overhanging rack scraped the left side of the appellant's car; and, as the appellant's son while driving allowed his left elbow to protrude slightly from the open window to his left, the rack also struck his arm, which was severely injured. The trial judge found that the respondent's truck in crossing the bridge was as near the right railing as he could safely go, but that the real cause of the accident was the overhanging rack, of which the appellant's son had no knowledge, owing to fog and darkness. He found both drivers at fault, awarding ¼ of the fault to the appellant's son and ¾ to the respondent's employee. The majority of the Court of Appeal reversed this judgment on the ground that on the facts it was impossible to find negligence on the part of the respondents.

Held, reversing the judgment of the Court of Appeal (45 B.C.R. 234), Rinfret and Lamont JJ. dissenting, that the judgment of the trial judge should be restored. The respondents owed a special duty, under the circumstances of the case fully stated in the judgment, on a foggy night, to the appellant's son on account of the wide vehicle under his

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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control and he should have used special care in approaching the narrow bridge.

Per Rinfret and Lamont JJ. dissenting. According to the finding of the trial judge, the respondent's employee was, at all times material to the action, "to the right from the centre of the travelled portion of the highway," as provided by section 19 of B.C. *Highways Act;* and the only way the collision could have happened was by the appellant's son driving over to respondent's side of the centre line. Therefore respondents cannot be held to have been in any way responsible for the collision.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, McDonald J., and dismissing the appellants' action for injuries sustained owing to the alleged negligence of the respondent's employee (also respondent) while driving a motor-vehicle.

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

R. L. Maitland K.C. and *E. F. Newcombe K.C.* for the appellant.

W. B. Farris K.C. for the respondent.

The judgment of the majority of the court, Smith, Cannon and Crocket JJ., was delivered by

CANNON J.—This is an appeal from the judgment of the Court of Appeal of British Columbia setting aside (Martin and McPhillips JJ.A. dissenting) a judgment of the Honourable Mr. Justice J. A. McDonald whereby the plaintiff St. George P. Baldwin was awarded $1,086.34 for special damages, and the plaintiff Gordon St. George Baldwin $2,250 general damages for injuries sustained in an automobile accident. The amount of special damages would not be sufficient to give jurisdiction to this Court; but the Court of Appeal for British Columbia gave leave to St. George P. Baldwin to appeal to this Court.

The appellant St. George P. Baldwin sued on his own behalf and as next friend to his son Gordon St. George Baldwin.

The respondent Hay is a truck driver employed by John W. Bell; and, on the occasion in question, was driving on the latter's business.

(1) (1932) 45 B.C. Rep. 234.

The accident occurred about seven o'clock p.m., on November 4, 1930, on a road near Kelowna, known as the Okanagan Mission Road, at or near a small bridge or culvert having 4 x 4 rails on each side, four feet high, and a total width between the rails of seventeen feet. The floor or travelled part consists of 3-inch planking and is 14½ feet wide. The respondent Hay admits that he used only this portion of the bridge and that it would not be possible to travel between the running part and the rail. There is no appreciable turn in from the side of the road to the bridge; and the side of the road, to use an expression of the witness Thomas G. Norris, "sort of melts into the bridge."

The respondent Hay was driving, in a northerly direction, a truck with a rack seven feet wide (for holding wood) on the chassis of the said truck which rack extended out at both sides. Gordon St. George Baldwin was driving in the opposite direction a Chevrolet closed car 5' 10" wide over all. The cars met at this small bridge; but neither could distinguish the nature of the car the other was driving. Hay naturally knew that he had this overhanging rack; and he says that he was aware of the fact that plaintiff could not know that he had such an overhanging rack. It is common ground that, at the time, one could only see the lights of an approaching car and that the visibility was poor.

The appellant approached the bridge at about fifteen miles per hour. He observed the light of the respondent's truck; but could not tell the nature of the vehicle, nor that it had an overhanging rack. He swears that he was drivslowly and on the right hand side of the road.

The respondent Hay approached the bridge at twenty-five miles per hour. He swears that he slowed a little to see if he had time to cross and then speeded up from twenty to twenty-five miles per hour. He says that he proceeded to cross the bridge on the right hand side and that, as he was leaving the end of the bridge, the other car came across the road; that he swerved on to the grass and, as he was leaving the road, the two cars met and slid along. He had no light on the overhanging part of the truck.

The drivers disagree as to the exact locus of the accident. The appellant says it happened on the bridge; and glass was found by some of his witnesses and a piece of bone on

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the truck. One found part of the handle of the car on the bridge.

The respondent admits that he crossed two preceding bridges that night in the centre and that he anticipated that this particular bridge was clear and did not expect to meet the other car on the bridge.

The appellant driver was resting his elbow on the ledge of the window of his car; and as the cars passed each other, the overhanging rack cut off the appellant's elbow and also the door handle of the Chevrolet. Young Baldwin's arm was very seriously injured and he will suffer a permanent disability.

The respondent Hay knew and admitted in his evidence that the other driver did not know that he was driving with an overhanging rack.

Mr. Norris, a barrister, met the respondent shortly before the accident. He says he did not know he had a rack until he got right on to the vehicle and had to swing right over to his right to avoid the overhanging rack hitting him. Hay was then driving on the centre of the road and did not alter his course at all. Norris had to swing his car to prevent the overhanging rack hitting him.

The respondent Hay states that he did turn out to his own side of the road when he met Norris.

The trial judge made no finding as to the exact spot where the accident happened; but he finds that the real cause of the accident was the overhanging rack, which took more space than would an ordinary car; that the respondent Hay knew that and that the appellant did not; that all that could be seen by the two drivers were two headlights and this is the case whether the accident took place actually on the bridge or a few feet off the bridge; and, although, in his opinion, the respondent had the right to drive a truck upon the road with an overhanging rack and the plaintiff should have anticipated this possibility, the trial judge found both drivers at fault; but, inasmuch as the defendan Hay had a certain knowledge which the plaintiff's driver did not possess, to the latter was imputed one-fourth and to Hay three-fourths of the fault. The trial judge found indications that, at the time of the collision, the defendant's truck was being driven well over to the right side of the road.

The majority of the Court of Appeal found that the respondent had not proven his case, while the two dissenting judges found that gross carelessness had been proven against Hay, although they did not feel that the assessment made by the trial judge should be disturbed.

After a careful and somewhat anxious consideration of this case, we have reached the conclusion that the appeal should be allowed and the first judgment restored. We agree with the trial judge that the real cause of the accident was the overhanging rack which occupied more space than would an ordinary motor car. We also believe that, in the parallel position which the two cars occupied at the time of the accident, the plaintiff would have suffered no injury, had it not been for the overhanging of the rack on the respondent's truck.

The appellant drove his car in such a manner as to pass safely the vehicle coming in the opposite direction, if it had been of ordinary, and not of abnormal, width. The width available to travel on that bridge made it dangerous to negotiate, to the knowledge of Hay, for his truck covering 7 feet width, and an ordinary car, like the appellant's, which needed 5′ 10″, leaving at most 3′ 2″ actual leeway.

In *Wintle* v. *Bristol Tramways and Carriage Co., Limited* (1), the road was 16 feet wide, the plaintiff's lorry 6 feet 4 inches and the defendant's 6 feet 10 inches meeting at night. The court found that, even compliance with a statute under which one was bound to carry one light, would not lessen the common law liability and does not prevent one from being under the necessity of taking reasonable and proper care to indicate his position in the road to approaching vehicles; the care to be exercised must depend on the nature of the vehicle, the character of the highway and the general circumstances of the case.

In *LeLièvre* v. *Gould* (2), Lord Esher, M.R., says:—

> If one man is near to another * * * a duty lies upon him not to do that which may cause a personal injury to that other * * * for instance, if a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or to his horse, or his carriage. * * * If a man is driving on Salisbury Plain, and no other person is near to him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause

(1) (1916) 86 L.J. K.B. 240. (2) (1893) L.R. 1 Q.B.D. 497.

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an injury to that other carriage. So, too, if a man is driving along a street in a town, a similar duty not to drive carelessly arises out of contiguity or neighbourhood.

We therefore reach the conclusion that the defendant Hay owed a special duty, under the circumstances of the case, on a foggy night, to the appellant, on account of the wide vehicle under his control. He should have used special care in approaching this narrow bridge. He might have stopped; but he probably misjudged the distance of the approaching car and speeded up and took a chance of clearing the bridge before meeting the car. It was not taking the necessary care to proceed as he did and without having the windshield wiper working, under the weather conditions prevailing that night.

The circumstances which are to be considered for the purpose of ascertaining whether there was negligence are:

1st. The nature of the physical object by which the accident was caused. A greater degree of care is required where the use of the object is, in the circumstances, attended with special danger.

2nd. The place of the accident. Greater care was required approaching this bridge by the owner of the wider vehicle.

3rd. The physical conditions prevailing at the time of the accident; the time of the day and the weather, which witness Baldwin describes as follows: "At that time, it was very foggy. The fog was the worst I have known in the Okanagan at that place, the fog from town out," although he admits that they could see the lights.

4th. The conduct of the persons.

In this case, in the ordinary course, the accident could not have happened if Hay, who had the management of the wider vehicle, had exercised proper care. The evidence shews that he was negligent in driving into a narrow bridge, in a dense fog, at a rate of speed immoderate under the conditions, which disabled him from avoiding an accident in the emergency; this seems to be what the trial judge had in his mind. Like the minority judges in the Court of Appeal, we do not feel that we should disturb his assessment of damages as between the parties.

The appeal should be allowed with costs here and in the Court of Appeal and the judgment of the trial judge restored.

The judgments of Rinfret and Lamont JJ. (dissenting) were delivered by

LAMONT J.—The collision which caused the injuries for which damages are sought to be recovered in this action took place between the automobile of the appellant, St. George P. Baldwin, driven by his seventeen year old son Gordon, and a truck belonging to the respondent Bell, driven by the respondent Hay. The accident occurred about 7 p.m. on the evening of November 4, 1930, on the Okanagan Mission Road, B.C., at or near a point where the road crosses, by a narrow bridge, the north branch of Saw Mill Creek. Gordon was driving south and Hay was driving north. It was a foggy night and the headlights of both vehicles were on. The bridge was only 12 feet 2 inches from north to south, and 17 feet from east to west. It was really only a culvert. There was a railing about 4 feet high on each side of the bridge. The evidence as to the point of collision is contradictory: Gordon Baldwin says it was right on the bridge, while Hay says it was about 15 feet to the north thereof. A friend of Gordon's, one Collett, who was riding in the back seat of the automobile, might have definitely fixed the place of the accident but, although he was in the court at the time of the trial, he was not called by either party. Wherever the accident took place, the truck, which was seven feet wide, came in contact with Gordon's left elbow, which was resting on the ledge of the window of the left front door, and crushed it causing serious and permanent injury. Each driver testified that at the moment of impact he was well over on his own side of the road, and each claimed the other had crossed the centre line and invaded his half of the road. Hay was driving about twenty-five miles per hour and Gordon about fifteen. Gordon did not know that the vehicle the headlights of which he saw coming towards him was a truck, or that it was wider than an ordinary automobile. Hay testified that crossing the bridge he was running as close as he reasonably could to the east side thereof, and that the side of his truck was only 4 or 5 inches from the railing. He said that when he was leaving the north end of the bridge the car approaching turned towards him and he, fearing a collision, swerved to the right and drove on to

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the grass, and that the car and his truck grazed each other as they passed. He looked back and saw the other car stop; he stopped too, and heard someone yelling, so he drove off the grass on to the road and backed up over the bridge to see what had happened. He found Gordon Baldwin was hurt but was being attended to, and that young Collett was cut. He drove Collett home and then returned to the scene of the accident with Collett's father. About two hours later he went over the scene with Mr. Lysans who had a flashlight and he shewed Lysans the tracks which he said were made by his wheels on the right hand side, and where, at 6 feet north of the bridge, they turned off onto the grass. They discovered glass about 15 feet north of the bridge where Hay says the accident took place. Next morning, in company with Mr. C. W. A. Baldwin, uncle of Gordon, he again visited the scene of the accident and shewed him the same tracks that he had pointed out the night before to Lysans. They also saw the pile of glass about 15 feet north of the bridge. Lysans corroborates Hay to this extent: that Hay shewed him the wheel tracks he claimed were his. Lysans testified that, with the aid of the flashlight and the light from the automobiles then gathered there, it was easy to follow the track and that at 6 feet north of the bridge he distinctly saw where the wheels went over onto the grass. He says they found a pile of glass 15 feet north of the bridge, and, in addition to the pile of glass, they found a piece of a nickle door handle 2 inches long like those used on an automobile. The appellants admit that the collision broke off the handle of the left front door of their automobile. Lysans also says that he saw the wheel tracks on the inside of the east rail of the bridge at a distance, he thought, of about 15 inches from the rail, and stated he did not think Hay could have driven any closer to the rail. Glass was also found on the bridge together with a piece of a nickle door handle. Whether it was the same part of the door handle which Lysans found north of the bridge the night of the accident the evidence does not shew. One of the witnesses, Thomas Apsey, testified that the glass on the bridge seemed to him "to be scattered over the bridge." Counsel for the respondents contended that the finding of glass and part of the door handle 15 feet north of the bridge and the finding of glass

on the bridge, would indicate that the collision took place north of the bridge; that the truck smashed the glass in the left rear door, which is established by the evidence, and that some part of the glass fell to the ground and some remained on the running board of the car and was shaken off on the bridge.

The learned trial judge found as follows:—

I am satisfied that the defendant's wheel marks were those which were afterwards seen by the defendant Hay and the witness Lysans. This would indicate that at the point of collision the defendant's truck was being driven well over to the right side of the road and in fact as far to the right as it could be driven if a collision between the right side of the truck-rack and the railing of the bridge was to be avoided. The real cause of the accident was I think that the defendant's rack overhung the truck and took more space than would an ordinary car. The defendant Hay knew this and the plaintiff did not know it.

This, in my opinion, is a finding that, whether the accident occurred on the bridge or on the road immediately to the north thereof, Hay was, at all times material to the action, east of the centre of the road. This finding is justified by the evidence and, in my opinion, must be accepted. From that finding it necessarily follows that the only way the collision could have happened was by Gordon Baldwin driving over to Hay's side of the centre line. If that is how the collision occurred, can Hay be held to have been in any way responsible for it? Both drivers had a right to be on the road with the vehicles they were driving. Both, however, were under a duty to take reasonable precautions to avoid a collision. In *Hambrook* v. *Stokes Bros.* (1), Atkin L.J. said:—

The duty of the owner of a motor car in a highway is not a duty to refrain from inflicting a particular kind of injury upon those who are in the highway. If so, he would be an insurer. It is a duty to use reasonable care to avoid injuring those using the highway.

The precautions which both drivers were under a duty to take to avoid a collision are set out in the statute. Section 19 of the British Columbia *Highways Act*, provides:—

19. In case a person travelling or being upon a highway in charge of a vehicle drawn by one or more horses or other animals, or propelled by some other means, meets another vehicle drawn or propelled as aforesaid, he shall reasonably turn out to the right from the centre of the travelled portion of the highway, allowing to the vehicle so met one-half of the travelled portion of the highway.

(1) [1925] 1 K.B. 141, at 156.

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If this statutory provision had been observed by both drivers in the present case it is clear the accident would have been avoided.

If we accept the finding of the trial judge as to the position of the truck at the time of the accident, and, as I have already said, I think we must accept it, that finding means that Hay performed the duty resting upon him under the statute and that Gordon did not. That being so, I am unable to see how Hay could have been guilty of negligence causing the accident unless he became aware or had an intimation that Gordon was about to cross the centre of the travelled portion of the highway, and he (Hay) failed to avoid a collision being able to do so. Upon this point Hay was examined and he testified that it was not until the front of Gordon's car was on the centre of the road that he feared a collision, and that he immediately swerved to the east. He, therefore, had no intimation that Gordon was not going to comply with the statute until it was too late to get out of his way. Under the circumstances there was, in my opinion, no duty resting upon Hay to anticipate that Gordon would commit a breach of the statute. It is not suggested that after the danger become apparent Hay could, by any act of his, have avoided a collision. What is charged against him is that:

> the overhanging rack of the appellant's truck occupied more space than would an ordinary motor car and that he knew this and Gordon Baldwin did not, and that he was driving too fast under the circumstances.

None of these circumstances, however, could have brought about the collision if Gordon had remained on his own side of the road. The truck was not an outlaw on the highway. It had a perfect right to be there so long as its overhanging rack did not prevent its driver from giving to a vehicle going in the opposite direction one-half of the travelled portion of the highway. The fact that Hay knew the width of the truck and that Gordon did not, cannot, in my opinion, be said to have caused or contributed to the accident for, as the trial judge pointed out, anyone driving at night and seeing the lights of an approaching car must anticipate that it may be a truck.

It was contended by counsel for the appellants that as the road was narrow, the night foggy and the respondent's truck wider than an ordinary automobile, there was a duty

resting upon Hay to be extra careful not to injure anyone using the highway and that he should have had a light to mark the left side of his truck. It is established that the bridge was seventeen feet wide, and that the road leading up to the bridge had no ditch on the right hand side so that, if the accident occurred north of the bridge, as I think it did, the road was sufficiently wide for the cars to pass in safety and have a satisfactory margin to spare. There was some fog which made the windshield misty, unless the windshield wipers kept it clear. Only one of Gordon's wipers was working, which one the evidence does not disclose, but he drove with his head out of the window the better to see, until just before the accident when he withdrew it. Then, looking through the windshield he saw the railing of the bridge on the right hand side—he thought it was at the southwest corner. If it was his right hand wiper which was working and through which he saw the railing, and the wiper directly in front of him was not working and the windshield covered with mist, it would account for his failure to see the truck after he drew in his head. Notwithstanding the evidence of some fog, Hay says he could see the railing of the bridge on his right hand side, and he was able to run his truck within a few inches of it. Furthermore a speed of twenty-five miles per hour does not seem to me excessive, so long as the light is such that a driver can see to keep his own side of the road.

In support of the argument that Hay should have had a light to mark the left hand side of the truck, the appellants cited the case of *Wintle* v. *Bristol Tramways & Carriage Co., Limited* (1). In that case the plaintiff claimed damages from the defendants in respect of the alleged negligent driving by night of their petrol lorry or trolley, when the plaintiff's steam lorry was run into and damaged. The negligence alleged was that the defendants were burning only one light on their trolley when they should have had two. The defence was that the statute required only one light and that the defendants had complied with the statute. In his judgment, at page 242, McCardie J. says:—

> Under the Locomotives on Highways Act of 1896 and the regulations made thereunder the defendants were bound to carry one light on their trolley. In the absence of doing so they are exposed to certain penalties.

(1) (1917) 86 L.J.K.B. 240.

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That provision does not, in my opinion, lessen their common law liability, and compliance with the regulation does not prevent them from being under the necessity of taking reasonable and proper care to indicate their position in a roadway to pedestrians and approaching vehicles. In this case the defendants carried only one light. There was evidence before the deputy Judge that it was usual for lorries to carry two lights, and he no doubt thought that the defendants ought to have had two lights on their lorry.

This judgment was affirmed on appeal (1).

It will be observed that in that case there was evidence that it was usual for lorries to carry two lights and, as stated in 21 Halsbury, page 449, a person is entitled to rely upon the other party taking reasonable care and precautions, and, in places to which the public have access, is entitled to assume the existence of such protection as the public have, through custom, become justified in expecting. See also *Smith* v. *South Eastern Rly. Co.* (2).

The non-observance by an automobile driver of the precautions prescribed or duties imposed by the legislature is usually *prima facie* evidence of negligence and, if damage results from such non-observance, he will be liable therefor. It is, however, not disputed that the statutory enactment is not in every case to be taken as the measure of the duty of the individual. As in the *Wintle* case (3) a person may comply with the terms of the statute and yet find that he has omitted some other duty of care which involves him in liability. *Precessly* v. *Burnett* (4). In such cases, however, the common law duty has been relied upon by the plaintiff because the statutory provision, if complied with, was not sufficient to prevent the accident and did not afford the plaintiff the measure of protection to which he was entitled. These cases, it seems to me, can have no application to the case at bar for here, if Gordon Baldwin had performed the statutory duty resting upon him the accident could not have happened. We were not referred to any case in which a plaintiff has successfully invoked the aid of a common law duty to take care, to excuse his failure to perform a statutory requirement which, if complied with, would have prevented the accident.

As, in my opinion, Hay was entitled to expect that Gordon would use reasonable care and take proper precautions

(1) 117 L.T.R. 238.
(2) [1896] 1 Q.B. 178.
(3) (1917) 86 L.J.K.B. 240.
(4) [1914] S.C. 874.

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in passing on the highway, and as, in particular, he was entitled to assume that he (Gordon), would observe the requirements of section 19 of the *Highways Act*, I am unable to reach any other conclusion than that Gordon Baldwin was the author of his own wrong.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Maitland and Maitland.*

Solicitors for the respondent: *Farris, Farris, Stultz & Sloan.*

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*May 17, 18.
*Nov. 28.

LA CORPORATION DE LA PAROISSE DE ST-JOSEPH DE COLERAINE (DEFENDANT) ..... APPELLANT;

AND

COLONIAL CHROME CO. LTD. (PLAINTIFF) ..... RESPONDENT;

AND

LE RÉGISTRATEUR DU COMTÉ DE MATANE AND ANOTHER (MIS-EN-CAUSE).

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

Municipal corporation—Valuation roll—Land and buildings owned by same person—Erroneus description—Real owner as to buildings and previous owner as to land—Sale for taxes—Notice to previous owner not excluding buildings—Action in nullity—Limitation of action—Absolute nullity—Statements in deeds to be taken as proved, even against third party, until contrary evidence—Arts. 414, 415, 1210, 1222 C.C.—Arts. 699 C.C.P.—Arts. 16, 654, 673, 726, 729, 740, 747 M.C.

Title to mining property having been granted by the Crown in 1906 to one K., the latter appeared in the books of the appellant municipality as owner until 1926, when the property and the buildings erected thereon were sold for unpaid taxes which were alleged to be due by K. The respondent company bought the property in 1922. According to the books of the appellant municipality in 1926 and previously, the land and the buildings were not described on the valuation roll under consecutive numbers nor on the same pages of the book. Accounts for municipal and school taxes were sent and paid by the respondent company. It was not disputed that the taxes on the buildings were paid; but the municipality claimed taxes were due on

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*PRESENT:—Duff, Rinfret, Lamont, Smith JJ. and St. Germain J. *ad hoc.*

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the land. The appellant municipality, in the public notice of sale for unpaid taxes, described the whole lot as being to be sold without indicating that the buildings were excluded. In 1928, title to the property was delivered to the purchaser at the tax sale by the appellant. The respondent company had no knowledge of the sale until 1929 when notified by the purchaser and then took an action to annul the sale.

Held that the tax sale was null and void *ab initio*, and that the title of the purchaser should be set aside.

Held, also, that, in a case of absolute nullity, the provisions of article 747 M.C. enacting limitation of the action in annulment of the sale do not apply.

Held, further that the declarations and statements contained in authentic deeds as well as in deeds under private seal are considered as proved until they are challenged and contrary evidence is adduced, and it is so, not only as between the parties to the deeds, but also against third parties.

Judgment of the Court of Kings Bench (Q.R. 52 K.B. 458) affirmed.

APPEAL from the decision of the Court of King's Bench appeal side, province of Quebec (1), affirming the judgment of the Superior Court, d'Auteuil J. and maintaining the respondent company's action to annul sale of mining property for unpaid taxes.

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

J. A. Prévost K.C. for the appellant.
Maurice Boisvert for the respondent.

The judgment of the court was delivered by

ST-GERMAIN, J. (*ad hoc*).—Il s'agit d'une action en déclaration de nullité de vente, pour taxes municipales, d'un immeuble situé dans la municipalité-appelante, et dont le mis-en-cause, Robutel Théberge, s'est porté adjudicataire, le 3 mars 1926, à une vente faite par la corporation du comté de Mégantic, sous l'autorité des dispositions des articles 726 et suivants du code municipal.

Cet immeuble désigné au cadastre comme étant la partie sud-est du lot n° 19 du 10e rang du canton de Coleraine, avait été originairement concédé, en 1906, par la couronne, comme concession minière, à Charles King, de Boston, et dame Marie-Louise King, veuve de feu Sir Adolphe Chapleau. Ces derniers apparaissaient encore, en 1926, aux

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rôles d'évaluation et de perception de la municipalité-appelante, comme propriétaires du fonds dudit immeuble, les bâtisses sus-érigées étant inscrites sur lesdits rôles au nom de la compagnie-intimée, et c'est pour les taxes qui auraient été dues par lesdits King et Lady Chapleau, comme propriétaires dudit fonds de terre, que ledit immeuble a été vendu et adjugé audit mis-en-cause Théberge, en mars 1926.

Le 26 mars 1928, le retrait prévu par l'article 740 du code municipal n'ayant pas été exercé, un acte de vente dudit immeuble a été délivré audit mis-en-cause-adjudicataire par ladite corporation de comté, et c'est cette vente qui fait maintenant l'objet de la présente demande en nullité.

La demanderesse-intimée invoque, au soutien de son action, que ladite vente a été faite *super non domino et non possidente*; que lorsque cette vente a eu lieu, elle était déjà propriétaire dudit immeuble depuis plusieurs années, par bons titres, et que son droit de propriété avait été dénoncé au conseil municipal et au secrétaire-trésorier de la corporation-appelante, que frauduleusement et sans droit, le secrétaire-trésorier de la corporation-appelante avait omis de porter l'intimée au rôle d'évaluation, comme propriétaire dudit immeuble, quant au fonds, laissant sur ledit rôle, comme propriétaires dudit fonds, les propriétaires originaires, et n'inscrivant l'intimée sur ce rôle que comme propriétaire des bâtisses sus-érigées; qu'un état des taxes municipales et scolaires lui avait été transmis et qu'elle avait toujours acquitté les taxes qu'on lui avait demandées, mais que, frauduleusement et sans droit, la corporation-appelante avait omis de dénoncer à la compagnie-intimée les taxes illégalement imposées sur ladite concession minière, indépendamment des bâtisses.

L'intimée ajoute que ce n'est qu'au cours de 1929 que ledit adjudicataire Robutel Théberge lui a dénoncé ses droits sur ledit lot; que jusqu'alors, elle avait toujours ignoré ladite vente municipale, et que c'est après avoir connu les prétentions dudit adjudicataire Théberge qu'elle a intenté la présente action en nullité de vente.

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La corporation-appelante soutient à l'encontre de cette action:—

1. Que l'intimée n'a pas prouvé qu'elle était propriétaire dudit immeuble ainsi vendu pour taxes, et que, conséquemment, elle n'a démontré aucun intérêt à intenter son action;

2. Que les ventes pour taxes municipales faites sous l'autorité des articles 726 et suivants du code municipal ne sont pas dirigées contre les personnes, mais contre les immeubles et que, pour cette raison, ces ventes ne sauraient être assimilées aux ventes d'immeubles par le shérif qui doivent être faites sur la personne condamnée qui les possède, ou est réputée les posséder *animo domini* (art. 699 C.P.C.); que la vente pour taxes dont l'intimée demande la nullité a eu lieu légalement sur les propriétés inscrites au rôle d'évaluation, l'intimée n'ayant jamais dénoncé son droit de propriété;

3. Que l'action est prescrite, aux termes de l'article 747 du code municipal.

La Cour Supérieure a maintenu l'action de l'intimée et ce jugement a été confirmé par la Cour du Banc du Roi siégeant en appel, monsieur le juge Tellier dissident.

Première question: L'intimée a-t-elle prouvé qu'elle était propriétaire de l'immeuble en question, tant pour le fonds que pour les bâtisses, lorsque ladite vente pour taxes a eu lieu?

L'intimée a produit trois documents pour établir son droit de propriété:

Le premier est un acte de transport-cession, en date du 25 octobre 1919, fait sous son seing privé, en la cité de New-York, par un nommé Parker Sloane à la United States Ferro Alloys Corporation.

Il est déclaré, dans cet acte de transport-cession, que le cédant Parker Sloane transporte à ladite compagnie United States Ferro Alloys Corporation une somme de $8,633.75, cette somme étant une balance due et qui lui est payable en capital et intérêt, aux termes d'un acte de vente consenti le 24 juillet 1918 par Charles A. King et les exécuteurs-testamentaires de Lady Chapleau à J.-Valère Bélanger, de ladite partie sud-est du lot nº 19 du 10e rang du canton de Coleraine, enregistré au bureau d'enregistrement du comté de Mégantic, le 30 juillet 1918, sous le nº 57886, et ledit acte ajoute:

as acquired by the said Charles A. King and Lady Chapleau under Grant of Mining Concession from the Department of Colonization, Mines and Fisheries of the Province of Quebec, of date the 8th August 1906, and registered in the Registry Office for the County of Megantic, at Inverness, on the 2nd November 1907, in Register B, Vol. 46, No. 43113.

A cet acte de transport-cession comparaît ledit J.-Valère Bélanger lequel, après avoir pris connaissance dudit acte, déclare en être satisfait et s'engage à payer ladite somme de $8,633.75 à ladite compagnie-cessionnaire, United States Ferro Alloys Corporation.

Cet acte sous seing privé, fait à New-York, est signé par toutes les parties, il est authentiqué conformément à la loi, et le double produit au dossier porte le certificat du régistrateur du comté de Mégantic, comme ayant été dûment enregistré, le 3 novembre 1919, sous le n° 60271.

Le deuxième document produit par l'intimée, pour établir son droit de propriété, est un acte de vente passé devant le notaire Joseph Sirois, à Québec, le 30 mai 1922.

Par cet acte, la United States Ferro Alloys Corporation, à qui le nommé Parker Sloane avait consenti le transport-cession ci-dessus relaté, vend à la compagnie-intimée ledit lot de terre connu comme étant la partie sud-est du lot n° 19 du 10e rang du canton de Coleraine,

as acquired (déclare encore ledit acte) by Charles A. King and Lady Chapleau from the Quebec Mines and Fisheries Department, on August the 8th 1906, with the buildings thereon erected, circumstances and dependencies, the mills, machinery, machines, apparatus, carriages, and all other effects moveable and accessories, placed upon and used for the mine, upon the said property and for the said mills, save and except a small house, stable and barn erected on said ground and the property of Oram Gagné * * *

Ledit acte ajoute:—

The properties, mills, machineries and rights sold * * * belong to the Vendor under and in virtue of a deed from the Sheriff for the District of Arthabaska, dated the seventeenth of December last (1921) and registered in the Registry Office for the County of Megantic (Inverness) on the 19th of the same month and year as No. 64274.

Cet acte a été dûment enregistré au long le 30 mai 1922, au bureau d'enregistrement à Inverness, sous le n° 64895, suivant certificat du registrateur inscrit à l'endos.

A cet acte est aussi annexé un extrait des minutes d'une assemblée du bureau de direction de la compagnie-venderesse, la United States Ferro Alloys Corporation aux fins de l'autoriser à faire ladite vente, et nous lisons, dans cet extrait des minutes, l'attendu suivant:—

Whereas this Company has acquired from the Sheriff of the District of Arthabaska, by Deed of Sale dated the 17th December 1921, registered at Inverness, in the County of Megantic, on the 19th December 1921, under No. 64274, the real estate hitherto belonging to the J.-V. Bélanger Mining Company, Limited, known as the south-east portion of lot 19 of the 10th Range of the Township of Coleraine, containing, etc. * * *

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Le troisième document produit par la compagnie-intimée, comme preuve de son droit de propriété, est un autre acte de vente passé devant Mtre Sirois, notaire, en date du 31 janvier 1923, encore entre ladite United States Ferro Alloys Corporation et ladite compagnie-appelante, The Colonial Chrome Company Limited.

Par cet acte de vente, la United States Ferro Alloys Corporation vend de nouveau à la compagnie-intimée, non seulement tout ce qu'elle lui a déjà vendu par l'acte de vente précédent du 30 mai 1922, c'est-à-dire ladite concession minière, avec les bâtisses dessus érigées, mais elle lui transporte en même temps toutes les réclamations qu'elle possède contre J.-V. Bélanger Mining Co. Limited, en vertu de certains jugements énumérés audit acte.

Parmi ces jugements, il y en a un au montant de $50,859.36 en acompte duquel la venderesse déclare qu'un crédit de $16,705.05 doit être donné, ce dernier montant représentant le prix réalisé par la vente du shérif des propriétés de ladite compagnie J.-V. Bélanger Mining Co. Limited.

Cet acte de vente contient de plus la déclaration suivante:—

> The properties, mills, machineries and rights sold * * * belong to the Vendor under and in virtue of a deed from the Sheriff for the District of Arthabaska, dated the seventeenth of December last (1921) and registered in the Registry Office for the County of Megantic (Inverness) on the nineteenth of the same month and year as number 64274.
>
> According to a certificate given by the sheriff of the District of Arthabaska on the fifteenth of June nineteen hundred and twenty-two, registered in the Registry Office for the Registration Division for the District of Megantic on the nineteenth of the same month and year as No. 20369, the purchase price mentioned in the deed of sale from the sheriff has been paid and satisfied in full, and the security bond of the United States Ferro Alloys Corporation for the said sum $19,000 was and is discharged.

Ce dernier acte a été aussi enregistré au long au bureau d'enregistrement du comté de Mégantic, à Inverness, le 6 février 1923, sous le n° 66107, ainsi qu'il appert au certificat du régistrateur à l'endos de la copie dudit acte qui est au dossier.

Voilà les titres que la compagnie-intimée a produits comme preuve de son droit de propriété, aussi bien dudit lot de terre partie sud-est du n° 19 du 10e rang du canton de Coleraine, que des bâtisses érigées sur ledit lot.

La corporation-appelante prétend que ces titres ne sont pas suffisants pour démontrer que l'intimée est propriétaire dudit immeuble, tant pour le fonds que pour les bâtisses. Elle soutient que les titres produits démontrent bien que la Colonial Chrome Company, Limited, a acheté le lot de terre en question, mais qu'ils ne démontrent pas que son vendeur en était propriétaire, en d'autres termes, que ces titres ne remontent pas aux lettres patentes.

Il est vrai, dit l'appelante dans son factum, que dans les ventes de la United States Ferro Alloys Corporation à la Colonial Chrome Company, Limited, la compagnie-venderesse déclare que son titre est une vente du shérif, mais, ajoute l'appelante, cette déclaration ne fait pas de preuve, car l'acte de vente du shérif n'est pas produit.

Sur ce point, monsieur le juge Tellier qui a été dissident en appel s'exprime comme suit:—

La demanderesse est-elle propriétaire du terrain qui a fait l'objet de la vente qu'elle attaque?

Le titre qu'elle produit se rapporte bien à ce terrain. Il lui vient de la United States Ferro Alloys Corporation. Il est en date du 31 janvier 1923. Dans ce titre, la venderesse a déclaré avoir acquis du shérif du district d'Athabaska, le 17 décembre 1921, ledit terrain qu'elle vendait. Cette déclaration, qui, naturellement, ne fait pas preuve, est-elle vraie? Nous n'en savons rien, le contrat de vente du shérif n'étant pas produit.

La demanderesse a en outre mis au dossier un acte de cession et transport (transfer and assignment), daté de New-York, le 25 octobre 1919, et attestant que, ce jour-là, M. Parker Sloane a cédé et transporté à M. J.-Valère Bélanger, pour bonne et valable considération, une somme de $8,633.75, étant la balance du prix de la vente du terrain en question, consentie le 24 juillet 1918, par M. Harry R. Fraser, procureur de M. Charles A. King, et par M. Albert J. Brown, pour les exécuteurs-testamentaires de feu Lady Chapleau. Cet acte de cession ou transport fait preuve, évidemment, de la vente de créance qui en fait l'objet, mais il ne prouve rien de plus.

Avant la vente municipale, dont la nullité est demandée, le terrain dont il s'agit figurait aux noms conjoints de M. C. A. King et de Lady Chapleau, sur le rôle d'évaluation de la défenderesse. C'est sur eux que ladite vente a été faite. La demanderesse prétend que ledit rôle d'évaluation, de même que le rôle de perception, auquel il servait de base, était erroné. Cela se peut; mais, encore faut-il qu'elle le démontre. Et, pour cela, elle a besoin de toute une chaîne de titres, remontant jusqu'à C. A. King et Lady Chapleau. En l'absence d'une chaîne ininterrompue de titres, je ne vois pas comment on pourrait la reconnaître comme propriétaire, au lieu et place de C. A. King et Lady Chapleau.

Avec beaucoup de déférence pour l'opinion exprimée par l'honorable juge, je suis d'avis que les actes produits au dossier par l'intimée sont suffisants pour établir la chaîne des titres, à partir de la concession faite par la Couronne à

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Charles A. King et Lady Chapleau, de ladite concession minière, jusqu'à l'acquisition d'icelle par la compagnie-intimée de la United States Ferro Alloys Corporation.

La doctrine et la jurisprudence françaises, commentant les articles 1319 et 1320 du Code de Napoléon, auxquels correspondent les articles 1210 et 1222 du Code Civil de Québec, affirment que les déclarations et énonciations contenues dans les actes authentiques, aussi bien que dans les écritures privées, ont force probante jusqu'à preuve contraire, non seulement entre les parties mais aussi contre les tiers.

Or, comme dans la cause actuelle, la corporation-appelante n'a fait aucune preuve à l'encontre desdites déclarations et énonciations contenues dans ces actes, il en résulte que ces déclarations et énonciations font pleine foi.

Les articles 1210 et 1222 du Code Civil de Québec sont dans les termes suivants:—

(1210) L'acte authentique fait preuve complète entre les parties, leurs héritiers et représentants légaux:

1. De l'obligation qui y est exprimée;

2. De tout ce qui y est exprimé en termes énonciatifs, pourvu que l'énonciation ait un rapport direct à telle obligation ou à l'objet qu'avaient en vue les parties en passant l'acte. L'énonciation étrangère à l'obligation ou à l'objet qu'avaient en vue les parties en passant l'acte ne peut servir que comme commencement de preuve.

(1222) Les écritures privées reconnues par celui à qui on les oppose, ou légalement tenues pour reconnues ou prouvées, font preuve entre ceux qui y sont parties, et entre leurs héritiers et représentants légaux, de même que des actes authentiques.

Les articles correspondants du Code Napoléon se lisent comme suit:—

(1319) L'acte authentique fait pleine foi de la convention qu'il renferme entre les parties contractantes et leurs héritiers ou ayants cause. * * *

(1320) L'acte, soit authentique, soit sous seing privé, fait preuve entre les parties, même de ce qui n'y est exprimé qu'en termes énonciatifs, pourvu que l'énonciation ait un rapport direct à la disposition. Les énonciations étrangères à la disposition ne peuvent servir que d'un commencement de preuve.

M. Mignault, dans son traité de Droit Civil Canadien, vol. 6, p. 21, commente ainsi l'article 1210 du Code Civil ci-dessus cité:—

Cet article, s'inspirant des articles 1319 et 1320 du code Napoléon, a reproduit une inexactitude de rédaction que tous les commentateurs ont reprochée à ces articles. Comme eux, il confond la force probante avec la force obligatoire de l'acte. Il est bien entendu que les contrats authentiques ou sous seing privé, n'obligent que les parties, leurs héritiers ou

représentants légaux. Au contraire, leur force probante est indivisible et elle existe à l'égard de tout le monde.

Corrigeons donc la formule de l'article 1210 en disant que l'acte authentique fait preuve complète, à l'égard des tiers comme des parties, de l'obligation qui y est exprimée, et aussi de tout ce qui y est exprimé en termes énonciatifs, etc., en ce sens que l'existence de l'acte, de l'obligation, ou de l'énonciation, c'est-à-dire, suivant le mot de Dumoulin, *rei gestæ*, ne peut être contestée par les tiers sans recourir à l'inscripion de faux.

Mais cette force probante s'étend-elle de la même manière à tout ce que cet acte contient?

On distingue les mentions qu'on ne peut contester sans mettre en question la véracité de l'officier public et celles qu'on pourrait nier sans attaquer cette véracité. Dans le cas des premières on décide qu'on ne peut les contester sans recourir à l'inscription de faux. Les autres font foi jusqu'à preuve contraire, mais on peut les mettre en question sans inscription de faux. Ainsi un acte de vente constate que le prix a été payé devant le notaire; cette mention ne peut être niée que par l'inscription de faux. Mais il en serait autrement s'il était dit que le vendeur reconnaissait avoir reçu le prix antérieurement à l'acte; cette mention prouverait le fait de cette reconnaissance, mais on pourrait nier le fait du paiement sans mettre en question la véracité du notaire et partant l'inscription en faux ne serait pas nécessaire. * * *

Nous en arrivons maintenant à la distinction que l'article 1210 fait entre l'obligation et l'énonciation. Par *l'obligation*, on doit *entendre les déclarations des parties*, car l'acte peut bien ne renfermer aucune obligation, et par *l'énonciation*, les explications que contient l'acte. Il n'y a aucune difficulté quant aux *déclarations* des parties, ou, pour employer l'expression de Pothier (Obligations, nº 735), quant au *dispositif* de l'acte. Il ne peut y avoir d'embarras qu'au sujet des énonciations, car celles-là seules sont authentiques qui ont un rapport direct à l'obligation ou à l'objet qu'avaient en vue les parties en passant l'acte, les autres ne pouvant servir que comme commencement de preuve par écrit. A quel signe reconnaître une énonciation qui a un rapport direct à l'obligation ou à l'objet que les parties avaient en vue? Pothier nous indique le moyen de les distinguer en disant qu'une énonciation à laquelle la partie adverse aurait intérêt à s'opposer si elle n'était pas vraie, est une énonciation qui a un rapport direct à la disposition. Ainsi l'acte de reconnaissance d'une rente dit que tous les arrérages de cette rente ont été payés. Le créancier, partie à l'acte, aurait intérêt à s'opposer à cette énonciation et son silence est un aveu. Au contraire, dans le même acte le débiteur déclare qu'il tient l'héritage chargé de la rente de la succession de son frère; le créancier ni aucun autre des parties n'a d'intérêt à s'opposer à cette énonciation, partant elle est étrangère à la disposition et elle ne pourra valoir que comme commencement de preuve par écrit contre le débiteur.

MM. Planiol et Ripert, dans leur Traité Pratique de Droit Civil Français, dernière édition (1931), vol. VII, p. 771, s'expriment aussi comme suit:—

1435. *Règles communes à tous les actes. Allégations qui font preuve.* D'après l'article 1320, "l'acte soit authentique soit sous seing privé fait foi entre les parties, même de ce qui n'y est exprimé qu'en termes énonciatifs pourvu que l'énonciation ait un rapport direct avec la disposition. Les énonciations étrangères à la disposition ne peuvent servir que de com-

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mencement de preuve." Ainsi y a-t-il lieu de faire une distinction essentielle, dans tout acte écrit, entre la *disposition* et les *énonciations*. Ces deux expressions s'opposent exactement comme celles de dispositif et de motifs dans les minutes des jugements. La disposition est la partie de l'acte qui en constitue l'objet même, celle où le débiteur reconnaît qu'il s'est engagé envers le créancier ou dans laquelle le créancier reconnaît que le débiteur l'a payé. C'est la raison d'être de l'acte. Les énonciations sont les allégations de l'acte qui n'ont pas essentiellement pour but d'engager ou de libérer les parties, les simples explications qui n'auraient pas suffi à elles seules à décider les parties à dresser l'acte. Dans l'intention des parties, elles ne sont pas relatées pour faire preuve de quoi que ce soit mais pour les raisons les plus diverses. Néanmoins les énonciations ayant un rapport direct avec la disposition ont la même valeur probante que la disposition; leur insertion dans l'acte a dû attirer l'attention des parties intéressées; si elles ont laissé passer cette énonciation sans protester c'est que le fait relaté est vrai. Les énonciations n'ayant pas de rapport direct avec la disposition ne peuvent au contraire servir que de commencement de preuve. Le fait énoncé n'est alors pas prouvé par l'acte; il est seulement vraisemblable, ce qui aura pour effet de rendre admissibles tous les compléments de preuve autorisés par la loi: témoins, présomptions, serment supplétif. Les juges du fait apprécient souverainement s'il y a ou non rapport direct entre l'énonciation incidente et le dispositif.

Nous pouvons aussi référé sur cette question à Laurent, vol. 19, n^{os} 133 et suivants.

Toute la doctrine et la jurisprudence française, sur cette matière, est d'ailleurs exposée dans le Juris-Classeur Civil, sous les art. 1319 et 1320 du Code Napoléon.

Me basant sur ces autorités, il me semble qu'il ne peut y avoir aucun doute que l'énonciation qui est faite dans l'acte de transport consenti par Sloane à la United States Ferro Alloys Corporation, et suivant laquelle il est déclaré que le montant de $8,633.75 qui fait l'objet dudit transport est une balance due, aux termes d'un acte de vente consenti par Charles A. King et les exécuteurs-testamentaires de Lady Chapleau à J.-Valère Bélanger, de la concession minière en litige, est une énonciation qui a un rapport direct à l'objet en vue par les parties en passant cet acte. En effet, cette énonciation est pour ainsi dire nécessaire pour la validité dudit transport, puisqu'elle détermine la source de la créance qui fait l'objet de ce transport. Cette somme de $8,633.75, transportée par Sloane à la United States Ferro Alloys Corporation, ne peut être une somme indéterminée; il faut bien nécessairement que le cédant indique au cessionnaire le titre de la créance qu'il lui transporte, et partant, l'énonciation contenue dans ledit acte de transport qui réfère à ce titre de créance est une

énonciation directe à l'obligation, pour ne pas dire que cette énonciation ne fait pas partie du dispositif même de l'acte.

Je suis donc d'opinion que l'acte de transport sous seing privé entre Parker Sloane et la United States Ferro Alloys Corporation, en date du 25 octobre 1919, ayant, aux termes de l'article 1222 du Code Civil, la même force probante qu'un acte authentique, établit, jusqu'à preuve contraire, vis-à-vis des tiers, comme entre les parties, que le 24 juillet 1918, Charles A. King et les exécuteurs-testamentaires de feu Lady Chapleau ont vendu à J.-Valère Bélanger le lot de terre connu comme étant la partie sud-est du lot n° 19 du 10e rang du canton de Coleraine, tel qu'acquis par lesdits Charles A. King et Lady Chapleau, du département de la Colonisation, des Mines et Pêcheries de la province de Québec, le 28 août 1906, et que cet acte de vente a été dûment enregistré au bureau d'enregistrement d'Inverness, comté de Mégantic, le 30 juillet 1918, sous le n° 57886.

Pour des motifs analogues, les deux actes de vente ci-dessus relatés, datés respectivement le 30 mai 1922 et le 31 janvier 1923, entre la United States Ferro Alloys Corporation et la Colonial Chrome Co., Limited, deux actes notariés et par conséquent authentiques (art. 1208 C.C.) font preuve, non seulement entre les parties, mais aussi vis-à-vis des tiers, jusqu'à preuve du contraire, non seulement du fait que la United States Ferro Alloys Corporation a bien vendu, aux termes de ces deux actes, à l'intimée, Colonial Chrome Co., Limited, le lot de terre ci-dessus décrit, avec toutes les bâtisses érigées sur icelui, mais aussi du fait, jusqu'à preuve contraire, que la United States Ferro Alloys Corporation est devenue propriétaire de ce qui fait l'objet desdites ventes, en vertu d'un titre du shérif du district d'Arthabaska, en date du 17 décembre 1921, et dûment enregistré au bureau d'enregistrement du comté de Mégantic, le 19 du même mois, sous le n° 64274; que suivant certificat du shérif, en date du 15 juin 1922 et dûment enregistré sous le n° 20369, le prix de vente mentionné audit acte du shérif a été dûment payé par la United States Ferro Alloys Corporation, et que cette vente du shérif a été faite sur J.-V. Bélanger Mining Co., Limited, à qui, suivant ledit acte du 31 janvier 1923, la United States Ferro Alloys Corporation donne crédit d'une somme de $16,705.05 réalisée, déclare ledit acte, dans la vente par le shérif des pro-

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priétés de ladite compagnie J-V. Bélanger Mining Co., Limited.

Lorsque dans ces deux actes de vente, la venderesse, United States Ferro Alloys Corporation, déclare à son acquéreur, l'intimée, qu'elle est propriétaire dudit lot de terre vendu pour l'avoir acquis du shérif, suivant acte en date du 17 décembre 1921, enregistré sous le n° 64274, elle fait là une déclaration qui a un rapport direct avec la disposition; d'ailleurs, la déclaration dans chacun de ces actes, que le titre du vendeur est un titre du shérif, et par conséquant un titre qui purge tous les droits réels, sauf quelques exceptions (art. 781 C.P.C.) a dû nécessairement attirer l'attention de l'acquéreur et si, nous rappelant la citation de Planiol et Ripert, l'acquéreur a laissé passer cette énonciation sans protester, c'est que le fait relaté est vrai.

D'ailleurs, ne doit-on pas supposer que le notaire instrumentant a dû nécessairement prendre connaissance du titre du shérif auquel il réfère dans son acte, puisqu'il indique même le numéro sous lequel ce titre a été enregistré au bureau d'enregistrement du comté de Mégantic?

Evidemment, rien n'empêchait la compagnie-appelante, à qui ces actes sont opposés, de faire une preuve à l'encontre des énonciations et déclarations qui y sont contenues, mais n'ayant pas jugé à propos de faire cette preuve, ces énonciations ou déclarations qui ne sont pas étrangères à l'obligation ou à l'objet qu'avaient en vue les parties en passant ces actes, mais, au contraire, qui ont un rapport direct à la disposition, ont force probante contre ladite appelante et établissent la chaîne des titres de la corporation-intimée, à partir de la concession ci-dessus mentionnée, faite en 1906, par la Couronne, à Charles A. King et Lady Chapleau, jusqu'à la vente consentie par la United States Ferro Alloys Corporation à la compagnie-intimée.

Il faut au moins décider que la compagnie-intimée a suffisamment établi, pour les fins de la présente cause, que, lors de la vente pour taxes de l'immeuble en question, elle était bien propriétaire dudit immeuble, aussi bien pour le fonds que pour les bâtisses.

Deuxième question:—La vente pour taxes dont l'intimée a demandé à la cour de constater la nullité a-t-elle eu lieu légalement sur les propriétaires inscrits au rôle d'évalua-

tion, l'intimée n'ayant jamais dénoncé son droit de propriété?

Les rôles d'évaluation de la municipalité-appelante, paroisse St-Joseph de Coleraine, ont été produits, à partir de 1914 à 1926, et sur ces rôles, Charles A. King et Lady Chapleau apparaissent sans interruption, depuis 1914 à 1926, comme propriétaires du lot de terre connu comme étant la partie sud-est du lot nº 19 du 10e rang du canton de Coleraine, lequel est évalué à la somme de $720.

Le rôle de perception de la municipalité, pour les années 1914 à 1926, a aussi été produit et sur ce rôle, Charles A. King et Lady Chapleau apparaissent encore comme propriétaires dudit lot de terre et une taxe immobilière de $12.60 pour les trois premières années, et de $10.80 pour chacune des années subséquentes, jusqu'en 1926, est portée audit rôle de perception.

D'après un extrait de ce rôle, les taxes immobilières dues à raison dudit lot, pour l'année 1918-1919 auraient été payées par un nommé J.-V. Bélanger dont le nom est mentionné dans les titres produits par l'intimée et auquel nous référons ci-dessus.

Un autre extrait du rôle d'évaluation de la municipalité-appelante, pour les années 1920 à 1926, a aussi été produit et il fait voir qu'à partir de 1914 à 1917, il n'y a aucune évaluation de bâtisses, pour ledit lot de terre, mais qu'en 1920, J.-V. Bélanger Mining Co., Limited, apparaît comme propriétaire de certaines bâtisses érigées sur ledit lot: un moulin et accessoires évalués à $20,000, une maison de pension évaluée à $2,000, et une maison pour le gérant évaluée à $1,500.

En 1923, c'est la compagnie-intimée qui apparaît comme propriétaire de ces bâtisses.

En 1925, c'est d'abord la Quebec Chrome Corporation et ensuite encore l'intimée, Colonial Chrome Co., après correction, qui apparaît comme propriétaire de ces mêmes bâtisses, de même qu'en 1926.

Un extrait du rôle de perception correspondant pour lesdites années 1920 à 1926 a été aussi produit et il appert, par ce rôle, qu'à partir de 1914 à 1920, il n'y a aucune taxe d'imposée pour bâtisses, mais que pour l'année 1920-21, J.-V. Bélanger Mining Co., Limited, est portée audit rôle comme propriétaire dudit moulin et accessoires, comme

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aussi de la maison de pension et de la maison du gérant, mais que seules la maison de pension et la maison du gérant sont taxées, le moulin étant indiqué comme non-imposable.

Pour les années 1921-1922 et 1922-1923, J.-V. Bélanger Mining Co., Limited, apparaît encore comme propriétaire desdites bâtisses sur le rôle de perception, et il n'y a encore que la maison de pension et la maison du gérant qui soient taxées pour ces années.

Pour les années 1923-1924, 1924-1925 et 1925-1926, c'est l'intimée qui apparaît propriétaire desdites bâtisses au rôle de perception et, pour ces années, il n'y a encore que la maison de pension et la maison du gérant qui soient taxées, le moulin et ses accessoires qui sont évalués à $20,000 ne semblent pas avoir jamais été taxés.

Nous avons vu ci-dessus, par l'analyse des titres de propriété de l'intimée, que le 24 juillet 1918, Charles A. King et les exécuteurs-testamentaires de Lady Chapleau avaient vendu ledit lot de terre à J.-Valère Bélanger et que ladite vente avait été enregistrée au bureau d'enregistrement du comté de Mégantic, le 30 juillet 1918, sous le n° 57886.

Nous avons vu aussi que ce même lot de terre, avec les bâtisses dessus érigées, avait été vendu par le shérif sur J.-V. Bélanger Mining Co., Limited, le 17 décembre 1921, et que cette vente avait été enregistrée au bureau d'enregistrement du comté de Mégantic, le 19 du même mois.

Nous avons vu enfin que l'intimée avait acquis ledit immeuble, le 31 janvier 1923, de la United States Ferro Alloys Corporation, et que cette vente avait aussi été dûment enregistrée.

Or, comment se fait-il que malgré ces ventes successives, à partir de 1918, Charles A. King et Lady Chapleau soient restés inscrits comme propriétaires du fonds dudit immeuble au rôle d'évaluation, aussi bien qu'au rôle de perception, jusqu'en 1926?

Pour l'année 1918-1919 qui est l'année durant laquelle Bélanger a acheté le lot de terre en question de Charles A. King et Lady Chapleau, le rôle de perception mentionne que c'est Bélanger qui a payé les taxes imposées sur le fonds, et à partir de 1920, c'est J.-V. Bélanger Mining Co., Limited, qui apparaît comme propriétaire des bâtisses érigées sur ledit lot.

En 1923, qui est précisément l'année où la compagnie-intimée a acheté ledit immeuble, son nom apparaît, pour la première fois, comme propriétaire, mais des bâtisses seulement.

Il importe de faire remarquer, en plus, que sur ces différents rôles d'évaluation, pour chacune des années que nous avons mentionnées, le fonds et les bâtisses ne figurent pas sous le même numéro d'ordre (C.M. art. 654, par. 1).

Les bâtisses sont inscrites à un numéro d'ordre qui, suivant les années, varie du numéro 196 au numéro 231. Le fonds est inscrit à un numéro d'ordre qui, également suivant les années, varie du numéro 349 au numéro 446. En plus, dans les inscriptions relatives aux bâtisses, il n'y a aucune référence au numéro cadastral du fonds sur lequel ces bâtisses sont construites.

Or, le code municipal permet bien de désigner sur le rôle d'évaluation "toute partie d'immeuble de la municipalité, possédée ou occupée séparément" (art. 654, par. 2); mais il va de soi que pour désigner correctement et légalement au rôle un immeuble qui est possédé ou occupé séparément, il est nécessaire d'inscrire cet immeuble à un seul numéro d'ordre, d'indiquer son numéro cadastral, si le cadastre est en force; puis de mentionner les nom et prénoms de chaque propriétaire, locataire ou occupant de chaque partie de l'immeuble qui est possédé et occupé séparément, sans quoi le rôle d'évaluation ne se trouve pas à donner d'une façon complète, ni surtout compréhensible, les indications qui concernent la totalité de l'immeuble.

En portant au rôle séparément le fonds et les bâtisses dessus construites dans deux endroits distincts, ayant des numéros d'ordre différents et éloignés les uns des autres, et surtout sans référer à aucun numéro cadastral dans l'inscription relative aux bâtisses, la corporation appelante ne s'est pas conformée aux exigences du par. 2 de l'art. 654, et elle a fait des entrées irrégulières, qui ont donné lieu aux conséquences que nous allons maintenant examiner.

D'après l'art. 673 C.M.,

> Après chaque mutation de propriétaire, d'occupant ou de locataire d'un terrain mentionné au rôle d'évaluation en vigueur, le conseil local, sur demande par écrit à cet effet, et sur preuve suffisante, doit biffer le nom de l'ancien propriétaire, occupant ou locataire et y inscrire celui du nouveau.

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Nous avons vu que, dans sa déclaration, la demanderesse-intimée a affirmé qu'elle avait dénoncé son droit de propriété au conseil municipal, mais que ce dernier aurait illégalement omis de la porter au rôle d'évaluation comme propriétaire du fonds et qu'il aurait, sans aucun droit, laissé sur ledit rôle, comme propriétaire du fonds, les propriétaires originaires, en inscrivant l'intimée sur le rôle comme propriétaire des bâtisses sus-érigées.

Or, comme le juge de première instance, nous pensons que l'examen du rôle fait présumer que cette affirmation de l'intimée est exacte. Pourquoi le rôle d'évaluation, à partir de 1920, mentionne-t-il d'abord J.-V. Bélanger Mining Co., Limited, et ensuite la compagnie-intimée, comme propriétaire des bâtisses seulement? L'explication suggérée par l'appelante dans son factum est que cette inscription a dû être faite d'après les renseignements fournis aux évaluateurs par des représentants de la compagnie qui se trouvaient sur les lieux lors de la confection du rôle.

Cette hypothèse n'est pas vraisemblable, car si l'appelante s'était renseignée auprès des représentants de la compagnie-intimée, ces derniers n'auraient pas pu lui dire que la Colonial Chrome Company était simplement propriétaire des bâtisses, car ils n'avaient aucun intérêt à ne pas dénoncer totalement le droit de propriété de l'intimée.

Il résulte plutôt des inscriptions faites au rôle que l'intimée a dénoncé son droit de propriété, conformément aux exigences du Code Municipal.

L'appelante ajoute, dans son factum, que l'on peut, dans certains cas, prétendre qu'une présomption existe que le propriétaire du fonds est le propriétaire des bâtisses, mais qu'il n'y a aucune présomption que le propriétaire des bâtisses soit aussi le propriétaire du fonds.

L'article 414 du Code Civil dit, en effet, que

> La propriété du sol emporte la propriété du dessus et du dessous;

et l'art. 415 ajoute que:

> Toutes constructions, plantations ou ouvrages sur un terrain ou dans l'intérieur, sont présumés faits par le propriétaire, à ses frais, et lui appartenir, si le contraire n'est prouvé.

mais c'est précisément à raison de cette présomption que l'appelante aurait dû indiquer pourquoi elle avait inscrit l'intimée au rôle d'évaluation, comme elle l'a fait, sans en même temps biffer les inscriptions antérieures, en laissant

subsister les noms de Charles A. King et Lady Chapleau comme propriétaires du fonds.

Il me semble que, dans les circonstances, il appartenait à la corporation-appelante de se justifier d'avoir fait les entrées comme elle l'a fait; et, en l'absence d'explications suffisantes, on peut présumer que l'intimée a régulièrement dénoncé ses titres au conseil municipal, que, dans l'application régulière de l'art. 673 C.M., les noms des anciens propriétaires, Charles A. King et Lady Chapleau, auraient dû être biffés, et que l'inscription au nom de l'intimée avait pour but d'indiquer qu'elle était propriétaire de la totalité de l'immeuble, fonds et bâtisses. Il s'ensuivrait, ou bien que l'immeuble figurait au rôle pour le tout au nom de deux propriétaires différents, ou bien que l'inscription aux noms de Charles A. King et Lady Chapleau était une inscription factice, restée là par oubli ou par omission, qui n'aurait pas dû être là et qui ne pouvait servir de base à un rôle de perception, à une imposition de taxes et à une vente pour taxes municipales.

Il faut, en effet, bien considérer que l'inscription au nom de l'intimée, tout en étant irrégulière, parce qu'elle n'y référait pas au numéro cadastral et parce qu'elle ne figurait pas au rôle au numéro d'ordre qu'elle aurait dû avoir (ainsi que nous l'avons indiqué plus haut), était, en soi, suffisamment compréhensive pour faire croire qu'elle comportait la totalité de l'immeuble. Elle était faite de telle façon que, à l'examen du rôle, l'intimée pouvait raisonnablement croire qu'elle indiquait l'immeuble tout entier. Il est vrai que chaque bâtisse y est mentionnée nommément; mais cela s'expliquait par le fait que certaines bâtisses étaient non-imposables, une autre appartenait à un monsieur Gagné (qui était indiquée séparément); et il devenait donc nécessaire d'énumérer les bâtisses à raison desquelles l'intimée était appelée à payer taxes. Au surplus, l'énumération de toutes les constructions sur le terrain, imposables et non imposables, contribuait davantage à donner à cette inscription sur le rôle le caractère d'une entrée qui couvrait la totalité de l'immeuble.

Et cela répond à l'objection de l'appelante qu'il appartenait à la compagnie intimée de surveiller le rôle d'évaluation afin de constater si son nom était bien inscrit comme propriétaire. A la vue du rôle et de l'entrée qui la concer-

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nait, l'intimée était justifiable de croire que l'immeuble tout entier était porté à son nom et n'était pas appelée à aller vérifier si, dans un autre endroit du rôle et à un numéro d'ordre complètement différent, le conseil municipal n'avait pas, par hasard, laissé subsister l'ancienne entrée au nom des anciens propriétaires.

En plus, l'intimée recevait régulièrement, chaque année, ses comptes de taxes municipales et scolaires se rapportant à cet immeuble; et, chaque année, elle acquittait les taxes qui lui étaient réclamées. Comment pouvait-elle supposer que, dans l'esprit du conseil municipal, elle n'était portée au rôle que comme propriétaire des bâtisses, lorsque la vue du rôle lui-même devait raisonnablement lui faire croire le contraire?

L'appelante veut prétendre que les comptes qu'elle adressait à l'intimée ne comportaient que les taxes pour les bâtisses. Aucun compte antérieur à la vente pour taxes n'a été produit. Le seul qui ait été fourni en preuve est celui qui était contenu dans la lettre du 9 octobre 1926. Cette lettre est postérieure à la vente. Elle ne prouve rien à l'égard de cette dernière, ni quant aux faits qui affectent cette cause. En plus, le compte qui y est contenu est, pour le moins, aussi ambigu que le rôle lui-même; et, mis en regard de l'inscription au rôle, il n'était pas susceptible d'apporter à l'intimée une information différente de celle que le rôle lui donnait, et ne voulait pas dire nécessairement que les taxes réclamées se rapportaient uniquement aux bâtisses, à l'exclusion du fonds sur lequel elles étaient érigées. Comme nous l'avons dit, il appert au rôle de perception que l'emplacement du moulin proprement dit était déclaré non imposable. Il appert aussi qu'il y avait sur le lot n° 19 une maison appartenant à un M. Oram Gagné. Comment indiquer, dans les comptes adressés à l'intimée, que le moulin n'était pas taxé et que le compte n'incluait pas non plus les taxes pour la maison Oram Gagné, sinon en décrivant les divers emplacements taxés par la désignation des bâtisses sus érigées? L'intimée était donc parfaitement justifiable de croire que les comptes de taxes qu'elle recevait comprenaient, non seulement les taxes pour les bâtisses, mais aussi pour le fonds sur lequel ces bâtisses étaient situées.

En vue de tout ce qui précède, il ne nous paraît pas que l'intimée puisse être blâmée et puisse souffrir de ne pas s'être plainte du rôle d'évaluation tel qu'il était fait.

Il se peut cependant que la seule raison des irrégularités foncières que nous constatons au rôle n'eût pas été suffisante en soi pour faire mettre de côté la vente pour taxes et qu'elle eût plutôt donné un recours en dommages contre la corporation municipale appelante.

Nous ne croyons pas qu'il soit nécessaire de nous prononcer sur ce point dans la cause actuelle, qui est avant tout une cause d'espèce; et nous préférons réserver notre opinion sur cette question, car nous croyons que la vente doit être mise de côté pour le motif qui a été retenu à la fois par la Cour Supérieure et par la majorité de la Cour du Banc du Roi et qu'il nous reste à exposer. Nous nous sommes expliqués longuement sur toutes ces questions concernant la confection du rôle, pour bien démontrer que, à notre avis, le conseil local de la corporation appelante doit être tenu pour avoir eu connaissance de tous les faits relatifs au titre de propriété de l'immeuble dont il s'agit.

Ce qui est décisif, c'est que le rôle d'évaluation faisait, au moins, voir que la totalité de l'immeuble qui a fait l'objet de la vente municipale pour taxes était possédée, à titre de propriétaires, à la fois par Charles A. King et Lady Chapleau d'une part, et par Colonial Chrome Co., Ltd., d'autre part.

En préparant, au mois de novembre, l'état mentionné à l'art. 726 du Code municipal, le secrétaire-trésorier de la corporation appelante devait indiquer

les noms et états de toutes personnes endettées envers la corporation pour taxes municipales, *tels qu'indiqués au rôle d'évaluation,* s'ils y sont entrés;

et, d'après l'art. 729, le secrétaire-trésorier de la corporation de comté devait préparer, conformément à cet état qui lui avait été transmis par le secrétaire-trésorier local, et devait publier, par avis suivant les formalités prévues au Code municipal, la liste des immeubles qui devaient être vendus à l'enchère publique pour les taxes auxquelles ils étaient affectés. Cette liste devait indiquer

la désignation de tous les immeubles situés dans la municipalité du comté et affectés au paiement de taxes municipales ou scolaires dues, avec les noms des propriétaires, *tels qu'indiqués au rôle d'évaluation.*

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L'avis de vente et de publication démontre que l'immeuble en litige a été annoncé en vente comme suit:—

Municipalité	Canton	Propriétaires	Rang	Lot	Etendue
par. de of	Coleraine	Chas. A. King Lady Chapleau	10	½ S.E. 19	360

Taxes
$96.90

L'acte d'adjudication

cède, transporte et vend * * * ce certain lot de terre situé dans le canton de Coleraine dans le comté de Mégantic, connu et désigné comme la moitié sud-est du lot nº 19 du 10e rang du canton de Coleraine, contenant 360 acres, plus ou moins.

L'appelante a donc annoncé en vente, et a vendu, le lot tout entier, sans aucune indication à l'effet que les bâtisses dessus construites étaient exclues de la vente.

Or, d'après le sous-paragraphe 28 de l'art. 16 du Code Municipal,

le mot "lot" désigne tout terrain situé dans un rang * * * avec (les) bâtiments et autres améliorations.

Cet article est d'ailleurs conforme aux principes du Code Civil en vertu desquels

La propriété du sol emporte la propriété du dessus et du dessous

et

Toutes constructions, plantations et ouvrages sur un terrain ou dans l'intérieur sont présumés faits par le propriétaire, à ses frais, et lui appartenir, si le contraire n'est prouvé

tel que le comportent les articles 414 et 415, auxquels nous avons déjà référé.

Il est clair, par conséquent, que, pour effectuer légalement une vente pour taxes de l'immeuble dont il s'agit, et pour désigner cet immeuble, depuis les procédures initiales de la vente jusqu'à l'adjudication, conformément aux exigences du Code Municipal, c'est-à-dire en le désignant "tel qu'indiqué au rôle d'évaluation", il était essentiel, en l'espèce, de préciser que le fonds seul du lot devait faire l'objet de la vente et que les bâtisses en seraient exclues. C'était la seule façon de se conformer aux inscriptions du rôle d'évaluation, en les interprétant de la façon la plus favorable à la corporation appelante. En annonçant et en vendant le lot d'après la définition même qui en est donnée dans le Code municipal, on a annoncé et on a vendu également les bâtisses qui s'y trouvaient construites et qui, d'après le rôle, appartenaient à la compagnie intimée. On a donc annoncé et vendu comme un seul tout un immeuble qui comprenait des propriétés portées au rôle lui-même aux

noms de personnes qui n'ont été mentionnées nulle part dans aucune des procédures ou des actes relatifs à cette vente; et, ce qui est plus grave, des propriétés appartenant à des personnes qui n'étaient pas "endettées envers la corporation pour taxes municipales" (C.M. arts. 726, par. 1, 727, 728 et 729), et alors que, au contraire, toutes les taxes avaient été payées. Nous sommes d'accord avec la Cour Supérieure et la majorité de la Cour du Banc du Roi pour dire qu'une pareille vente est nulle *ab initio,* d'une nullité radicale et absolue. Il y avait donc lieu, sur ce point, de maintenir l'action de l'intimée en déclaration de nullité.

Troisième question:—L'action était-elle prescrite aux termes de l'art. 747 C.M.?

Cet article se lit comme suit:

> L'action pour faire annuler une vente d'immeubles faite en vertu des dispositions du présent chapitre, ou le droit d'en invoquer l'illégalité, se prescrit par deux ans à compter de la date de l'adjudication.

Le Cour Supérieure, ainsi que la Cour du Banc du Roi, ont, toutes deux, répondu dans la négative; et nous sommes d'avis qu'elles ont eu raison.

L'article parle des actions "pour faire annuler une vente", ou du "droit d'en invoquer l'illégalité". Il ne s'agit pas ici d'une simple illégalité, non plus que d'une action pour faire annuler la vente. Comme nous l'avons dit plus haut, nous sommes en présence d'une vente absolument nulle, et nulle *ab initio,* parce que, depuis le commencement jusqu'à la fin, les conditions ne se sont jamais rencontrées pour que l'immeuble tel qu'il a été vendu puisse faire l'objet d'une vente municipale pour taxes. L'appelante a vendu comme incorporée à un tout indivis une propriété qui appartenait à l'intimée, qui n'a pas été désignée telle qu'indiquée au rôle d'évaluation et qui ne devait aucune taxe. Cette vente n'était pas seulement annulable; elle était, légalement parlant, inexistante; et la Cour n'avait pas besoin de l'annuler; elle n'avait qu'à en constater la nullité, et à déclarer cette nullité.

En arrivant à cette conclusion, nous nous conformons à une ancienne jurisprudence de la province de Québec, qui ne semble pas avoir été désavouée jusqu'à présent.

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LA CORP. DE LA PAR. DE ST-JOSEPH DE COLERAINE v. COLONIAL CHROME CO. LTD.

St-Germain, J.

Dans une cause de *Lovell v. Leavitt* (1), la Cour du Banc du Roi, en 1893, interprétant cet article 747, s'exprime comme suit dans deux des considérants de son jugement:—

Considérant que d'après l'art. 1591 C.C., les règles applicables aux ventes forcées, en vertu des dispositions du code municipal sont celles applicables généralement au contrat de vente, et qu'en vertu de l'art. 1487 C.C., une vente faite *super non domino et non possidente* est absolument nulle;

Considérant qu'en conséquence la vente invoquée par l'intimé n'a pu lui conférer, non plus qu'à ses auteurs, aucun droit sur le terrain revendiqué, et que la prescription de l'art. 1015 du code municipal ne peut être invoquée pour couvrir ladite nullité;

Maintient l'appel * * *

Il n'est pas sans à propos de rapporter ici les remarques de monsieur le juge Blanchet dans cette cause:

Mais l'intimé invoque un autre moyen: Il prétend que la vente municipale est une vente publique, notifiée au régistrateur du comté, qui l'enregistre; que Davis et ses ayants cause n'ayant pas jugé à propos de retraire ou de racheter le lot en question dans le délai de deux ans fixé par l'article 1008, l'acte de vente qui en a été consenti par la corporation du comté de Compton lui a transféré, comme cessionnaire de l'adjudicataire, la propriété absolue de ce quart de lot, et que, d'après l'article 1015, l'action pour faire annuler une semblable vente ou le droit d'en invoquer l'illégalité se prescrivant par deux ans, à compter de la date de l'adjudication, l'appelant n'a plus le droit, ce délai expiré, de demander, ainsi qu'il le fait, la nullité de la vente en question.

Il s'agit, comme on le voit, de déterminer quel est l'effet ou l'étendue de cette disposition exorbitante du droit commun et qui, par conséquent, doit être interprétée strictement.

Les termes de cet article: l'action pour faire annuler la vente ou le droit d'en invoquer l'illégalité, sont-ils suffisamment clairs pour autoriser les tribunaux à déclarer qu'ils couvrent non seulement les irrégularités et les informalités qui peuvent se rencontrer dans les procédés des conseils relativement à ces ventes, mais même les nullités absolues résultant de l'omission des formalités requises lorsqu'il doit nécessairement en résulter de graves injustices.

Ne serait-ce pas faire dire à la loi, contrairement aux principes élémentaires de saine législation, qu'elle a voulu encourager par une protection spéciale, l'inobservation de ses dispositions? Une semblable interprétation ne nous paraît pas autorisée par le texte même de cet article. Elle serait contraire non seulement aux règles ordinaires du code civil et du code de procédure, mais à l'ensemble des dispositions du code municipal lui-même qui déclare, à l'art. 16, que des objections à la forme peuvent être admises, si une injustice réelle doit résulter de leur rejet, et que l'omission de formalités, mêmes impératives, donne lieu, dans le même cas, à la même exception qu'aurait celui qui invoquerait une nullité formellement prononcée par le code.

Dans le cas actuel, il s'agit d'une injustice qui, si elle était consacrée, permettrait à un débiteur récalcitrant ou malhonnête de payer ses dettes avec le bien d'autrui et un propriétaire se verrait ainsi dépouillé de ses droits en vertu de procédés sommaires non autorisés par la loi.

(1) [1893] Q.R. 2 Q.B. 324

En présence d'un texte qui est loin d'être explicite, nous préférons lui donner une interprétation restreinte et conforme à l'esprit général de notre droit sur des sujets analogues.

Nous n'avons guère d'hésitation à en arriver à cette conclusion, car les procédés du conseil de Clifton, quant à la confection des rôles de perception relativement aux taxes réclamées de Davis, sont tellement irréguliers qu'il est possible de prétendre qu'il n'ont jamais eu d'existence légale et l'adjudicataire du terrain réclamé qui n'a jamais tenté de se mettre en possession, ne paraît pas même avoir payé les taxes dues depuis la vente avant d'obtenir son titre définitif, ces taxes ayant toujours été payées depuis par l'appelant sans protêt de la part de la corporation de Clifton.

Nous sommes d'avis que l'appel doit, en conséquence, être maintenu et l'action de l'intimé renvoyée.

Deux autres jugements dans le même sens sont cités par l'intimée: *Bartley v. Boon* (1) et *Coady v. Cité de Montréal* (2).

Les deux premières décisions sont bien antérieures au nouveau code municipal qui est devenu en force en 1916. Il n'est pas à présumer que les commissaires qui ont été chargés de la rédaction de ce code ignoraient alors cette ancienne jurisprudence, et s'ils n'ont pas jugé à propos de changer le texte de l'art. 747 qui correspond à l'ancien art. 1015, c'est qu'ils en sont venus à la conclusion que l'interprétation jusqu'alors donnée par nos tribunaux était conforme à l'intention du législateur. A ce sujet, nous ne saurions mieux faire que de référer aux remarques de monsieur le juge Rinfret dans la cause de la *Corporation du village de la Malbaie v. Bouliane* (3).

Pour toutes ces raisons, je suis encore d'avis que ce troisième moyen invoqué par l'appelant n'est pas fondé.

Je renverrais donc l'appel avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Louis Morin.*

Solicitors for the respondent: *Rémillard & Boisvert.*

(1) [1874] 1 Q.L.R. 33. (2) [1915] 22 R.L. n.S. 67.
(3) [1932] S.C.R. 389.

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*Oct. 13, 14.
*Nov. 28.

ARVO VAARO, STEFAN WOROZCYT, AND OTHERS ..... } APPELLANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Aliens—Immigration Act, R.S.C., 1927, c. 93, ss. 41, 42, 21—Complaint—Warrant—Examination by Board of Enquiry—Resolution for deportation—Appeal to Minister—Detention—Habeas corpus—Sufficiency of complaint—Examination of evidence.

Each of the appellants was taken into custody under a warrant or order issued under s. 42 of the *Immigration Act* (R.S.C., 1927, c. 93), pursuant to a complaint, by the Commissioner of Immigration, expressed to be "made under section 41 of the Immigration Act and Regulations that (appellant) is a person other than a Canadian citizen, who advocates in Canada the overthrow by force or violence of the Government of Canada, the overthrow by force or violence of constituted law and authority and by word or act creates or attempts to create riot or public disorder in Canada." A Board of Enquiry found each appellant guilty of the acts alleged in the complaint and passed a resolution for his deportation. Each appellant appealed to the Minister of Immigration and Colonization, and also, before the Minister's decision, applied for discharge from custody under the *Liberty of the Subject Act*, R.S.N.S., 1923, c. 231, and obtained *ex parte* an order *nisi* in the nature of *habeas corpus* with *certiorari* in aid. To this order the Board made its return. Carroll J. refused the applications (5 M.P.R. 151), his decision was affirmed by the Supreme Court of Nova Scotia *en banc* (*ibid*), and appellants appealed to this Court.

Held: Appellants were entitled to apply to the court. Broadly speaking, every alien who has been admitted into and is actually in Canada and who has been taken into custody on a charge for which he may be deported, is entitled to the benefit of the writ of *habeas corpus* to test in court if his detention is according to law.

Appellants' detention was authorized under the *Immigration Act*, and their applications for release were rightly dismissed.

The complaint was sufficient, notwithstanding that it did not state the date when, or the particular place where, the acts charged had been committed. All that is necessary is that it makes known with reasonable certainty to the person against whom the investigation is directed his alleged conduct, in violation of the Act, to which objection is taken. (*Samejima* v. *The King*, [1932] Can. S.C.R. 640, distinguished). There is no analogy between a complaint under the *Immigration Act* and an indictment on a criminal charge (*The King* v. *Jeu Jang How*, 59 Can. S.C.R. 175, *Immigration Act*, ss. 33 (2), 42 (2), referred to). Moreover, the objection of insufficiency in the complaint was not open to appellants because (1) they did not challenge the return, which stated that the case was considered by a Board of Enquiry con-

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

stituted under the provisions of the *Immigration Act*, and, under English law, the facts stated in a return to a writ of *habeas corpus* or order in lieu thereof are taken to be true until impeached; and (2) in the proceedings before Carroll J. and the Court *en banc* they did not question the regularity or sufficiency of the complaint or the warrant; and, before this Court, they stated they were not impeaching the validity of the warrant.

After the Board's decision, and pending the Minister's decision on the appeals to him, the appellants were lawfully detained under s. 21 of the *Immigration Act*.

The court was not entitled to examine the evidence as to its sufficiency to justify the Board's decision (*McKenzie* v. *Huybers*, [1929] Can. S.C.R. 38; *Samejima* v. *The King*, [1932] Can. S.C.R. 640, referred to).

APPEALS (consolidated) from the judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing the present appellants' appeals from the judgment of Carroll J. (1) refusing the appellants' applications, on the return of an order *nisi* in the nature of *habeas corpus* under the provisions of the *Liberty of the Subject Act*, R.S.N.S., 1923, c. 231, to discharge them from custody. They were kept in custody under the provisions of the *Immigration Act*, R.S.C., 1927, c. 93. The material facts of the case are sufficiently stated in the judgment now reported. The appeals to this Court were dismissed.

L. A. Ryan and *M. Garber* for the appellants.

C. B. Smith K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—This is an appeal by Stefan Worozcyt and seven others from the judgment of the court *en banc* of *Nova Scotia* (1) affirming the judgment of Mr. Justice Carroll (1) who refused the appellants' application for their discharge from custody. The facts briefly are as follows:—

Each of the appellants was taken into custody by virtue of a warrant or order issued by the Deputy Minister of Immigration and Colonization under the provisions of section 42 of the *Immigration Act* (R.S.C., 1927, ch. 93) pursuant to a complaint by the Commissioner of Immigration. The complaint in the case of Stefan Worozcyt reads as follows:—

To the Minister of Immigration and Colonization.

Complaint is hereby made under Section 41 of the Immigration Act and Regulations that Steve Worozcyt, Montreal, is a person other than a

(1) (1932) 5 M.P.R. 151.

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Canadian citizen, who advocates in Canada the overthrow by force or violence of the Government of Canada, the overthrow by force or violence of constituted law and authority and by word or act creates or attempts to create riot or public disorder in Canada.

Sgd. A. L. Joliffe,
Commissioner of Immigration.

The complaint in the case of each of the other appellants was to the same effect.

The warrant described the offence practically in the terms of the complaint and directed that the person charged therein "be taken into custody and detained for examination and an investigation of the facts alleged in" the complaint. The examination was to be made by a Board of Inquiry or officer acting as such.

On arrest each appellant was conveyed to the immigration station at Halifax and there brought before a Board of Inquiry and informed of the complaint against him. He was given the opportunity of having counsel and three of them in fact had counsel at the hearing. Each was separately examined by the Board of Inquiry as to the charges alleged in the complaint and each was found guilty of the acts therein stated, and a resolution for his deportation was passed. After the resolution had been carried the Chairman of the Board stated to each of the appellants that he had a right to appeal from the decision of the Board to the Minister of Immigration and Colonization. They all appealed and the appeals are still pending before the Minister. Section 20 of the Act provides that notice of appeal shall act as a stay of all proceedings until a final decision is rendered by the Minister.

Instead of waiting for the decision of the Minister, each of the appellants made an application to Mr. Justice Carrol in Chambers for his discharge from custody under and by virtue of the provisions of the *Liberty of the Subject Act* (R.S.N.S., 1923, ch. 231), and obtained *ex parte* an order *nisi* in the nature of *habeas corpus* with *certiorari* in aid. The order in the Worozcyt case directed that the Board of Inquiry "do have before me or such other Judge of the Supreme Court as may be presiding in chambers at the County Court House, Spring Garden Road in the City of Halifax, on Monday, the 16th day of May, A.D. 1932, at the hour of 11 o'clock * * *."

(*a*) the body of Stefan Worozcyt with the cause of his detention;

(*b*) the warrant of the Deputy Minister, and

(*c*) the depositions, minutes of evidence, minutes of proceedings and all such other orders and proceedings had and taken before the Board of Inquiry respecting the detention of said Stefan Worozcyt.

To this order the Board certified a return which, *inter alia,* set out:—

2. That the applicant is now detained in custody by virtue of the warrant or order of the Deputy Minister of Immigration and Colonization under the provisions of the *Immigration Act.*

3. That Exhibit "A" is a true copy of the said warrant or order.

4. That Exhibit "B" is a true copy of the complaint upon which the warrant or order was granted.

5. That on May 2nd, 1932, the case of the said applicant was considered by a Board of Inquiry constituted under the provisions of the said *Immigration Act,* and that Exhibit "C" is a copy of the record of the proceedings and the decision of the Board.

6. That the said applicant has appealed from the said decision of the Board to the Minister under the provisions of section 19 of the said Act, and the Minister has not yet rendered decision in the said appeal.

7. Pending the decision of the Minister the said applicant is kept in custody at the Immigration Station at Halifax aforesaid under the provisions of section 21 of the said Act.

On perusing the return made by the Board, Mr. Justice Carroll dismissed the application of each of the appellants and his decision was unanimously affirmed by the court *en banc.* The appellants now appeal to this court.

Although the applications were made by the appellants individually, they have been consolidated and this appeal includes them all.

That the appellants were acting within their rights in making their applications to the court is, I think, not open to dispute. Broadly speaking, every alien, who has been admitted into and is actually in Canada and who has been taken into custody on a charge for which he may be de-

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ported, is entitled to the benefit of the writ of *habeas corpus* to test in court if his detention is according to law. If it is not, the applicant may be released. If, however, his detention is authorized by law his application must be refused.

It is generally considered that by the law of nations the supreme power in every state has the right to make laws for the exclusion and expulsion of aliens and to provide the machinery by which these laws can be effectively enforced. In the distribution of legislative powers between the Dominion and the provinces made by the *B.N.A. Act,* 1867, the exclusive legislative jurisdiction over "naturalization and aliens" was given to the Dominion (section 91 (25)). In the exercise of the power thus given Parliament passed the *Immigration Act.* The question, therefore, in this appeal, is whether the *Immigration Act* authorizes the detention of the appellants.

Section 41 of the Act provides that any person guilty of the acts therein described (among which are those alleged against the appellants in the complaints) shall, for the purposes of the Act, be considered and classed as an undesirable immigrant, and that it is the duty of every officer becoming cognizant thereof, and the duty of the officials of the municipality wherein such person may be, to forthwith send a written complaint thereof to the Minister, *giving full particulars.* Then section 42 provides:—

> 42. Upon receiving a complaint from any officer, or from any clerk or secretary or other official of a municipality against any person alleged to belong to any prohibited or undesirable class, the Minister or the Deputy Minister may order such person to be taken into custody and detained at an immigrant station for examination and an investigation of the facts alleged in the said complaint to be made by a Board of Inquiry or by an officer acting as such.
>
> * * * * *
>
> 3. If upon investigation of the facts such Board of Inquiry or examining officer is satisfied that such person belongs to any of the prohibited or undesirable classes mentioned in the two last preceding sections of this Act, such person shall be deported forthwith, subject, however, to such right of appeal as he may have to the Minister.

Up to the decision of the Board of Inquiry there can be no question that the appellants were properly detained under the warrant of the Deputy Minister provided the conditions precedent called for by the Act had been complied with.

The only grounds upon which the appellants challenge the judgments below are:

1. That the complaint was bad in that it did not set out full particulars of the offences alleged, that is to say it did not state the date when, and the place where, the appellant had been guilty of the acts charged in the complaint, and

2. That the evidence did not warrant the findings of the Board.

The first of the above grounds is really not open to the appellants, because,

1. They do not challenge the return, which states that the case was considered by a Board of Inquiry constituted under the provisions of the *Immigration Act,* and, under English law, the facts stated in a return to a writ of *habeas corpus* or order in lieu thereof, will be taken to be true until impeached. Short & Mellor's Practice of the Crown Office, 2nd ed., page 326.

2. In all the proceedings before Mr. Justice Carroll and the court *en banc,* they did not question the regularity or sufficiency of the complaint or the warrant of the Deputy Minister, and, even on the opening of the argument before us, the leading counsel for the appellants stated that he was not impeaching the validity of the warrant. If the warrant is valid so also must be the complaint upon which it is founded.

Assuming, however, that the objection had been taken before Mr. Justice Carroll and was still open to the appellants, it cannot, in my opinion, prevail. A perusal of section 41 shews that the particulars called for by that section can only be those in the possession of the officer or official making the complaint. The Act does not call for an investigation by the officer or official to ascertain the particular place where, or the particular time when, the act alleged against the immigrant was committed. These particulars are within the knowledge of the immigrant himself. The very fact that the appellants did not challenge the complaint until now shews that they understood it and did not consider they were prejudiced through lack of particulars. In fact, until near the close of the argument before us, the appellants' objection to the complaint was not that it contained insufficient particulars but that it contained a

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multiplicity of charges—a contention subsequently withdrawn.

All that is necessary, in the complaint, in my opinion, is that the allegation shall make known with reasonable certainty to the person against whom the investigation is directed, the conduct on his part, in violation of the Act, to which objection is taken. There is no analogy between a complaint under the *Immigration Act* and an indictment on a criminal charge. *The King* v. *Jeu Jang How* (1). In the latter case the Crown cannot compel the accused to go into the witness box and answer all questions put to him, while, under the *Immigration Act,* the immigrant is detained "for examination and an investigation" into the facts alleged, and he must answer the questions put to him. (Section 33 (2) and section 42 (2).) The object of making provision for a Board of Inquiry is to have at hand a tribunal which can without delay inquire into the truth of the allegations made in the complaint. In many cases the immigrant himself must necessarily be the chief witness.

It was argued that the complaint in this case brought it within the principle of *Samejima* v. *The King* (2). In my opinion there is no similarity whatever: in the *Samejima* case (2) the complaint was that Samejima "was in Canada contrary to the provisions of the *Immigration Act,* and had effected entrance contrary to the provisions of section 33, subsection (7) of the said Act." Such a complaint did not inform the immigrant of the charge made against him and which he had to meet; while in the case before us the complaint sets out in clear and unambiguous language, in fact in the very words of the statute, the acts charged against these appellants. This ground of appeal therefore fails.

The complaint and other proceedings up to the time the Board gave its decision being valid, there was statutory authority for detaining the appellants under the warrant of the Deputy Minister. After the Board gave its decision the appellants appealed to the Minister. That brought section 21 into play. It reads:—

> 21. Pending the decision of the Minister, the appellant and those dependent upon him shall be kept in custody at an immigrant station, unless released under bond as hereinafter provided.

(1) (1919) 59 Can. S.C.R. 175. (2) [1932] Can. S.C.R. 640.

As the Minister has not yet given his decision the appellants are lawfully detained, as the return states, by virtue of this section. Their applications for release were, therefore, rightly dismissed.

The second ground of appeal—that the evidence does not warrant the finding of the Board, must also, in my opinion, be determined against the appellants.

As a general rule in *habeas corpus* matters we are not entitled to look at the evidence to see if it is sufficient to justify the decision arrived at. In *McKenzie* v. *Huybers* (1), the appellants were imprisoned under the *Collection Act,* R.S.N.S., 1923, c. 232, for fraudulently contracting a debt which formed the subject of a judgment in the Supreme Court of Nova Scotia, they " intending at the time of the contracting of said debt not to pay the same." The appellants made an application to Mr. Justice Mellish for discharge from custody. He refused their application. There was then an appeal to the court *en banc* and, by special leave, to this court. In giving the judgment of this court, Anglin, C.J., said:—

> The evidence cannot be gone into for the purpose of ascertaining whether there was anything in it to warrant the finding of fraud.

See also *Samejima* v. *The King* (2).

Moreover, the appellants having appealed from the decision of the Board of Inquiry to the Minister, the sufficiency of the evidence is a matter with which the Minister can deal in the appeal but unless he reverses the finding of the Board its decision is final.

The appeal must therefore be dismissed.

Appeals dismissed.

Solicitor for the appellants: *L. A. Ryan.*

Solicitor for the respondent: *C. B. Smith.*

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(1) [1929] Can. S.C.R. 38. (2) [1932] Can. S.C.R. 640.

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*Nov. 2.
*Nov. 28.

RAOUL TREMBLAY (DEFENDANT).....APPELLANT;

AND

DUKE-PRICE POWER CO. (PLAINTIFF). RESPONDENT

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

Appeal—Jurisdiction—Judgment by appellate court quashing appeal for failure to give security—Matter in controversy—Supreme Court Act, section 39.

The appellant, having appealed from a judgment of the Superior Court and having apparently failed to give security within the delays prescribed by the code, the respondent obtained a certificate of default from the prothonotary and moved the appellate court to have the appeal declared abandoned. The appellate court granted the motion and from that judgment the appellant appealed to this court.

Held that there is no jurisdiction in this court to entertain the appeal. —In appeals from judgments upon demurrers or from judgments dismissing actions upon points of law, the title to the relief claimed is in controversy. Here, the only question involved is the regularity of the particular proceedings in appeal. *Gatineau Power Co.* v. *Cross* [1929] Can. S.C.R. 35 followed.

MOTION to quash for want of jurisdiction an appeal from a decision of the Court of King's Bench, appeal side, Province of Quebec, quashing an appeal to that court for failure by the appellant to give security.

Aimé Geoffrion, K.C., for the motion.
Gustave Monette, K.C., contra.

The judgment of the court was delivered by

RINFRET J.—Under the Code of Civil Procedure of the province of Quebec, proceedings in appeal must be brought within thirty days from the date of the judgment of first instance. They are brought by means of an inscription filed in the office of the court which rendered the judgment and, within prescribed delays, the appellant must give good and sufficient security that he will effectually prosecute the appeal and that he will satisfy the condemnation and pay all costs and damages adjudged in case the judgment appealed from is confirmed. (Arts. 1209, 1213 and 1214, C.C.P.)

If security be not given within the prescribed delays, the opposite party may obtain from the prothonotary a certifi-

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crockett JJ.

cate of default and the inscription in appeal is thereupon held to be abandoned and of no effect, *saving any recourse which may appertain to the appealing party* (Art. 1213, C.C.P.)

In this case, the appellant, having appealed from the judgment of the Superior Court, sitting in the city of Quebec, apparently failed to give security within the delays, the respondent obtained a certificate of default from the prothonotary and moved the Court of King's Bench (appeal side) to have the appeal declared abandoned. Whereupon that court rendered the following judgment:—

Considérant que le cautionnement requis par l'article 1214 du Code de procédure civile, sur le présent appel, n'a pas été fourni dans les délais prescrits par l'article 1213 du dit code;

Considérant que l'intimé a obtenu du protonotaire de la Cour Supérieure, un certificat constatant le défaut de l'appelant de fournir tel cautionnement;

Considérant que le présent appel est ainsi déserté à la suite de l'obtention du dit certificat;

La dite inscription en appel est déclarée désertée et la présente requête de l'intimée pour rejet d'appel, est accordée avec dépens.

The appeal to this Court is from the above judgment and the respondent moves to quash for want of jurisdiction on the ground, amongst others, that there is no amount involved in the appeal and that special leave was not obtained.

For the purposes of appeal to this Court, "the amount or value of the matter in controversy" depends, not on what is claimed in the action, but on what may be contested in the proposed appeal (*Dreifus* v. *Royds* (1); *Jack* v. *Cranston*) (2).

The only matter in controversy in this appeal is whether the Court of Appeal rightly decided that the appellant's proceedings should be held to have been abandoned, in view of the special provisions of the Code of Civil Procedure.

The question whether there exists jurisdiction in this Court to entertain an appeal of that kind is concluded by our decision in *Gatineau Power Co.* v. *Cross* (3). In fact the situation there was even more favourable to the appellant than it is here. In the *Gatineau Power* case (3), the matter in controversy was the right of appeal to the Court

(1) (1922) 64 Can. S.C.R. 346. (2) [1929] Can. S.C.R. 503.
(3) [1929] Can. S.C.R. 35.

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of King's Bench, and it was decided that "such right was not appreciable in money." In the present appeal, the only point involved is the regularity of the appellant's particular proceedings before the Court of King's Bench. His right of appeal is not in question. If he was still within the delays, he might yet have filed a new inscription, as, under art. 1213, the proceedings are held abandoned, "saving any recourse which may appertain to the appealing party".

If, in the premises, the appellant is deprived of the means to effectively prosecute his appeal, it is not the direct result of the judgment appealed from, but only the collateral or consequential effect of that judgment in the special circumstances (*Bulger* v. *Home Insurance Co.*) (1).

The present appeal, contrary to what the appellant urged before us, cannot be assimilated to appeals from judgments upon demurrers or from judgments dismissing actions upon a plea of prescription or upon other points of law. That question was discussed in *Davis* v. *Royal Trust* (2), where reference was made to *Ville de St. Jean* v. *Molleur* (3) and to *Dominion Textile Co.* v. *Skaife* (4). In appeals of that character the right of action is involved; the matter in controversy is the title to the relief claimed. Judgments upon these matters, to borrow the expression of Lord Watson (*Dechêne* v. *City of Montreal*) (5), have "reference to the title or want of title in the plaintiff to institute and maintain" his suit. So that the amount or value involved in such appeals is the amount or value of the title to the claim itself. Here, the utmost relief which the appellant can obtain on the appeal is merely the right to have the Court of King's Bench entertain his particular proceedings before that court. The original claim of the appellant is not before us for judicial determination.

The motion of the respondent should be allowed and the appeal quashed with costs.

Motion granted with costs.

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(1) [1927] Can. S.C.R. 451, at 453.

(2) [1932] Can. S.C.R. 203, at p. 209.

(3) (1908) 40 Can. S.C.R. 139.

(4) [1926] Can. S.C.R. 310.

(5) [1894] A.C. 640 at p. 645.

THE BOARD OF TRUSTEES OF THE ACME VILLAGE SCHOOL DISTRICT No. 2296, OF THE PROVINCE OF ALBERTA (DEFENDANT)..... APPELLANT;

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*Oct. 12, 13.
*Dec. 23.

AND

JOHN STEELE-SMITH (PLAINTIFF) .. RESPONDENT.

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

Statutes—Construction—Retrospective operation—School Act, Alta., 1931, c. 32, s. 157—Provision requiring inspector's approval before notice terminating teacher's engagement—Its application as to engagements entered into prior to its enactment.

The provision in s. 157 of the Alberta *School Act, 1931,* that, except in the month of June, no notice terminating a teacher's engagement should be given by a school board without the approval of an inspector previously obtained, which provision was first introduced into the school law by said Act (1931, c. 32), which replaced the former Act (R.S.A., 1922, c. 51), was *held* to apply in regard to the termination (after said Act of 1931 came into force) of an agreement of engagement entered into prior to the enactment of said provision.

Judgment of the Appellate Division, Alta., [1932] 1 W.W.R. 849, [1932] 3 D.L.R. 262, affirming judgment of Ewing J., [1932] 1 W.W.R. 315, affirmed.

Rinfret J. dissented.

APPEAL by the defendant (by leave given by the Appellate Division, Alta.) from the judgment of the Appellate Division of the Supreme Court of Alberta (1), dismissing its appeal from the judgment of Ewing J. (2), answering in favour of the plaintiff the questions submitted in a special case stated for the opinion of the court, pursuant to Rule 114 of the Alberta Rules of Court.

The defendant Board and the plaintiff entered into an agreement dated June 28, 1929, whereby the Board agreed to employ the plaintiff as teacher from and after September 3, 1929. Clause 6 of the agreement provided:

6. This agreement shall continue in force from year to year, unless it is terminated as hereinafter provided, or unless the Certificate of the Teacher has been revoked in the meantime.

Either party hereto may terminate the agreement by giving thirty (30) days' notice in writing to the other party:

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

(1) [1932] 1 W.W.R. 849; [1932] 3 D.L.R. 262.
(2) [1932] 1 W.W.R. 315.

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Provided that no such notice shall be given by the Board until the Teacher has been given the privilege of attending a meeting of the Board (of which five clear days' notice in writing shall be given to the Teacher) to hear and to discuss its reasons for proposing to terminate the agreement .

The following is stated in the special case (which is dated November 18, 1931):

"2. The defendant desiring to terminate the said agreement complied with the provisions of paragraph 6 thereof in the following manner, namely, that the plaintiff was given the privilege of attending a meeting of the Board, of which five clear days' notice in writing was given to the plaintiff by service of a notice to that effect upon him, which meeting was held to hear and to discuss its reasons for proposing to terminate the agreement, such notice being served on or about the 4th day of July, 1931, and a meeting was held pursuant to such notice on the 14th day of July, 1931, at Acme, in the province of Alberta, and a resolution having been passed by the defendant Board that the said agreement should be terminated, a notice was duly served upon the plaintiff by the defendant Board on or about the 18th day of July, 1931, notifying the plaintiff that the agreement would be terminated at the expiration of such period of thirty days from the date of service of said notice, no approval of an inspector having been previously obtained by the defendant Board.

"3. The plaintiff brings this action complaining that the said agreement has been wrongfully terminated in that the provisions of The School Act, Statutes of Alberta (1931), Chapter 32, Section 157, have not been complied with by the defendant in giving such notice of termination.

"4. The questions for the opinion of the Court are:

(1) Can the agreement in question be terminated by compliance only with the provisions of Section 6 thereof?

(2) Are the provisions as to termination of an agreement, as set forth in The School Act, Statutes of Alberta (1931), Chapter 32, Section 157, applicable to an agreement entered into between a teacher and a Board of School Trustees in the province of Alberta prior to the 1st day of July, 1931?

The said Act, c. 32 of 1931, was assented to on March 28, 1931, and came into force on July 1, 1931.

(Said section 157 has since been amended by c. 34 of 1932).

Ewing J. answered the first question in the negative and the second question in the affirmative, and his decision was affirmed by the Appellate Division. By the judgments now reported, the appeal to this Court was dismissed with costs, Rinfret J. dissenting.

H. E. Crowle for the appellant.

O. M. Biggar, K.C., for the respondent.

LAMONT, J.—I agree with the conclusion of my brother Crocket. Section 157 of the present School Act of Alberta came into force on July 1, 1931. It, in part, reads as follows:—

157. Subject to the conditions hereinafter set out in this section, either party thereto may terminate the agreement of engagement between the teacher and the Board by giving thirty days' notice in writing to the other party of his or its intention so to do;

Provided always:

(*a*) that except in the month of June no such notice shall be given by a Board without the approval of an inspector previously obtained;

(*b*) that except in the months of June and July no notice of the termination of a contract shall be given by a teacher without the approval of an inspector previously obtained;

The School Act of 1931 repealed the School Act in force prior to that time (R.S.A. 1922, c. 51). Under the former Act the agreement of engagement between a teacher and the Board of Trustees of a school could be terminated by either party giving to the other party thirty days' notice in writing of his or its intention to terminate it unless otherwise provided in the agreement. In this action the agreement of hiring between the teacher and the Board was entered into in 1929. In the month of July, 1931, the appellant gave notice to the respondent that the agreement between them would be terminated at the expiration of thirty days. Therefore the question for determination is, whether or not the appellant, in July, 1931, could give a valid notice terminating the agreement without having previously secured the approval of the inspector.

The question involves the construction of section 157. In the *Sussex Peerage* case (1), Lord Chief Justice Tindal, in delivering the opinion of the judges, said:—

(1) (1844) 11 Cl. & F. 85, at 143; 8 E.R. 1034, at 1057.

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My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

If, however, any doubt as to the legislative intention exists after a perusal of the language of the Act, then, as Lord Hatherly, L.C., said in *Pardo* v. *Bingham* (1):—

We must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated.

In this Court in the case of *Upper Canada College* v. *Smith* (2), Mr. Justice Duff, at page 419, pointed out various ways in which the legislative intention might be expressed. He said:—

That intention may be manifested by express language or may be ascertained from the necessary implications of the provisions of the statute, or the subject matter of the legislation or the circumstances in which it was passed may be of such a character as in themselves to rebut the presumption that it is intended only to be prospective in its operation.

Referring first to the language of the section, we find the legislature declaring that "subject to the conditions hereinafter set out either party may terminate the agreement of engagement between the teacher and the Board". The legislature here was providing by whom and in what circumstances agreements of engagement might be terminated. The old Act provided for such termination, but that Act was being repealed by the Act of 1931, it was, therefore, necessary to make provision in the new Act for terminating the agreements. Giving to the words employed in section 157 their natural and ordinary meaning, we have a section general in its character, and susceptible of application to every agreement of engagement between teacher and trustees. Why then should the section be construed as relating to future agreements only?

The appellant contends that to construe the section as applying to agreements in existence prior to the coming into force of the Act would be to violate two well known rules of construction. The first is that statutes are not to be construed as having retrospective operation unless such a construction appears very clearly in the terms of

(1) (1869) 4 Ch. App. 735, at 740.

(2) (1920) 61 Can. S.C.R. 413.

the Act, or arises by necessary or distinct implication; the second is they should not be given a construction that would impair existing rights, unless that effect cannot be avoided without doing violence to the language of the enactment.

That these are well recognized general rules of construction is not questioned. Rules of construction, however, are only useful in ascertaining the true meaning of a statute where the language is not clear and plain. If the intention of the legislature can be ascertained all rules of construction must yield to the legislative intention.

The foundation upon which the above rules rest is that it would be unfair and unjust to deprive people of rights acquired by transactions perfectly valid and regular at the time they were acquired, and that the legislature is not to be presumed to act unjustly. The right of the Board under the previous Act to give a thirty days' notice of the termination of the agreement of engagement without the consent of the inspector amounted, in my opinion, to something more than a mere matter of procedure. Therefore a legislative intention to deprive the Board of that right will not be presumed. But the legislature was competent to take away that right, and we have to determine whether a legislative intention to take it away is not a necessary implication from the language of the Act, particularly in view of its scope, the mischief it was designed to prevent and the remedy provided.

Briefly, the Act had for its object the amendment and revision of the former school law so as to present in one Act the law governing the formation and organization of school districts, the erection of schools and the control and management thereof, including the employment and dismissal of the teacher by Boards of Trustees. The provisions of the Act clearly indicate a legislative intention to give the Minister what may be termed a supervising control over the employment of the teacher and the termination of that employment by either the Board or the teacher. (Sections 155 to 158). The right under the former Act that one party could at any time give to the other a thirty days' notice of the termination of the agreement permitted a Board of Trustees to dismiss a teacher, or a teacher to quit the school, during the term, no matter how detrimental to the efficiency of the school and the pupils' courses of studies

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the termination of the agreement at such a time might be. That was the mischief struck at by subsections (*a*) and (*b*) of section 157. The remedy provided was to require the consent of the inspector before notice of termination was given, except during the months specified in those subsections. Thus to the inspector was committed the duty of deciding whether the reasons for desiring the termination of the agreement were, in the circumstances of the particular case, sufficient to justify the impairment in efficiency of the school which would likely follow upon a break in the course of the pupils' studies.

Considering the nature and scope of the Act and the control over the agreement of engagement between teacher and Board retained by the Minister, and considering also that the mischief for which the legislature was providing a remedy was a presently existing evil which the legislature proposed to cure by making the right of either party to terminate the agreement depend upon the consent of the inspector, I am of opinion that sufficient has been shewn to rebut the presumption that the section was intended only to be prospective in its operation. I can find nothing that would justify us in construing section 157 as if it read: "Either party may terminate any future agreement between the teacher and the Board." In order to give the section the meaning contended for by the appellant we should have to read into it words which limit its *prima facie* operation and which would make it something different from and smaller than what its terms express. As Bowen, L.J., said in *The Queen* v. *Liverpool Justices of the Peace* (1):—

> Certainly we should not readily acquiesce in a non-natural construction which limits the operation of the section so as to make the remedy given by it not commensurate with the mischief which it was intended to cure.

In my opinion section 157 was passed to remedy an evil which had been found to exist. It should, therefore, be construed in conformity with the well established rule that all cases within the mischief aimed at by that statutory provision are, if the language permits, to be held to fall within its remedial influence.

(1) (1883) 11 Q.B.D. 638, at 649.

In Craies on Statute Law, 3rd ed., at page 336, the author says:—

> If a statute is passed for the purpose of protecting the public against some evil or abuse, it will be allowed to operate retrospectively, although by such operation it will deprive some person or persons of a vested right.

And in *West* v. *Gwynne* (1), Buckley, L.J., points out that most Acts of Parliament do in fact interfere with existing rights.

The case at bar, in my opinion, is similar to that of *West* v. *Gwynne* (2). In that case the statutory provision was as follows:—

> In all leases containing a covenant, condition or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent.

The lessees applied to the landlord for his consent to their subletting the demised land. The landlord replied that he was only prepared to grant the plaintiffs a licence to underlet on condition that he should thenceforward receive for himself one-half of the surplus rental to be obtained from the lessees in respect of the demised premises over and above the rent payable under the lease. An action was brought for a declaration that the lessees could make a valid underlease without his consent. The question was, as in the present case, whether the statutory provision applied to all leases or only to those executed after the passing of the Act. It was held to apply to leases already existing as well as to those to be executed in the future, on the ground that the Act was passed for the purpose of correcting a state of the law which was lending itself to grave abuse.

The appellant relies upon the case of *Upper Canada College* v. *Smith* (3). That case, in my opinion, is clearly distinguishable, for there, if the statutory enactment had been given a retrospective operation it would have deprived an agent who had earned a commission on the sale of land, under a contract valid when entered into, from recovering that commission. The statutory provision in that case prohibited the bringing of an action to recover the commis-

(1) [1911] 2 Ch. 1, at 12. (2) [1911] 2 Ch. 1.
(3) (1920) 61 Can. S.C.R. 413.

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sion "unless the agreement upon which such action shall be brought shall be in writing * * * and signed by the party to be charged therewith * * * *". As Mr. Justice Duff pointed out at page 422, "the words 'shall be in writing' point to a writing to be brought into existence after the passing of the Act". It was there held that the enactment was prospective only in its operation.

In the case at bar there is, in my opinion, nothing whatever to indicate an intention that the section was to be more restricted in its operation than the language employed would convey given its ordinary meaning.

I would dismiss the appeal.

The judgment of Smith and Crocket JJ. was delivered by

CROCKET J.—This case arises out of the repeal by the Legislature of Alberta, in the year 1931, of the School Act of that province, chap. 51, R.S.A. (1922), and its replacement by a revised Act, which came into force on July 1 of that year.

While the old Act was in force, on June 28, 1929, the respondent, a qualified teacher, entered into a contract with the appellant Board as teacher in the above school district at a salary of $2,200 per year. The contract, which was in the form approved by the Minister of Education in accordance with the provisions of the old Act, contained, *inter alia*, the following provision, as clause no. 6, which is the only one with which this appeal is concerned:—

> 6. This agreement shall continue in force from year to year, unless it is terminated as hereinafter provided, or unless the certificate of the teacher has been revoked in the meantime.
>
> Either party hereto may terminate the agreement by giving thirty (30) days' notice in writing to the other party.
>
> Provided that no such notice shall be given by the Board until the teacher has been given the privilege of attending a meeting of the Board (of which five clear days' notice in writing shall be given to the teacher) to hear and to discuss its reasons for proposing to terminate the agreement.

On July 14, 1931, after the new Act came into operation, the appellant gave the respondent thirty days' notice in writing of the termination of the agreement, as provided by the above clause, but failed to obtain the approval of a school inspector to such notice, in accordance with the provisions of section 157 of the new Act, chap. 32 of the

Statutes of Alberta for the year 1931, which had come into force on July 1 of that year.

The respondent having brought an action against the appellant to recover damages for the alleged wrongful termination of the contract, on the ground that the provisions of sec. 157 of chap. 32, Statutes of Alberta, 1931, had not been complied with, a special case was stated for the opinion of the court, pursuant to Rule 114 of the Alberta Rules of Court, the questions submitted to the court being:—

(1) Can the Agreement in question be terminated by compliance only with the provisions of Section 6 thereof?

(2) Are the provisions as to termination of an Agreement, as set forth in The School Act, Statutes of Alberta (1931), Chapter 32, Section 157, applicable to an Agreement entered into between a teacher and a Board of School Trustees in the Province of Alberta prior to the 1st day of July, 1931?

The case was argued before Ewing, J., who answered the first question in the negative and the second question in the affirmative (1). On appeal these answers were affirmed by the Appellate Division of the Supreme Court of Alberta (2).

The text of sec. 157 of the new Act, in so far as it is relevant to the question involved, is as follows:—

157. Subject to the conditions hereinafter set out in this section, either party thereto may terminate the agreement of engagement between the teacher and the Board by giving thirty days' notice in writing to the other party of his or its intention so to do:

Provided always:

(a) that except in the month of June no such notice shall be given by a Board without the approval of an inspector previously obtained;

(b) that except in the months of June and July no notice of the termination of a contract shall be given by a teacher without the approval of an inspector previously obtained.

This section is one of sixteen sections—154 to 169 inclusive—comprising Part XIII of the Act under the principal caption "Relating to the Teacher." Sec. 154 appears under the sub-caption "Qualification," while sections 155 to 158 inclusive are under the sub-caption "Engagement and Contract." Sec. 159 follows under the sub-caption "Suspension and Dismissal" and the remaining sections of this Part of the Act, are set out under such sub-captions as "Board of Reference" (for the investigation of disputes between school boards and teachers), "Payment of Teachers," "Duties of Teachers," etc.

(1) [1932] 1 W.W.R. 849.

(2) [1932] 1 W.W.R. 849; [1932] 3 D.L.R. 262.

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The agreement here in question, as already pointed out, provided for its termination on thirty days' notice in writing by either party. Had it not done so it would have been terminable in the same way by virtue of subsec. 2 of sec. 199 of the old Act, which read as follows:—

> Unless otherwise provided for in the contract either party thereto may terminate the agreement for teaching between the teacher and the board of trustees by giving thirty days' notice in writing to the other party of his or its intention so to do.

It will be noticed that the change which sec. 157 of the new Act effected in the law regarding the termination of teaching agreements was to require the previous approval of an inspector to the thirty days' notice of termination by the Board of Trustees, except in the month of June, and the like approval of an inspector to the notice of termination by the teacher, except in the months of June and July. In the month of June the Board of Trustees can, as before, terminate on thirty days' notice, without previously obtaining the approval of an inspector, and in the months of June and July the teacher also has the same privilege, as formerly. The object evidently was to prevent, except for some sufficient reason, the cancellation of teachers' contracts during the teaching days of the school year, and the disturbing and detrimental effects thereof upon the work of the schools. The change, undoubtedly, deprives the Board of Trustees of the right to terminate the teaching agreement on its own motion, except by notice given in the month of June, as it deprives the teacher of the right to do so on his own motion, except in the months of June and July.

In behalf of the appellant, it is contended that section 157 was not intended to apply to existing teachers' contracts, but only to contracts entered into after July 1, 1931, when the new Act came into force, and that the trial judge and the Appeal Division of the Supreme Court of Alberta erroneously gave it a retroactive operation.

I am of opinion that Ewing, J., and the Appeal Division correctly construed the section, as enacted in 1931, as applicable to all teachers' contracts, those entered into before the coming into force of the Act, as well as those entered into afterwards.

Whether or not such a construction really involves giving retroactive operation to the section, having regard to the

fact that its new provisions relate only to the manner in which exising contracts may subsequently be terminated or to the right of terminating them in the future, I am satisfied that the clear intention of the legislation was that it should apply to all teachers' contracts alike just as all other provisions of Part XIII were clearly intended to apply to all teachers alike, whether engaged before or after the coming into force of the Act.

Reading the section in question with its context in Part XIII and as part of an Act passed as a complete revision and consolidation of the former School Act, which it repealed, and to which all schools, school boards, teachers, teaching contracts and all else pertaining to the maintenance and administration of schools were subject, I cannot for my part find, either in the language of the section itself or in its context, any indication whatever that the legislature intended to exclude all existing teachers' contracts from its operation.

It was argued that the use of the word "shall" in the two previous sections, 155 and 156, indicated an intention that these sections should apply only to future contracts. It goes without saying that, in so far as the provisions of these two sections relate to the manner and authority in and under which teachers shall be engaged and the form and terms of the contract which they shall enter into, they could not possibly apply to contracts which had already been entered into, but it does not follow from this fact that none of their provisions shall have any application to existing contracts, where it is clear they may apply to existing and future contracts alike. For example, subsec. 3 of sec. 156 provides that "unless the employment be stated in the contract to be for a definite period, the contract shall, subject to the following provisions, continue in force from year to year unless and until the certificate of the teacher shall have been revoked." Unquestionably, this latter provision may apply to existing as well as to future contracts. As a matter of fact, it is a re-enactment of an identical provision in the repealed Act. Every teacher's contract in which the employment is not stated to be for a definite period would on the face of the subsection itself fall within its terms. The word "shall" in the phrase "*the contract* shall continue, etc." throws no light whatever upon the

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question whether the intention was to exclude or to include existing contracts. It is true that its provisions could operate only prospectively, so far as the contract continuing in force from year to year is concerned, but this does not mean that the subsection cannot and does not apply to existing as well as to future contracts.

Similarly, when sec. 157 is examined it will be seen that it treats exclusively of the manner of terminating "*the agreement* between *the teacher* and *the Board*". It provides in its main clause that "either party may terminate *the agreement* between *the teacher* and *the Board*". Its provisions, so far as the terminating of teachers' contracts is concerned, could likewise operate only prospectively, but this is not to say that they cannot and do not apply to existing as well as to future agreements. The question wholly turns upon the meaning of the words "*the agreement* between *the teacher* and *the Board.*" Were they intended to embrace all teachers' contracts, existing as well as future, as they undoubtedly did as they stood in the former Act when it was repealed, or are they now to be limited as applying only to such contracts as might be entered into after the coming into force of the new Act?

Were it not for the addition of the provisoes (*a*) and (*b*), no one would suggest that the phrase "either party may terminate *the agreement* between *the teacher* and *the Board*" in the main clause of sec. 157 has any different meaning in the new Act than it had in the repealed Act, where it seems to me to be perfectly clear that it referred, not to any agreement that might be entered into in the future, but was used as a form to designate all teachers' agreements. In my opinion, it does this quite as effectually as if the words "either party may terminate *any agreement* between a teacher and a board" had been used. If the intention had been as argued in behalf of the appellant, how simply it could have been shewn by inserting the words "hereafter entered into." If the meaning I have indicated be the true meaning of the words of the opening clause, the addition of the provisoes cannot alter that meaning. They are the controlling words and if they apply to all teachers' contracts, existing as well as future, the provisoes likewise apply to all.

If the language of the section itself and its immediate context left any doubt as to its general application, the implications arising from its remedial object, the nature of the agreement and of the right affected and the extent to which it is affected, the fact of the amendment being made in a general revision and consolidation of the former Act, and the whole frame and scope of the new Act, which, though passed on March 28, did not come into operation until July 1, would, in my judgment, put the matter beyond all question.

To confine the words to future contracts only would be, if not entirely to defeat the remedial object of the enactment, at least to render it ineffective for years to come in the great majority of the schools of the province. There would, of course, be no contracts to which it could apply in any way at the time the Act was passed or at the time it came into force, and after that it would only be as existing contracts were cancelled and new ones substituted here and there that the legislation could begin to speak. It would be impossible for the Department of Education to know whether it was in effect at all without an examination of all teaching contracts, to ascertain whether they were entered into before or after the coming into force of the Act. It would necessitate the division of all teaching contracts into two classes: those entered into before July 1, 1931, and those entered into afterwards, and thereby entail such inconvenience and confusion in the administration of the provincial school system as to render the new enactment extremely difficult, if not practically impossible, of observance.

Moreover, public school teachers' contracts are of a public character. The School Boards are essentially public corporations representing the rate-payers of the different school districts. The teachers are licensed by the Board or Minister of Education. The Minister of Education was authorized by the former School Act, as he is authorized by the new Act, to prescribe a standard form for all teachers' contracts, and to determine the terms and conditions which all teachers' contracts uniformly should and shall contain. They are contracts which affect the rights and interests of the whole population of every school district. The contracts themselves and the School Boards and teachers being

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so peculiarly subject at all times to public control, I find it impossible to conclude that when the legislature revised and consolidated the entire school law of the province and provided in that revision that a notice terminating a teacher's contract in the middle of a teaching term should require the approval of a school inspector, it did not intend that provision to have any present operation or indeed any future operation until some new teachers' agreement should be entered into. If there were any presumption that the legislature did not intend to affect such an existing right, which I very much question, such a presumption must yield to the language of the enactment read in the light of the circumstances and considerations I have mentioned. As was said by Buckley, L.J., in *West* v. *Gwynne* (1), practically every legislative enactment does affect to some extent existing rights. The rights affected by the legislation now in question were mere potential rights, upon which no causes of action had accrued, and the modification of which to the extent indicated could cause no substantial injustice to either the Board of Trustees or the teacher. Each party, had it been desired to terminate the contract without the approval of the inspector, had the interval between the passage of the Act and its coming into force, to do so. Even had the Act come into force on the date it was assented to, the trustees in the case at bar could have acted under its provisions in the month of June.

I would dismiss the appeal with costs.

CANNON J.—The contract, admittedly, was in the form approved by the Minister of Education under a regulation made in accordance with the provisions of the old Act. This old Act was repealed and "other provisions were substituted by the repealing enactment for the provisions or regulations thereby repealed." Section 14 of the *Interpretation Act* (R.S.A., 1922, ch. 1) provides that in such a case

(*b*) all proceedings taken under the old enactment or regulation or which may require to be instituted shall be continued or instituted as the case may be *under the substituted provisions, so far as applicable;*

(*c*) all by-laws, orders, regulations and rules made under the old enactment *shall continue good and valid in so far as they are not inconsistent with the substituted provisions,* until they are annulled or others are made in their stead;

(1) [1911] 2 Ch. 1.

In my opinion, the various steps regulating the dismissal of a teacher were always subject to change by regulation or statute and the teacher and the Board were both subject to such contingency—which excluded the possibility of any right, as to notice, becoming incommutably vested in either party.

Even assuming that such right or advantage had accrued or become vested, it would always be subject to the application of section 12 of the same *Interpretation Act,* which expressly reserves to the Legislative Assembly the power of revoking, restricting or modifying any advantage vested or granted by any Act of the Legislature to any person or party, whenever such repeal, restriction, or modification is deemed by the Legislative Assembly to be required for the public good. This has been done in a matter of public policy, and I would therefore answer the questions as follows:

1. No.
2. Yes.

and dismiss the appeal with costs.

RINFRET J. (dissenting).—With deference, I think the appeal in this case ought to be allowed.

We have to construe section 157 of the *School Act,* being c. 32 of the Statutes of Alberta (1931).

In the Act, section 157 forms part of a fasciculus of sections (ss. 155-158) under the sub-heading "Engagement and Contract"; and, so as to understand its full purport, I think all the sections must be reproduced in the order in which they appear:

155. A teacher *shall* not be engaged except under the authority of a resolution of the Board passed at a regular or special meeting of the Board.

Provided always that in case the chairman or secretary sends any communication in writing to an applicant for engagement as a teacher by the Board, to the effect that the Board has decided to engage such applicant, and if the applicant delivers or causes to be delivered to the chairman or secretary of the Board a communication in writing to the effect that the applicant accepts such engagement, either by actual delivery or by mail or by telegraph, not later than the fifth day after the day upon which the communication from the chairman or secretary was mailed or otherwise despatched, the Board and the applicant *shall* be thereupon under a legal obligation to enter into a contract in the standard form, subject only to such variation as may be approved by the Minister; otherwise such communications *shall* not be effective to create any contract whatsoever between the Board and the applicant.

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Rinfret J.

156. (1) The contract of employment *shall* contain such agreements, terms, conditions and restrictions as may be approved by the Minister, who may prescribe a standard form of contract.

(2) In the event of any alteration or amendment of the standard form being made without the approval of the Minister, the standard form shall have effect as if such alteration or amendment had not been made.

(3) Unless the employment be stated in the contract to be for a definite period, the contract shall, subject to the following provisions, continue in force from year to year, unless and until the certificate of the teacher shall have been revoked.

157. Subject to the conditions hereinafter set out in this section, either party thereto may terminate the agreement of engagement between the teacher and the Board by giving thirty days' notice in writing to the other party of his or its intention so to do; Provided always

(*a*) that except in the month of June no such notice shall be given by a Board without the approval of an inspector previously obtained;

(*b*) that except in the months of June and July no notice of the termination of a contract shall be given by a teacher without the approval of an inspector previously obtained;

(*c*) that any such notice may be given either by delivering the same to the person to whom it is addressed or sending the same in a duly addressed and prepaid cover by registered mail, and in the latter case the notice shall be deemed to have been given upon the day on which it is mailed;

(*d*) that a teacher may notify the secretary of a post office address to which any notices may be sent, and in that event, all notices shall be sent to that address, but if no such address is furnished to the secretary, any notice sent by mail shall be deemed to have been duly addressed if addressed to the teacher at the last known post office address of such teacher.

158. The contract shall be signed by the teacher and by the chairman, or, in the absence of the chairman, by another trustee on behalf of the Board.

The question is whether the new enactment applies to contracts entered into before the Act came into force.

The fundamental rule is that, *prima facie*, statutes are to be construed as prospective. The rule is " one of construction only " and " will certainly yield to the intention of the legislature." (*Moon v. Durden* (1).) But, as pointed out by Duff J. in *Upper Canada College* v. *Smith* (2), there is high authority for the proposition " that the intention to affect prejudicially existing rights must appear from the express words of the enactment"; and he quotes Fry J. in *Hickson* v. *Darlow* (3); Rolfe B. in *Moon* v. *Durden* (4); and a passage of Erle, C.J., in *Midland Ry. Co.* v. *Pye* (5),

(1) (1848) 2 Ex. R. 22, at 42 & 43.
(2) (1920) 61 Can. S.C.R. 413 at 419.
(3) (1883) 23 Ch.D. 690, at 692.
(4) (1848) 2 Ex. R. 22 at 33.
(5) (1861) 10 C.B.N.S. 179 at 191.

approved by the Privy Council in *Young* v. *Adams* (1); and " words not requiring a retrospective operation so as to affect an existing status prejudicially ought not to be so construed " (per Lord Selborne in *Main* v. *Stark* (2)). For, as a general principle, legislation introduced for the first time, " ought not to change the character of past transactions carried on upon the faith of the then existing law." (*Phillips* v. *Eyre* (3).)

Wright J., in *In re Athlumney* (4), laid down the principle as follows:

No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

The above rule was referred to and followed by this Court only recently in *Electric Motor & Machinery Co.* v. *The Bank of Montreal* (5).

Now, if the principle and the rule be applied first to the language of section 157, there exists no difficulty in giving to it a meaning which makes it prospective only in its operation and, on the contrary, there is nothing " on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively." (Rolfe B., in *Moon* v. *Durden* (6).)

The following passage of the trial judge's judgment has my fullest concurrence:

At the outset I find myself unable to agree with the argument that sec. 157 of the new Act merely effects a change in procedure and has therefore a retrospective effect. Under the contract and under the old Act the Board had the complete and unassailable right to terminate—subject only to the requirements as to notice and as to giving the Teacher the privilege of attending a meeting of the Board to hear and discuss the reasons for proposing to terminate the contract. It lay easily within the power of the Board to comply with these requirements. Under the new Act the Board is required, except in the month of June, to get the approval of an Inspector, which it may or may not be able to get. Failing to get the approval of an Inspector the Board has no power to terminate the contract—except in the month of June. This provision therefore seriously limits the contractual powers of the Board.

(1) [1898] A.C. 469.
(2) (1890) 15 App. Cas. 384, at 388.
(3) (1870 L.R. 6 Q.B. 1, at 23.
(4) [1898] 2 Q.B. 547, at 551, 552.
(5) [1932] Can. S.C.R. 634, at 637.
(6) (1848) 2 Ex. R. 22, at 33.

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There are many dicta to the effect that statutes which make alterations in procedure are retrospective. There is Lord Blackburn's well known dictum in *Gardner* v. *Lucas* (1), viz:—

"I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure."

But in the case at bar the Legislature has not merely altered the form by which a thing shall be done, but it has taken away from the Board in certain contingencies the power to do it at all. New disabilities and obligations are created and the change in this respect cannot therefore be a mere matter of procedure.

But I cannot follow the learned judge further when he says:—

But to declare that sec. 157 applies to contracts, still in effect, although entered into before sec. 157 came into force, with respect to acts done or events happening after sec. 157 came into force is not to declare that the section is retrospective.

If these acts are done pursuant to the rights of the parties under the existing contracts, and if the parties are told that they may no longer act in accordance with their contracts mutually agreed upon, clearly their legal rights are prejudicially affected retrospectively and the legislation is given a retroactive operation upon the contracts themselves. I do not think the intention to deprive the parties of their contractual rights and to substitute a new contract is manifested in sec. 157, either by express language or by necessary implication. Still less can I come to that conclusion, when I look at the heading under which and the sections among which section 157 is to be found in the Act.

The heading is a key to the interpretation of the sections ranged under it. It must be read in connection with them and the sections interpreted by the light of it. (Brett, L.J., in *The Queen* v. *Local Government Board* (2); Lord Herschell in *Ingliss* v. *Robertson* (3); *Toronto Corporation* v. *Toronto Ry. Co.* (4)). As already mentioned, the heading reads "Engagement and Contract," which imports the idea of a future agreement.

Then sections 155 and 156 which precede and section 158 which follows section 157 clearly refer to contracts to be entered into in the future. They are all sections under the same heading. Moreover, subsec. 3 of sec. 156 is made

(1) (1878) 3 App. Cas. 582, at 603.
(2) (1882) 10 Q.B.D. 309, at 321.
(3) [1898] A.C. 616, at 630.
(4) [1907] A.C. 315, at 324.

"subject to the following provisions," namely, those of sec. 157, and therefore connects the latter with the former. It is in accordance with the ordinary rules of interpretation, that the words "the agreement of engagement" in sec. 157 should be held to bear the same meaning as the words "the contract of employment" in the surrounding sections under the same heading. There is no sufficient indication that sec. 157 should be treated as an isolated enactment, wherein the legislature jumped from one subject-matter to another, viz., from the subject of future contracts to that of contracts already in existence, again to return to the subject of future contracts in the following section. It seems more natural and more logical to interpret all four sections as dealing with the same kind of contracts, namely, future contracts.

For these reasons, I would allow the appeal with costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *H. E. Crowle.*
Solicitor for the respondent: *G. H. Van Allen.*

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*Nov. 10.
*Dec. 23.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF YAMASKA

AIME BOUCHER (DEFENDANT).....APPELLANT;

AND

NAPOLEON VEILLEUX (PETITIONER)....RESPONDENT.

Election law—Petition by qualified elector—Claim to the seat on behalf of defeated candidate and claim for the voiding of the election, not incompatible—Computation of votes—Voiding of election for corruption or illegality—Dominion Controverted Elections Act, R.S.C., 1927, c. 50, ss. 9, 10 (5), 47, 48, 49, 57.

In an election petition, a claim to the seat on behalf of a candidate defeated according to the return and a claim for the voiding of the election are not so incompatible as to render the petition illegal and void.

On the hearing of the petition, the trial judges, after having proceeded to the computation of votes under section 48 of the Act and having eliminated all the votes of each candidate tainted with illegality, are not bound to award the seat to the candidate having a majority of votes after such computation and elimination.—The trial judges have still jurisdiction to declare the election void owing to acts of corruption or illegality practised by one or both of the candidates.

Judgment of the trial judges (Q.R. 70 S.C. 339) affirmed.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crockett JJ.

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APPEAL from the judgment of Coderre and Denis JJ. (1) sitting as trial judges under the provisions of the "Dominion Controverted Elections Act," R.S.C. (1927), c. 50, in the matter of the controverted election of a member for the Electoral District of Yamaska in the House of Commons of Canada, rendered on the 23rd of June, 1932, maintaining the respondent's petition as to the claim for the voiding of the election and dismissing it as to the other claims, without costs, and declaring the appellant's election void.

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

Aimé Geoffrion K.C. for the appellant.
Edouard Masson and *Aimé Chassé* for the respondent.

The judgment of the court was delivered by

SMITH J.—At a Dominion election held on the 28th day of July, 1930, the appellant and one Paul François Comtois were the candidates in the Electoral District of Yamaska and the appellant was returned as elected.

A petition against the appellant was presented under the Dominion *Controverted Elections Act* (R.S.C., 1927, c. 50) by the respondent, a duly qualified elector of the said electoral district.

This petition, after numerous allegations of corrupt and illegal acts, committed on behalf of the appellant, concludes as follows:

Pourquoi le pétitionnaire conclut à ce que l'élection du défendeur Aimé Boucher, notaire, comme député à la Chambre des Communes, pour la division électorale d'Yamaska, soit déclarée nulle à toutes fins que de droit; et à ce que le dit défendeur soit frappé de toutes les pénalités, sanctions et incapacités que prescrit la loi; et à ce qu'il soit retranché du nombre de suffrages qui paraissent avoir été donnés en faveur du défendeur, un vote pour chaque personne qui a voté à la dite élection, et qui a été subornée, régalée, illégitimement influencée et qui a été engagée et employée moyennant rétribution, tel que ci-haut mentionné; et à ce que le candidat Paul François Comtois, agriculteur, domicilé et résidant dans la paroisse de St. Thomas de Pierreville, district judiciaire de Richelieu, soit déclaré élu député à la Chambre des Communes du district électoral d'Yamaska; le tout avec dépens contre le dit défendeur, y compris les dépens incidents et autres occasionnés par la présente contestation.

(1) (1932) Q.R. 70 S.C. 339.

Sections 48 and 49 of the Act are as follows:

48. If, on the trial of an election petition, claiming the seat for any person, a candidate is proved to have been guilty, by himself or by any person on his behalf of bribery, treating, or undue influence with respect to any person who voted at such election, or if any person retained or employed for reward by or on behalf of such candidate, for all or any of the purposes of such election, as agent, clerk or messenger, or in any other employment, is proved on such trial to have voted at such election, there shall, on the trial of such election petition, be struck off from the number of votes appearing to have been given to such candidate, one vote for every person who voted at such election, and who is proved to have been so bribed, treated or unduly influenced, or so retained or employed for reward as aforesaid.

49. If it is found by the report of the trial judges that any corrupt practice has been committed by a candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate, or that any illegal practice has been committed by a candidate or by his official agent or by any other agent of the candidate with the actual knowledge and consent of the candidate, the election of such candidate, if he has been elected, shall be void.

Section 9 provides that the petition may be in form "B" in the schedule to the Act; and the concluding clause of that form reads as follows:

> Wherefore your petitioner prays that it may be determined (that * * * was duly elected *or* returned *or* that * * * ought to have been returned *or* that the election is void, *as the case may be*) (the words "as the case may be" are in italics).

The trial judges found that the claim to the seat on behalf of the candidate Comtois should be rejected because the proof on this point does not justify this part of the conclusions of the petition and also because of the admission of the petitioner himself in the record.

They further found the appellant guilty by agents of corrupt practices sufficient to void the election and declared same void accordingly. From this decision voiding the election the appeal is taken.

The ground of appeal is that because the seat is claimed for the defeated candidate the function of the trial judges was limited to striking off votes from the number given for each candidate as provided by s. 48 and to finding by this means who "had" the majority of lawful votes and of declaring the candidate, so found to have the majority, elected.

It is argued that a claim to the seat on behalf of a candidate defeated according to the return and a claim for the

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voiding of the election are incompatible claims that cannot be set up side by side; or, in the alternative, because, if the election of Boucher is first declared either valid or void, it is not then possible to reverse this on a computation of votes under s. 48; and, on the other hand, that if such computation under s. 48 is first made, the Court must award the seat to the candidate having the majority by such computation, and cannot then proceed to void the election because, the judges having eliminated all the votes of each candidate tainted with illegality, there are left only the good or untainted votes, and the party having the majority of these is entitled to be declared elected; and all the illegal votes cast for him having been disallowed, these and the means by which they were procured cannot be made a ground for unseating him.

I am of opinion that this reason is not tenable. It means that if the seat is claimed by or on behalf of a candidate who has been defeated according to the return, the trial judges, quite regardless of any large amount of corruption and illegality practised on behalf of both candidates, must declare one of them elected.

To confirm the successful candidate according to the return in the seat under such circumstances would be directly contrary to the provisions of s. 49.

Section 10 (5) of the Act provides that the sitting member, whose election and return is petitioned against, may file a petition, complaining of any unlawful and corrupt act by any candidate at the same election who was not returned or by his agent with his privity, and s. 47 provides as follows:

> On the trial of a petition under this Act complaining of an undue return and claiming the seat for any person, the respondent may give evidence to show that the election of such person was undue in the same manner as if he had presented a petition complaining of such election.

The language of this section is peculiar, inasmuch as it treats or speaks of any person for whom the petition claims the seat as an elected person whose "election" may be attacked in the prescribed manner. It seems a misnomer to speak of the "election" of a candidate who by the return is not elected. I am of opinion, however, that the section means that a candidate who has not been declared elected, on whose behalf a petition against the candidate returned as elected claims the seat, may be proceeded

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against in the same manner as if a counter petition had been filed against him under s. 10 (5) referred to.

It follows that a defeated candidate for whom the petition claims the seat is in the same position, so far as corrupt or illegal practices are concerned, as the successful candidate against whom the petition has been filed. Where, therefore, the evidence establishes against the candidate declared elected, and also against the candidate for whom the seat is claimed, corrupt and illegal acts sufficient to void an election, the trial judges are not bound to declare one of them elected on a computation of votes pursuant to s. 48, but may declare the election void.

Section 57 provides that at the conclusion of the trial, the trial judges shall determine whether the member whose election or return is complained of or any and what other person was duly returned or elected, or whether the election was void.

The trial judges here, as expressly empowered by this section, have declared that neither the appellant nor Comtois, for whom the seat was claimed, was duly returned or elected, and that the election is void.

I am of opinion that there was jurisdiction so to declare, and, this being the only question submitted to us, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Adolphe Allard, Elie Salvas.*
Solicitors for the respondent: *Chassé & Duguay.*

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*Dec. 19.
*Dec. 23.

NORMAN JOSEPH (RUFUS) PITRE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Criminal law—Evidence—Trial—Direction to jury as to uncorroborated evidence of accomplice—Refusal to allow opinion evidence of ballistic expert—Competency to testify as to handwriting.

The judgment of the Supreme Court of New Brunswick, Appeal Division, setting aside a jury's verdict of acquittal of appellant on a charge of murder, and ordering a new trial, was affirmed, on the ground that

*PRESENT:—Rinfret, Lamont, Smith, Crocket and St. Jacques (*ad hoc*) JJ.

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the trial judge charged the jury in such a way as to give the impression that they should not convict on the uncorroborated evidence of an accomplice and, unless they found corroborative evidence, their duty was to acquit; that this was a misdirection in law; and, under the circumstances, probably had a material effect upon the jury's minds.

The jury should be told that it is within their legal province to convict, but should be warned that it is dangerous to convict, and may be advised not to convict, on the uncorroborated evidence of an accomplice. *Rex* v. *Baskerville,* [1916] 2 K.B. 658; *Rex* v. *Beebe,* 19 Cr. App. R. 22; *Gouin* v. *The King,* [1926] Can. S.C.R. 539, and other cases referred to.

Crocket J. took also the ground that the trial judge erroneously refused to allow a certain ballistic expert witness to state his opinion as to whether or not the bullet which caused the death had been fired from the revolver produced. (Rinfret, Lamont and Smith JJ., while holding that the trial judge's ruling out was wrong, were of opinion that, in view of later evidence from the same witness, the ruling out had not much effect).

Rinfret, Lamont and Smith JJ. held that the trial judge had rightly refused to allow the evidence of a certain witness as to certain letters being in appellant's handwriting, as the witness' competency to testify in that regard had not been established; a witness may be competent to testify as to a person's handwriting by reason of having become familiar with his handwriting through a regular correspondence; but in the present case the evidence to establish competency did not shew sufficient to constitute a "regular correspondence."

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division, setting aside the jury's verdict of acquittal of the present appellant on his trial (before Le Blanc J. and a jury) on a charge of murder, and ordering a new trial. The material facts for the purposes of the present appeal, and the questions in issue on the appeal, are sufficiently stated in the judgment of Smith J. now reported. The appeal to this Court was dismissed.

C. T. Richard for the appellant.

C. D. Richards K.C. for the respondent.

The judgment of Rinfret, Lamont and Smith JJ. was delivered by

SMITH J.—The appellant was indicted for murder and tried at Bathurst, N.B., on the 19th August, 1932, and acquitted. The verdict of not guilty was appealed to the Supreme Court of New Brunswick, Appeal Division, and was set aside on the 4th October, 1932, and a new trial ordered, on the following grounds:

1. The learned trial judge was in error in refusing to admit in evidence certain letters written by the accused and found undelivered in his cell.

2. The learned judge was in error in refusing to permit the ballistic expert witness, Dr. Rosalier Fontaine, to give evidence expressing his opinion as to the mortal bullet having been fired from the revolver in the possession of the accused.

4. The learned judge was in error in his charge to the jury on the question of corroboration:

(*a*) in instructing the jury that they should not convict instead of warning them of the danger of convicting on the evidence of an accomplice unless corroborated in some material particular implicating the accused;

(*b*) in placing undue stress on the point that they should not convict on the evidence of an accomplice unless corroborated in some material particular implicating the accused; and

(*c*) in instructing the jury as follows:

> If you have found that corroborative evidence and believe the evidence of Wallace Pitre and if you find that he has been corroborated in the way in which I have marked out to you, then your duty is to convict and to find the prisoner guilty. If you find the evidence of Wallace Pitre has not been corroborated in the way which I have marked out, then your duty is clear to acquit him.

The appeal is from this judgment, setting aside the acquittal on these three grounds.

The evidence excluded, which is referred to, in the first of the grounds mentioned, was that of Audina Auber, who was called to prove that certain letters, found in the cell of the accused, were in his handwriting. She testified that she had known the accused for six months, and that he had been "keeping company" with her; that he was away from home last winter, and sent her two post cards, which she read, but did not keep. She further testified that since the appellant had been in jail, she had received two letters from him, brought to her by some boys, one of whom she recognized.

Relying on the receipt, in this way, by the witness of the two post cards and the two letters, and on nothing else, the Crown proposed to prove by her that the paper writing

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produced marked "M" was in the handwriting of the appellant. This evidence was objected to, and the Court ruled, "I will not allow that evidence at present"; and the witness stood aside. She was recalled, at a later stage, but the Crown made no further effort to examine her as to the appellant's handwriting.

It is not necessary to prove handwriting by an expert witness, but it must be established that the witness has in some way become competent to testify as to the handwriting; and it has been laid down that a witness may be competent by reason of having become familiar with a person's handwriting through a regular correspondence or through having frequently seen the person's handwriting. On the bare facts established here, I do not think the learned trial judge erred in refusing to accept the witness as one competent to testify as to the appellant's handwriting. Two post cards and the letters, unanswered, without any indication as to their contents, or any circumstances brought out to indicate that the witness had reason to believe that these two post cards and two letters were actually in the handwriting of the accused, do not go far enough, in my opinion, to constitute a regular correspondence within the meaning of the rule laid down by Lord Coleridge in *Rex* v. *O'Brien* (1), as follows:

> To prove handwriting, it is necessary that a witness should have either seen the person write, or corresponded regularly with him, or acted upon such a correspondence. Then the witness may swear to his belief as to the handwriting, but without one of these foundations for his belief the question is inadmissible.

The Crown was not precluded by the ruling from further questioning the witness to show grounds for her belief that the documents she had received were really in the handwriting of the accused, but simply dropped the matter.

As to the second ground quoted above, Dr. Fontaine, a qualified expert, had examined the bullet of ·38 calibre that caused the death, and had examined also a ·38 calibre revolver shown to have been in the possession of the accused the day before the murder, and had fired another bullet from this revolver, and then compared by a microscope and photographs the marks left on the two bullets by the barrel of the revolver from which they had been fired. He found seven similar marks on each bullet. He

(1) (1911) 7 Cr. App. R. 29, at 31.

was asked, as an expert, from the experiment and observations he had made, his opinion as to whether or not the bullet which caused the death had been fired from the revolver mentioned. He testified that he was in a position to give an opinion, and was finally asked:

And what would be your opinion?

The COURT: I will not allow him to express an opinion. I will shut it out.

This ruling was wrong, but it is claimed that the effect of it is modified by what followed. The witness is next asked if the points of similarity would indicate anything to him, and what, and he answered:

That indicates that the two bullets compared were fired from the same revolver.

The COURT: They are indications——

A. It is an opinion, not a certitude.

The COURT: You say that positively——?

A. They might indicate——

The COURT: They are indications——?

A. They are indications——

The COURT: That the two bullets might have come from the same revolver?

A. Yes.

The COURT: And that is as far as any man can go?

A. Yes.

It is argued from this that the witness actually gave his opinion, and that all he could say was that these two bullets, both of ·38 calibre, might have come from the same revolver. It would hardly take an expert of Dr. Fontaine's experience and capacity, with his microscopes and experiments, to be able to say that two bullets of ·38 calibre might have been fired from the same revolver of ·38 calibre. Under these circumstances, it can hardly be said that the original ruling out of his opinion had much effect.

The fourth ground upon which the setting aside of the acquittal is based is therefore the serious one.

The learned trial judge, in instructing the jury in his charge as to what they should do with regard to the uncorroborated evidence of the accomplice, many times gave them misdirection. At p. 159 he says:

* * * although you may convict upon Wallace Pitre's evidence alone uncorroborated you should not do so. I am warning you that Wallace Pitre being an accomplice his evidence should be corroborated by other testimony implicating Rufus in some of the material particulars of the offence, and I am repeating it to you because it is important and I want you to understand it—that a jury although they may convict on the uncorroborated evidence of an accomplice, they ought not to do so and it

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is the duty of the trial judge to warn you not to convict on the uncorroborated evidence of an accomplice, in this case, Wallace Pitre is an accomplice of Rufus Pitre, and you should not convict on his evidence alone unless you find it is corroborated in some material particular by independent evidence implicating Rufus Pitre.

At p. 168, he says:

* * * I have explained to you how although you may convict on his uncorroborated evidence, that you should not unless it was corroborated by independent evidence of witnesses testifying as to independent particulars implicating the accused.

At p. 169, he says:

If you find the evidence of Wallace Pitre has not been corroborated in the way which I have marked out then your duty is clear to acquit him.

Again, on the same page, he says:

* * * although you may convict on the uncorroborated evidence of Wallace Pitre who is an accomplice, you should not do so unless his evidence is corroborated in some material particular by evidence implicating the accused * * *.

The rule as to what direction should be given to a jury concerning the uncorroborated testimony of an accomplice was settled in *The King* v. *Baskerville* (1).

In the subsequent case of *Rex* v. *Beebe* (2), Lord Hewart C.J., gives in a few words the rule laid down in the *Baskerville* case (1), as follows:

[The jury should be told] that it is within their legal province to convice; they are to be warned in all such cases that it is dangerous to convict; and they may be advised not to convict.

He further points out that a direction in such a case to the jury that they ought to convict would not be according to the law laid down in the *Baskerville* case (1).

These judgments have been referred to and acted upon in a number of cases in this Court, particularly *Gouin* v. *The King* (3); *Brunet* v. *The King* (4); and *Vigeant* v. *The King* (5).

In the *Baskerville* case (1) Lord Reading quotes from *Rex* v. *Everest* (6), as follows:

The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused;

and, commenting on this quotation, says:

"Tell the jury to acquit" should read "Warn the jury of the danger of convicting."

(1) [1916] 2 K.B. 658.
(2) (1925) 19 Cr. App. R. 22.
(3) [1926] Can. S.C.R. 539.
(4) [1928] Can. S.C.R. 375.
(5) [1930] Can. S.C.R. 396.
(6) (1909) 2 Cr. App. R. 130.

Again he says, on the same page, that the *Everest* case statement quoted above goes too far in saying that the judge should direct the jury to acquit.

In the present case, it will be seen that the learned trial judge, in the quotations set out above, misdirected the jury in telling them on these various occasions throughout the charge that they should not convict on the uncorroborated evidence of the accomplice, and that it was their duty to acquit.

In the reasons of the Court of Appeal, one of the passages from the learned trial judge's charge, quoted above, is set out, as follows:

* * * a jury although they may convict on the uncorroborated evidence of an accomplice, they ought not to do so and it is the duty of the trial judge to warn you not to convict on the uncorroborated evidence of an accomplice;

and the following comment is made on it:

The latter sentence is correct; the former is an error.

I am of opinion that the latter sentence is not correct. The learned trial judge was entitled to *advise* the jury not to convict on the uncorroborated evidence of an accomplice, or to warn them that it was dangerous to convict.

There was, of course, evidence before the jury corroborating the evidence of the accomplice and implicating the accused; and it was only in the event of the jury disbelieving or discarding such corroborative evidence that they were called upon to make a finding upon the uncorroborated evidence of the accomplice; and it becomes difficult to understand why the learned judge kept impressing upon the jury so many times their duty to acquit on the uncorroborated evidence of an accomplice. In addition to the fact that these repeated directions were wrong, they probably had the effect of leading the jury to believe that the case must be disposed of on the theory that there was no evidence corroborating the accomplice. Under all the circumstances, the repeated misdirections of the learned trial judge probably had a material effect upon the minds of the jury.

The appeal therefore should be dismissed.

CROCKET J.—I am of opinion that the learned trial judge in his directions to the jury regarding the corroboration of the testimony of the accomplice, Wallace Pitre, went

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beyond the rule laid down in *Rex* v. *Baskerville* (1), and adopted by this Court in *Gouin* v. *The King* (2) and *Vigeant* v. *The King* (3). While he had the right, if in his discretion he deemed it wise to do so, to advise the jury not to convict in the absence of independent evidence corroborating the testimony of the accomplice in some material particular implicating the accused, the effect of the several passages quoted from the judge's charge by my brother Smith is such that the jury might well have supposed that, no matter how fully they may have believed in the truth of the testimony of the accomplice, they could not convict upon it alone. The statement " If you find the evidence of Wallace Pitre has not been corroborated in the way which I have marked out then *your duty is clear to acquit him*" could leave no other impression than that of an imperative and positive direction to acquit in the absence of corroboration. Such a direction cannot, I think, be justified within the rule, as now recognized in the Court of Criminal Appeal in England and in this Court, that a trial judge may in his discretion advise the jury not to convict upon the uncorroborated evidence of an accomplice. Whatever formula judges may adopt in giving such advice, when they deem it proper to do so, it ought not to be given in language which may convey to the jury the impression that they cannot convict upon the uncorroborated testimony of an accomplice if they are convinced beyond all reasonable doubt that the testimony of the accomplice is in fact true, and see fit thus to act upon it.

Upon this ground as well as upon the ground of the refusal of the learned trial judge to allow Dr. Fontaine, the ballistic expert, to state his opinion as to whether or not the mortal bullet was fired from the revolver which was produced in court—a question to which the Crown was entitled to have a definite answer—I think the Appeal Division of the Supreme Court of New Brunswick was fully justified under the law, as it now stands in this country, in setting aside the verdict of acquittal and ordering a new trial, and for these reasons would dismiss the appeal.

(1) [1916] 2 K.B. 658. (2) [1926] Can. S.C.R. 539.
(3) [1930] Can. S.C.R. 396.

ST. JACQUES J. (*ad hoc*).—The appeal should be dismissed. 1932 PITRE v. THE KING.

Appeal dismissed.

Solicitor for the appellant: *C. T. Richard.*
Solicitor for the respondent: *R. P. Hartley.*

THE CORPORATION OF THE CITY OF TORONTO ..... APPELLANT; 1932 *Dec. 19. *Dec. 23.

AND

FLORENCE MARION THOMPSON AND OTHERS ..... RESPONDENTS.

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

Appeal—Jurisdiction—"Final judgment" (Supreme Court Act, R.S.C., 1927, c. 35, ss. 2 (b), 36)—Appeal from judgment setting aside arbitrator's award and referring matter back.

The Appellate Division of the Supreme Court of Ontario had (35 Ont. W.N. 126) set aside awards of the official arbitrator fixing the rentals to be paid on renewals of certain leases, and referred the matter back for reconsideration from the viewpoint of certain aspects of the case, with liberty to the parties to supplement the evidence already given. An appeal to this Court was quashed ([1930] Can. S.C.R. 120) for want of jurisdiction on the ground that the judgment of the Appellate Division was not a "final judgment" within ss. 2 (*b*) and 36 of the *Supreme Court Act*. The arbitrator again made awards, and the Appellate Division again (41 Ont. W.N. 341) set them aside and referred the matter back, in order that the arbitrator "should, upon the existing evidence, determine" the proper rentals "in conformity with the considerations laid down" in its first judgment. From this second judgment, special leave to appeal (refused by the Appellate Division) was asked from this Court.

Held: The judgment sought to be appealed from was not a "final judgment," being not distinguishable in this respect from the one previously appealed from; and this Court was without jurisdiction to entertain an appeal.

MOTION for an order granting special leave to appeal (refused by the Appellate Division) from the judgment of the Appellate Division of the Supreme Court of Ontario (1) allowing the present respondents' appeal from awards

* PRESENT:—Rinfret, Lamont, Smith, Crocket and St. Jacques (*ad hoc*) JJ.

(1) (1932) 41 Ont. W.N. 341.

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of the Official Arbitrator determining the amounts to be paid by the present respondents as rentals for the renewed terms of certain leases from the present appellant to them respectively of properties in the city of Toronto. The Appellate Division vacated and set aside the awards and referred the matter back to the arbitrator for reconsideration, with a direction that "the arbitrator must consider himself bound by the judgment affecting his previous awards," and in order "that he should, upon the existing evidence, determine in conformity with the considerations laid down in the (first) judgment of the Divisional Court what is the proper amount that should be paid by each tenant." The earlier judgment of the Appellate Division, referred to in the above quoted passages, had set aside previous awards and referred the matter back to the arbitrator for reconsideration, from the viewpoint of certain aspects of the case, with liberty to the parties to supplement the evidence already given (1). An appeal from said earlier judgment to this Court was quashed (2) for want of jurisdiction, on the ground that the judgment appealed from was not a "final judgment" within ss. 2 (*b*) and 36 of the *Supreme Court Act.*

The present motion was dismissed with costs, on the ground that this Court was without jurisdiction to entertain the appeal.

G. R. Geary K.C. for the motion.

F. G. McBrien contra.

The judgment of the court was delivered by

RINFRET, J.—We are all of opinion that, from the viewpoint of jurisdiction, no distinction should be made between the judgment appealed from and the first judgment of the Appellate Division which was previously before this Court.

On a former appeal, the present respondents had appealed from earlier awards of the official arbitrator fixing the respective rentals to be paid by them as tenants upon the renewal of certain leases of properties by the City of Toronto.

(1) (1928) 35 Ont. W.N. 126. (2) [1930] Can. S.C.R. 120.

The Appellate Division then set aside the awards on the ground "that the whole matter (had) been approached in an entirely erroneous way," and referred "the matter back to the arbitrator to reconsider the case" from the viewpoint of certain aspects of the situation which, in the opinion of the court, had not been properly worked out upon the evidence and apparently had not been thought of by the arbitrator.

From that first judgment special leave to appeal to this Court was granted by the Appellate Division to the City of Toronto, with a direction that the costs of such appeal should be costs in the cause, payable by the City in any event. But, in the course of argument of counsel for the appellant, this Court mentioned the question of its jurisdiction to hear the case, notwithstanding the order giving special leave; and argument was heard on this question as well as on the merits.

At the conclusion of the argument of counsel for the appellant, the court unanimously decided that the judgment appealed from was not a final judgment within the meaning of section 36 of the *Supreme Court Act* and within the definition of a "final judgment" given in section 2 (*b*) of the Act. It was held, therefore, that the Court was without jurisdiction (1).

The official arbitrator made a further award on the 16th December, 1929.

On appeal to the Supreme Court of Ontario, that court came to the conclusion that the arbitrator had "entirely disregarded the judgment of the Divisional Court"; and, for that reason, the awards were again vacated and set aside and the matters referred back a second time to the artitrator for reconsideration, in order "that he should, upon the existing evidence, determine in conformity with the considerations laid down in the (first) judgment of the Divisional Court * * * the proper amount that should be paid by each tenant."

Upon a motion made unto the Appellate Division on behalf of the City of Toronto for an order granting special

(1) [1930] Can. S.C.R. 120.

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leave to appeal to this Court from the latter judgment, leave was refused for the reason, verbally stated, "that leave could not be given because the decision of the said court * * * was not a 'final judgment'."

In our view, the second judgment does not add anything to the first judgment of the Appellate Division. All that it says is that the purport and the salient propositions of the first judgment were well known to the arbitrator; that he ought to have been guided by them; that he has disregarded them in his amended award; and that the matter should go back to him a second time with the intimation that he should determine the amount to be paid by each tenant in conformity with the considerations laid down in the first judgment.

If, as was decided by this Court, the first judgment was not a "final judgment" within the meaning of the *Supreme Court Act,* the second judgment, which, in our view, goes no further than the first, must also be held not to come within the definition of a "final judgment" as given in section 2 (*b*) of the Act. This Court is without jurisdiction, and the motion for an order granting special leave to appeal must be dismissed with costs.

Motion dismissed with costs.

Solicitor for the appellant: *C. M. Colquhoun.*

Solicitor for the respondents: *F. G. McBrien.*

CASE STATED BY THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

1932

*Oct. 13.
*Nov. 28.

IN THE MATTER OF "THE RAILWAY GRADE CROSSING FUND" (SECTION 262 OF THE RAILWAY ACT)

Railways—Board of Railway Commissioners for Canada—Jurisdiction—"Railway Grade Crossing Fund"—In what cases grant can be made—Interpretation of section 262 of the Railway Act.

The Board of Railway Commissioners for Canada has jurisdiction to order that a grant will be made from "The Railway Grade Crossing Fund" to help construction work, only when the crossing is eliminated or such protection is provided by the work that the danger is lessened and the safety and convenience of the public increased—The Board has no power to grant an application for a contribution from that Fund towards the costs of highway diversions whereby rail level crossings are not eliminated, although they would relieve the crossings from a substantial volume of highway traffic.

CASE STATED by the Board of Railway Commissioners for Canada for the opinion of the Supreme Court of Canada, under s. 43 of the *Railway Act*, R.S.C., 1927, c. 170, in the matter of a reference as to the jurisdiction of the Board of Railway Commissioners for Canada, under section 262 of *The Railway Act*, as amended by c. 43 of the statutes of Canada, 1928, to allow contributions from "The Railway Grade Crossing Fund" to aid actual construction work for the protection, safety, and convenience of the public in respect of highway crossings of railways at rail level.

The Case is fully stated in the judgment now reported.

A. G. Blair K.C. for the Board of Railway Commissioners for Canada.

W. S. Gray K.C. for the Attorneys General for Alberta and Saskatchewan.

F. H. Chrysler K.C. for the Attorney General for Manitoba.

The judgment of the court was delivered by

RINFRET J.—The Board of Railway Commissioners for Canada, in pursuance of the powers conferred upon it by section 43 of the *Railway Act*, submits for the opinion of the Court the following question:

Has the Board jurisdiction, under section 262 of the *Railway Act*, as amended by c. 43 of the statutes of Canada, 1928, to allow contributions

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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In re "THE RAILWAY GRADE CROSSING FUND" S. 262 OF THE RAILWAY ACT.

Rinfret J.

from "The Railway Grade Crossing Fund" in the case of highway diversions, whereby rail level crossings which are not eliminated are relieved from a substantial volume of highway traffic?

The material parts of section 262 of the *Railway Act*, as amended by c. 43 of the statutes of 1928, read as follows:

262. (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 highway crossings of railways at rail level shall be placed to the credit of a special account to be known as "The Railway Grade Crossing Fund," and shall (in so far as not already applied) be applied by the Board, subject to the limitations hereinafter set out, solely towards the cost, not including that of maintenance and operation, of actual construction work for the protection, safety and convenience of the public in respect of crossings (railway crossings of highways or highway crossings of railways) at rail level in existence on the first day of April, one thousand nine hundred and nine, and in respect of existing crossings (railway crossings of highway or highway crossings of railways) at rail level, constructed after the first day of April, one thousand nine hundred and nine, provided, however, that the Board shall not apply any moneys out of The Railway Grade Crossing Fund towards the cost of the actual construction work, for the protection, safety and convenience of the public in respect of any existing crossing (railway crossing of a highway or highway crossing of a railway), at rail level, constructed after the first day of April, one thousand nine hundred and nine, unless and except an agreement, approved of by the Board, has been entered into between the company and a municipal or other corporation or person by which agreement the municipal or other corporation or person has agreed with the company to bear a portion of the cost of the actual construction work for the protection, safety and convenience of the public in respect of such crossing (railway crossing of a highway or highway crossing of a railway), at rail level, constructed after the first day of April, one thousand nine hundred and nine.

The limitations referred to in the above subsection are set out in subsection 2 of the amending Act (c. 43 of S.C. 1928) and are not material here.

"Crossing," for the purposes of section 262, is defined as follows in subsection 4:

(4) In this section "crossing" means any railway crossing of a highway, or any highway crossing of a railway, at rail level, 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 the one or the other and any other work ordered by the Board to be provided as one work of protection, safety and convenience for the public in respect of one or more raiways of as many tracks crossing or so crossed as in the discretion of the Board determined.

We are not concerned with the other subsections of section 262.

The "Railway Grade Crossing Fund" was created by c. 32 of the statute of Canada 8-9 Edw. VII, to be applied by the Board

solely towards the cost (not including that of maintenance and operation), of actual construction work * * * for the purpose of providing * * * protection, safety and convenience for the public in respect of highway crossings of the railway at rail level (Section 7 of c. 43 of 1909).

As originally enacted, the legislation was limited to crossings in existence on the 1st day of April, 1909; but its application was gradually extended by subsequent amendments until it assumed its present form in section 262 already reproduced in part at the beginning of this judgment.

The fund is made up of appropriations set apart from the Consolidated Revenue Fund of Canada and of such contributions as the provinces are willing to make, subject to the conditions and restrictions they may impose.

We now quote from the case stated by the Board:

In dealing with an application for a contribution from The Railway Grade Crossing Fund towards the cost of diversion of a highway which would withdraw a considerable portion of highway traffic from two crossings of the railway, neither of which, however, was closed, the then Chief Commissioner Carvell, in a memorandum dated June 9, 1921, said:

"I do not think this application can be favourably considered. In my opinion the intention of the Railway Grade Crossing Fund, the appropriation for which is provided for by Section 262 of the Railway Act, is for the protection, safety and convenience of the public in respect of the railway crossing itself, that is, either that the crossing must be eliminated or the protection provided must be such that the danger is lessened and the safety and convenience of the public increased.

In subsection (4) of the said section, 'crossing' is defined as—'any steam railway crossing of a highway, or highway crossing of a railway, at rail level, and every manner of construction of the railway or of the highway by the elevation or the depression of the one above the other, or by the diversion of the one or the other, and any other work ordered by the Board to be provided as one work of protection, safety and convenience for the public in respect of one or more railways not exceeding four tracks in all crossing or so crossed.

While it might be argued that the diversion referred to southwest of the Village of Acton will withdraw some of the traffic from the two crossings of the Grand Trunk Railway now existing, yet it in no way reduces the danger or increases the safety and convenience of the crossings themselves. The individual will be just as liable to an accident at either of these crossings after the new highway is constructed as at the present time, the only difference being there will not be as many individuals who possibly might meet with an accident.

Moreover, I cannot see that the construction of this new highway comes under the definition of 'any other work ordered by the Board to be provided as one work of protection,' etc. This Board has nothing whatever to do with it. Were a grant made in this case, every municipality in Canada which builds a road that might, by argument, withdraw traffic from an existing railway crossing, would be entitled to come to this Board for a contribution.

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In re "THE RAILWAY GRADE CROSSING FUND" S. 262 OF THE RAILWAY ACT.

Rinfret J.

Another question would arise, were we to decide to grant a contribution from the Grade Crossing Fund, as to upon what basis it should be levied. Would be on the cost of the highway between the two crossings, or would it extend to the east or west thereof?

The whole question present so many difficulties that I think the application should be refused."

In 1928 this view was modified by Chief Commissioner McKeown, and the following issued as a ruling by the Board:

"In the case of highway diversions made for the protection, safety and convenience of the public in respect of highway crossings or railways at rail level whereby such crossings are relieved from a substantial volume of highway traffic, a proper contribution to the expense of such highway diversion may be made from The Railway Grade Crossing Fund although the complete elimination of such crossing be not possible in every instance, and such contributions will be accordingly so ordered."

Applications for contributions from the Fund are now pending before the Board in the case of highway diversions which would relieve existing highway rail level crossings from a substantial volume of traffic and which, under the later ruling, would be entitled to grants from The Railway Grade Crossing Fund.

It is because of the conflict of views referred to and to determine definitely the Board's authority that the opinion of the Court is sought by the Board.

It does not appear to us that, when enacting the legislation in question, Parliament intended to confer on the Board any special power distinct and independent from its normal railway jurisdiction. The fund was appropriated by Parliament towards actual construction work for the protection, safety and convenience of the public in respect of highway crossings of railways at rail level, and the Board was not to allow contributions from that fund, except in dealing with works over which it held jurisdiction and as an incident of the exercise of its ordinary powers in railway matters. The statute does not contemplate that direct applications for payments out of the fund may be made to the Board to aid works outside the sphere of its usual competence. The intention was that when the Board was regularly seized of an application in respect of an existing crossing at rail level (railway crossing of a highway or highway crossing of a railway), it might, when granting the application and subject to certain conditions and restrictions, order at the same time that a certain sum be allowed out of the Crossing Fund to aid the actual construction work ordered by it. This view is supported by the definition of " Crossing " as applying to that word in section 262. It refers to

a work ordered by the Board to be provided as one work of protection, safety and convenience for the public in respect of one or more railways

of as many tracks crossing or so crossed as in the discretion of the Board determined.

The section of the Act under which the Board has jurisdiction to make such an order, in respect of an existing crossing, is section 257. That section empowers the Board to order protection works at or on the crossing. In the exercise of the powers so given to it, the Board may order that a highway be permanently diverted, but its jurisdiction in that respect is limited to that portion of the highway which lies at the crossing proper. It

is confined entirely to the extinguishment of the public right to cross the railway company's right of way at that particular spot. (In *re Closing Highways at Railway Crossings*) (1).

The authority of the Board upon the highway exists only so far as concerns the crossing. Otherwise, the highway remains under the control of the provincial or municipal authorities and, in the words of Chief Commissioner Carvell, " the Board has nothing whatever to do with it."

Moreover, the question submitted assumes that the rail level crossing will not be eliminated. It follows that there will be no highway diversion at the crossing. The highway will continue to cross the railway. The new highway whereby it is claimed that the crossing is relieved from a substantial volume of traffic, was or will be constructed by the provincial or the municipal authorities entirely of their own motion, without any intervention of the Board and, in fact, without the Board having any right to interfere. It does not, therefore, come within the definition of "crossing" in section 262 as being

one work * * * in respect of one or more railways of as many tracks crossing or so crossed as in the discretion of the Board determined;

nor does it come within the classification of construction works ordered or authorized by the Board " in respect of highway crossings of railways at rail level."

Our conclusion is that the question submitted ought to be answered in the negative.

It is ordered that the matter be remitted to the Board of Railway Commissioners with the present opinion, which will be certified to the Board as being the opinion of the Court on the subject referred to.

There will be no costs on the reference.

Question answered in the negative.

(1) 15 Can. Ry. Cas. 305.

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*May 19.
*Dec. 23.

ASBESTOS CORPORATION LIMITED (DEFENDANT) ..... } APPELLANT;

AND

WILLIAM A. COOK (PLAINTIFF) ..... RESPONDENT.

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

Contract—Lease or hire of personal services—Engagement at so much per year—Whether yearly or for an unlimited term—Dismissal—Claim for full year salary—Tacit renewal—Arts. 1642, 1667, 1668, 1670 C.C.

The respondent alleged a verbal contract of lease or hire of his services as Assistant Manager of the appellant company "at an annual salary of $6,000 *per annum* dating from 1st of May, 1927, payable $500 a month" with the free use and occupancy of a dwelling house belonging to the company; and he further alleged that this oral agreement had been confirmed by a letter from the president of the company, dated 5th May, 1927, as follows: "Mr. Cook has agreed to join us on the conditions mentioned at $6,000 *per annum*, and use of Penhale's house." The appellant company alleged the oral agreement was for hire from month to month; but the only evidence tendered on either side was the letter of the 5th of May. The respondent continued in the discharge of his duties until the 31st August, 1929, when he was dismissed and paid $1,875, being his salary to that date plus three months' pay in lieu of notice. The respondent then brought an action claiming the balance of his salary up to the 1st of May, 1930, on the ground that he was entitled to his salary up to the end of the current year.

Held, Anglin C.J.C. and Cannon J., dissenting, that the respondent was not entitled to the surplus of salary claimed by him.

Held, also, that the respective claims of the parties must be determined by the terms of the letter, as no other evidence had been adduced. According to its literal meaning, a contract of lease or hire of personal services at so much per year or month is not a contract for a fixed term but one for an indeterminate period; and there is no provision in the Civil Code to the effect that a contract of hire of personal services, whose duration has not been agreed upon, will be deemed to have been made for one year when the salary has been fixed at so much per year. Article 1642 of the Civil Code, relating to the lease or hire of houses, is not applicable to lease or hire of personal services.

Anglin C.J.C. (dissenting) was of the opinion that, under the circumstances of the case, a new trial should be ordered.

Per Cannon J. dissenting.—According to the terms of the letter coupled with the circumstances of the case fully detailed in the reasons for judgment, the engagement of the respondent's services by the appellant company was for a term of one year; and such contract had been continued from year to year by tacit renewal.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Smith and Cannon JJ.

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ASBESTOS CORPORATION LTD. v. COOK.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Duclos J., and maintaining the respondent's action for salary.

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

J. L. Ralston K.C. and *J. D. Kearney K.C.* for the appellant.

E. Languedoc K.C. for the respondent.

The judgment of the majority of the court (Duff, Rinfret and Smith JJ.) was delivered by

RINFRET, J.—L'intimé était demandeur devant la Cour Supérieure. Il avait été à l'emploi de l'appelante, et il l'a poursuivie en réclamation de dommages-intérêts sous prétexte de renvoi sans cause et sans avis de congé suffisant. Il a allégué un engagement verbal

at an annual salary of $6,000 per annum dating from the 1st of May 1927, payable $500 a month,

avec, en plus, le droit d'habiter gratuitement une maison appartenant à la compagnie, pendant la durée de son engagement. Il a ajouté que le contrat d'engagement verbal avait été confirmé par une lettre, en date du 5 mai 1927, dans les termes suivants:

Mr Cook has agreed to join us on the conditions mentioned, $6,000 per annum and use of Penhale's house.

Or, le 29 août 1929, l'intimé a reçu avis de congé avec trois mois d'indemnité. Il a alors fait valoir que l'engagement qui, d'après lui, était pour une année se terminant le 1er mai 1928 avait été renouvelé par tacite reconduction jusqu'au 1er mai 1929, puis, de nouveau, jusqu'au 1er mai 1930, et qu'il ne pouvait être congédié avant cette date; ou, à tout événement, qu'il avait droit à son salaire et à une compensation pour l'occupation de la maison jusqu'à cette date.

Dans son plaidoyer, la compagnie a admis la lettre: mais elle a allégué que le contrat était pour un engagement " from month to month "; et, en outre, elle a invoqué justification pour le renvoi.

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ASBESTOS CORPORATION LTD. v. COOK.

Rinfret J.

A l'ouverture de l'enquête, le procureur de la compagnie fit la déclaration suivante:

Defendant declares it has no proof to offer in support of the allegation that the dismissal was for cause, and the issue is, therefore, limited to the question of law as to whether there was an annual engagement expiring on May 1st, 1930.

Dans ses termes, cette déclaration écartait la question de renvoi pour cause, mais elle laissait subsister les deux autres questions débattues jusque-là entre les parties: la durée de l'engagement et la durée de son renouvellement, s'il y avait eu tacite reconduction. Je ne crois pas que l'on puisse dire que le débat a été autrement limité pour se borner à l'unique question de la tacite reconduction. Cela ne ressort pas du texte de la déclaration faite par le procureur de la compagnie; et si les parties l'eussent interprétée dans ce sens restreint le juge de première instance n'aurait pas manqué de le consigner dans son jugement. Or, on n'y trouve aucune trace de cette restriction, non plus d'ailleurs que dans les notes des juges de la Cour du Banc du Roi. En l'absence d'entente entre les procureurs des parties sur ce point, je ne vois pas comment on pourrait y donner effet. Voici d'ailleurs comment l'intimé lui-même nous soumet le litige dans son factum:

Points in issue.

As has already been noted, the Appellant has abandoned all pretence of complaint against the Respondent as cause for his dismissal. We take it, therefore, that no question arises but this: *Was the contract of engagement an annual one in the intention of the parties, or was it not?*

A l'enquête devant la Cour Supérieure, malgré que les deux parties eussent invoqué un contrat verbal effectué entre le président de la compagnie et l'intimé, le 1er mai 1927, ni l'une, ni l'autre n'a tenté de faire la preuve de ce contrat. Il n'y a pas un mot au dossier de ce qui s'est passé ce jour-là entre le président de la compagnie et l'intimé.

Toute la preuve consiste dans un examen préalable (on discovery) où la lettre du 5 mai 1927 fut produite, mais qui, au surplus, porte exclusivement sur les allégations de renvoi pour cause. En outre, devant la Cour Supérieure, l'intimé s'est contenté de fournir des détails sur la maison qu'il avait dû louer à Montréal à la suite de son départ de Thetford-Mines, et de comparer cette maison avec celle que la compagnie avait mise à sa disposition. Il est évident qu'il a offert cette preuve dans le but d'établir sa réclamation pour

la valeur d'occupation de cette maison pendant le reste du temps où, d'après lui, son emploi aurait dû continuer. Il dit bien qu'avant de se rendre à Thetford-Mines pour prendre charge de ses fonctions il habitait la ville de Westmount; mais il ne le dit que d'une façon incidente, au cours de la preuve relative à la valeur de l'occupation. Il ne dit pas que cette question a été discutée avec le président de la compagnie le 1er mai 1927, lorsque les conditions de son engagement furent arrêtées. Il ne dit pas non plus qu'il a dû résilier le bail de sa résidence à Westmount pour se rendre à Thetford-Mines, ou que ce changement de domicile lui ait causé le moindre inconvénient. Il suffit de lire son témoignage pour constater qu'il ne réfère à cet incident en aucune façon comme à une circonstance qui pouvait être de nature à affecter les conditions de son engagement. Il ne suggère même pas que l'obligation de transférer son domicile à Thetford-Mines a eu le moindre effet sur sa décision d'accepter l'engagement. Pour tout ce que l'on en sait: l'on était au 1er mai 1927; d'après la loi (Art. 1642 C.C.), en l'absence de convention contraire, dans la province de Québec, les baux finissent "le 1er jour de mai de chaque année", et la présomption est plutôt que son bail à Westmount était terminé.

Si toutefois cette question peut avoir la moindre importance, il est exact de dire que, en l'espèce, l'on ignore absolument tout des circonstances où l'intimé se trouvait lorsqu'il a accepté le contrat d'engagement avec l'appelante. L'on ne sait même pas s'il avait un emploi au moment où il a fait ce contrat; et il est tout aussi vraisemblable de présumer qu'il a considéré cet engagement comme très avantageux et qu'il s'est empressé de l'accepter, que l'on est en droit de supposer le contraire.

Toujours est-il que les parties ont laissé la cour sans aucune preuve du contrat verbal qu'elles avaient allégué, et qu'elles semblent avoir été satisfaites de laisser décider la cause sur la lettre du 5 mai 1927. La situation ainsi créée par les parties s'est donc trouvée la suivante:

Le demandeur a invoqué un contrat verbal pour un an. La compagnie a prétendu que c'était un contrat verbal "from month to month". Entre les deux, jusque-là, la question était une question de preuve, où les présomptions de fait sont admises comme tout autre élément de preuve.

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Après avoir entendu la version des deux côtés, le juge aurait décidé quels étaient les termes exacts du contrat, en tenant compte des présomptions de fait, et il aurait jugé en conséquence. Pour rendre son jugement, dans cette cause-ci comme dans toute autre cause, il aurait pu tirer des faits les présomptions qui en résultaient.

Mais il reste que, en l'espèce, la preuve des faits n'a pas été offerte. Le demandeur s'est contenté de la lettre du 5 mai et en est resté là. Les parties ont jugé à propos de soumettre leur cause sur cette lettre. La preuve du contrat se résume donc à cette lettre. Par suite de la façon dont les parties ont procédé, la cause se présente exactement comme s'il y avait un contrat d'engagement par écrit; et le résultat dépend de l'interprétation que l'on doit donner à cet écrit.

Nous comprenons parfaitement que si le juge de première instance s'était trouvé en présence d'une preuve verbale où le demandeur aurait affirmé qu'il avait été engagé pour un an et où les témoignages de la part de la compagnie défenderesse auraient prétendu le contraire, il aurait pu tirer du fait que le prix convenu était de $6,000 par année la présomption que l'engagement était pour un an, et, par conséquent, que la version du demandeur était la vraie. Mais ici, encore une fois, nous n'avons la version ni de l'une, ni de l'autre des parties contractantes. Elles nous soumettent seulement un écrit, la lettre du 5 mai 1927. Elles font reposer toute leur cause sur cet écrit et elles nous demandent de décider quel a été le contrat en vertu des termes de cet écrit. Nous ne voyons pas pourquoi nous procéderions autrement que dans toutes les autres causes qui dépendent de l'interprétation d'un écrit et nous nous inspirerions des circonstances qui ont entouré le contrat, excepté dans le cas où l'écrit serait ambigu. Il s'agit donc de décider quelle est la durée de l'engagement du demandeur d'après le texte de l'écrit qu'il a produit comme l'unique preuve de cet engagement.

L'on est convenu de considérer l'engagement du demandeur comme étant un louage d'ouvrage régi par les articles 1666 et suiv. du Code civil. Le chapitre du code qui traite de ce contrat, après avoir défini "les principales espèces d'ouvrages qui peuvent être loués", ne contient que trois articles qui peuvent s'appliquer au cas dont il s'agit: les articles 1667, 1668 et 1670. Ils sont à l'effet que le contrat

de louage de services personnels ne peut être que pour un temps limité ou pour une entreprise déterminée. Il peut être continué par tacite reconduction. Il se termine par le décès de la partie engagée, ou lorsque, sans sa faute, elle devient incapable de remplir le service convenu. Il se termine aussi, en certains cas, par le décès du locataire, suivant les circonstances.

Les droits et obligations résultant du bail de services personnels sont assujettis aux règles communes aux contrats. Ils sont aussi, dans les campagnes, sous certains rapports, régis par une loi spéciale; et, dans les villes et villages, par les règlements municipaux.

On a interprété la règle qui veut que le louage de services personnels ne puisse être que pour un temps limité comme voulant dire qu'un contrat de ce genre ne peut être fait pour toute la vie du locateur, ou pour une période de temps qui équivaudrait à une location permanente. Mais la doctrine et la jurisprudence n'ont jamais compris qu'un louage de services personnels ne pouvait être fait pour un temps indéterminé. La seule conséquence d'un contrat de ce genre est que l'une des parties peut s'en libérer en donnant un avis de congé raisonnable.

D'après le sens littéral de l'expression, un contrat à tant par an ou à tant par mois n'est pas un contrat pour une période fixe, mais est un contrat pour une période de temps indéterminée.

Ce qui démontre clairement que c'est là à la fois le sens des mots et le sens dans lequel les codificateurs du code ont compris ces mots, c'est l'article 1642 C.C. Cet article traite un bail de maison dont "le loyer est de tant par an" ou "de tant par mois" ou de "tant par jour" comme un bail dont "la durée n'en est pas fixée"; et il pose la règle particulière qu'un bail de maison ainsi consenti sera "censé fait à l'année, finissant au premier jour de mai de chaque année, lorsque le loyer est de tant par an", etc.

Cette exception fait bien comprendre que, tant d'après le sens des mots que dans l'esprit des codificateurs, le louage de services personnels à "tant par an" est un louage dont, pour me servir des expressions du code, "la durée n'est pas fixée".

Or, il n'y a rien dans le Code civil à l'effet que le contrat de louage de services personnels dont la durée n'est pas

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fixée sera censé fait à l'année, lorsque le salaire est de tant par an, etc. L'article 1670 du Code civil, qui s'applique au contrat de louage de services personnels, ne réfère pas à l'article 1642; mais il dit que

les droits et obligations résultant du bail de services personnels sont assujettis aux règles communes aux contrats.

L'article 1642 n'est pas une règle commune aux contrats; ce n'est même pas une règle commune à tous les contrats de louage des choses; c'est, comme le titre le dit et comme le texte l'indique, une règle particulière au bail de maison. Il n'y a pas d'analogie générale entre un contrat de louage de services personnels et un bail de maison. Je ne vois pas comment on pourrait dire qu'un louage de services personnels dont la durée n'est pas fixée serait censé finir "au premier jour de mai de chaque année"—ce qui serait la conséquence de l'application de l'article 1642; et, si le code avait entendu subordonner à cette règle le contrat de louage de services personnels, il est difficile de comprendre pourquoi il aurait spécialement déclaré que c'est une règle particulière au bail de maison et pourquoi, dans l'article 1670 C.C., il se serait contenté de référer "aux règles communes aux contrats".

Si l'on examine la jurisprudence, l'on trouve deux décisions de la Cour Supérieure où un engagement à tant par année paraît avoir été interprété comme un engagement "à l'année" (*Tardif* v. *Ville de Maisonneuve*) (1), ou comme "a yearly engagement" (*Silver* v. *Standard Gold Mines* (2).

Il resterait naturellement à se demander si un engagement "à l'année" veut dire la même chose qu'un engagement pour un an—et, de prime abord, il paraît certainement y avoir entre les deux une nuance importante.

Mais si l'on consulte les autres arrêts qui sont rapportés, l'on trouve d'abord, en 1853, le jugement dans *Lennan* v. *The St. Lawrence and Atlantic Railroad Company* (Day, Smith & Mondelet JJ.) (3), où il fut décidé que, dans un contrat de louage d'ouvrage, les mots "your remuneration will be at the rate of £300 per annum from the 1st May next" ne constituaient pas un engagement pour un an et

(1) (1918) Q.R. 58 S.C. 176. (2) [1912] 3 D.L.R. 103.
(3) (1853) 5 L.C.R. 91.

qu'un contrat de cette espèce cesse au gré de l'une ou de l'autre des parties.

Dans cette cause, comme dans la présente, les termes de l'engagement étaient contenus dans une lettre. Monsieur le juge Day, qui a prononcé le jugement de la cour, a posé le principe suivant:

The general rule of law in this country is, that when parties engage in service, the contract is determinable at the option of either party. Pothier goes further, and says, at the option of the party who hires. It is true, the reference in the books is to *domestiques,* but the same rule applies here. If nothing is said as to time, the contract is determinable at the option of either party. If the engagement in this case had been specifically for a year, we should have no difficulty in saying there was a *tacite reconduction* for the second year; but the terms of the letter do not justify this opinion. It would be going a great way to say that because a salary is fixed at the rate of so much a year, the engagement is for a year (Troplong, *Louage,* No. 862, and Pothier, *there quoted*).

Cet arrêt paraît certainement être le jugement le plus important sur cette question qui ait été rendu avant le Code civil.

Après le code, nous trouvons les jugements de la Cour du Banc de la Reine dans les causes de: *The City of Montreal v. Dugdale* (1), et *Commissaires des Chemins à Barrières de Montréal* vs *Rielle* (2).

Ces jugements sont respectivement des années 1880 et 1890.

Dans la première de ces causes (1), le rapport ne fait pas voir les conditions précises de l'engagement. Monsieur le juge Ramsay, qui faisait partie de la majorité, emploie, au cours de son jugement, les expressions suivantes (p. 153): " engaged them for the year 1870 at the rate of $500 ", et (page 155):

A question has been raised whether his re-engagement by tacite reconduction gives him a right to his salary for his services for the period of a year, *the original engagement being for that period.*

De ce jugement, il résulterait que l'engagement du docteur Dugdale était originairement pour une période fixe d'un an.

L'arrêt dans la cause de *Rielle* (2) paraît être à l'effet qu'un salaire de tant par année constitue un contrat de louage pour une année, sujet à tacite reconduction. Le jugement fut rendu, pour la cour, par monsieur le juge Bossé, qui fait allusion à la jurisprudence en France et à la

(1) (1880) 25 L.C.J. 149. (2) (1890) M.L.R. 6 Q.B. 53.

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Cour de cassation qui, jusqu'à 1859, déclarait que les engagements de cette nature étaient pour un temps indéterminé et, lorsqu'ils étaient rompus par le maître, qu'il y avait lieu contre lui aux dommages-intérêts.

Depuis 1859 (ajoute monsieur le juge Bossé) l'on trouve de cette même cour six arrêts différents qui jugent le contraire. Mais la doctrine semble condamner cette jurisprudence; et les auteurs les plus récents expriment tous le désir de voir la cour revenir à sa première opinion.

Puis, il cite: Laurent, vol. 25, nos 511 à 517; 4 Aubry & Rau, p. 514: Dalloz, vbo Louage d'ouvrage, nos 50 à 54.

Ces citations permettent de comprendre exactement le sens de cette partie du jugement. Tant avant qu'après 1859, la Cour de cassation et les auteurs cités considéraient les engagements de cette nature comme étant pour un temps indéterminé; et la discussion ne portait pas sur ce point, mais sur la question de savoir si le louage d'ouvrage ou de services fait pour un temps indéterminé peut prendre fin par la seule volonté des parties. Laurent (*loc. cit.*) dit ce qui suit:

Il s'ensuit que celui qui veut faire cesser la convention doit manifester sa volonté en donnant congé à l'autre, et le congé implique un certain délai dans l'intérêt de celui à qui il est donné; si le délai n'est pas suffisant, il y a lieu à dommages-intérêts. (Dalloz, 1876-2-72.)

Aucun des auteurs cités n'émet l'opinion qu'un contrat de louage de services à tant par année est un contrat pour un an. Ils prennent, au contraire, pour acquis que c'est un contrat fait pour un temps indéterminé et ils discutent la question de savoir de quelle façon les parties peuvent y mettre fin.

L'Honorable juge Bossé poursuit ensuite, en comparant l'arrêt de *Lennan* v. *St. Lawrence and Atlantic Railroad Company* (1) et celui de *Corporation de Montréal* v. *Dugdale* (2) dont il dit, à tort suivant nous, que la cour y aurait décidé " qu'un engagement de cette nature était pour l'année " (car nous croyons que le rapport ne fait pas voir cela mais que, comme nous avons tenté de le démontrer, le jugement de monsieur le juge Ramsay indiquerait que le contrat était pour une période fixe d'un an); et il adopte le point de vue que l'arrêt *re Dugdale* (2) " est plus logique et plus conforme à nos mœurs ". Il ajoute:

Dans cette province un commis, employé dans une grande compagnie de chemin de fer ou autre, est, à moins de circonstances spéciales démontrant le contraire, engagé à l'année, il est censé ne pas avoir voulu s'expo-

(1) [1853] 4 L.C.R. 91. (2) (1880) 25 L.C.J. 149.

ser à un renvoi sans autre motif que le caprice ou l'intérêt du maître, et se trouver sans emploi à une saison de l'année où les engagements ne sont généralement pas faits. De son côté le maître ne peut être censé avoir voulu s'exposer à tous les inconvénients qui pourraient lui résulter de ce que, à un moment donné, un ou plusieurs de ses employés quitteraient ses bureaux.

Le passage qui précède démontrerait qu'il devait se trouver dans le dossier de la cause de *Rielle* (1) toute une preuve établissant, sous ce rapport, les mœurs de cette province, sans quoi nous ne nous expliquerions pas que le savant juge ait pu prendre connaissance d'office et son raisonnement manquerait de fondement juridique.

Aussi sommes-nous portés à nous ranger du côté de l'avis de la Cour du Banc du Roi dans *Cité de Montréal* v. *Davis* (2), où l'Honorable juge Lacoste, prononçant le jugement de la majorité de la cour, parle ainsi des deux causes auxquelles nous venons de référer précédemment (page 192):

On nous a cité les causes de *Dugdale* et *La cité de Montréal* (3) et de *Les commissaires des chemins à barrières de Montréal et Rielle* (1), où l'on prétend que cette cour aurait décidé qu'un louage de services à tant par année était un engagement à l'année. Il est impossible de connaître par les rapports toutes les circonstances de ces actions. Dans *Dugdale* et *La cité de Montréal* (3), les juges étaient partagés d'opinion. Dans *Les commissaires des chemins à barrières de Montréal* et *Rielle* (1), les employés n'étaient pas renvoyés au bon plaisir des commissaires. Je ne crois pas que notre cour ait tiré de la fixation du salaire à l'année une présomption légale de la durée du contrat. Je ne connais aucun texte de loi qui crée une semblable présomption en matière de louage de services. C'est tout au plus une présomption de fait qui a plus ou moins de force suivant les circonstances. Dans l'espèce, l'engagement a été effectué le 1er août sans durée définie, conformément à l'usage suivi. Ce n'est que deux mois après que le salaire a été déterminé dans une résolution où il n'y a aucune référence à l'engagement, lequel n'a pas, en conséquence, été modifié dans sa durée laquelle est restée indéfinie.

Ce passage du jugement est important, d'abord pour indiquer l'interprétation que la Cour du Banc du Roi elle-même donnait, en 1897, aux arrêts de cette cour dans les causes de *Dugdale* (3) et de *Rielle* (1). Puis il définit bien clairement le principe:

Je ne crois pas que notre cour ait tiré de la fixation du salaire à l'année une présomption légale de la durée du contrat. Je ne connais aucun texte de loi qui crée une semblable présomption en matière de louage de services.

(1) (1890) M.L.R. 6 Q.B. 53. (2) (1896) Q.R. 6 K.B. 177.
(3) (1880) 25 L.C.J. 149.

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Ce n'est pas là un principe posé spécialement pour les fins de la cause de *Davis* (1); c'est l'énonciation d'un principe général. Il est vrai de dire que, dans cette cause de *Davis* (1), le point principal était de décider si la Cité de Montréal avait le droit de renvoyer ses employés suivant "son bon plaisir" et "à sa discrétion", sans congé préalable. Mais je ne vois pas comment on peut lire ce jugement sans comprendre qu'il a également une portée générale sur l'interprétation qu'il faut donner à un contrat de louage de services où le salaire est stipulé à tant par an.

Sir Alexandre Lacoste (page 191) (1) dit:

> La résolution du 1er août 1892 qui le nomme, ne détermine pas la durée de son engagement. Celle du 3 octobre fixe le salaire à tant par an, mais l'année ici n'est prise en considération, dans notre opinion, que pour la fixation du salaire. Pothier (Louage 176), Troplong (Louage 862) nous donnent des exemples de ce genre. Voy. Rolland de Villargues, vo. *Bail d'ouvrage et d'industrie,* nos 24, 25.

Puis, dans le jugement de la cour, on trouve le considérant suivant:

> Considérant que l'intimé n'a pas prouvé qu'il ait été engagé pour une durée limitée et déterminée.

Ce considérant n'a évidemment rien à voir avec le pouvoir spécial de la cité de Montréal de démettre ses employés suivant son bon plaisir. C'est clairement l'interprétation du contrat de Davis, dont le salaire était fixé à tant par année.

Cette cause de *Davis* (1) vint ensuite devant la Cour Suprême du Canada, où le jugement de la cour (2) fut prononcé par l'honorable juge Taschereau et où l'on trouve le passage suivant (page 544):

> Chief Justice Sir Alexandre Lacoste's reasoning for the Court, on both parts of the claim, seems to be unanswerable and I would dismiss the appeal with costs.

Le jugement de la Cour du Banc du Roi dans la cause de *Davis* (1) fut rendu le 17 décembre 1896; celui de *McGreevy* v. *Les Commissaires du havre de Québec,* rendu par la même cour présidée par le même juge-en-chef, est en date du 9 novembre 1897. Il n'y est nullement référé à l'arrêt de *Cité de Montréal* v. *Davis* (1). L'on ne peut supposer que cette cour aurait changé d'avis, ni surtout qu'elle eût voulu mettre de côté l'opinion qu'elle avait exprimée *re Davis* sans le déclarer formellement et sans

(1) [1896] Q.R. 6 K.B. 177. (2) (1897) 27 Can. S.C.R. 539.

même discuter l'arrêt antérieur. Aussi suffit-il de lire le jugement rendu par l'honorable juge Ouimet pour constater qu'il s'agit là d'un cas d'espèce qui semble avoir dépendu exclusivement des faits spéciaux de la cause. Il réfère, entre autres choses, à la prétention des Commissaires du havre que

ce nouvel engagement ne faisait que continuer l'appelant et ses collègues comme membres *permanents* du personnel des ingénieurs.

Nous pouvons passer rapidement sur la décision dans la cause de *Charbonneau* v. *Publishers Press* (1), où l'engagement était "par écrit *pour le terme d'une année* à partir du 5 juin 1911"; et nous arrivons à la décision de la Cour de Revision (Tellier, de Lorimier et Greenshields JJ.) dans *Couture* v. *La cité de Montréal* (2). La résolution suivante avait été passée par la commission de la voirie:

Résolu que MM. (le demandeur et autres) soient nommés chaîneurs pour la cité à raison de $600 par année.

Il fut jugé que cette résolution devait être interprétée comme ne déterminant pas la durée de l'engagement du demandeur et que le mot "année" n'y était mentionné que pour la fixation du salaire du demandeur. On y ajouta que le contrat de louage de services personnels est régi par les dispositions contenues aux articles 1667 et suiv. et 1022 et suiv. du Code civil et que la durée des engagements est déterminée par la nature des conventions, par la nature des travaux et par l'usage des lieux.

Cela veut dire évidemment que la durée est d'abord déterminée par la convention, à laquelle, comme dans tout autre contrat, on doit suppléer les clauses d'usage, quoiqu'elles n'y soient pas exprimées (art. 1017 C.C.). Dans cette cause, la Cour Supérieure avait également décidé que "l'engagement du demandeur avait été fait pour une période indéterminée".

Nous avons ensuite, en 1920, le jugement dans la cause de *Bessette* v. *La Société Anonyme d'Imprimerie Le Pays* (3), à laquelle l'intimée nous a référés, où le contrat d'engagement était par écrit, pour une période d'un an; puis celle de *Iverson* v. *Chicoutimi Pulp Co.* (4) citée par l'appelante, et où la résolution d'engagement comportait que

from January 1st 1922 to April 15th 1922, the salary of Mr. Iverson will be $6,000 per annum. After April 15th 1922, at the rate of $6,300.

(1) (1912) 18 R.L.n.s. 410.
(2) (1913) 19 R. de J. 458.
(3) (1920) Q.R. 59 S.C. 9.
(4) (1924) 30 R.L.n.s. 460.

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Il y fut jugé qu'il s'agissait d'un contrat pour une période indéterminée auquel la compagnie avait pu valablement mettre fin avec un avis de congé suffisant.

Dans la cause de *Kidston* v. *Palmer* (1), la Cour du Banc du Roi a unanimement décidé que les présomptions de l'article 1642 relatives au louage de maison ne s'appliquent pas rigoureusement dans le cas de louage d'ouvrage; et adopta l'opinion de Sir Alexandre Lacoste dans la cause de *Davis* (2), que la fixation du salaire constitue à l'égard du terme et de la durée de l'engagement une présomption de fait qui a plus ou moins de force, suivant les circonstances.

Les termes de l'engagement étaient contenus dans une lettre et exprimés ainsi: " the proposition of $4,800 per year ".

Dans cette cause, il y avait une preuve de part et d'autre sur les conditions de l'engagement dont la lettre n'était qu'un élément. L'Honorable juge Dorion, qui a rendu le principal jugement, a analysé la preuve testimoniale en détail; et, après avoir dit (p. 199):

> Les mots "$4,800 per year" ne constituent pas nécessairement un engagement à l'année; les autorités citées par l'appelante le démontrent,

il en vint à la conclusion que la fixation du salaire à $4,800 par an constituait, dans cette preuve, une présomption de fait suffisante pour arriver à la conclusion que la version de l'employé à l'effet que l'engagement avait été fait pour un an était justifiée.

On peut compléter cette revue des arrêts par une référence à *Gallagher* v. *Confer* (3), où la mention du salaire était faite comme suit:

> at a salary of $2,700 per annum to be paid in twelve regular monthly instalments of $225 per month.

Il y avait là évidemment un engagement de faire douze paiements mensuels de $225, et l'on a interprété cette stipulation, avec raison suivant nous, comme liant le patron à l'employé au moins pour cette période de douze mois.

Dans *Garon* v. *Security Life Insurance Company* (4), l'engagement du gérant moyennant un salaire de " $200 par mois " fut considéré tant par la Cour Supérieure que par la Cour de Révision, non pas comme un engagement pour un mois seulement; mais comme un engagement au mois pour une période indéterminée.

(1) (1925) Q.R. 40 K.B. 198.
(2) (1896) Q.R. 6 K.B. 177.
(3) (1915) Q.R. 48 S.C. 303.
(4) (1916) Q.R. 50 S.C. 294.

Enfin, dans *Lacasse* v. *Tucket Tobacco Company* (1), il s'agissait d'un engagement d'un voyageur de commerce au salaire de $1,800 par année, payable mensuellement; et la Cour du Banc du Roi, comme la Cour Supérieure (Philippe Demers, J.), fut d'avis qu'un mois d'avis de congé était suffisant. La Cour du Banc du Roi considéra cependant que le contrat d'engagement, une fois le mois commencé, ne pouvait être résilié qu'à l'expiration du mois suivant et à la condition toutefois qu'avis ait été donné dans le mois précédent.

Voilà tous les arrêts que l'on nous a cités ou que nous avons pu trouver. L'on est loin de compte, par conséquent, lorsqu'on prétend que la jurisprudence de la province de Québec est à l'effet qu'un contrat de louage de services à tant par année constitue un contrat pour un an. Pour notre part, nous ne trouvons rien dans cette jurisprudence qui justifie d'appliquer par analogie, au louage de services personnels, l'article 1642 du Code civil, qui contient une règle particulière au bail de maison, ou de dire que l'on puisse, suivant l'expression de Sir Alexandre Lacoste, dans la cause de *Davis* (2).

tirer de la fixation du salaire à l'année une présomption légale de la durée du contrat.

Dans la cause actuelle, l'intimé n'a offert comme preuve de son contrat que la lettre du 5 mai 1927. Cette lettre n'a pas été produite seulement comme un des éléments de la preuve, mais elle constitue la seule et unique preuve, et toute la preuve, du contrat. C'est un texte écrit d'où il ressort que l'engagement a été pour une période indéfinie. Nous n'avons pas à nous demander si un engagement de ce genre est raisonnable ou déraisonnable. L'intimé nous soumet un écrit et nous n'avons qu'à l'interpréter, de la même façon que si les parties avaient rédigé un contrat dans les mêmes termes. Dans un contrat de ce genre, la loi le dit et le bon sens le veut, les parties ne sont pas liées au delà de leur volonté; et il leur est libre d'y mettre fin, suivant l'expression de Laurent, "en donnant congé à l'autre, et le congé implique un certain délai". (Comparer: Planiol, Traité Elémentaire, 6e éd., Tome 2, p. 606, n° 1883). Si l'une des parties trouve le délai insuffisant, il reste au tribunal à apprécier les circonstances et à accorder des domma-

(1) (1924) Q.R. 36 K.B. 321. (2) [1896] Q.R. 6 K.B. 177.

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ges-intérêts, s'il en arrive à la conclusion qu'en effet le délai n'a pas été suffisant. Et, sur ce point, l'article 1657 du Code pose une règle qui peut servir de guide.

Nous ne voyons rien de déraisonnable ou de surprenant dans un contrat de ce genre, où l'intimé savait qu'il ne pourrait se terminer que pour une cause suffisante, ou sur un avis raisonnable.

Et si le contrat était, comme nous le décidons, pour une période indéterminée, il ne pouvait être question de tacite reconduction. En effet, comme le fait remarquer Mignault, Droit civil canadien, vol. 7, p. 371:

> Pour qu'il y ait lieu à tacite reconduction, il faut qu'il y ait un terme convenu ou présumé pour la durée du service.

La tacite reconduction n'a lieu que si les relations des parties persistent après l'expiration de la date fixée au bail de services; dans le cas d'un louage pour une période indéterminée, le cas ne saurait se présenter. Il convient, en effet, de faire remarquer que, pour établir son allégation de tacite reconduction, il ne suffisait pas au demandeur-intimé de prouver qu'il avait été engagé à l'année (ce qui comporte nécessairement quelque chose d'indéfini); mais il lui fallait prouver qu'il avait été engagé pour un an, c'est-à-dire pour une période fixe, à l'expiration de laquelle la tacite reconduction aurait pu commencer. Ici, l'appelante a mis fin à un contrat de louage pour une période de temps indéterminée, où le salaire était payable tant par mois, au moyen d'un avis de congé de trois mois; ou, si l'on veut, en remettant à l'intimé une indemnité de trois mois de salaire pour tenir lieu de congé. De prime abord, cet avis nous paraît suffisant et il n'y a au dossier aucune preuve d'usage ou d'autres circonstances pour nous justifier de décider le contraire. (*Lacasse* v. *Tuckett Tobacco Company* (1).

Il reste la possibilité que le procès ait été faussé par suite d'un malentendu entre les parties résultant d'une certaine ambiguïté dans la déclaration faite au début de l'enquête par les procureurs de l'appelante. En semblable cas, la cour essaie parfois d'apporter un remède en ordonnant un nouveau procès.

En l'espèce, cependant, ni l'une ni l'autre des parties ne l'a demandé; cette question n'a pas été discutée avec leurs procureurs lors de l'audition devant cette cour.

(1) (1924) Q.R. 36 K.B. 321.

Il ne paraît pas y avoir eu de méprise sur la nature des questions en contestation. L'appelante affirme dans son factum:

> It urged both before the trial judge and before the Court of King's Bench (appeal side) that, as a matter of law, the contract in question was neither a contract of a yearly duration, nor a contract of a monthly duration, but one for an indeterminate period.

D'autre part, nous l'avons vu, lorsque l'intimé en vient à définir les "points in issue", il les établit comme suit:

> We may take it, therefore, that no question arises but this: Was the contract of engagement an annual one in the intention of the parties, or was it not?

Et, comme nous l'avons déjà fait remarquer, le jugement de première instance et les notes des juges de la Cour du Banc du Roi ne se bornent pas à la question de tacite reconduction, mais discutent à la fois la nature et la durée de l'engagement, ainsi que ses conséquences sur la durée de la tacite reconduction.

Le nouveau procès ne saurait être accordé simplement pour permettre à l'appelante ou à l'intimé de développer davantage les arguments de droit. Il serait utile seulement s'il leur permettait de faire une preuve additionnelle qui aurait pour but d'élucider la situation. Sur ce point essentiel: la période de temps pour laquelle l'engagement a été fait, l'intimé se trouve lié par l'assertion contenue dans sa déclaration, que la lettre du 5 mai 1927 confirmait l'engagement verbal. Par suite, les termes de cette lettre, et particulièrement les mots: "six thousand dollars per annum", resteront, en définitive, la base du contrat qu'il s'agit d'interpréter. Le résultat du litige dépend du sens qu'il faut donner à cette stipulation. S'il y avait d'autres conditions se référant à cette question, l'intimé les aurait relatées dans la déclaration, ou il les aurait, au moins, mentionnées devant l'une des trois cours où il a comparu jusqu'ici.

Dans les circonstances, nous ne nous croirions pas justifiés d'ordonner un nouveau procès *proprio motu,* lorsque l'intimé ne le demande pas et n'a exposé aucune raison pour laquelle il pourrait l'obtenir, ni surtout lorsque l'appelant n'a pas eu l'opportunité de faire valoir les objections qui peuvent militer contre l'octroi de cette faveur à son adversaire.

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Pour ces raisons, nous sommes d'avis de faire droit à l'appel et de rejeter l'action avec dépens devant toutes les cours.

ANGLIN C.J.C. (dissenting).—The trial in this case was unsatisfactory. The parties appear not to have appreciated the issues involved. These were, (*a*) what, *if any,* was the duration of the original contract; (*b*) was there a reconduction; and, (*c*) if so, for what term?

In my opinion, a new trial is inevitable. I, therefore, refrain from any comment on the evidence.

CANNON, J. (dissenting).—Appel d'un jugement de la Cour du Banc du Roi de la province de Québec, du 26 novembre 1931, confirmant à l'unanimité celui de la Cour Supérieure (Duclos, J.) du district de Montréal, en date du 27 février 1931, condamnant l'appelante à payer à l'intimé $3,475 avec intérêts et dépens.

L'action allègue que le, ou vers le, 1er mai 1927, l'intimé fut engagé par le président de la compagnie appelante, monsieur W. G. Ross, comme assistant-gérant, à un salaire de $6,000.00, du 1er mai 1927, avec, en outre, l'usage gratuit d'une maison d'habitation à Thetford-Mines, et l'électricité sans frais. Ce contrat verbal aurait été confirmé par la lettre suivante, adressée le 5 mai 1927 par le président Ross au gérant de l'appelante à Thetford-Mines, monsieur R. P. Doucet:

Dear Mr. Doucet,

Mr. Cook has agreed to join us on the conditions mentioned, $6,000 per annum and use of Penhale's house.

He will go down to Thetford either Sunday or Monday.

Yours very truly,

(Signed) W. G. Ross,
President and General Manager.

Le demandeur allègue qu'après son entrée en fonctions son salaire fut augmenté, en septembre 1927, à $7,500.00 par année, payable à raison de $625.00 par mois; que ce contrat aurait été renouvelé, par tacite reconduction, le 1er mai 1928, et, de nouveau, le 1er mai 1929, alors que les parties se seraient liées tacitement pour une autre année se terminant le 1er mai 1930.

Le demandeur se plaint d'avoir été renvoyé le 29 août 1929, sur paiement de trois mois de salaire jusqu'au 30

novembre 1929, qu'il accepta sous protêt, sans préjudice à ses droits. Sa démission brusque lui a causé des dommages pour perte de salaire, location d'une nouvelle maison, compte d'électricité à Montréal et frais de déménagement, pour lesquels ils réclame $3,850.00.

La défenderesse, par son plaidoyer, prétend avoir engagé le demandeur au mois, comme tous ses autres employés qui n'étaient pas engagés en vertu d'une résolution du bureau de direction; et, en payant $1,875.00 à l'intimé, l'appelante aurait généreusement excédé son obligation stricte envers lui.

Remarquons que la défenderesse n'a nullement prétendu que le contrat était pour une période de temps indéterminée; au contraire, elle a plaidé, en fait, un engagement au mois. D'après la contestation liée, le contrat était limité à une période fixe; un mois ou une année. Ceci ressort clairement du plaidoyer alternatif au paragraphe 16, où l'appelante allègue que, même si Cook était engagé du 1er mai 1927 au 1er mai 1928, la tacite reconduction n'aurait pu avoir lieu que pour une période indéterminée qui pouvait être interrompue par l'appelante en donnant un avis raisonnable à l'intimé et en payant son salaire.

L'appelante prétendit, de plus, avoir renvoyé l'intimé pour bonne et suffisante cause; mais elle a renoncé à cette prétention.

Par l'application à ce plaidoyer des articles 110 et 339 du Code de Procédure civile, l'appelante ne peut pas nous soumettre, en la déguisant comme une question de droit, sa nouvelle prétention qu'*en fait*, l'engagement était pour une période indéterminée, surtout après avoir pratiquement exempté l'intimé de prouver le contrat pour un an en faisant, à d'ouverture de l'enquête, la déclaration suivante:

> Defendant declares it has no. proof to offer in support of the allegation that the dismissal was for cause, *and the issue is, therefore, limited to the question of law as to whether there was an annual engagement expiring on May 1st, 1930.*

Quelle est la portée de cette déclaration? Devons-nous la considérer comme limitant le litige à la seule question de droit mentionnée au paragraphe 16 du plaidoyer quant à la longueur du terme pour lequel le contrat aurait été renouvelé par tacite reconduction le 1er mai 1929? Dans l'affirmative, cela expliquerait suffisamment, vu le décès de l'ex-président W. G. Ross, pourquoi on n'a pas interrogé le deman-

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deur Cook sur les circonstances qui ont précédé et accompagné son entrée à l'emploi de l'appelante. L'appelante n'a jamais plaidé, mais a prétendu, apparemment pour la première fois devant nous, que l'engagement initial était, ni pour un an, ni pour un mois, mais pour une durée indéterminée. Je ne crois pas qu'elle puisse le faire, vu notre loi de procédure et sa déclaration, peut-être ambiguë, mais qui semble renoncer à sa prétention d'un engagement au mois et nous laisser, d'après les plaidoiries, la seule alternative d'un engagement à l'année, tel qu'allégué par l'intimé. Cette déclaration élimine aussi l'idée d'une novation en septembre, lors de l'augmentation du salaire.

Quoiqu'il en soit, d'après la doctrine, la jurisprudence et la loi, même ce fait serait suffisamment établi au dossier.

L'on nous a cité, comme devant lier cette cour, la cause de *Cité de Montréal* v. *Davis* (1). Je serais plutôt porté à considérer cet arrêt comme une décision d'espèce affirmant le pouvoir de la cité de Montréal, en vertu d'une disposition spéciale de sa charte, de renvoyer ses employés, à discrétion et suivant son bon plaisir. L'Honorable juge Rinfret, cependant, dans la cause de *Iverson* v. *Chicoutimi Pulp Company* (2), a cru nécessaire de suivre la doctrine exposée par Sir Alexandre Lacoste dans cette cause de *La Cité de Montréal* v. *Davis* (3) où l'ancien juge-en-chef affirme que la Cour du Banc du Roi, dans les causes de *Dugdale* v. *La Cité de Montréal* (4) et *Les Commissaires des chemins à barrières de Montréal & Rielle* (5) n'aurait pas tiré, de la fixation du salaire à l'année, une présomption légale de la durée du contrat.

Je ne connais aucun texte de loi, disait-il, qui crée une semblable présomption en matière de louage de services. C'est tout au plus une présomption *de fait* qui a plus ou moins de force suivant les circonstances.

Appliquant cette jurisprudence à la présente cause, il n'y a pas de doute que la lettre précitée, comme le dit l'honorable juge Bernier, serait presque suffisante, par elle-même, pour indiquer que l'engagement du demandeur était un engagement à l'année. L'article 1602 du Code civil définit le louage d'ouvrage: un contrat par lequel l'une des parties s'engage à *faire* quelque chose pour l'autre, moyennant un

(1) [1896] Q.R. 6 K.B. 177 at 192; [1897] 27 Can. S.C.R. 539.
(2) [1924] 30 R.L.N.S. 460.
(3) [1896] Q.R. 6 K.B. 177.
(4) [1880] 25 L.C.J. 149.
(5) [1890] 34 L.C.J. 107; M.L.R. 6 K.B. 53.

prix. Quel est le prix fixé, d'après la lettre de W. G. Ross? $6,000. C'est un minimum. On ne dit pas: "payable monthly or semi-monthly", ni "at the rate of $6,000 per annum". Quelle chose Cook devait-il faire pour gagner cette rémunération de $6,000 et la jouissance d'une maison? Travailler comme assistant-gérant, pendant une année. La lettre nous donne clairement les obligations réciproques requises par l'article 1602. Outre cette lettre, le premier juge avait, pour décider en faveur de l'engagement à l'année et non au mois:

1° Le fait que lors de l'engagement Cook demeurait à Westmount, ce qui nécessitait son déménagement à Thetford Mines;

2° La mise à sa disposition d'une maison à Thetford comme partie de sa rémunération;

3° L'impossibilité de penser qu'un homme de bon sens aurait déménagé pour occuper une position précaire qu'on aurait pu lui enlever chaque mois, sans raison, suivant le caprice de la compagnie;

4° Que cette dernière a plaidé qu'elle avait bonne et suffisante raison de renvoyer le défendeur; ce qui aurait été inutile s'il avait été engagé au mois;

5° Le fait que le nouveau président Massie a cru devoir, indirectement, demander la résignation du demandeur, ce qui est incompatible avec l'idée d'un engagement au mois.

Le juge de première instance, prenant en considération la lettre et les autres circonstances de la cause, a conclu en fait à l'existence d'un contrat annuel. Or, cette présomption de fait, mentionnée dans la cause de *Cité de Montréal* v. *Davis* (1), acceptée par le juge de première instance et par la Cour du Banc du Roi à l'unanimité, est, d'après les articles 1238 et 1242 du Code civil, abandonnée à la discrétion et au jugement du tribunal.

Pouvons-nous, même si la déclaration à l'enquête de la défense n'était pas une admission implicite de l'engagement à l'origine pour au moins une année entière, mettre de côté le jugement de première instance et celui des juges en appel et leur appréciation des circonstances qui, d'après l'un d'eux, crée une présomption de faits violente que les deux parties entendaient faire un engagement à l'année et non pas au mois? Il nous est impossible de déclarer que tous

(1) [1896] Q.R. 6 K.B. 177.

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ces savants magistrats ont commis une erreur évidente; et, suivant la jurisprudence de cette cour, il n'y aurait donc pas lieu d'intervenir sur cette question de fait.

Reste la question de droit, qui est le seul et véritable litige entre les parties. La tacite reconduction qui, d'après l'admission de l'appelante, a eu lieu entre l'appelante et l'intimé le 1er mai 1929 est-elle un renouvellement pur et simple du contrat pour une autre année ou pour une période indéfinie?

Sur ce point, comme l'a exposé clairement monsieur le juge St-Germain dans ses notes, la doctrine française contemporaine ne saurait nous aider, vu les divergences capitales qui existent entre le Code Napoléon et le nôtre. L'article 1667 de notre Code civil dit que le contrat de louage de service personnel ne peut être que pour un temps limité, ou pour une entreprise déterminée, reproduisant pratiquement l'article 1780 du Code Napoléon. Nos codificateurs ont cependant ajouté un deuxième paragraphe qui ne se trouve pas au code français en disant que ce contrat de louage de service "peut être continué par tacite reconduction".

L'honorable juge Dorion dit fort bien dans ses notes que ce n'est pas un bail continué, mais un bail renouvelé. D'après Larousse, *reconduction* veut dire renouvellement. Je crois, comme l'honorable juge Ramsay dans la cause de *City of Montreal* v. *Dugdale* (1) que

> *If it be reconduction, the parties must be put in the same position in which they were before, else the law would presume a different bargain. This would be an illogical operation.*

En France, l'article 1780, non seulement ne pourvoit pas expressément à la tacite reconduction du louage de service, mais la loi du 27 décembre 1890 dit que le louage de service, fait sans détermination de durée, peut *toujours* cesser par la volonté d'une des parties contractantes, sauf indemnité, qui doit être fixée en tenant compte de certains éléments énumérés dans l'article.

Nous sommes en présence d'une espèce toute particulière dans laquelle les parties ont conduit le procès et l'enquête de manière à restreindre les tribunaux à la décision d'une seule question: si l'engagement originaire a été fait pour un

(1) [1880] 25 L.C.J. 149, at 155.

an, la tacite reconduction a-t-elle eu lieu pour une période indéterminée ou pour une année additionnelle?

S'il s'agissait, dans l'espèce, d'un contrat originaire pour une période de plus d'une année, et en conséquence d'une reconduction, d'un renouvellement possible, pour une nouvelle période dépassant une année, il nous faudrait examiner et décider l'application, par analogie ou autrement, de la règle de l'article 1609 à la tacite reconduction prévue par l'article 1667. Il n'est pas nécessaire de décider cette question dans la présente cause. Pour moi, il n'y a pas de doute que le renouvellement d'un contrat d'un an doit être pour une nouvelle année.

La tacite reconduction qui a eu lieu en mai 1929 a renouvelé les obligations des parties pour une nouvelle période d'un an. En France, on a été obligé de recourir, par analogie, aux articles 1758, 1759 et 1760 du Code Napoléon, pour déterminer la durée du louage de services continus du consentement tacite des parties. Or, comme le fait remarquer monsieur le juge St-Germain, l'article 1738 du Code Napoléon, qui correspond à l'article 1609 de notre Code civil, contrairement à ce dernier, dit que si, à l'expiration des baux écrits, le preneur est laissé en possession, il s'opère un nouveau bail dont l'effet est réglé par l'article relatif aux locations faites sans écrit, c'est-à-dire sans durée indiquée, et où l'une des parties ne peut donner congé à l'autre qu'en observant les délais fixés par l'usage des lieux. Notre code, au contraire, contient des règles précises quant à la durée de l'occupation, même sans bail, par simple tolérance du propriétaire, et quant aux effets de la tacite reconduction. Le Code Napoléon, de propos délibéré, vu la multitude des coutumes existant dans les différentes provinces de France, a simplement référé à l'usage des lieux. *Vo.* Motifs du Code civil, 1er vol. Page 636 (Paris 1855).

Il nous faut donc éviter l'application des commentateurs du Code Napoléon, et de la législation encore plus récente du travail en France, et nous en tenir au texte de notre code et à notre jurisprudence. Je crois appliquer l'un et l'autre en disant que le contrat annuel intervenu en mai 1927 s'est renouvelé en 1928 pour un an, et en 1929 pour une autre année expirant le 1er mai 1930.

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Reste la dernière question soulevée par l'appelante, à savoir que le jugement doit être réduit de $225.00, la différence entre le montant de son salaire avec l'appelante et celui qu'il recevait en avril 1930.

Je crois que, le 24 avril 1930, date de l'institution de l'action, la mesure des dommages qu'il réclamait était suffisamment établie, vu qu'il était employé pour jusqu'à la fin d'avril 1930 à un salaire moindre que celui qu'il aurait reçu s'il n'avait pas été congédié prématurément par l'appelante. Quand l'action fut prise, il endurait la réduction de salaire qu'il avait dû accepter pour tout le mois d'avril alors courant, sans remède possible. Il s'agit d'ailleurs de l'appréciation des dommages, et il n'y a pas lieu d'intervenir. Il ne s'agit pas d'une action pour salaire réclamé pour une période non expirée. Le demandeur a pu, quelque mois après son renvoi, obtenir un nouvel emploi et il avait droit, dès que sa situation s'était de nouveau stabilisée, de venir devant la cour pour démontrer les dommages dès lors assurément causés par la rupture du contrat. Il est évident que si l'on avait plaidé et prouvé qu'il aurait été physiquement incapable dans cette dernière semaine du mois d'avril 1930 de gagner aucun salaire, cette circonstance aurait pu être prise en considération par le premier juge. Mais en appliquant la règle: *De minimis non curat prætor,* je ne crois pas qu'il y ait lieu de modifier le jugement pour cette raison, qui n'a pas, d'ailleurs, été spécialement plaidée.

Je suis donc d'avis que l'appel doit être renvoyé avec dépens.

Appeal allowed with costs.

Solicitors for the appellant: *Mitchell, Ralston, Kearney & Duquet.*

Solicitor for the respondent: *E. Languedoc.*

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PROVINCIAL TRANSPORT COMPANY (INTERVENANT) ..... APPELLANT; *Oct. 24, 25. *Dec. 23.

AND

MONTREAL SIGHT SEEING TOURS LIMITED (PLAINTIFF)

AND

GENERAL MOTORS PRODUCTS OF CANADA LTD. (DEFENDANT)

AND

MONTREAL SIGHT SEEING TOURS LIMITED (CONTESTANT) ..... RESPONDENT.

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

Sale—Deed—Sale of undertaking as "going concern"—Certain rights and things specifically mentioned—Claim against third party—Whether included in the sale.

When, in a deed of sale, an autobus company "conveys, sells, assigns and transfers to the purchaser the whole of its enterprise and undertaking as a going concern, including its good will and clientele" and further specifically mentions as sold certain equipment and parking rights, such a sale includes a contract with a third party, as an accessory of and as forming part of the enterprise; and a claim made in respect of said contract also forms part of the rights and interests assigned and transferred, together with any action already brought to enforce that claim. If, at the time of the sale, the action against the third party by the vendor be pending before the courts, the purchaser has the right to substitute himself to the plaintiff vendor by way of intervention, and deal with the case as he thinks fit.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Surveyer J. and maintaining respondent's contestation of the intervention filed by the appellant company.

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

Thomas Vien K.C. for the appellant.

P. Bercovitch K.C. and *J. J. Spector* for the respondent.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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PROVINCIAL TRANSPORT CO. v. MONTREAL SIGHT SEEING TOURS LTD.

The judgment of the court was delivered by

CANNON J.—This appeal is asserted from the unanimous judgment of the Court of King's Bench for the province of Quebec, which set aside the judgment of the Superior Court in favour of the intervenant, which declared that respondent, on the 28th November, 1928, sold to Louis P. Gélinas his whole undertaking as a going concern and further all his rights, title and interest whatsoever in all movable property forming part of its undertaking; that the said Gélinas, on the 28th November, 1928, transferred his rights to J. E. Savard; that, on the 27th November, 1928, the said J. E. Savard had transferred all such rights to the appellant; that on the date on which the appellant acquired the rights and assets of the respondent, the present action was pending before the court; that appellant automatically acquired all the respondent's rights against the defendant in the present action.

As appears from the above, the whole question to be determined is whether or not the intervenant did, on or about November 28, 1928, acquire from plaintiff its claim against defendant and whether or not, as a consequence, it is authorized to substitute itself to plaintiff and deal with it as it thinks fit.

The Provincial Transport Company purchased, not from respondent, but from J. Ernest Savard, under the following deed:

Whereas the vendor has previous to this date entered into various contracts of sale in favour of the present vendor as purchaser whereby he has acquired as a going concern various organizations for the operation of autobus transportation and sightseeing service throughout the province of Quebec; and

Whereas the company-purchaser was incorporated on the 22nd of November, 1928, for the purpose of carrying on the business of operating omnibusses, sightseeing busses, cabs, taxicabs and other vehicles, and of carrying on the business of running motor busses and motor trucks both on regular routes and for special trips, and of acquiring franchises or rights to operate the same, with an authorized capital divided into twenty thousand (20,000) shares having no nominal or par value and into twenty thousand (20,000) Six per cent (6%) non-cumulative preference shares of the par value of one hundred dollars ($100) each.

Now, therefore, it is hereby agreed by and between the parties as follows:—

1. The vendor sells and the company-purchaser purchases all the vendor's rights, title, interest and good-will whatsoever in the various contracts of sale entered into by various individuals and companies carrying on the operation of autobus transportation and sightseeing services, in

favour of the present vendor as purchaser, which said contracts, in each case, transfer to the present vendor *the whole of the enterprise and undertaking of the respective vendors mentioned therein,* the said contracts of sale being enumerated in the schedule annexed hereto, * * *

2. The company-purchaser hereby acknowledges the receipt of the original contracts of sale set forth in the schedule mentioned above, which contracts have been delivered to it previous to this day.

One of the contracts enumerated in the schedule annexed to the memorandum of agreement was one with the company respondent therein acting and represented by its president and its treasurer, *thereunto* duly authorized by a resolution of the shareholders of the company adopted at a regularly constituted meeting held on the 24th day of November, 1928, of which a certified copy annexed to the contract reads as follows:—

It was regularly moved, seconded, and unanimously carried, that an offer of sale made by J. Ernest Savard of the entire assets of the com pany for cash consideration of forty thousand dollars ($40,000) be and is hereby accepted, and that the president Mr. W. N. Karp, and the treasurer, R. Rutenberg, be hereby authorized on behalf of the company to sign any documents necessary for the completion of the sale.

These duly authorized officers of the respondent signed a contract which contains the following:

Whereas the company-vendor is at present carrying on a system of sightseeing tours and the operation of sightseeing autobuses in the city of Montreal; and

Whereas the said company-vendor is authorized by its charter to sell its enterprise, franchises and rights, in whole or in part, for such consideration as may be deemed advisable; and

Whereas the purchaser is desirous of purchasing *the whole of the undertaking of the company-vendor as a going concern,*

Now, therefore, it is hereby agreed by and between the parties as follows:

1. The company-vendor conveys, sells, assigns and transfers to the purchaser, hereby accepting, the *whole of its enterprise* and undertaking as a going concern, including its good-will and clientele and, in particular, the company-vendor hereby sells, conveys, assigns and transfers to the purchaser all its rights, title and interest whatsoever in the following equipment, namely:

"(*a*) Three (3) autobuses, namely:

Autobus	Number of Passengers	Series	Engine	Year
1. Reo Sedan	25	S.D. 679	C18656	1928
1. Reo Sedan	24		59587	1926
1. Reo Sedan	24		94937	1926

"(*b*) All the accessories and autobus parts actually possessed by it and *all moveable property of any nature whatsoever composing and forming part of the undertaking* presently carried on by the company-vendor;

"(*c*) Two (2) parking permits allowing it to park its cars at the corner of Metcalfe and St. Catherine streets, in the city of Montreal, and at the corner of Peel and Cypress streets, in the said city;

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2. The company-vendor further undertakes to do all in its power to transfer and assign to the purchaser all licences, permits or franchises of any nature or kind whatsoever presently held by it in connection with the operation of its undertaking.

3. The present sale is made for and in consideration of the sum of forty thousand dollars ($40,000), which has been paid cash this day, and the company-vendor hereby acknowledges having received the said sum from the purchaser and gives a full and final discharge therefor.

4. The company-vendor declares that the only debts due by it do not exceed in amount the sum of six thousand dollars ($6,000), and the company-vendor undertakes to pay the said sum not later than the 15th of December, 1928, it being understood between the parties that the purchaser will not be held responsible for any debts incurred by the company-vendor prior to signing of the present agreement.

5. The said company-vendor hereby undertakes and agrees to sign and execute all deeds, documents, matters and things which are convenient or necessary, or which counsel may advise for more completely and effectually carrying out the intention of these presents, and for vesting in the purchaser the property comprised in this agreement.

6. The present sale shall take effect from the date hereof and the purchaser shall, from the signing of these presents, have possession of the whole of the enterprise and undertaking above mentioned.

The trial judge gives the following reasons for his finding in favour of the intervenant (present appellant):

Considering that what the resolution intends plaintiff to sell, and the purchaser intends to buy, is "the entire assets" of the company plaintiff; that is that no sort of assets, whether corporeal or incorporeal, was excluded from the said sale (Words and phrases judicially defined, 10th series, Vo. *Assets;* 3rd series, Vo. *Entire:*).

Considering that the preamble of the contract entered into between the parties states that the purchaser is desirous of purchasing the undertaking of the company-vendor as a going concern;

Considering that by clause 1 of the said contract, "The company-vendor conveys, sells, assigns and transfers to the purchaser, hereby accepting, the whole of its enterprise and undertaking as a going concern, including its good-will and clientele";

Considering that subsequently to the said agreement, the president of the plaintiff company, who was its principal representative, handed to the purchaser's assignee the charter and minute book of the plaintiff company; that the said charter and minute book were secured for the purpose of securing a surrender of plaintiff company's charter; that whatever may have been the outcome or legality of such negotiations, they show that the parties intended a complete transfer of plaintiff's assets of whatever nature, plaintiff, by the said contract, assuming its own liabilities;

Considering that rules of interpretation cannot be invoked to restrict the scope of a contract when the words used and the parties' behaviour show no intention to restrict it;

It might be added that, under its charter, the company-respondent was authorized to dispose, by lease, sale or otherwise, of the business, assets and undertaking of the company, or any part thereof.

The Court of King's Bench, however, has reached the conclusion that the plaintiff's claim against the General Motors Products of Canada, Ltd., was not included in the above sale, for the following reasons:

Considering that the appellant's claim for damages against General Motors as set forth in its action is not expressly mentioned in the said contract of sale nor is it included by implication among the rights and things or categories of rights and things specifically mentioned; in particular it is not part of the equipment set forth in paragraphs "*a*" and "*c*" of the clause hereinabove quoted, nor does it form part of the autobus accessories or parts referred to in paragraph "*b*";

Considering that the said claim is for the return of moneys paid and for the loss of profits which the appellant pretends would have been earned for it by autobus contracted for, if it had been delivered by the defendant as stipulated, and if such profits had been earned they would have been distributed to the shareholders or held in reserve for dividend purposes and so would not have formed part of the enterprise and undertaking carried on by the appellant at the time of the sale to the respondent;

Considering that the said claim was not at the time of the sale established as being an asset of the appellant, and that whether it will eventually prove to be an asset or a liability is contingent upon whether the action will be successful or not, and so it could not be included in the moveable property of the appellant which composed or formed part of its undertaking at the time of the sale;

Considering, therefore, that the said claim or right of action was not transferred by the sale to the respondent and that its intervention in the said action is unfounded:

It seems to me that the wording of the resolution, the preamble of the contract, and the first clause of the contract, mentioning the whole of the enterprise and undertaking as a going concern and all moveable property of any nature whatsoever composing and forming part of the undertaking then carried on by the company respondent is clear and unambiguous, if one is to give the words their ordinary meaning. The Court of King's Bench limits the scope of the deed to the particulars: three autobuses, all their accessaries and autobus parts then possessed by the respondent, together with the two parking permits.

This interpretation, to my mind, goes against the well known rule which is embodied in 1021 C.C.

When the parties in order to avoid a doubt whether a particular case comes within the scope of a contract, have made special provision for such case, the general terms of the contract are not on this account restricted to the single case specified;

and also against the other found in article 1018:

All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act.

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The application of these two articles, however, must be tempered by article 1020:

> However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract.

It appears by the title deed of the intervenant company that it purchased Savard's right, title, interest and goodwill whatsoever in the contract signed by the respondent which, as represented to the appellant, was transferring to Gélinas and Savard, the whole of the enterprise and undertaking of the respective vendors as a going concern. The contract entered into between the appellant and the General Motors Products of Canada, Ltd., which forms the object of the original action into which the appellant wishes to intervene, was transferred to the appellant as an accessory of and as forming part of the enterprise and undertaking of the respondent; and the claim made in respect of the said contract must, in our opinion, also form part of the rights and interests assigned and transferred to the appellant for the cash consideration of $40,000.

Moreover, the contract with the General Motors Products, basis of the present action, is essentially connected with the business undertaking of the plaintiff, has not yet been resiliated and therefore is still in existence. Plaintiff's declaration sets forth their demand as follows:

> Wherefore plaintiff prays that the contract entered into between the parties and herewith filed as plaintiff's exhibit P-1 be resiliated for all purposes of law and that the defendant be condemned to pay and satisfy unto the plaintiff the said sum of $5,960 damages, a further sum of $500 in cash paid to the defendant at the time that the said contract was entered into, the return of the Packard Twin Six motor car with two bodies, or the value thereof, to wit, $900, and a further sum of $1,300 the difference between the price he was to pay the defendant for the bus in question, and the price he is obliged to pay for a new bus of a similar kind, or a total in all of eight thousand six hundred and sixty dollars ($8,660), the whole with interest from date of service hereof, and all costs.

If the purchasers of the transportation business of the respondent deem it advisable to withdraw the demand for cancellation and damages, and will rather carry out this agreement, or substitute thereto another agreement with the General Motors Products of Canada, Ltd., it seems to me that the letter and the spirit of the sale, for which the respondent received $40,000 cash, would entitle the intervenant to their conclusions, and that the trial judge was right when he declared the intervenant to be, for the pur-

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poses of this suit, in all the rights of the plaintiff in the present action; that the transfer of rights from plaintiff to Gélinas and Savard and from the latter to the intervenant did include all the plaintiff respondent's right in the present action and allowed intervenant to follow up, in plaintiff's place and stead and to the exclusion of plaintiff, the last valid proceeding originally had in the suit.

I would therefore maintain the appeal and restore the judgment of the Superior Court with costs against respondent in the Court of King's Bench and here.

Appeal allowed with costs.

Solicitors for the appellant: *Vallée, Vien, Beaudry, Fortier & Mathieu.*

Solicitors for the respondent: *Bercovitch, Cohen & Spector.*

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*Oct. 11, 12.
*Dec. 23.

CLARENCE L. DOWSLEY (PLAINTIFF) . . . . APPELLANT;

AND

BRITISH CANADIAN TRUST COMPANY (DEFENDANT) . . . . . } RESPONDENT.

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

Contract—Construction—Claim, under agreement, to possession and control of theatre property—Claimant suing his assignors' trustee in bankruptcy for damages for dispossession by trustee—Nature, purpose and effect of the agreement, and extent of claimant's rights and security thereunder—Bankruptcy Act, R.S.C., 1927, c. 11, ss. 64, 54—"Change of possession" of chattels (Bills of Sale Act, Alta., 1929, c. 12, s. 2 (b)).

Appellant, claiming that he was entitled to possession and control of theatre property under an agreement with B. & H., and that respondent, to whom B. & H. had made an assignment under the *Bankruptcy Act*, had wrongfully dispossessed him, sued respondent for damages.

Held (affirming, Crocket J. dissenting, the judgment of the Appellate Division, Alta., 26 Alta. L.R. 393): On construction of the agreement, appellant's personal interest in the equitable interest assigned by the agreement to him was, at most, to hold it as his security for the 5% of the gross receipts which he was to receive for his wages as man-

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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ager. His contract for services as manager ended with the assignment in bankruptcy. He would have no right to retain possession of the property to enforce a contract for personal services (*Stocker* v. *Brockelbank*, 20 L.J. Ch. 401; *Frith* v. *Frith*, [1906] A.C. 254); his only remedy being an action for damages for breach of contract (*Ogden* v. *Fossick*, 4 DeG. F. & J. 426). (As to provision made in the agreement for the payment of a debt of B. & H. to one Hoar (who was not a party to the agreement or the action)—it was very doubtful if that provision made the property in appellant's hands a security for that debt. Appellant, who was suing only for his own personal damages, could not rely on any rights of Hoar. Moreover, if the agreement and transfer was to secure Hoar's account, it was for that purpose fraudulent and void as against respondent). Appellant, after the assignment in bankruptcy, had no personal right to possession, either of the realty or chattels. Further, as to the chattels, there was not such a "change of possession" as defined by the *Bills of Sale Act*, Alta.; moreover, respondent was protected by the provisions of s. 54 of the *Bankruptcy Act*.

Per Crocket J. (dissenting): The agreement was not essentially a contract for personal services. Its terms, as well as the whole evidence as to the acts and conduct of the parties under it, indicated rather that its main purpose was to vest in appellant all the title and interest of B. & H. in the property, and to transfer to him the actual possession and complete control thereof, in order that the business might be placed on a profitable basis in the interest and for the benefit of both parties. If appellant was in any sense an agent of B. & H. under the agreement, it was an agency created to secure some benefit to him beyond his mere remuneration as agent, and therefore an agency irrevocable until its purposes were fulfilled. B. & H. had no right to interfere with appellant's possession and control until completion of the payments on Hoar's account (for which appellant was personally liable) and the fulfillment in other respects of the agreement; (*Frith* v. *Frith*, *supra*, and *Ogden* v. *Fossick*, *supra*, distinguished); nor, unless the agreement was impeachable as a fraud upon creditors, had respondent any right so to interfere. (*Ex parte Holthausen; In re Scheibler*, L.R. 9 Ch. App. 722, at 726). The agreement was not impeachable under s. 64 of the *Bankruptcy Act*, as no intent to hinder, delay or defeat creditors or to give a preference could properly be imputed. S. 54 of said Act did not apply.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1), dismissing his appeal from the judgment of Ewing J. dismissing his action for damages for dispossessing him of certain theatre property. The material facts of the case

(1) 26 Alta. L.R. 393; [1932] 2 W.W.R. 601; [1932] 4 D.L.R. 97; 14 C.B.R. 53.

are sufficiently stated in the judgments now reported. The appeal was dismissed with costs, Crocket J. dissenting.

J. B. Barron for the appellant.

O. M. Biggar K.C. and *M. B. Gordon* for the respondent.

The judgment of the majority of the court (Rinfret, Lamont, Smith and Cannon JJ.) was delivered by

SMITH J.—James A. Booth and Cecil J. Hughes owned and were operating a motion picture theatre at Macleod, Alberta, under the firm name of Booth & Hughes.

Business became bad, and they were running without making any profit, and were unable to pay their debts. They had purchased from the Canadian Orchestraphone Limited, of which the appellant was manager, a sound equipment called a Talkatone on a conditional sale agreement which had been assigned to and discounted with one C. M. Hoar, on which there was a balance unpaid of $970.

Under these circumstances they opened negotiations with the appellant, an electrical engineer engaged in the motion picture business at Calgary and having an interest in a circuit of some thirty theatres, giving him, as he claims, apart from his personal experience and ability, the advantage of a large buying power and facilities for the economical and effective operation of theatres. On October 24, 1931, the appellant visited Booth and Hughes at their request, when they arrived at an agreement which the appellant, on his return to Calgary, reduced to typewriting, dating it 25th October, 1931, and sent by letter, Exhibit 2, dated 25th October, 1931, to Booth and Hughes, requesting them to sign and return it, stating that on receipt of it he would sign and return to them their copy. This letter has the following paragraph:

> Referring to subsection 6 of paragraph 6 of the agreement and paragraph 7, you will retain the full amount, this letter being your authority, but in accordance with our conversation, do not let the film companies know of this.

The date on the agreement was altered to 4th November, 1931, and signed by Booth and Hughes and returned to Dowsley, who says he received it on the 2nd November.

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The following is the agreement, Exhibit 3:

AGREEMENT

"J.A.B." "E.J.H."

THIS AGREEMENT MADE this ~~25th~~ 4th day of ~~October~~ November, 1931

Between:

BOOTH & HUGHES theatre operators, of the Town of Macleod, in the Province of Alberta, of the Party of the First Part, hereinafter called

"BOOTH & HUGHES"

and

C. L. DOWSLEY, of the City of Calgary, in the Province of Alberta, the Party of the Second Part, hereinafter called,

"THE MANAGER."

WHEREAS Booth & Hughes, operating the Empress Theatre in the Town of Macleod, in the Province of Alberta, are indebted to C. M. Hoar, of the City of Calgary, for certain amounts owing on talking picture equipment, which amount is now all in arrears, and whereas Booth & Hughes are unable to pay any of this money at the present time, and whereas Booth & Hughes are purchasing the said Empress Theatre under an Agreement of Sale, there being considerable balance still owing on said Agreement of Sale and to avoid being forced out of business by seizure which might be forced by the said C. M. Hoar, with the consequent loss of all money invested to date in the Empress Theatre by Booth & Hughes, it is agreed as follows:

1. Booth & Hughes hereby assign their complete equity in the said Empress Theatre Building and Equipment to C. L. Dowsley, Manager, Party of the Second Part.

2. Date of possession of the said theatre by the manager shall date from November 4th, 1931, at which time the manager shall assume complete control.

3. The manager shall not be responsible for any debts contracted by Booth & Hughes nor shall he assume any film contracts made by Booth & Hughes.

4. Upon completion of payments on C. M. Hoar's account and fulfillment of all other terms of this agreement, but in no event under three years, the manager then agrees to make a new agreement with Booth & Hughes, returning to them their equity in the Empress Theatre as transferred to C. L. Dowsley, the manager, by this Agreement.

5. Proceeds from sale of Amusement Tax tickets shall be deposited daily in separate account "In Trust for Amusement Tax Return."

6. Gross receipts from the operation of the theatre exclusive of amusement tax will be deposited daily in trust account to the credit of the Empress Theatre, and withdrawals from this account will be made as follows:

1. In payment of film, express and advertising.
2. In payment of electric service, water and heat.
3. Payment of $50 per month to C. M. Hoar.
4. Payment of 5% of gross receipts to the manager.

5. Payment of other expenses, such as taxes, interest, licences, payments on property and equipment and miscellaneous theatre expense.

6. Balance divided equally between Booth & Hughes and the Manager.

7. Booth & Hughes will give their services to the Empress Theatre for one year, without any additional charge other than amounts they may receive under subsection 6 of this agreement.

8. This agreement has been made in consideration of the sum of One Dollar ($1.00) in hand paid, by each party hereto to the other party hereto, receipt whereof is hereby acknowledged, and in consideration of the premises and covenants hereinbefore set forth.

"J. A. BOOTH"
"E. J. BOOTH"
BOOTH & HUGHES.

Witness:
"C. H. Cooney"

"C. L. DOWSLEY"
C. L. DOWSLEY.

"F. D. Cook"
(As to signature of C. L. Dowsley).

Before signing and returning this agreement to Dowsley, Booth & Hughes, on 28th October, 1931, executed a transfer of the theatre property to one Augustus T. Leather, in which the consideration is stated to be $7,582, made up by the transferee, Leather, assuming two mortgages on which there was owing $4,576 and $2,080 respectively, and an amount of $926 for insurance, taxes and other charges assumed by the transferee.

They also made a bill of sale to Leather, bearing date the 31st day of October, 1931, of the equipment in the theatre, reciting that all of the lot, buildings and equipment had been sold as a going concern by Booth and Hughes to Leather for $8,882. These documents were duly registered.

On the 28th day of October, 1931, Leather made a lease to Booth and Hughes of the land, theatre and equipment for a term of one year and three days from the 28th day of October, 1931, at a yearly rental of $1,200.

The appellant was not informed of this sale to Leather and lease to Booth and Hughes, and therefore did not realize that the change of date in the agreement from 25th October, 1931, to 4th November, made the agreement subsequent to these transactions with Leather. He therefore claims that this sale and lease was a fraud upon him and also a fraud on creditors. He is, however, not in a position

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to ask relief here upon these claims, because he has not sued to set aside the transaction, either on his own behalf or on behalf of creditors, and Leather is not a party.

On learning of the transactions with Leather, on the 4th December, 1931, the appellant drew a rider to agreement of 4th November, Exhibit 9, and had same signed by Booth and Hughes. This rider reads as follows:

MACLEOD, ALTA., December 4th, 1931.

RIDER TO AGREEMENT DATED NOV. 4th, 1931, made between Booth & Hughes, of Macleod, Alta., and C. L. Dowsley of Calgary, Alta.

(*a*) C. L. Dowsley shall have the right to cancel this agreement at any time without prior notice, and shall be entitled to withdraw from all active operation or interest in the Empress Theatre, and shall not be liable for any debts from the operation of the said theatre, except for monies received over and above the amount of expenditures made.

(*b*) C. L. Dowsley shall have the right to make arrangements for the installation of sound-on-film reproducing equipment on a rental basis, and it shall be understood that Booth & Hughes shall have no interest in this equipment whatsoever and that it may be removed at any time, without prior notice, either by C. L. Dowsley or the Installing Company, or by both.

(*c*) All monies expended by C. L. Dowsley on account of the operation of the Empress Theatre, either in operation repairs or maintenance, over and above the monies received in receipts, shall constitute a direct debt on the part of Booth & Hughes to C. L. Dowsley.

(*d*) This RIDER shall be read and construed as being part of, and forming part of the above mentioned agreement between Booth & Hughes and C. L. Dowsley, dated Nov. 4th, 1931.

Booth & Hughes
Per: "J. A. Booth."

Witness:
"C. Cooney," Macleod.

On 22nd December, 1931, Booth and Hughes made an assignment under the Bankruptcy Act to the respondents. On the same day, Mr. Leather went to the theatre and took possession of the cash on hand from the cashier, Mrs. Cook, and gave a receipt for it on behalf of one Kirk; but the evidence shows that neither Leather nor Kirk had any authority to act for the respondents at that time. Notice of their appointment as Custodians was first received from the Official Receiver on the morning of the 23rd, and, after this, on the same day, Shearer, for respondents, notified Kirk to take possession of the property of the assignors on their behalf, which was done.

After the respondents had received notice of their appointment as Custodians, and before telephoning Kirk to take possession, the appellant demanded from them possession of the property, claiming to be entitled to same under the agreements cited above. This was refused, and appellant sues, on his own behalf, the respondents in their capacity as a legal entity, and not as liquidators, for damages caused to him by what he claims to have been wrongful dispossession by the respondents.

His right to possession, if any, rests entirely upon the terms of the written contract as modified by the letter, Exhibit 2, and the rider, Exhibit 9, set out above. By these documents, Booth and Hughes purported to assign their complete equity in the Empress Theatre building and equipment to the appellant, the date of possession being from 4th November, 1931, at which time the manager (appellant) is to assume complete control.

It is argued on behalf of the appellant that, by virtue of section 4 of the agreement, he held the equitable interest in the theatre assigned to him as security for the payments to Hoar and fulfilment of all other terms of the agreement. The appellant is suing for his own personal damage, and must base his action on his own personal rights under the contract. He does not, by the contract, agree to advance any moneys, and if he did advance moneys, as he claims, they became, as provided by the rider, a direct debt of Booth and Hughes to him; but there is no provision that the equitable interest assigned to him is to be held as security for repayment of such advances.

If the appellant, as he claims, holds the equitable interest assigned to him as security for any personal interest that he has under the contract, that interest is the five per cent. of gross receipts that he is to receive for his wages as manager, and which is made the fourth charge on these gross receipts. The first and second charges are for the expenses of running the theatre, for which Booth and Hughes alone were liable. The third charge is for the payment of $50 per month to Hoar; the fifth is again for payment of other expenses connected with the theatre, for which Booth and Hughes alone were liable; the sixth is for the balance of gross receipts, all of which, by appellant's letter, Exhibit 2, were to go to Booth and Hughes.

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At most, therefore, the appellant's interest in the equitable interest assigned to him was to hold it as his security for his wages as manager; that is, for the five per cent. of gross receipts. His contract for services as manager came to an end with the assignment, and, as pointed out by Mr. Justice Clarke in his reasons, the cases of *Stocker* v. *Brockelbank* (1), and *Frith* v. *Frith* (2), show that the appellant would have no right to retain possession of the property to enforce a contract for personal services. He would be left to his action for damages for breach of the contract as his only remedy. *Ogden* v. *Fossick* (3).

When Mr. Justice Clarke remarks that the contract was simply one of hiring and of service, he is no doubt referring to the contract so far as it concerned the appellant's personal interest. It is argued, however, that the contract amounts to more than a mere contract of hiring and service. This argument is grounded on the provision made for payment of Hoar's account. The appellant, by the contract, was to be a manager in complete control, so that he was to receive, and to be accountable for, the receipts; and the contract simply provides for the order in which he was to disburse these receipts. It is very doubtful if the provision, that in the third place $50 a month was to be paid to Hoar, made the property in the appellant's hands a security for Hoar's debt. Hoar is not a party to the agreement, and the appellant is not suing to enforce the security on Hoar's behalf; he is suing for his own personal damages, and cannot rely on any rights of Hoar, who is not a party to the action. Moreover if, as appellant contends, the agreement and transfer of the property of the bankrupts was to secure Hoar's account, the terms of the document itself show that it was for that purpose fraudulent and void as against the liquidator.

The appellant therefore, as has been found by the learned trial judge and the majority of the judges in the Appellate Division, had no personal right to possession after the assignment was made.

As to the assignment to the appellant of the chattels belonging to Booth and Hughes, the same rule would apply, and in addition it is evident, as pointed out by Mr. Justice

(1) (1851) 20 L.J. Ch. 401. (2) [1906] A.C. 254.
(3) (1862) 4 De G.F. & J. 426, 45 E.R. 1249.

Clarke, that there was not such a change of possession as is defined by the *Bills of Sale Act,* namely, such change of possession as is open and reasonably sufficient to afford public notice thereof. Again, the respondents are protected by the provisions of sec. 54 of the *Bankruptcy Act.*

The appeal is therefore dismissed, with costs.

CROCKET J. (dissenting).—With all deference, I find myself unable to agree with the interpretation which the judgment appealed from places on the agreement entered into between the appellant and Booth & Hughes, viz: that it was essentially a contract for personal service. In my opinion, its terms—as well as the whole evidence regarding the acts and conduct of the parties under it—indicate rather that its main purpose was to vest in Dowsley all Booth & Hughes's title and interest in the theatre property and its equipment, and to transfer to him the actual possession and complete control thereof, in order that the business might be placed on a profitable basis in the interest and for the benefit of both parties. No doubt the taking over of possession and complete control had the effect of conferring managerial powers on Dowsley, as the learned trial judge put it, but not, I think, as a mere agent for Booth & Hughes, with no other interest than the securing of five per cent. of the gross receipts for his wages as manager.

Although, as pointed out by our brother Smith, Dowsley did not expressly agree by the contract to advance any moneys, it is apparent that it contemplated that substantial sums of money should be advanced by him, as the evidence shews substantial sums were, in fact, advanced by him in the few weeks which elapsed between the date of the agreement and rider and December 23, when the respondent company went into possession under the bankruptcy assignment, in addition to the personal responsibility he assumed for the installation of the new sound-on-film equipment and the future supply of films, amounting together to over $4,000. It is true that paragraph 3 of the agreement of November 4th provided that Dowsley should not be responsible for any debts contracted by Booth & Hughes, nor for any film contracts made by them, but it is clear that the intention was, once Dowsley took over the possession and control, he and not they would provide

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the films. It is also true that clause (*c*) of the rider of December 4, which was executed after Dowsley discovered the deception the firm had practised upon him by conveying their equity to Leather in all the theatre property, and taking back from the latter a lease for one year and three days, provided that all moneys expended by Dowsley on account of the operation of the theatre over and above the moneys received in receipts, should constitute a direct debt on the part of Booth & Hughes to him, but it is none the less significant for that reason of the intention that Dowsley was to make advances of money for these purposes.

These considerations, in my opinion, in themselves shew that it was not intended that Dowsley should go into possession as a mere agent or servant of Booth & Hughes. There is no mention in the agreement of Dowsley himself undertaking to render any personal services, any more than there is of his undertaking to advance any money for operating expenses, or to pledge his credit for the supply of future films—nothing beyond his description as "the manager." While these words, no doubt, designate him as manager of the Empress Theatre, they do not necessarily import that he was to become manager merely as Booth & Hughes's servant and agent. As a matter of fact, the only specific mention of personal services in the agreement is found in clause 7 of paragraph 6, where Booth & Hughes agree to "give their services to the Empress Theatre for one year," without any additional charge other than the amounts they may receive under clause 6—that is, from any balance that might be left after payment of the sums indicated in clauses 1, 2, 3, 4 and 5, which items cover, not only all operating and miscellaneous expenses and Dowsley's commission, but capital payments on property and equipment and $50 per month on the C. M. Hoar lien note indebtedness of $970, on which Dowsley was personally liable.

Apart from the question, however, as to whether Dowsley bound himself by the agreement to advance any moneys or credits, which, as I have pointed out, the evidence shews he did in fact do, the agreement unquestionably did provide for the payment of the Hoar indebtedness, for which he was personally liable, and is thus distinguish-

able from the agreement dealt with in *Frith & Frith* (1), which is so strongly relied upon by the respondent. In addition to this, clause 6 of paragraph 6 of the agreement provides for the equal division of the net profits after payment of the sums indicated in clauses 1 to 5, between Booth & Hughes and Dowsley. It is true, that for some reason or other Dowsley had, before the execution of the agreement, promised to waive his right under this clause and to allow Booth & Hughes the whole balance, on the understanding that they were not to let the film companies know. The motive for the insertion of the clause in the agreement is doubtful, but it would appear from the terms of the letter to be found in the dealings of one or other of the parties with the film companies. The fact remains, however, that, notwithstanding the statement in the letter, both parties afterwards executed the agreement. Whether, in the circumstances, clause 6, as it appears in the executed agreement, or the letter, fixes the rights of the parties in respect of the "balance" referred to, the letter clearly demonstrates, not only that there was no thought of Dowsley acting under the agreement as the mere servant and agent of Booth & Hughes, but that he was the dominant authority, who controlled even the terms of the agreement itself. Moreover, the agreement must, I think, be interpreted in the light of the admitted and indisputable fact that Dowsley was an electrical engineer, who had been engaged for many years in the moving picture business and owned, operated or had an interest in an extensive circuit of moving picture theatres throughout the provinces of Alberta and Saskatchewan, and that this fact was well known to Booth & Hughes. This would itself point to the unlikelihood of his entering into an agreement to serve Booth & Hughes's interest solely for the remuneration provided—five per cent. of the gross proceeds. It will be noted in this connection that clause 6 of the rider provided that Dowsley should have the right to make arrangements for the installation of sound-on-film reproducing equipment, and that Booth & Hughes should have no interest whatsoever in this equipment.

(1) [1906] A.C. 254.

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In my opinion, if Dowsley is to be regarded in any sense as an agent of Booth & Hughes, under the terms of the agreement, it was an agency which was created for the purpose of securing some benefit to him beyond his mere remuneration as such agent, and an agency which was, therefore, irrevocable within the meaning of the passage quoted and approved by Lord Atkinson from Story on Agency in *Frith* v. *Frith* (1), until its purposes were fulfilled.

With regard to the case of *Ogden* v. *Fossick* (2), referred to in the judgments of both Clarke and Mitchell JJ.A., it is to be observed that in that suit, which was one for specific performance, the defendant was the party who, in the agreement, had both engaged his services and covenanted to grant the lease of the coal wharf. In the case at bar the agreement itself purported at least to assign Booth & Hughes's whole equity to Dowsley, who, it is claimed, was the party who had covenanted to render the personal service, and he was in actual possession and complete control of the theatre under the terms of the agreement and already had, as pointed out by McGillivray, J.A., all that a decree for specific performance could have given him. It is not a question of whether he could have succeeded in maintaining a suit against Booth & Hughes for specific performance of their agreement to give him possession and control of the theatre, had they refused to do so, but a question of whether, he having gone into possession and assumed control, under the terms of the agreement, Booth & Hughes, if they had not assigned, could have rightly ejected him, failing any breach of the agreement on his part.

If the view I have intimated be the correct view of the agreement, Booth & Hughes had no right to interfere in any way with Dowsley's possession and control of the theatre property, until the completion of the agreed payments on C. M. Hoar's account and the "fulfillment of all other terms of the agreement" at least. The question directly involved here is as to whether the trustee in bankruptcy had any legal right to oust him of that possession and control. As to this, the dictum of James L.J., in *Ex parte*

(1) [1906] A.C. 254, at 259-260. (2) (1862) 4 De G.F. & J. 426.

Holthausen; In re Scheibler (1), quoted by McGillivray J.A., enunciates the governing rule of law as follows:

> If a bankrupt or a liquidating debtor, under circumstances which are not impeachable under any particular provision connected with his bankruptcy or insolvency, enters into a contract with respect to his real estate for a valuable consideration, that contract binds his trustee in bankruptcy as much as it binds himself.

So that, unless the agreement here in question is impeachable as a fraud upon Booth & Hughes's creditors, the respondent company as custodian in bankruptcy would have no more right to interfere with Dowsley's possession and control of the theatre than Booth & Hughes themselves would have.

Regarding the contention that the agreement was fraudulent and void under the Statute 13 Elizabeth and sec. 64 of the *Bankruptcy Act,* whatever may be said of the conveyances which were arranged between Booth & Hughes and Leather behind Dowsley's back before the execution of the Booth & Hughes-Dowsley agreement, I am of opinion that no intent to hinder, delay or defeat other creditors can properly be imputed to the latter, nor any intent to give Hoar an undue preference over other creditors. Unlike the conveyances to Leather, which made no provision for any other creditor than Leather himself, the whole scheme of the Dowsley agreement was to place the Empress Theatre business on a paying basis so that the debts of Booth & Hughes might be paid, not Hoar's alone, as contended, but payments made as well on property and equipment. The preamble of the agreement itself, which it is said indicates the purpose only to give Hoar a preference, mentions as well the balance owing on the agreement of sale of the theatre itself.

In any event, before this or any court would be justified in holding the agreement fraudulent under the provisions of sec. 64 of the *Bankruptcy Act,* it must be satisfied that it was made "with a view of giving such creditor (Hoar) a preference over the other creditors" of Booth & Hughes. For the reasons already indicated, I do not think that any such finding is warranted. The provision that $50 a month was to be applied out of the receipts on account of the Hoar note, secured as it was by a

(1) (1874) L.R. 9 Ch. App. 722, at 726.

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right of seizure, whereby Hoar could force the firm out of business at any moment, was clearly one which gave Hoar no advantage over his existing security.

Section 54 of the *Bankruptcy Act* has no application, I think, to a case of this kind, where the debtor had wholly divested himself of his equity and possession and control of the property involved.

For all these reasons, some of which have been discussed more fully by McGillivray J.A., in his dissenting judgment, I have come to the same conclusion as he upon the whole case, and would therefore allow the appeal with costs, set aside the judgment with costs and refer the action back to the trial judge to assess damages with or without further evidence as he may decide.

Appeal dismissed with costs.

Solicitor for the appellant: *J. B. Barron.*

Solicitors for the respondent: *Hogg & Menzie.*

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*Jan. 7.
*Jan. 12.

BURT BUSINESS FORMS LIMITED (DEFENDANT) ..... APPELLANT;

AND

ARTHUR A. JOHNSON (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Appeal—Jurisdiction—Exchequer Court Act (R.S.C., 1927, c. 34), s. 82—"Actual amount in controversy"—Claim involved to property or rights of value exceeding $500, but no pecuniary demand—Conflicting claims in applications for patents.

The right of appeal to the Supreme Court of Canada given by s. 82 of the *Exchequer Court Act* (R.S.C., 1927, c. 34), although expressed in the words "the actual amount in controversy," extends to cases where a claim to property or rights (in the present case, conflicting claims in applications for patents) of a value exceeding $500 is actually involved in the proceeding, although no pecuniary demand is involved. Such value may be established by affidavit.

Burnett v. *Hutchins Car Roofing Co.*, 54 Can. S.C.R. 610, and other cases referred to.

Quaere whether, where it appears that an applicant for leave to appeal has a right of appeal *de plano*, a judge has authority to allow an appeal under s. 83 of said Act.

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*RINFRET J. in chambers.

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BURT BUSINESS FORMS LTD. v. JOHNSON.

MOTION for leave to appeal from a judgment of the Exchequer Court of Canada.

Henri Gérin-Lajoie K.C. for the motion.

O. M. Biggar K.C. contra.

RINFRET J.—The appellant moves for leave to appeal from a judgment of the Exchequer Court of Canada rendered December 9, 1932.

The matter relates to conflicting claims in applications for patents made by or on behalf of the parties. The proceeding does not involve a pecuniary demand, but affidavits are filed on behalf of the appellant to the effect that the claims in conflict are of great importance, and that their value to the parties herein and, in particular, to the appellant, is far in excess of the sum of $500. In fact it is sworn in the affidavits that, according to the value of the claims in conflict forming the subject matter of the present case, the actual amount in controversy far exceeds the sum of $500.

In my opinion that is sufficient to give the Supreme Court of Canada jurisdiction to entertain the appeal in this case under section 82 of the *Exchequer Court Act*. The right of appeal given therein, although expressed in the words " the actual amount in controversy," should be held to extend not only to cases where a sum of money exceeding $500 is actually in dispute, but also to cases where a claim to property or rights of a value exceeding $500 is actually involved in the proceeding. I take this to be the effect of the unanimous judgment of this Court in the case of *Burnett* v. *Hutchins Car Roofing Co.* (1), which is directly in point because the matter there in controversy related, as it does in the present case, to conflicting applications for a patent.

It might also be stated that in *Borrowman* v. *The Permutit Company* (2), in a similar case of conflicting applications, this Court entertained jurisdiction (although, however, the point was not raised) and the Judicial Committee of the Privy Council (3) subsequently confirmed the judgment of this Court.

Moreover, the question of the proper construction to be given to the words " actual amount in controversy " in sec-

(1) (1917) 54 Can. S.C.R. 610. (2) [1925] Can. S.C.R. 685.
(3) (1926) 43 R.P.C. 356.

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tion 82 was discussed in this Court in the case of *The Sun Life Assurance Co. of Canada* v. *The Superintendent of Insurance* (1). The Chief Justice (with whom Cannon J. concurred) was of opinion that the condition of the right to appeal was not satisfied in that case, because there was not at stake "a pecuniary sum of more than $500, or, at least, tangible property, exceeding that amount in actual value," and the right to recover which was directly in issue in the judicial proceeding. Duff J., (with whom Smith J. concurred) thought section 82 should be read with section 83 of the *Exchequer Court Act* and, "having regard to the general scope of the sections, it must be held that in this particular respect the conditions of jurisdiction * * *" are complied with "if the right immediately involved amounted to the value of" $500.

From this Court the case went to the Privy Council (2) where the question as to the jurisdiction of the Supreme Court to consider the judgment of the Exchequer Court Judge was given up, but, in their reasons, their Lordships declared themselves to be in agreement with the dissenting Judges in this Court. If the Supreme Court were without jurisdiction, it would seem to follow as a logical consequence that the judgments herein would have been disregarded; and the fact that they were approved would, I think, be at least an indication that, in the opinion of their Lordships, the Court was not precluded from entertaining jurisdiction under the conditions referred to.

Being of opinion that the affidavits filed establish the value of the claims in dispute at more than $500, and that, therefore, the appellant has a right of appeal *de plano* to this Court, and that this is a judicial proceeding wherein the actual amount in controversy exceeds the sum or value of $500 within the meaning of s. 82, I entertain some doubt accordingly as to my authority to allow an appeal under section 83 and, at all events, if I am right, the special leave to appeal becomes unnecessary. However, my decision is not binding on the full Court and it may well be that the Court might hold a different view.

Under the circumstances it seems to me that the proper course to follow is to notify the parties of the opinion I hold at present on the motion of the appellant presented

(1) [1930] Can. S.C.R. 612. (2) [1931] 4 D.L.R. 43.

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to me, so that the appellant, if it is so advised, may proceed to lodge its appeal in the ordinary way under section 82 of the *Exchequer Court Act*.

In the meantime I wish to express no opinion on the question whether this is a proper case for the granting of special leave to appeal under section 83 of the Act. I will keep the motion before me for further adjudication, according as occasion requires, at the request of either party, after notice to the other.

Solicitors for the appellant: *Lajoie, Lajoie, Gelinas & Macnaughten.*

Solicitors for the respondent: *Smart & Biggar.*

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*Nov. 28.

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*Feb. 7.

THE PALMOLIVE MANUFACTURING COMPANY (ONTARIO) LIMITED (DEFENDANT) ..... } APPELLANT;

AND

HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY GENERAL OF CANADA (PLAINTIFF)..... } RESPONDENT;

AND

COLGATE-PALMOLIVE-PEET COMPANY, LIMITED (DEFENDANT).

HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY GENERAL OF CANADA (PLAINTIFF)..... } APPELLANT;

AND

COLGATE-PALMOLIVE-PEET COMPANY, LIMITED (DEFENDANT).... } RESPONDENT;

AND

THE PALMOLIVE MANUFACTURING COMPANY (ONTARIO) LIMITED (DEFENDANT).

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax—Special War Revenue Act, 1915, s. 19BBB (1), as amended by 13-14 Geo. V, c. 70, s. 6 (1)—Manufacturing company and selling company and control by foreign parent company—Relationship of the companies and mode of business—Sales by manufacturing company to selling company and by latter to public—"Sale price" for basis of the tax.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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THE KING v. COLGATE-PALMOLIVE-PEET CO. LTD.

P. Co. (an Ontario company), incorporated January 17, 1924, manufactured (*inter alia*) certain kinds of toilet articles, which they sold only (and were, by arrangement, allowed to sell only) to C. Co. (a Dominion company, which, prior to incorporation of P. Co., was engaged in the manufacture and sale of such articles) which sold them to the trade. Both companies had the same president, and the same vice-president and general manager. All the capital stock of both companies, except qualifying shares, was owned by a foreign parent company, which fixed from time to time the percentage over cost to be allowed P. Co., on figures furnished by department heads. The quantity of goods to be produced by P. Co. was prescribed by C. Co., which controlled the formulæ. The Crown claimed that the sales (from January 17, 1924, to April 13, 1927) made by C. Co. to the trade were chargeable with sales tax, under s. 19BBB (1) of the *Special War Revenue Act, 1915,* as amended by 13-14 Geo. V, c. 70, s. 6 (1). The companies claimed that the price at which P. Co. sold to C. Co. (and not the price received by C. Co., as claimed by the Crown) was the proper basis for the tax.

Held: C. Co. (but not P. Co.) was liable for the tax, based on the prices obtained by it, as being the real prices taxable under the true intent of the Act. The character and substance of the real transaction must, for taxation purposes, be ascertained and the tax levied on that basis. On the evidence it must be held that the goods in question were produced and sold to the public by a combination of the two incorporated departments of a foreign company doing business here in order to reach the Canadian consumer. While the two companies were separate legal entities, yet in fact, and for all practical purposes, they were merged, P. Co. being but a part of C. Co., acting merely as its agent and subject in all things to its proper direction and control.

Dixon v. *London Small Arms Co.,* 1 App. Cas. 632, at 647-648, 651, etc., and other cases, referred to.

Judgment of Maclean J., President of the Exchequer Court, [1932] Ex. C.R. 120 (holding P. Co. liable for the tax, to be based on the selling price of the goods calculated at the "fair market price," as and when sold), varied.

APPEALS and cross-appeal from the judgment of Maclean J., President of the Exchequer Court of Canada.(1)

The plaintiff claimed from the defendants a sum alleged to be due for sales tax, and for interest and penalties.

Maclean J. (1) found that the sale price on which the defendant, The Palmolive Manufacturing Co. (Ontario) Ltd., had paid sales tax was not the "sale price" on which it should have been paid, within the meaning of the *Special War Revenue Act,* and declared that the plaintiff was entitled to recover from that defendant the balance due, and that the sales tax be based upon the selling price of the goods calculated at the fair market

(1) [1932] Ex. C.R. 120.

price of same as and when sold, reserving the precise amount recoverable under the judgment and the question of interest and penalties. He dismissed the action as against the defendant, Colgate-Palmolive-Peet Co. Ltd.

The defendant, The Palmolive Manufacturing Co. (Ontario) Ltd., appealed to this Court. The plaintiff appealed and cross-appealed, claiming that the judgment below should be varied by declaring that the plaintiff was entitled to recover from the defendants sales tax calculated upon the price received by the defendant, Colgate-Palmolive-Peet Co. Ltd., and by giving judgment against the latter company as well as against the other defendant, and by directing payment by the defendants of interest and penalties.

The material facts of the case are sufficiently stated in the judgment of this Court now reported.

The appeal of the defendant, The Palmolive Manufacturing Co. (Ontario) Ltd., was allowed, and the action against it dismissed without costs throughout either to or against it. The appeal of the plaintiff against the defendant, Colgate-Palmolive-Peet Co. Ltd., was allowed and the case against that company remitted to the Exchequer Court with a direction to enter judgment for the amount of the sales tax, at the rates from time to time applicable, based on the prices obtained by that company (less the amounts already paid by the other defendant), with interest at the rate of 5% per annum up to 14th April, 1927, and thereafter at the rate of $\frac{2}{3}$ of 1% per month; with costs in this Court and in the Exchequer Court.

W. N. Tilley, K.C., and *G. M. Clark, K.C.*, for the companies.

H. H. Davis, K.C., and *D. Guthrie* for the Crown.

The judgment of the Court was delivered by

CANNON J.—These are an appeal and a cross-appeal from the judgment of the Exchequer Court of Canada of the 12th of May, 1932 (1), in an action brought by His Majesty the King on the information of the Attorney General of Canada against Colgate-Palmolive-Peet Company and The Palmolive Manufacturing Company (On-

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tario) for the recovery of sales tax on goods sold between the 17th January, 1924, and the 13th April, 1927, together with interest and statutory penalties.

Prior to the 1st of January, 1924, the *Special War Revenue Act, 1915,* as amended, imposed, by sec. 19 BBB, an *excise* tax on sales and deliveries by manufacturers, or producers, and wholesalers, or jobbers. This section was replaced by 13-14 Geo. V, c. 70, s. 6 (1), as follows:

19 B.B.B. (1). In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a *consumption or sales tax* of six per cent on the sale price of all goods produced or manufactured in Canada, including the amount of excise duties when the goods are sold in bond, which tax shall be *payable by the producer or manufacturer at the time of the sale thereof by him.*

This new levy came into force on the 1st of January, 1924, and imposed "a consumption or sales tax" on the sale price of all goods produced or manufactured in Canada, which tax was made payable "by the producer or manufacturer at the time of the sale thereof by him".

Since 1917, the Palmolive Company of Canada Ltd., whose name was later changed to Colgate-Palmolive-Peet Co. Ltd., one of the defendants (which will hereinafter be called the Dominion company), was engaged in the manufacturing and sale of soap and toilet preparations in Toronto. On the 17th January, 1924, the other defendant, the Palmolive Manufacturing Company (Ontario) Limited (which will hereinafter be called the Ontario company) was incorporated. The letters patent have not been produced; but from the evidence it appears that during the period from the 17th of January, 1924, until the 13th of April, 1927, this company was engaged, with the Dominion company, in the manufacturing and sale of toilet soap and toilet articles.

The only witness heard was Mr. Charles R. Vint, who has been, throughout that period, Vice-President and General Manager of both companies. Although the evidence would have been more satisfactory if the contracts between the two companies and with the parent American company had been produced, this gentleman seems to have given fairly and without reticence the relationship of the three companies and the mode in which the business was carried on. Avoiding the incidence of taxation is one of the reasons mentioned for the incorporation of the Ontario company,

and it is claimed that, by this incorporation in 1924 of a manufacturing company, the price arranged between this unit of the organization with the older company which continued to sell to the public, is the real price of the goods produced or manufactured by them and is, legally, the basis of the sales tax payable by this producer.

The Crown, by their cross-appeal, contended that the price received from the public by the Dominion company for their goods is the only and real price of sale which should be considered.

According to Mr. Vint, the following conditions obtained during the period under scrutiny:

1. All the capital stock of both the Dominion and the Ontario companies, except the few qualification shares, was owned and held by the parent company, the Palmolive Company of Delaware;

2. Each company had the same President;

3. Mr. Vint was Vice-President and General Manager of each company;

4. The Ontario company's activities were limited to manufacturing and, to a certain extent, shipping operations;

5. The salaries of the employees of both companies were fixed by the parent company;

6. The quantity of goods to be produced by the Ontario company was prescribed in advance by the selling company which controlled the formulae and prescriptions;

7. The raw materials (oils) were purchased as previously by or through the parent company;

8. The percentage over cost to be allowed to the Ontario company was fixed from time to time by the parent company on figures furnished by department heads;

9. The cost to the customers of the Dominion company was just the same (subject to trade fluctuations) as it was before what Mr. Vint calls the *departmentalization* of the original business;

10. Goods were shipped, from Toronto at least, by the manufacturing (Ontario) company direct to the customers on the instructions of the Dominion company and also, on the same instructions, to warehouses in

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Montreal and Winnipeg. These warehouses, although the evidence is not clear, seem to have remained the property of the Dominion company;

11. The two departments, during all this period, were carried on in the same premises as before, with the same machinery, and, more or less, the same workmen, the same superintendents and the same employees;

12. The Ontario company, according to Mr. Vint, had no right to sell Palmolive goods to outsiders. This is to be noted as the present case concerns only the sale of Palmolive goods. "The Dominion Company," says Mr. Vint, "are owners of the Palmolive Trade Marks; they could not allow their goods to be manufactured promiscuously, could they; they had to be manufactured under their proper arrangements in order to protect their trade marks, and they were interested primarily in goods *of their own manufacture,* but the Manufacturing Company sold goods on their own account that were not under trade marks";

13. The Dominion company gave permission to the Ontario company to make the goods according to the formulæ and prescriptions and to make the wrappers and everything necessary according to trade mark directions.

Under those circumstances, the Crown alleges as a fact that the defendant, the Ontario company, was the instrument or agent of the defendant, the Dominion company, and that the operations of the manufacturing company were the operations of the Dominion company; that the alleged sales made by the Ontario company to the Dominion company were fictitious and made with intent to avoid payment of the amount of sales tax properly payable and that the sales of the Dominion company to the trade were chargeable with sales tax.

In order to determine whether the Ontario company was an independent manufacturer or the agent and subordinate of the older company, I believe the case of *Dixon* v. *London Small Arms Company* (1) to be very much in point. The Lord Chancellor, Lord Cairns, Lord Hatherley, Lord Penzance, Lord O'Hagan and Lord Selborne all discuss under

(1) (1876) 1 App. Cas. 632.

what circumstances a manufacturer might be considered as a private contractor or as the agent of the person who wishes to produce a certain article.

Lord Hatherley, at pp. 647-648, says:

> Now I apprehend, my Lords, that when you speak of a home manufacture, and a manufacture through the medium of servants and agents of your own, you ordinarily mean, although in some cases some elements may be wanting, and in others, others—that there is a plant—that you have an establishment—that you either have in your own possession or have acquired by purchase the article upon which you are to operate in bringing your manufacture to perfection—and, having done all that, you proceed to manufacture as you think fit, at your own time and in your own manner, stopping the manufacture when you think fit so to do, and retaining the control over it in your own hands. I do not think that that would be interfered with because you might give out one or two portions of it to be manufactured by piece-work, if you think fit to do so. But how different is that from the contract which you enter into when you go out into the open market and purchase an article.

And Lord Penzance says (p. 651):

> * * * and I conceive that the argument * * * that it was a contract of agency, rests upon the general proposition that in all cases where an individual, *bargaining,* contracts to sell a completed article, which is to be manufactured according to the special directions of the purchaser, he is, while in the course of manufacturing that completed article, the agent of the purchaser.

Another test proposed by the noble Lord Penzance is whether there is anything in the contract that would prevent the manufacturer from selling the same goods (in that case small arms) to a foreign government. If he could do so, he must be considered to have been an independent contractor and not an agent of the Crown.

Now, in our case, it clearly appears that the Ontario company were not at liberty to sell the Palmolive products to outsiders. They were not free agents, as far as the manufacture and sale of these articles were concerned.

Another test submitted by the House of Lords was: While the work was going on, could the dismissal of a workman be ordered or could any step which the officers of the Dominion company thought desirable in the organization of the Ontario company be ordered by the General Manager of the latter company, who was also the General Manager of the other company? Could the General Manager give any special direction for doing the work in a special way; or was that entirely in the power of the Ontario company? Could the Dominion company withdraw any

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orders they had given or order that the same should be done in a different way? Who could decide the rate at which the work should proceed?

Evidently the Ontario company had to carry out the instructions of the Dominion company. Was not this *home manufacture,* to use the expression of Lord Hatherley, acting under a master's control, dealing with a master's product and attending solely to a master's interest? The two companies were not even free agents in fixing the alleged price or remuneration, as this was determined by the parent company, as appears by the following:

Q. Then during that period, from January, 1924, to April, 1927, who fixed the cost, or the prices, rather, to be paid by the Dominion Company to the Ontario Company?—A. That was made by—in consultation with the Delaware Company, having regard for the interests of both companies.

Q. Consultation by whom with the Delaware Company?—A. Well, our Delaware office.

Q. By you?—A. Yes.

Q. You, as representing both the Dominion and the Ontario Companies?—A. Well yes, as Manager of both. I had facts, of course, on the operations of both companies.

Q. Well then, you, after consultation with the Delaware Company, decided what was a fair price to charge?—A. At the meeting in the Delaware office the facts were presented and it was the opinion of the meeting —prices were arrived at as of the opinion of the meeting, you see.

This is not an ordinary free sale in the open market, where a freely made tender by a person is freely accepted or rejected by another person. I entertain serious doubt, in the absence of a written contract between the two companies, whether this evidence is sufficient to show that the contract of sale really existed, as alleged by the defendant. In order to effect a sale, it is manifest from the general principles which govern all contracts that it requires two parties capable of giving, freely, a mutual assent.

According to *Collinson* v. *Lister* (1), a contract requires two parties and a man in one character can with difficulty contract with himself in another character. And in *Grey* v. *Ellison* (2): A company which carries on two kinds of business under two separate departments, is nevertheless one company, so that one department of it cannot enter into a contract with the other. At page 444, the Vice-Chancellor, in this case of *Grey* v. *Ellison,* says:

(1) (1855) 25 L.J. Ch. 38.

(2) (1856) 1 Giffard's Chancery Reports, 438.

If a man were so fanciful as to grant a lease to himself of his own house, with a covenant that he should quietly enjoy, and a covenant that he should pay to himself a rent for his own house, and chooses to conduct it in the way of having two departments, that is, that he will draw cheques upon himself upon his own account for rent, and pay them into another account of his own at his bankers—it would be a mere whimsical transaction; but it would be futile and an abuse of language to say that it came within the law of contract.

But, in the present case, the producer has incorporated the manufacturing department as a separate company. Is this sufficient to successfully avoid the payment of the sales tax on the real price paid by the public when purchasing the goods of this producer?

In *Cartwright* v. *City of Toronto* (1), which was also an assessment case, my brother Duff stated that taxing statutes "must be construed according to the usual rule, that is to say, with reasonable regard to the manifest object of them as disclosed by the enactment as a whole."

And under the *Interpretation Act,* R.S.C. 1927, c. 1, sec. 15,

Every Act and every provision and enactment thereof, shall * * * receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

I believe that the character and substance of the real transaction must, for taxation purposes, be ascertained and the tax levied on that basis.

In *The Gramophone and Typewriter Limited* v. *Stanley* (2), Cozens-Hardy, M.R., said:

I do not doubt that a person in that position may cause such an arrangement to be entered into between himself and the company as will suffice to constitute the company his agent for the purpose of carrying on the business, and thereupon the business will become, for all taxing purposes, his business. Whether this consequence follows is in each case a matter of fact.

In *The King* v. *Bloomsbury Income Tax Commissioners* (3), Lord Reading, C.J., deals with two companies in the light of the law as laid down in the *Salomon* case (4), and says that if the companies were in fact acting as agents for and carrying on the business of a partnership the applicant would be liable to income tax in respect of the profits and gains made by the firm.

(1) (1914) 50 Can. S.C.R. 215, at 219.
(2) [1908] 2 K.B. 89, at 96.
(3) [1915] 3 K.B. 768, at 785.
(4) [1897] A.C. 22.

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PALMOLIVE MANUFACTURING CO. (ONTARIO) LTD. THE KING

THE KING v. COLGATE-PALMOLIVE-PEET CO. LTD.

Cannon J.

In *Daimler Company Limited* v. *Continental Tyre & Rubber Company* (1), Lord Halsbury, at page 316, went behind the legal entity and held that the English company controlled by German directors and shareholders was in substance a hostile partnership and was therefore incapable of suing. To use his words, it became material "to consider what is this thing which is described as a 'corporation'."

In *Rainham Chemical Works Limited* v. *Belvedere Fish Guano Company Limited* (2), Lord Buckmaster says:

> A company, therefore, which is duly incorporated, cannot be disregarded on the ground that it is a sham, *although it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence.*

A reference may also be made to the Supreme Court of the United States' decisions treating two distinct corporate entities as parts of the same enterprise and the apparent transactions between them as really nothing more than book-keeping entries. *Southern Pacific Company* v. *Lowe* (3); *Gulf Oil Corporation* v. *Lewellyn* (4).

The above authorities satisfy me that we must, as matters of fact, identify the producer of the goods and determine the real price received by such producer when selling them to the public for consumption. In this case, it is abundantly clear that the Palmolive soap is produced and sold to the public by a combination of these two incorporated departments of a foreign company doing business here in order to reach the Canadian consumer. While the two companies are separate legal entities, yet in fact, and for all practical purposes, they are merged, the Ontario company being but a part of the Dominion company, acting merely as its agent and subject in all things to its proper direction and control. In order to reach completely the producer, both companies had to be brought before the court; and I believe that the Crown's cross-appeal against the Dominion company should be allowed. That company should be condemned to pay the tax at the rates from time to time applicable based on the prices obtained by the Colgate-Palmolive-Peet Company, Limited, during the

(1) [1916] 2 A.C. 307.
(2) [1921] 2 A.C. 465, at 475.
(3) (1918) 247 U.S. 330.
(4) (1918) 248 U.S. 71.

period under scrutiny, less the amounts already paid, with interest at the rate of 5% per annum to the 14th of April, 1927, and thereafter at the rate of $\frac{2}{3}$ of 1% per month. We are bound on this issue by *The King* v. *Carling Export Brewing & Malting Co. Ltd.* (1), confirmed on this point by the Privy Council (2).

The condemnation against the Palmolive Manufacturing Company (Ontario) cannot stand, as they were, under the evidence, only agents of the producers, who also looked after the sales of the Palmolive products, and its appeal should therefore be allowed and the claim against it dismissed—but, in view of the circumstances, there should be no costs throughout either to or against that company.

The cross-appeal should be allowed and there should be judgment against the Dominion company for the amount of sales taxes at the rates from time to time applicable and based upon the price received by the Colgate-Palmolive-Peet Company Ltd. for the goods mentioned in paragraph seven of the information herein, less the amounts paid by the Palmolive Manufacturing Company (Ontario) Limited, with interest at 5% from the date on which such sales taxes became due until the 14th of April, 1927; and thereafter a penalty of $\frac{2}{3}$ of 1% per month. Each party will pay their own costs on the appeal of the Ontario company against The King; costs will be against the respondent in the cross-appeal of His Majesty versus The Colgate-Palmolive-Peet Company Limited both here and before the Exchequer Court; and the case will be remitted to the latter court with a direction to enter judgment accordingly.

Appeal of The Palmolive Mfg. Co. (Ont.) Ltd. allowed without costs.

Appeal of His Majesty the King against Colgate-Palmolive-Peet Co. Ltd., allowed with costs.

Solicitors for the companies: *Parker, Clark & Hart.*

Solicitors for the Attorney General of Canada: *Cassels, Brock & Kelley.*

(1) [1930] Can. S.C.R. 361 at 374. (2) [1931] A.C. 435, at 445.

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*Dec. 1, 2, 5, 6.
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*Feb. 7.

GILLETTE SAFETY RAZOR CO. OF CANADA, LIMITED (PLAINTIFF)... } APPELLANT;

AND

PAL BLADE CORPORATION, LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Infringement—Specification—Claims—Patent relating to safety razors—Claim for blade as subordinate invention—Anticipation—Subject matter—Scope of invention.

Appellant sued respondent for alleged infringement of a patent relating to safety razors, alleging that respondent had manufactured and sold razor blades which constituted an infringement of certain five claims (relating to the blade alone) of the patent.

Held: Three of the claims alleged to have been infringed were clearly anticipated in the prior art. As to the others (certain openings in the blade for certain purposes)—if construed as presenting generally certain characteristics, they were invalid, having regard to the prior art; if construed as limited to the precise mechanism described in the specification and shown in the drawings, the respondent's blade did not infringe; the patent in question had to do with a certain mechanical improvement in a well known class of safety razors; and, even if there was valid subject matter of a patent in the blade alone (to which a contrary view was indicated), the subject matter lay in the particular mechanical mode by which the alleged invention was carried into operation, and the patentee could not bring within the scope of his invention a blade such as that of respondent (although it might fit the patented razor), differing, in the respects in which it did, from what the patentee had specifically described and claimed. (*Tweedale* v. *Ashworth*, 9 R.P.C. 121, at 126, 128, and other cases cited).

The nature of the invention protected by a patent and the extent of the monopoly thereby granted must be ascertained from the claims. The claims should be construed with reference to the specification and to the drawings, but the patentee's monopoly is confined to what he has claimed as his invention (*Patent Act*, R.S.C., 1927, c. 150, s. 14; *Pneumatic Tyre Co. Ltd.* v. *Tubeless Pneumatic Tyre & Capon Headon Ltd.*, 15 R.P.C., 236, at 241; *Ingersoll Sergeant Drill Co.* v. *Consolidated Pneumatic Tool Co. Ltd.*, 25 R.P.C. 61, at 82-83).

The patentee had claimed the blade as an appendant or subordinate invention (in addition to the main or principal invention consisting in the complete safety razor). In such a case, the patentee must describe with particular distinctness the alleged new element for which he asks special protection. He must make plain the metes and bounds of the subsidiary invention and he will be held strictly to the thing in which he has claimed "an exclusive property and privilege" (*Patent Act*, s. 14; *Ingersoll* v. *Consolidated Pneumatic, supra*, at 84).

Judgment of Maclean J., President of the Exchequer Court, [1932] Ex. C.R. 132, dismissing appellant's action, affirmed.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

APPEAL by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing its action for alleged infringement of a patent. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

A. W. Anglin K.C. and *E. G. Gowling* for the appellant.

O. M. Biggar K.C., R. S. Smart K.C. and *M. B. Gordon* for the respondent.

The judgment of the court was delivered by

RINFRET J.—The appellant brought this action against the respondent for the alleged infringement of patent No. 260,368. The particulars of breaches were that the respondent manufactured and sold razor blades which constitute an infringement of claims 1, 2, 3, 4 and 5 of the patent.

The defence was: no infringement; and, alternatively, no invention on account of anticipation, lack of novelty and lack of utility.

Before the Exchequer Court, the appellant failed in its action, which was dismissed with costs (1).

The patent relates to safety razors and the invention is stated to be particularly applicable to the class of safety razors comprising a guard, a backing and a thin flexible blade clamped between the guard and the backing to retain the cutting edge of the blade in shaving position to the guard teeth.

In the class of razors referred to, as, for example, in the widely known razors of the original Gillette type, it has been customary to provide the backing members with pins that project through holes in the blade and into holes in the guard member, whereby the blade and the backing are retained from rotation on the guard by the co-operation of the pins with the guard and by the clamping of the blade between the guard and the backing, so that the blade performs no function in retaining any of the said parts in relation one to another.

The object of the invention defined in the patent is said to provide a safety razor wherein a blade will co-operate

(1) [1932] Ex. C.R. 132.

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with a guard member to retain the blade in shaving relation thereto and the blade will also co-operate with a backing member to retain the latter in proper relation to the blade for shaving purposes, so that the position of the backing member with regard to the guard member is maintained by the blade and not by the co-operation of said members together in the well known manner which used to prevail up till then.

Having so defined the object of the invention, the specification states that the latter comprises novel details of improvement more fully set forth thereinafter and to be pointed out in the claims; also, that "reference is to be had to the accompanying drawings forming a part hereof." The specification then proceeds to describe the razor, and the description refers to the blade as follows:

> The blade is provided with a substantially centrally disposed opening 2a through which the projection 4 of the backing member may pass when the blade is between the members 1 and 3. Heretofore, so far as I am aware, the opening in the blade for the projection from the backing for clamping the parts together has been circular so that reliance was had upon spaced pins projecting from the backing to pass through spaced holes in the blade and into holes in the guard member to keep the blade and backing in position on the guard member. In accordance with my invention I provide co-operative means between the blade and the guard member to keep the blade from rotating on said member. For such purpose I provide a projection 1b on the blade side of the guard member adapted to enter an opening 2a in the blade. By preference I make the opening 2a in the blade of non-circular shape, preferably having straight sides, the opening 2a in the drawing being shown in so-called diamond shape, and the projection is of non-circular shape, as shown in so-called diamond shape, (fig. 3), adapted snugly to receive the metal at the sides of opening 2a so that the blade will, by said projection, be retained upon guard member 1 with its cutting edges in shaving relation to the guard teeth when the parts are assembled. Means are provided between the blade and the backing member to cause the blade to retain the backing in operative relation to the blade and the guard, for which purpose I have shown the blade provided with recesses or openings 2b, preferably at its ends, adapted to receive projections or pins 6 extending from the backing member toward the blade, but not to co-operate with the guard member to retain the backing.

The balance of the description relates to the combination of the guard, the backing member and the blade and explains how they should be assembled for purposes of co-operation.

There follows a series of eleven claims, the last six of which have to do with the combination, that is to say, with the complete razor; while the first five claims relate to the

blade alone. They are the only claims with which we are concerned in this case and they may now be set out in this place:

1. A blade having means to co-operate with clamping members located on opposite sides of the blade to retain said members and blade in shaving relation.

2. A blade having means to position it on a clamping member, and having means to co-operate with another clamping member to retain the latter member in relation to the blade.

3. A blade provided with means to position itself on a clamping member, and having means independent of the first-named means for positioning another clamping member on the blade.

4. A blade having a non-circular opening substantially centrally disposed to retain the blade in shaving relation to a guard member, said blade having means spaced from said opening to co-operate with a clamping member to retain the latter in shaving relation to the blade independent of the guard member.

5. A blade having an angularly shaped opening disposed substantially centrally in the blade to co-operate with a guard member to retain the blade in shaving position thereon, and said blade being provided with means spaced from said opening to co-operate with a backing member to retain the latter in shaving relation to the blade and to the guard member.

The plain object of the invention as described in the specification is to substitute to the razor of the old Gillette type a new and improved safety razor wherein the position of the backing member with regard to the guard member is maintained by the blade and not by the co-operation of the backing and guard. The purpose of this was explained in the evidence.

In that class of razors, which have a flexible blade clamped between a guard and a backing, both the outside surface of the guard teeth as well as the upper corner at the edge of the backing member combine as a shield for the blade to prevent it cutting the face when it is in use. "The combined function of the guard and cap makes it a safety razor, provided the blade does not project too far beyond a plane which might be considered a tangent to the guard teeth and corner of the cap (or backing member), which plane (in this case) is represented by a man's cheek when he shaves with a razor. The guard teeth bear on the cheeks underneath and pull down so as to depress the cheek somewhat, so that the blade will only cut the hair and not dig deeply into the cheek."

Obviously the amount of the exposure of the blade along that tangent plane is important and has a great deal to do with the utility of the razor, for, the greater the accuracy

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of the blade exposure, the greater the shaving efficiency of the razor.

According to the evidence, a long series of blade tests and shaving tests indicate $\frac{1}{1000}$ of an inch is the preferable exposure. But there are difficulties in the way of securing this result. There stands the necessity for clearance, that is, the necessity of providing a "sliding fit" between the holes in the blade and the projections in the holder. And there is also the manufacturing necessity of providing tolerances, or, in other words, of determining, from a commercial and economical point of view in governing the factory, how far the clearances should be allowed to vary from the dimensions essentially required for the "sliding fit." The consequence is that the accuracy of the blade exposure is affected by these clearances and tolerances. It is contended that, through the invention, the variations caused by the cumulative effect of the clearances and tolerances are corrected to a great extent and, thus, the improvement makes surer the approximation to the ideal exposure. This is caused, it is explained, by the fact that the clearances and tolerances are taken up simultaneously by the respective movements of the several parts of the razor, that is to say, that the movements of the guard and cap—which are designed to move independently from one another—are controlled by the blade, acting as a link between the two. As a result, you may have the same tolerances or, in other words, the same inaccuracies in manufacture, but they are taken care of and they are corrected to an extent at least sufficient to insure at all times the desired accuracy of the blade exposure. It is in this, the appellant stated, that lies the whole point of the patent.

This result, however, as will be perceived, is brought about—and can only be brought about—by the co-operation between the blade and the other members of the razor. It is not produced—and cannot be produced—by the blade alone. It is essentially the result of the particular combination of the component parts of the razor.

For the purposes of this case, it may be assumed that there was invention in the combination referred to. If there was, it is protected by the claims of the patent which are not in issue. But the attachment of the blade to the other members of the razor is not involved here. The ques-

tion we have to consider is whether the blade was patentable independently of the combination and, if so, whether it was adequately claimed and whether the blade manufactured and sold by the respondent constitutes an infringement thereof.

In order to answer that question, we must be guided primarily by the provisions of the 14th section of the *Patent Act*.

That section requires the specification to be a correct and full statement of what the invention is. The inventor must describe its operation or use as contemplated by him. He must set forth clearly the method of constructing or making the manufacture he has invented. He must end the specification with claims stating distinctly the things or combinations which he regards as new and in which he claims an exclusive property and privilege. In any case in which the invention admits of illustration by means of drawings, the inventor shall, with his application, send in drawings showing clearly all parts of the invention and each drawing shall have written references corresponding with the specification. One duplicate of the specification and of the drawings, if there are drawings, shall be annexed to the patent, of which it shall form an essential part.

It follows that the nature of the invention protected by a patent and the extent of the monopoly thereby granted must be ascertained from the claims. The claims should be construed with reference to the specification and to the drawings, but, as pointed out by Lindley, M.R., in *The Pneumatic Tyre Company Limited* v. *The Tubeless Pneumatic Tyre and Capon Headon Limited* (1), whether the patentee has discovered a new thing or whether he has not, his monopoly is confined to what he has claimed as his invention. And, if the proposition requires further support, we would like to quote a passage from the speech of Lord Loreburn, L.C., (concurred in by Lord Halsbury, Lord Macnaghten and Lord Atkinson) in the case of *Ingersoll Sergeant Drill Company* v. *Consolidated Pneumatic Tool Company Limited* before the House of Lords (2). It is, we think, peculiarly apposite in the circumstances:

> There can be no dispute about the law. Each Claim in a Specification is independent, and a plaintiff in an action for infringement must show that there has been an adoption of some new invention adequately

(1) (1898) 15 R.P.C. 236, at 241. (2) (1907) 25 R.P.C. 61, at 82-83.

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described in a Claim when fairly construed. I am not aware that any special canons of construction are applicable to Specifications, nor am I able to accept, if indeed I rightly understand them, certain formidable generalizations presented to us in argument as to the principles on which they are to be interpreted. Obviously, the rest of the Specification may be considered in order to assist in comprehending and construing a Claim, but the Claim must state, either by express words or by plain reference, what is the invention for which protection is demanded. The idea of allowing a patentee to use perfectly general language in the Claim, and subsequently to restrict, or expand, or qualify what is therein expressed by borrowing this or that gloss from other parts of the Specification, is wholly inadmissible. I should have thought it was also a wholly original pretension.

The claims alleged to have been infringed are set out in an earlier part of this judgment. They are five in number, but they may be divided into two groups.

The first group, composed of claims 1, 2 and 3, may be at once disposed of. They are clearly anticipated in the prior art and we deem it unnecessary to refer to or even to enumerate the numerous patents shown in the evidence as disclosing blades of the kind described in these claims and blades having means performing similar functions. We fail to see how claims 1, 2 and 3 may be patentably distinguished from the patents set forth in the particulars of objection and discussed in the evidence of Mr. Blosk. Moreover, each of these claims are completely met, we think, by one or the other of the original Gillette patents (U.S. Nos. 775,134 and 775,135), which have expired.

Further, it may be noted that claims 1, 2 and 3 do not appear in the corresponding United States patent. The evidence shows that they were inserted in the original application for that patent, but they were subsequently abandoned and cancelled.

The second group of claims in suit are Nos. 4 and 5. The characteristics of the blade therein described are that the blade must have a non-circular or angularly shaped opening, substantially centrally disposed, to co-operate with the guard and to retain the blade in shaving position on the guard, as well as in shaving relation to the latter; and the blade is also to be provided with means spaced from said opening to co-operate with the backing member and to *retain the latter,* independently of the guard, in shaving relation to the blade and to the guard.

In dealing with these claims, one must remember that they have reference only to the blade. They have nothing

to do with the combination of blade, guard and cap covered by the subsequent claims and which is the true subject-matter of the patent. For the purpose of construing the claims, we must assume that the holder is neglected, and the blade must be envisaged, not as an element of the combination, but as a separate article independent of the other component parts of the razor. And the question must be: Is that blade standing alone as described a good and valid subject-matter of a patent?

In that view and as presented in the specification, the blade would be an appendant or subordinate invention, which the patentee has chosen to claim in addition to the main or principal invention consisting in the complete safety razor.

In such a case, the patentee must describe with particular distinctness the alleged new element for which he asks special protection. He must make plain the metes and bounds of the subsidiary invention and he will be held strictly to the thing in which (to borrow the words of s. 14 of the Act) he has claimed " an exclusive property and privilege." (*Ingersoll Sergeant Drill Co.* v. *Consolidated Pneumatic Tool Co. Ltd.* (1).)

The claims relate to a blade with means to " co-operate " and to " retain." One of the means is stated: it is the centrally disposed opening. The others are referred to merely as " means spaced from said opening." If we look at the rest of the specification and at the drawings, to assist in comprehending what these means are, we find that what the patentee had in view and what he intended to claim were four notches or openings, at the ends of the blade, adapted to receive projections extending from the backing member of the razor. So that, so far as concerns the blade, the means disclosed throughout are nothing but holes, one set of means being the central hole and the other, the holes or openings in the ends.

We would not think the patentee intended to make the broad claim to the monopoly of the right to perforate any and all shapes of holes in a razor blade of the type in question. That alone would be quite sufficient to invalidate the claim, for evidently, having regard to the prior art, the claim would be abnormally wide.

(1) (1907) 25 R.P.C. 61, at 84.

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Always bearing in mind that the blade alone is now under discussion, we are of opinion that neither could the patentee have claimed the invention of a blade presenting generally the characteristics of a central non-circular opening with spaced corner apertures or recesses. In that connection, many prior disclosures might have to be referred to, including Krusius (U.S. 885,252), Wakeley (U.S. 1,119,132), Van Den Berg (U.S. 1,276,712); and more particularly Société Générale de Coutellerie et Orfèvrerie (Brit. 23,563), where the blade described is strikingly similar to that of the appellant's specification. If claims 4 and 5 were meant to cover all central non-circular openings with spaced corner apertures in a razor blade, the question how far they are anticipated by these patents would have to be developed.

But the appellant argues the openings in the blade he claims as new are openings with certain functions in the holder and the openings in the earlier blades were not intended to function in the same way as the openings described in the claims in suit. A claim for a blade having openings with certain functions in the holder comes perilously near being a claim for the combination and not a claim for the so-called subordinate invention, for, in such a case, the utility of the holes depends entirely upon their co-operation with the projections in the other members of the razor. In any event, the moment the validity of the subordinate invention is put on that ground, it necessarily limits the form of the holes in the blade to that of holes shaped in the particular way required to function in the holder and that is to say: to holes precisely as described in the specification for the purpose of functioning in the precise holder therein described.

The appellant's patent does not disclose a pioneer invention. It has to do with a certain mechanical improvement in a well-known class of safety razors. Even if there be valid subject-matter of a patent in the blade alone—and our present view would be that there is not—the subject-matter lies in the particular mechanical mode by which the alleged invention is carried into operation (*Tweedale* v. *Ashworth* (1)). And the words of Lord Watson in that case are very pertinent (p. 128):

(1) (1892) 9 R.P.C. 121, at 126.

The plain object of the invention as described in the specification is to substitute better mechanical equivalents for those already known and used as a means to the same end. It follows that, in construing the appellant's specification, the doctrine of mechanical equivalents must be left out of view. He cannot bring within the scope of his invention any mechanical equivalent which he has not specifically described and claimed.

Similar observations were made in *Curtis* v. *Platt* (1), and in the judgment of Lord Davey in *Consolidated Car Heating Co.* v. *Came* (2).

If the above principles be applied to claims 4 and 5, the appellant is driven to the alternative that: either the claims are to be construed as limited to the precise mechanism described in the specification and shown in the drawings or else they have been designed in order that they might be expanded or contracted as occasion might require in the interest of the patentee and, if that be so, they are bad and void. (See Lord Loreburn's speech in the House of Lords in *Natural Colour Kinematograph Co. Ltd.* v. *Bioschemes Ltd.* (3); and also that of the Lord Chancellor in *British Ore Concentration Syndicate* v. *Minerals Separation Ltd.* (4).

The blade disclosed in the claims in suit is a blade having a non-circular or angularly shaped opening disposed substantially centrally. The specification refers to and the drawings show a diamond shaped opening in the centre—both latitudinally and longitudinally—of the blade. The drawings "form an essential part" of the patent (*Patent Act,* subs. 4 of s. 14) and they are useful to indicate the invention "as contemplated by the inventor" (s. 14 (1) (*a*)). It was represented that they are only subsidiary to the verbal description. In this case, they agree with it and, besides, reading claims 4 and 5 with the body of the specification and with the drawings is giving them a beneficial construction, as otherwise they would lack the distinctness and the precision required in the premises.

Further proceeding in the disclosure, we find that the function of the central opening is to co-operate with a projection of a similar shape in the guard, adapted snugly, "so that the blade will * * * be retained * * * in

(1) (1863) 3 Ch. D. 135; (1864) 11 L.T. n.s. 245.
(2) [1903] A.C. 509, at 516-518.
(3) (1915) 32 R.P.C. 256, at 266.
(4) (1909) 27 R.P.C. 33, at 46.

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shaving relation to the guard teeth when the parts are assembled."

According to the evidence, no razor or blade was ever built by the appellant in accordance with the above description. The patent issued in May, 1926. In November, 1929, a safety razor—known as the bar type razor—which might or might not come under the patent—went into production and was put on sale by the appellant in the early part of 1930, but the manufacture of that article was soon abandoned; and, then, another safety razor, known as the Goodwill type, claimed to be made under the patent by the appellant, came on the market in May or June, 1931. We are not called upon to decide whether the Goodwill razor corresponds to the patent. We are concerned only with the blade disclosed in the claims in suit and the question is whether that blade was patentable, whether it was adequately claimed and whether it was infringed.

The blade manufactured and sold by the respondent differs from that disclosed in the patent in that, instead of a diamond shaped opening disposed in the centre latitudinally and longitudinally of the blade, it has a long irregularly shaped slot extending for most of its length and that, instead of the notches in the ends, the four corners are perforated with rectangular openings. The central hole in the blade is not adapted to fit snugly over a projection in the guard. In fact, if one takes the whole opening as being a hole—which it is not within the meaning of the patent—that opening is not disposed centrally in the blade, in the sense that, as just mentioned, it extends practically over the whole length of the blade. Assuming the respondent's blade was used in the Goodwill holder, far from fitting snugly over the projections of the Goodwill guard, there would be no function whatever in the longitudinal slot, nor in the central hole of the respondent's blade. The means co-operating with the guard of the holder and retaining the blade in shaving relation thereto would then consist in two enlargements, diamond shaped, of the longitudinal slot; and, for that purpose, the rest of the slot and the central hole would be functionless. If one suppressed all the parts of the elongated slot thus being functionless, the blade would remain with the central hole (which has nothing to

do with shaving relation), and two diamond shaped apertures spaced from the central hole; or altogether, three openings. The blade as designed by the respondent may fit the razor patented by the appellant, although it would not fulfil the functions intended in claims 4 and 5—or, at least not in the same way—but it will also fit the bar type razor, the Goodwill razor and other holders, according to the evidence.

The respondent's blade does not correspond to the blade described in the specification and in the drawings. There was no infringement. Of course, the appellant urges the respondent's blade is substantially similar to the blade used in the Goodwill type of razors. The answer is that the Goodwill blade is not the article disclosed in the patent.

We have been referred to a judgment rendered in the United States (1), wherein the corresponding United States patent was involved. In that case, the combination claims were sued on. Besides, it is quite apparent from the report that the evidence, the prior art referred to and, in certain aspects, the law to be applied were not the same. The whole trial was conducted on a different footing. We mention the judgment to show that it was not overlooked.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Henderson, Herridge & Gowling.*

Solicitors for the respondent: *Smart & Biggar.*

(1) *Gillette Safety Razor Co.* v. *Hawley Hardware Co.*, (1932) 60 Fed. Rep. (2nd series), 1019.

1932
*Dec. 7.
1933
*Feb. 7.

ETHEL NIXON (PLAINTIFF) ..... APPELLANT;

AND

THE OTTAWA ELECTRIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Person struck by street car while crossing track in front of car, intending to board it—Liability of railway company—Jury's findings—Jury's apportionment of fault (The Negligence Act, 1930, Ont., c. 27, s. 7).

Plaintiff sued for damages for injuries caused by her being struck by defendant's street car while she was crossing on a concrete walk traversing defendant's double-tracked right of way from the north platform to the south platform at defendant's Ottawa Civic Hospital terminal station, intending to board the car. The station and tracks were in a field beyond the city limits. It was daytime. The car was going easterly. Passengers waiting at the station to return to the city were allowed to board cars from the south platform, when the cars stopped at the station, before proceeding east to turn west at a loop about 700 feet beyond the station. Plaintiff, before she reached the station, had seen the car coming and persons standing on the south platform. The jury found defendant negligent in not having the car under proper control, and plaintiff negligent in not taking a second look before crossing, and apportioned the blame for the injuries, 90% to defendant and 10% to plaintiff. The trial judge, however, dismissed the action on the ground that there was no evidence upon which a reasonable jury could find for the plaintiff. His judgment was affirmed by the Court of Appeal, Ont., [1932] O.R. 389. Plaintiff appealed.

Held (reversing the judgments below): Plaintiff should have judgment in accordance with the jury's findings, which there was evidence to support.

As to defendant's negligence—It was not a question as to its motorman being under a duty to stop at the south platform or to expect that any person desiring to board his car for return to the city would be coming to the south platform; but a question whether, having regard to all the circumstances and conditions obtaining at the time and of which he was or should have been aware, he exercised due care in approaching and rushing through the station at the speed he did. There was clear evidence of negligence in his approaching and passing through the station at a speed which disabled him from exercising that degree of control which, under the circumstances, he should have been able to exercise for the reasonable safety of people whom he might have expected to be passing, as they had a right to do, over the walk to the south platform to board the car.

The jury's apportionment of fault (*The Negligence Act, 1930,* Ont., 20 Geo. V, c. 27, s. 7) must stand as the basis for the apportionment of the damages, the court not being prepared to hold that it was one which could not fairly and honestly be made in any reasonable view of the evidence.

*PRESENT:—Rinfret, Lamont, Smith, Crocket and Maclean (*ad hoc*) JJ.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1), dismissing her appeal from the Judgment of McEvoy J., dismissing her action, which was brought for damages for personal injuries caused by her being struck by defendant's street car. The action was tried with a jury, and certain questions were submitted to and answered by them, as set out in the judgment now reported. They found negligence on the part of the defendant and negligence on the part of the plaintiff, and assigned 90% of the blame to defendant and 10% to plaintiff. They assessed the whole damage suffered by the plaintiff at $17,557.15. The trial judge, however, giving effect to a motion for non-suit on which he had reserved judgment, gave judgment dismissing the action, upon the ground that there was no evidence upon which a reasonable jury could find for the plaintiff.

The material facts and circumstances of the case are sufficiently stated in the judgment now reported. The appeal to this Court was allowed and judgment directed to be entered for the plaintiff for $15,801.45 (nine-tenths of the damages as found by the jury), with costs throughout.*

A. W. Beament for the appellant.

R. Quain K.C. for the respondent.

The judgment of the court was delivered by

CROCKET J.—The plaintiff brought this action to recover damages for personal injuries sustained by her as a result of being struck by one of the defendant company's electric street cars while crossing a concrete walk traversing the company's double-tracked right of way from the north passenger platform to the south passenger platform of what is known as the company's Ottawa Civic Hospital terminal station in the township of Nepean, a suburb of the city of Ottawa, shortly before one o'clock p.m. on January 29, 1931.

On the trial before McEvoy J. and a jury, the defendant's counsel at the close of the plaintiff's case announced that he did not propose to call any witnesses and moved

*Leave to appeal was refused by the Judicial Committee of the Privy Council, March 9, 1933.

(1) [1932] O.R. 389.

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for a non-suit. After a lengthy argument, His Lordship decided that he ought to take the opinion of the jury on questions he proposed to submit to them on the case as it stood, and reserved judgment on the motion in the meantime. He thereupon charged the jury and gave them eight questions to answer. These questions and the jury's answers thereto are as follows:—

1. Were the plaintiff's injuries caused wholly or in part by any negligence on the part of the defendant or of its servants?—Ans. Yes.

2. If you answer question 1 "yes," then state fully in what such negligence consisted?— Ans. Car not under proper control. According to evidence submitted car travelled about 400 feet from time brakes were applied until it came to a full stop.

3. Were the plaintiff's injuries caused wholly or in part by any negligence on the part of the plaintiff?—Ans. Yes.

4. If you answer question 3 "yes," then state fully in what such negligence consisted?—Ans. Plaintiff neglected to exercise due precaution in not taking a second look before stepping on tracks.

5. If after he became aware, or if he had exercised care he ought to have been aware, that the plaintiff was in a position of danger; could the defendant's motorman have prevented the accident by the exercise of reasonable care?—Ans. Yes.

6. If you answer question 5 "yes," then state fully what he did or omitted to do that would have prevented the accident?—Ans. He should have approached at a slower rate of speed so as to be in a position to stop the car in a reasonable distance.

7. If you answer questions 1 and 3 both "yes," what proportion of the blame do you assign to,—

(*a*) The plaintiff?—Ans. 10 per cent.

(*b*) The defendant or its motorman?—Ans. 90 per cent.

8. At what amount do you assess the whole damage suffered by the plaintiff?—Ans. $17,557.15.

The jury attached a memorandum shewing how they made up this amount. They allowed the amount of the hospital and medical bills at $2,113.15; salary eighteen months at $198 per month, $3,564; 50 per cent. regular salary for ten years, $11,880, making a total of $17,557.15.

The plaintiff's counsel moved for judgment for the full amount of the damages as assessed by the jury. His Lordship refused this motion and endorsed on the record the following memorandum, which discloses the only reasons assigned for his judgment:—

At the close of the argument in this case, I was not able to see any principle of law upon which I could charge the jury in a way that would enable them to find and assess damages to the plaintiff. There was a motion for non-suit at the close of the plaintiff's case, and I reserved the question of non-suit until after hearing further about the matter. I am now of opinion that there should be judgment of non-suit with costs upon the ground that there is no evidence upon which a reasonable jury could find for the plaintiff.

This appeal is from the judgment of the Ontario Court of Appeal (1) affirming the dismissal of the action by the learned trial judge.

We think there was ample evidence to support the jury's findings upon questions 1 and 2, which, read together, undoubtedly mean that the defendant's motorman was guilty of negligence in not having the car under proper control when he approached the Civic Hospital station, and that this negligence on his part materially contributed to cause the plaintiff's injuries.

The answer to question 2 not only states the fact of this negligence but it indicates the evidence which proves it, viz: that the car travelled about 400 feet from the time the motorman applied his brakes until the car came to a full stop, and this notwithstanding the fact that the car hit the plaintiff at a point about 90 feet east of the trolley pole where he sounded the gong and presumably applied the brakes, and dragged her along the track under the front guard, a distance of 300 feet. This is established conclusively by the evidence of the witness, Carson. Although there is no definite testimony that the motorman did apply his brakes, it is a fair inference from Carson's testimony that he did so immediately after sounding the gong when passing the trolley pole, which the evidence and the plan of the locus shewed was 86½ feet west of the west side of the concrete walk connecting the two passenger platforms.

The written admission (Ex. 6), signed by the solicitors of both parties, contains the statement that the plaintiff was entitled to come upon the platform or walks at the scene of the accident for the purpose of taking a street car. The purpose of the filing of this admission is not clear, but, apart from it entirely, the evidence leaves no question that passengers waiting at this station for cars to return to the city were allowed to board cars from the south passengers' platform, when they stopped at the station, before proceeding east to turn west around the loop about 700 feet beyond the station. The witness, Robinson, a motorman in the defendant's employ, stated not only that there was such a practice, but that an order had actually been issued by the company to that effect when there was an eight or ten minute service around that end of the line,

(1) [1932] O.R. 389.

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and that he presumed this was done because in the winter it got very cold in the open shelter on the north side of the tracks. There was no evidence that this order had ever been cancelled, or of any notices posted about the station forbidding passengers from boarding the cars when they stopped at the south platform.

The plaintiff swore that she saw three people waiting on the south platform to get on the car, two gentlemen and a lady, and that then she started to run across to get the car because she was cold. The witness, Carson, was one of them, and it was while standing on the south platform with the lady and the other gentleman waiting to board the car, that he saw it approaching the station at what he described as a fierce speed, which he estimated to be 30 miles an hour, and hit the plaintiff. He was watching the car as it approached and did not see the plaintiff until he turned his head and saw the plaintiff for the first time at almost the instant she was struck. The car was right on her, he said, before he noticed her, only two paces from the car. When the motorman sounded the gong over 80 feet west of the platform he said he saw from the speed it was going there was no chance of it stopping at the station.

The station and the connecting concrete walk between the two platforms, as indicated by the plan, themselves clearly shew that passengers were expected to use the walk as a passage from one platform to the other, and it is clear from the evidence of the plaintiff and Carson that the latter and the lady and other gentleman who were standing on the south platform with him had crossed over from the north platform before the plaintiff started to cross, for the purpose of boarding the car on the south side. There was no road or walk leading to this platform from the south. There were no houses to the south, only a bare open field, so that it is self-evident that the concrete walk across the company's right of way was ordinarily used only by passengers disembarking from or boarding the company's cars.

The local jurymen were no doubt themselves well aware of the practice which obtained regarding the taking on of passengers at this station, and the danger which might reasonably be anticipated from the running of cars at excessive speed through a station which so many employees of and visitors to such an institution as the Civic Hospital so often frequented.

Moreover, the station plan and the oral evidence shew that the north platform, which is of the same length as the south platform (58 feet), and is for about half its length twice as wide, has upon it near its westerly end a roofed shelter enclosed by three walls, 6′ 7″ high, on the west, north and east sides. It is obvious that the west wall of this shelter would completely hide from the view of the motorman passengers standing behind it, any of whom might at any moment emerge from it, carelessly or otherwise, to cross the walk to the south platform.

In the light of all these facts which, on the defendant's motion for a non-suit, must be taken as admitted, we cannot agree with the learned trial judge that there was no evidence upon which a reasonable jury could find for the plaintiff. We think there was clear evidence of negligence on the part of the motorman in approaching and passing through such a station at a speed which disabled him from exercising that degree of control over his car which, under the circumstances, he should have been able to exercise for the reasonable safety of people whom he might have expected to be passing, as they had a right to do, over the concrete walk to the south platform to board his car.

If he was keeping a proper look-out and exercising any thought whatever, he must have seen the three passengers standing on the south platform and known that they were there with the expectation that the car would stop to take them on, and that the plaintiff was rushing to the station for the purpose of joining them.

It is not a question, however, of the motorman being under a duty to stop at the south platform or under a duty to expect that any person desiring to board his car for return to Ottawa would be coming to the south platform, as is suggested in the reasons for judgment of the Appeal Court, but a question whether the motorman, having regard to all the circumstances and conditions obtaining at the time and of which he was or should have been aware, exercised due care in approaching and rushing through the station at such a rate of speed as above indicated—a rate of speed which undoubtedly made it impossible for him to bring it to a stop in a distance of less than 300 feet after running the plaintiff down. This was a clear question of fact for the jury's determination and upon which, for the reasons stated, there was abundant evidence to support the finding they made.

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Whether this negligence of the motorman caused or materially contributed to cause the plaintiff's injuries was also a clear question of fact for the jury's determination in the light of all the circumstances proved. They found in answer to question 1 that it did, and in answer to questions 3 and 4 that there was negligence on the part of the plaintiff as well, which also materially contributed to cause the injuries complained of, such negligence on her part being her failure to look a second time before stepping on the tracks. We think that there was evidence to support this latter finding also.

This being the case, the plaintiff is clearly not entitled to rely upon the answers to questions 5 and 6 as a finding of ultimate negligence to which her injuries must solely be attributed. It is evident that the answer to question 6 indicates precisely the same negligence as the jury found in answer to question 2, viz: that at the time he saw or ought to have seen the plaintiff stepping off the north platform to cross the tracks the motorman, by reason of the excessive speed at which he was then running the car towards the station, was unable to stop it within a reasonable distance, i.e., he did not have the car under proper control. Obviously this had no reference to the motorman's failure to do any particular thing, subsequently to the plaintiff's negligence, by which he could have avoided its consequences.

Section 7 of the Ontario Contributory Negligence Act (*The Negligence Act, 1930*), 20 George V, cap. 27, provides that in any action tried with a jury the degree of fault or negligence of the respective parties shall be a question of fact for the jury. The jury here assigned 10% of the blame to the plaintiff and 90% to the motorman.

Where damage is caused by the combined negligence of two or more persons it is by no means an easy task to accurately determine the percentage of fault which should be assigned to each. The Contributory Negligence Act, however, has expressly declared it to be the special function of the jury to do so on a jury trial. The jury in this case has made its apportionment. Unless it is one which we are clearly satisfied could not fairly or honestly be made in any reasonable view of the evidence, we would not be justified in rejecting it.

For my part, I can understand how the jury may very well have concluded that the plaintiff's conduct, in the circumstances, was much less inexcusable than the motorman's. Leaving the hospital on an apparently very cold day with a hat fitting closely over her ears and her coat collar turned up, she saw to her right as she ran across Carling Avenue, the car turning the corner at Holland Avenue, and at the same time or later, while proceeding along the concrete walk leading from the former street to the railway station, a distance of about 60 feet, observed the lady and two men on the south platform. Naturally assuming that the car would slow up and stop, she rushed across the north platform and on to the walk traversing the right of way, in order to escape the cold and board the heated car with the others at the earliest opportunity.

While upon other considerations it may perhaps seem that the apportionment of fault was unduly favourable to the plaintiff, I am not prepared to hold that the apportionment was one which could not fairly and honestly be made in any reasonable view of the evidence. In this view it must stand as the basis for the apportionment of the damages between the parties under the provisions of the Contributory Negligence Act.

No exception can be taken to the jury's assessment of damages, in view of the seriousness of the plaintiff's injuries, which included a fracture of the base of the skull, the fracture of her right thigh, permanent injury to the central nervous system, and complete and permanent deafness in one ear, resulting, according to the medical testimony, in the impairment of her earning capacity as a trained nurse to the extent of at least 50 per cent.

Judgment should, therefore, be entered for the plaintiff under the provisions of sec. 4 of the Contributory Negligence Act, for $15,801.45—nine-tenths of the damages as found by the jury.

The appeal should be allowed with costs and judgment entered for the plaintiff for the above amount with costs of the trial and of the appeal to the Appeal Court.

Appeal allowed with costs.

Solicitors for the appellant: *Beament & Beament.*

Solicitors for the respondent: *Quain & Wilson.*

1932
*Nov. 7.
*Nov. 28.

PANNETON *v.* PANNETON

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

Community of property—Death of one consort—Failure to make inventory—Continuation of the Community—Art. 1323 C.C., abrogated in 1897 by 60 Vict., c. 52.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Fortier J., and dismissing the appellants' action.

The appellants were the respondent's sons by previous marriage and brought an action against him to have it declared that there had been a continuation of the community between their mother and the respondent and that the latter be ordered to make an inventory of the community and to account to the appellants.

The trial judge held that the community had continued and, the respondent having failed to make inventory, the action ought to be maintained.

The appellate court reversed that judgment, holding that, according to the evidence, the estate was insolvent at the time of the death of the appellants' mother and that, accordingly, the respondent was not bound to make inventory. *King* v. *McHendry* (2) and *Laroche* v. *Laroche* (3) were followed.

On the appeal to this Court, after hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Jos. Barnard for the appellants.

C. Bourgeois K.C. for the respondent.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

(1) (1931) Q.R. 53 K.B. 113. (2) (1900) 30 Can. S.C.R. 450.
(3) (1916) Q.R. 24 K.B. 138; 52 Can. S.C.R. 662.

I. W. C. SOLLOWAY AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

SAMUEL BLUMBERGER (PLAINTIFF) .... RESPONDENT.

1932
*Oct. 4, 5.
1933
*Feb. 7.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Stock exchange—Broker and client—Stocks delivered as collateral security —Wrongful conversion—Evidence.

The respondent employed as stock brokers the appellants who carried on business first as partners and later as a limited company. From time to time the respondent delivered to them stocks, shares and bonds as security to finance his transactions with the appellants with whom he carried on an active trading account. In each case, before depositing the shares, the respondent endorsed the certificates in blank, and they became what is known as "street certificates." The respondent, when placing orders to buy or orders to sell, received from the appellants confirmation in the form of a bought or sold note and also during the whole course of his trading, received each month a statement showing the position of his account. The respondent took no exception to the bought and sold notes or to the monthly statements, and, at the time, accepted them as correct. The securities were first transferred over from the partners to the limited company and, when it closed out, they were at the respondent's request turned over to newly employed firm of stock-brokers. Several months later, without making any previous demand upon the appellants, the respondent brought an action for damages for wrongful conversion of the securities so deposited with them. The appellants did not give evidence other than calling the secretary and a member of the Vancouver Stock Exchange, who testified as to the rules and customs of the exchange. The respondent, however, not without objection, secured the production of the appellants' books and documents. An extract of the ledger so produced showed in respective columns the name of the stock deposited by the respondent, the date of the deposit, the number of shares, the number of the certificate and its date, that it was received from the respondent, and then, under the heading "To whom delivered," an indication that delivery had been made either to "H.O." (head office) or to certain brokers whose names were given, together with mention of the date on which such delivery was made. The trial judge held against the appellants on the ground that the entries in the books showed that the appellants "dealt with these securities as if they were their own property, without notice and regardless of the rights of the plaintiff." This judgment was unanimously affirmed by the Court of Appeal: Martin and McPhillips, JJ.A., agreed with the conclusions arrived at by the trial judge, although Martin, J.A., admitted the case was "not free from doubt," and Macdonald, C.J., thought the respondent's evidence was "insufficient to support the action"; but he was of opinion that the onus was upon the appellants

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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"to show that, in accordance with their duty, they had properly disposed of the collateral securities."

Held (reversing the judgment appealed from) that the respondent's action ought to have been dismissed on the ground that, on the record submitted and upon the evidence, the court could not come to the conclusion that wrongful conversion had been established. *Smith* v. *Great Western Ry* [1922] A.C., 178, foll.

Semble that the onus was upon the respondent to prove wrongful conversion.

APPEAL from the decision of the Court of Appeal for British Columbia affirming the judgment of the trial judge, Macdonald J. (1), and maintaining the respondent's action.

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

W. B. Farris K.C. for the appellants.

J. A. MacInnes K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—The appellants were stock brokers and members of the Vancouver Stock Exchange. They carried on their business, at first, as partners; and later they were incorporated into a limited company. The respondent employed them as his brokers; and, between June 14, 1928, and September 14, 1929, he proceeded to place with them orders to buy and sell stock. For this purpose, he delivered certain shares as security to the appellants, with whom he carried on an active trading account. In each case, before depositing the shares, the respondent endorsed the certificates in blank, and they became what is known as "street certificates."

As the respondent placed orders to buy or orders to sell, in every instance he got from the appellants confirmation in the form of a bought or sold note. He admits the amounts shown in these confirmations were in accordance with current market prices.

Further, during the whole course of his trading, he received each month a statement showing the position of his account. He took no exception to the bought and sold notes, or to the monthly statements, and, at the time, accepted them as correct. In fact, the trading went on between the parties as a continuous account.

(1) (1931) 45 B.C.R. 66.

Incidentally the account was transferred over from the partners to the limited company and, in the end, when it was closed out, the shares and stocks shown in the account (on the assumption that it was correct) were, at the respondent's request, turned over to Branson & Brown, other brokers of Vancouver.

Several months later, without making any previous demand upon the appellants, the respondent brought this action into court for the alleged wrongful conversion of the shares he had deposited with the brokers. Judgment was given in favour of the respondent as against the partners for the period covering the transactions with them, and as against Solloway, Mills & Co. Ltd., for the period covering the remaining transactions. The limited company is not an appellant in this court, and we are concerned only with the dealings between the respondent and the partnership, all gone through within a single month, to wit, from June 14th to July 14th, 1928.

The respondent did not sue for an accounting. At the trial, the issues were clearly limited to the question of wrongful conversion; and the trial judge declared all he was going to consider was that question of conversion and the ensuing damages.

The appellants did not give evidence. At the conclusion of the plaintiff's case, they moved for non-suit. When warned by the court that it would be more advisable to reserve this, if they wished to put in further evidence, they contented themselves with calling the secretary and a member of the Vancouver Stock Exchange, who testified as to the rules and customs of the Exchange.

The respondent, however, not without discussion and strenuous objections on the part of the appellants' counsel, succeeded in securing the production of the appellants' books and documents. He relied on these for his success. The learned trial judge held against the appellants on the ground that the entries in the books, as he thought, showed that the appellants

> dealt with these securities as if they were their own property, without notice and regardless of the rights of the plaintiff.

In the Court of Appeal, two of the judges, Martin and McPhillips, JJ.A., agreed with the conclusions arrived at by the trial judge, although Martin, J.A., admitted the case was "not free from doubt." The Chief Justice thought the

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respondent's evidence was "insufficient to support the action"; but he was of opinion that the onus was upon the appellants

to show that, in accordance with their duty, they had properly disposed of the collateral securities.

M. A. Macdonald, J.A., did not write any notes.

The holding of the learned trial judge was entirely based on his reading and interpretation of the entries in the books. An extract from the ledger was produced. It showed in respective columns the name of the stock deposited by the respondent, the date of the deposit, the number of shares, the number of the certificate and its date, that it was received from the respondent, and then, under the heading "To whom delivered," an indication that delivery had been made either to "H.O." (head office) or to certain brokers whose names were given, together with mention of the date on which such delivery was made. From those entries, the learned judge gathered that the stock had been delivered as indicated on the several dates stated in the ledger and that the appellants had therefore failed to hold the stock under their control. It is in that respect, we assume, that he held the monthly statements did not agree with the account of the securities as entered in the books; and, for that reason, he came to the conclusion that

the disposition of the securities there shown by the (appellants) amounted to a denial of plaintiff's ownership and an assertion on their part of a right to dispose of them as they saw fit. This (he held) clearly was conversion.

In our view, the conclusions of the courts below are not consistent with the nature of the contract between the parties, nor with the nature of the action brought by the respondent.

This was an agreement for dealing in stocks on the Vancouver Stock Exchange. In the absence of evidence to the contrary, the respondent, who gave authority to the appellants to do business for him on the Exchange, should be deemed to have contracted subject to the rules and customs of the Exchange; and the nature of the powers and the duties of the brokers would be determined by the usage and course of dealing in transactions of this character between broker and customer in Vancouver (Parke B. in *Foster* v. *Pearson* (1); *Clarke* v. *Baillie* (2); *Cartwright* v. *Mac-*

(1) (1835) I C.M. & R. 849, at 859.

(2) (1911) 45 Can. S.C.R. 50.

Innes (1); *Forget* v. *Baxter* (2). Moreover, it is a fair inference from the evidence that the respondent was pretty familiar with the usages and customs of the stock market.

The meaning and effect of the evidence is that the universal practice of brokers—and the prevailing practice in Vancouver—is to treat " street certificates " as dollar bills, that is to say: as money to finance the transactions for which the client has given the securities. The physical certificate itself is immaterial; it is used indiscriminately to make deliveries or otherwise, provided the broker, at all times, has on hand or keeps under his immediate control a sufficient quantity of each stock to meet his obligations towards his customers. To borrow the expressions of Mr. Justice Day, delivering the opinion of the United States Supreme Court, in *Gorman* v. *Littlefield* (3):

> the certificates of stocks are not the property itself, but merely the evidence of it . . . a certificate for the same number of shares (represents) precisely the same kind and value of property as another certificate for a like number of shares in the same corporation; the return of a different certificate or the substitution of one certificate for another makes no material change in the property right of the customer * * * such shares are unlike distinct articles of personal property, differing in kind and value, as a horse, wagon or harness, and stock has no earmark which distinguishes one share from another, but is like grain of a uniform quality in an elevator, one bushel being of the same kind and value as another.

Assuming, as was held by the courts below, that the respondent's securities were deposited with the intent that they should be held by the appellants as collateral security for any indebtedness which the respondent might owe them in the course of their employment, the agreement should be taken to have been entered into with reference to the established practice. And, there being no express understanding to the contrary, all that the agreement meant was that a like amount of shares—not the same identical certificates—but a like amount of similar shares would be held by the appellants for the purpose mentioned. One of the objects of giving a blank form of transfer and of transforming the documents into " street certificates " must be precisely so that they may be used in the manner referred to.

Now perhaps it should be emphasized that this was not an action for accounting. The respondent elected to sue in tort and brought an action to recover damages for the

(1) [1931] S.C.R. 425 at 429, 430. (2) [1900] A.C. 467.
(3) [1908] 229 U.S. 19.

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alleged wrongful conversion of the shares deposited. On that issue of wrongful conversion the burden, of course, was on the plaintiff. The proof of the entries in the appellants' ledger does not sustain the respondent's cause of action. Certainly, the mere indication, without more, that the certificates had been sent to the head office, did not prove that they had been withdrawn from the control of the appellants and that they had ceased to be held by them. Nor did the indication that the certificates had been delivered to certain brokers establish wrongful conversion. At best, these entries might have shown disposal of the particular certificates to the brokers mentioned, but it does not follow that the appellants did not retain in their possession and hold similar stock, as represented in their monthly statements, and which they could have delivered to the appellant had he demanded the same. (*Rogers* v. *Thomson* (1).) At all events, the respondent did not prove wrongful conversion by showing mere delivery of the physical certificates—an operation quite consistent with the general practice and the well understood usage. The proper inference was that such dealings were authorized by the arrangement between the parties and constituted an implied condition of their agreement. (*Clarke* v. *Baillie* (2).) The entries in the books were not *per se* sufficient evidence of the improper use which it was incumbent upon the respondent to establish.

Contrary to what was stated in the Court of Appeal, we would not think the onus was upon the appellants to show that they had properly disposed of the securities. The respondent had undertaken to establish wrongful conversion. He was bound to prove it. It was no part of the appellants' case to help the respondent in the task he had set out for himself. There are dicta to that effect by Finch J. delivering the judgment of the Appellate Division of the Supreme Court of New York in *Rogers* v. *Thomson* (3) and by Lord Buckmaster in *Smith* v. *Great Western Ry. Co.* (4), which would indicate a view contrary to that expressed in the British Columbia Court of Appeal.

(1) (1926) 215 N.Y. App. 541, at 545.
(2) (1911) 45 Can. S.C.R. 50.
(3) 215 App. Div. Rep. N.Y. 541 at 545, 546.
(4) [1922] I. A.C. 178.

But, in the present case, it is quite unnecessary to decide the particular question of onus, for the statement made in the Court of Appeal totally disregards the orders to sell—which the respondent had to admit in cross-examination. He admitted that, immediately after the orders were given, he got confirmation of the sales, and, in each case, the transactions as shown in the "sold notes" agreed with the current market prices. These orders gave complete authority to the appellants and afforded full explanation of the disposal of the shares deposited. The respondent received the "sold notes" without taking exception to them. More than that, he acquiesced in them and he acted upon them. He gave orders to buy on the basis of the credits standing in his name in the appellants' books as a result of the sales made pursuant to his orders to sell. He went on, in that way, for a year and a half, receiving confirmations and monthly statements and, in the end, when he closed his account,

> he admits (as pointed out by the Chief Justice of the Court of Appeal) that according to the monthly statements rendered to him if they were bona fide, that is to say that if the purchases and sales were actually made as therein stated by defendants, everything which he was entitled to from them was transferred to Branson & Brown.

all of which goes to show that, when the respondent ordered the sale of the shares deposited, they must have been available, for the proper inference is that the sale was carried out. The proceeds were undoubtedly placed to the credit of the respondent; and, in the end, when he asked for delivery to Branson & Brown of the stock remaining in his name, his demand was complied with.

Of course, throughout his testimony, the respondent, although admitting these facts and circumstances, keeps on repeating that "he does not believe them now." But that is hardly sufficient to establish his case. We fail to understand how, having received and still retaining the proceeds of the sales, the respondent can be heard to question the reality of those sales.

The respondent did intimate a charge of "bucketting," but there is an absolute lack of evidence to substantiate the charge. He suggested the entries or the accounts or the statements were fictitious, but he did not even attempt to prove it. His testimony is built upon suppositions and suspicions and, of course, that comes far short of showing

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wrongful conversion, which it was the respondent's duty to establish, if he wished to be successful.

We are of opinion that the action ought to have been dismissed on the short ground that, on the record submitted, and upon the evidence, the court could not come to the conclusion that wrongful conversion had been established (*Smith* v. *Great Western Ry.* (1)).

There remains one point to mention. As already stated, the respondent brought his action both against the partnership and against the company. The defendants joined in their written statement of defence. After having specifically denied each and every allegation of fact contained in the statement of claim, in the alternative, whilst denying liability, they brought into court the sum of $175, saying that, at all events, that sum was enough to satisfy the plaintiff's claim for damages, because, at most, the plaintiff would be entitled only to nominal damages. It follows that the deposit was made on behalf of both defendants. In the result, the respondent fails in his action against the partners, but succeeds against the company.

Under the circumstances and upon the record submitted, we are not in a position to make any order in respect of the deposit. The point was not discussed at bar. We trust that the parties will be able to agree between themselves as to its final disposition. Should they be unable to do so, the matter may be spoken to.

The appeal should be allowed and the action should be dismissed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Farris, Farris, Stultz & Sloan.*

Solicitors for the respondent: *Fleishman & MacLean.*

(1) [1922] I. A.C. 178 at 189.

FRASER *v.* FRASER

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*Oct. 6, 7.
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*Feb. 7.

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

Trusts—Transfer of land—Oral understanding—Evidence of—Sufficiency—Claim against estate.

APPEAL by the plaintiff appellant from the decision of the Appellate Division of the Supreme Court of Alberta (1), allowing (Simmons, C.J.T.D. and Clarke J.A. dissenting) the defendant respondent's appeal from the judgment of Ewing J. in favour of the plaintiff appellant.

The trial was upon an issue directed by Ford J. upon an application by the plaintiff by way of originating notice. The plaintiff's action was brought against the estate of his deceased father for a portion of the proceeds of the sale of the father's farm which had been transferred to the father by the plaintiff.

The trial judge maintained plaintiff's action; but that judgment was reversed by a majority of the Appellate Division, Mitchell, Lunney and McGillivray JJ.A.

On the appeal to this Court, after hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment allowing the appeal and restoring the judgment of the trial judge, with costs out of the estate.

Appeal allowed.

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

W. N. Tilley K.C. for the respondents.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

(1) (1932) 26 Alta. L.R. 322; [1932] 1 W.W.R. 863; [1932] 2 D.L.R. 816.

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*Oct. 18, 19.
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*Feb. 7.

THOMPSON AND ALIX, LIMITED (PLAINTIFF) ..... APPELLANT;

AND

B. F. SMITH (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Contract—Sale of goods—Contract for sale of potatoes to be delivered in carload instalments—Rejection by purchaser of carloads shipped, as being of inferior quality—Question whether these carloads were shipped on account of the contract—Question whether rejection amounted to repudiation of the whole contract—Jury's findings—Sale of Goods Act, R.S.N.B., 1927, c. 149, s. 28 (2).

By contract dated September 3, 1927, respondent agreed to sell and appellant to buy 20 carloads of white potatoes, Cobblers or Green Mountains, Canada Grade A, at 90 cents per 90 pounds, bulk, delivered at rate of 5 cars per week, payment to be made in cash against documents. All cars were to be Government inspected and certificate of grading was to accompany the draft for each car as shipped. The contract did not specify time of shipment, but no Government certificate as to grade could be obtained before October 1 (*Root Vegetables Act*, R.S.C., 1927, c. 181, s. 19). On September 17 the broker who had arranged the contract wired respondent: "Thompson and Alix (appellant) would like you ship one car this coming Monday against their contract can you do so if not kindly wire immediately present price and conditions," to which respondent replied: "Will ship one car Thompson and Alix 90 per bag bulk to-morrow or Tuesday best can do." A car was shipped on September 21 and was followed by another. Appellant refused to accept and pay for these, claiming they were of inferior quality, whereupon respondent refused to make further shipments. Appellant sued for damages. The jury found that the two cars were shipped under the contract, that the potatoes therein were grade A, that respondent did not commit a breach of the contract, that respondent, by appellant's statements and conduct, was justified in repudiating the contract and relieved from making further delivery under it; but the trial judge held that, on interpretation of the documents, the two cars were not shipped under the contract, and, notwithstanding the jury's findings, ordered judgment for appellant. The Supreme Court of New Brunswick, Appeal Division (4 M.P.R. 245), set aside the judgment and ordered a new trial. Appellant appealed, and respondent cross-appealed, to this Court, each asking for judgment in its or his favour and (there having been already two trials) for a final decision that would avoid further trials.

Held (Lamont J. dissenting): Appellant had not repudiated the contract, and was entitled to damages for non-delivery by respondent.

Per Smith J.: Assuming the first car of potatoes was shipped on account of the contract (requirement of certificate of grading being waived as to it), and was of the required quality, appellant's rejection of it

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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(though making him liable for breach in respect of that car) was not, and there was no evidence on which the jury could find that it was, a refusal to carry out the contract. The second car was never ordered, had not the necessary certificate, and appellant was not bound to accept it, and there was no evidence justifying the jury's finding in reference to it.

Per Cannon and Crocket JJ.: Assuming the two cars were shipped on account of the contract (Cannon J. was clearly of opinion they were not; Crocket J. thought there might be justification for a finding that the first was, but none for a finding that the second was), and was of the required quality, appellant's rejection of them was merely a "severable breach giving rise to a claim for damages," and was not, and a jury could not, on the evidence, reasonably find that it was, a repudiation of the contract.

Per Lamont J. (dissenting): The jury was justified on the evidence in finding that the two cars were shipped on account of the contract and were of the required quality, and, in view of the contract, letters and other evidence, it was open to them to find that appellant's refusal to accept and pay for them evidenced an intention to repudiate the whole contract unless respondent would ship Green Mountains (instead of Cobblers as shipped) which the contract did not require him to do.

The Sale of Goods Act, R.S.N.B., 1927, c. 149, s. 28 (2); *Freeth* v. *Burr*, L.R. 9 C.P. 208, at 213, and other cases referred to.

As to the Court finally determining on this appeal the issue between the parties, Cannon J. referred to Order 58, Rule 4, and Order 40, Rule 10, of the New Brunswick Rules of Court, and to *Skeate* v. *Slaters*, 83 L.J.K.B. 676, at 680-681, 686, and *Banbury* v. *Bank of Montreal*, [1918] A.C. 626.

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1).

By a contract in writing dated September 3, 1927, the defendant agreed to sell and the plaintiff to buy 20 carloads of white potatoes, Cobblers or Green Mountains, Canada Grade A, at 90 cents per 90 pounds, bulk, delivered at Sherbrooke, Quebec, at the rate of five cars per week, payment to be made in cash against documents. All cars were to be Government inspected and certificate of grading was to accompany the draft for each car as shipped. The contract was arranged by a broker in Sherbrooke. No date was specified in the contract as to the time of shipment, but no Government certificate as to grade could be obtained before October 1 (*Root Vegetables Act*, R.S.C., 1927, c. 181, s. 19).

(1) (1932) 4 M.P.R. 245.

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On September 17, the broker wired defendant:

> Thompson and Alix [the plaintiff] would like you ship one car this coming Monday against their contract can you do so if not kindly wire immediately present price and conditions.

to which defendant replied:

> Will ship one car Thompson and Alix ninety per bag bulk to-morrow or Tuesday best can do.

A car of potatoes was shipped on September 21, and was followed by another. The plaintiff refused to accept and pay for these cars, claiming that they were of inferior quality; whereupon the defendant refused to make any further shipments.

There was considerable correspondence other than the above, much of which is set out in the judgments now reported.

The plaintiff brought action for damages, claiming the sum of $3,290, as being the difference between the contract price and the price paid by the plaintiff in the open market at the time of the alleged breach by defendant.

The action was tried twice, each time before Le Blanc J., with a jury. On the first trial, the jury gave a general verdict for the defendant and judgment was entered in his favour. The Appeal Division set aside that verdict and judgment and ordered a new trial (1). On the second trial the jury answered the questions submitted to them in favour of the defendant, finding (*inter alia*) that the two cars sent were shipped under the contract, that the potatoes therein were grade A, that defendant did not commit a breach of the contract, and that defendant, by the statements and conduct of the plaintiff, was justified in repudiating the contract and relieved from making any further delivery under it. But the trial judge held that, on interpretation of the documents, the two cars were not shipped under the contract, and, notwithstanding the jury's findings, ordered judgment to be entered for the plaintiff for $3,290. The Appeal Division set aside this judgment and ordered a new trial (2).

The plaintiff appealed to the Supreme Court of Canada, asking that the judgment of the Appeal Division be set aside and the judgment of the trial judge restored. The defendant cross-appealed, asking that, in so far as the judgment of the Appeal Division ordered a new trial, it be

(1) (1929) 1 M.P.R. 510. (2) (1932) 4 M.P.R. 245.

varied and that judgment be entered for the defendant. Both parties asked that this Court, if possible, put an end to the litigation and render a final judgment.

P. J. Hughes, K.C., and *W. J. West* for the appellant.

W. P. Jones, K.C., and *G. McDade* for the respondent.

RINFRET, J.—There have already been two trials in this case. The Appeal Division of the Supreme Court of New Brunswick has again ordered a new trial (1). The parties have requested us, if possible, to put an end to the litigation and to render a final judgment.

I agree with my brothers Cannon and Crocket that there was no repudiation of the contract by the appellant and that the appeal should be allowed and the cross-appeal dismissed with costs throughout, judgment being entered in favour of the plaintiff for the sum of $3,290, the amount of damages assessed by the jury.

SMITH, J.—I agree with my brothers Cannon and Crocket that there was no repudiation by the appellant of the contract.

The first car of potatoes shipped was not government inspected and had no certificate of grading, as required by the terms of the contract; but appellant, by his telegram asking for the shipment of this car, waived the requirement as to that particular car because of his knowledge that there could be no such inspection at that time. The appellant was entitled to reject this car if the contents were not in compliance with the terms of the contract. The jury, however, has found that the contents were in fact in compliance with the terms of the contract, and that appellant was not entitled to reject it. Appellant, therefore, remained accountable to the respondent for that car of potatoes at the contract price, or for the loss sustained by its rejection; but that is the full extent of its liability for its refusal to accept that particular car, whether shipped as part fulfilment of the contract or on an independent contract resulting from the telegram. It was not a refusal to carry out the contract, and there was no evidence before the jury on which they could come to any such conclusion.

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The second car was never ordered, had not the necessary certificate of inspection, and appellant was not bound to accept it; and there is no evidence justifying the finding of the jury in reference to it.

The jury has assessed the damages for respondent's breach of contract at $3,290. I therefore agree that the judgment of the trial judge should be restored, with costs of this appeal and of the appeal to the Appeal Division to the appellant.

CANNON, J.—The plaintiff's claim is for damages for non-delivery of potatoes, under a contract dated the 3rd September, 1927, for twenty minimum carloads of white potatoes, Cobblers or Green Mountains, Canada Grade A, at the price of ninety cents per ninety pounds, and ten cents per bag extra, to be delivered at the city of Sherbrooke, in the province of Quebec, or some other point with equal freight, the same to be shipped at the rate of five carloads per week, mostly over the Canadian National Railways. All potatoes were to be Government inspected, and the certificate of the grading was to accompany the draft of defendant and bill of lading for each car shipped. The potatoes were to be paid for by the plaintiff with cash against documents of title and bills of lading. According to the plaintiff, the defendant refused to deliver and compelled the plaintiff to purchase in the open market at an advanced price, whereby the plaintiff suffered damages for $3,290.

The defendant pleads in substance that he had the right to fulfil his contract with the plaintiff by shipping Cobbler potatoes or Green Mountain potatoes, or both, at his option, of a certain quality and description; and that defendant, at the request of plaintiff, did ship a portion of said potatoes, being Cobbler potatoes conforming to such quality and description; whereupon the plaintiff refused to accept and pay for such portion so shipped by the defendant, who was entitled to treat the said contract as having been repudiated by the plaintiff. The defendant also pleaded a custom, ancient, general, uniform, certain, notorious and universally recognized and acted upon in the potato trade, that when a carload of potatoes, being a perishable product, is shipped from one province to another province in Canada, as one

instalment under a contract providing for the shipment of several instalments, where each instalment is to be paid for separately, and if such carload answers the requirements of the contract, the buyer must take delivery of the carload; and if in doubt as to whether or not the potatoes in such carload answer the requirements of the contract, the buyer must unload the potatoes; and if the buyer does not unload the carload and take delivery of the same, subject to claims, the seller is justified in regarding the whole contract as having been repudiated by the buyer; and the seller may, under such circumstances, refuse to ship the other instalments.

I may say immediately that there is no evidence of such general and uniform custom. I have quoted this paragraph to show that defendant himself considered that this contract provided for shipment of several instalments where each instalment had to be paid for separately.

The case was tried twice before Leblanc, J., with a jury; and the Court of Appeal of New Brunswick has twice ordered a new trial. Both parties come before us requesting that judgment should be rendered on the merits of the case and are both dissatisfied with the order for a third trial. The trial judge, after the second trial, ordered a verdict to be entered in favour of plaintiff, although the jury's answers to the questions put to them by the trial judge were mostly favourable to the defendant. The Court of Appeal, in its second judgment (1), disapproved of the course followed by the trial judge; but instead of rendering judgment for the plaintiff or for the defendant, as they had the power to do, notwithstanding the verdict of the jury, ordered a new trial.

We stand in the position of the Court of Appeal and have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, under Rule 4 of Order LVIII of the Rules of the Supreme Court of New Brunswick, which have been numbered to conform, as far as possible, to the English Judicature Rules of 1883.

It should be noticed that, under Rule 10 of Order XL, upon a motion for judgment, or upon an application for a new trial, the Court may draw all inferences of fact not

(1) (1932) 4 M.P.R. 245.

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inconsistent with the findings of the jury; and, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute or any of them, give judgment accordingly.

These two rules have been discussed by the Court of Appeal in England, in the case of *Skeate* v. *Slaters* (1), where Lord Reading said:

> There (under Order XL, Rule 10) the power to draw inferences of fact is limited, when there is a verdict of a jury, to such inferences as are not inconsistent with the finding of the jury. The application before us is not for a new trial, but is an appeal from the decision of the Judge. It is, however, important to consider whether the powers of this Court on appeal from a trial by a jury are limited to those formerly exercised by the King's Bench Division under Order XL, rule 10. *Millar* v. *Toulmin* (2) decided that under Order LVIII, rule 4, greater powers are given to the Court of Appeal than were conferred under Order XL, rule 10, and, in the words of Lord Esher, included "the power, if all the necessary materials are before the Court, of giving that judgment which in the opinion of the Court ought to be the judgment between the parties, even though such judgment be inconsistent with the findings of the jury." In that case the Court of Appeal entered judgment for the plaintiff, which was deciding affirmatively the rights of the plaintiff without the assistance of the jury, and left the question (if any) as to the amount to be decided by the Master. Lord Halsbury in the same case in the House of Lords criticised the exercise of this power. The other Lords expressed no opinion upon this point, and the House of Lords did not reverse the judgment upon that ground. In *Allcock* v. *Hall* (3), the Court of Appeal again considered the question with the assistance of the observations of Lord Halsbury, and came to the conclusion that they had such powers and exercised them by entering judgment for the defendants. Be it observed that Lord Justice Lindley added that the Lord Justices deciding that case had consulted their colleagues in the other branch of the Court, who had carefully considered the point and agreed with the decision. Lord Loreburn in *Paquin, Ltd.* v. *Beauclerk* (4), referring to these two cases, said: "Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn, I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value."
>
> The authority of *Allcock* v. *Hall* (5) was approved by Lord Loreburn there and is clearly binding upon us; and I am of opinion that this Court, if satisfied that it has all the necessary materials before it, and that no evidence could be given at a re-trial which would in this Court support a verdict for the plaintiff, ought to enter judgment for the defendants.

(1) (1914) 83 L.J. K.B. 676, at 680-681.
(2) (1886) 55 L.J.Q.B. 445; 17 Q.B.D. 603.
(3) 60 L.J.Q.B. 416; [1891] 1 Q.B. 444.
(4) 75 L.J.K.B. 395; [1906] A.C. 148.
(5) 60 L.J.Q.B. 416; [1891] 1 Q.B. 444.

And, in the same case, Lord Phillimore, L.J., said at page 686:

> The result, I think, is that the cases lay down that when the Court to which the motion for new trial is made sees that the verdict was wrong, and sees also that upon the admitted facts, or the only possible evidence that could be given, the verdict should be the other way, and has all the materials before it, it may conclude the case, dispense with another trial by a jury, which will either result in a verdict for the applicant or be itself set aside and so *toties quoties*, and at once give judgment.

I would also refer to *Banbury* v. *Bank of Montreal* (1).

I believe, in view of the request of both parties, who have, after two trials, adduced all the evidence that they could possibly place before the court, that we should finally determine the issue and put an end to this litigation.

The plaintiff carries on business in Sherbrooke, in the province of Quebec, and purchased from the defendant, carrying on business in East Florenceville, in New Brunswick, the potatoes described in their contract for October shipment through Dastous & Company Registered, who were acting as brokers for both parties. After the signing of the contract, 3rd September, 1927, the defendant, on the 8th of the same month, wrote that the only assurance they could give was that they would have potatoes inspected as loaded and each car would carry a certificate of Canada Grade A. Now, it is common ground that no such certificate could be obtained under section 19 of the *Root Vegetables Act*, R.S.C., 1927, c. 181, for new potatoes shipped between the 1st day of June and the 30th day of September, both dates included. It would, therefore, appear clear, to my mind, that the jury could not reasonably find that the two cars shipped in September were shipped under the contract. The telegrams covering the first car satisfy me that they referred to a separate sale independent of the contract. They read as follows:

Sherbrooke, Que., Sept. 17th/27.

B. F. Smith,
East Florenceville, N.B.

Thompson and Alix would like you ship one car this coming Monday against their contract can you do so *if not* kindly wire *immediately present price* and conditions.

Dastous and Co. Regd.

(1) [1918] A.C. 626.

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Defendant answered as follows:

East Florenceville, N.B., Sept. 18.

Dastous & Co. Regd.
Sherbrooke, Que.

Will ship *one* car Thompson and Alix ninety per bag bulk to-morrow or Tuesday best can do.

B. F. Smith.

Although plaintiff, perhaps in ignorance of the impossibility of securing a certificate before the 1st October, asked, on the 17th September, to ship one car against their contract, it is evident that Smith knew that he could not do so and accordingly wired that he would ship one car giving the price and the date. He also shipped on the 23rd of September a car that had never been ordered. Whether or not the potatoes shipped in September were equal in quality to potatoes that might, in October, have been graded by the Government Inspector as Canada One does not, to my mind, affect the issue between the parties. Even assuming, as found by the jury, that these two cars were shipped under the contract and that the plaintiff should have accepted delivery thereof, this does not in law help the defendant in any way to establish his plea of complete repudiation or rescission by the plaintiff of this contract by instalments.

Paragraph 2 of sec. 28 of ch. 149 of the Revised Statutes of New Brunswick, 1927, respecting the sale of goods, reads as follows:

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

I quite agree with the views of Mr. Justice White, in the first judgment of the Court of Appeal (1), where he says:

No one, I think, could reasonably infer that the plaintiff would not accept delivery of potatoes under the contract when the same were certified as Grade "A" by the inspector, merely because the plaintiff had refused to accept the potatoes in the car sent, where the question as to whether the potatoes were, or were not, equal in quality to Grade "A," was one the answer to which must depend upon the opinions of those who

(1) (1929) 1 M.P.R. 510, at 525-526.

had examined the potatoes. The contract provided that each separate shipment was to be paid for in cash.

When defendant, on September 23rd, learned by wire (Exhibit "T") that plaintiff refused to accept the first car sent and thought that possibly it had been shipped in mistake, he did not inform the plaintiff that the car was shipped against the contract, and that unless the plaintiff accepted it he would treat the contract as repudiated. It was not until September 30th that the plaintiff learned from defendant's wire (I.2) that he did not propose shipping plaintiff any potatoes. Assuming that the potatoes shipped in the first car were equal in quality to Grade "A," then from the facts in evidence I myself, sitting as a jury, would have had no hesitation in finding that the breach occasioned by the plaintiff's refusal to accept the potatoes was, in the words of the Sale of Goods Act, "a severable breach giving rise to a claim for damages but not to a right to treat the whole contract as repudiated."

But the question is not one of law merely but one of mixed fact and law, and therefore to be determined by the jury under the instructions of the Court as to the law. At the same time, I think, that under the evidence in this case, no jury *properly instructed as to the law, could reasonably find that the breach was other than a severable one entitling the defendant to damages but not entitling the defendant to repudiate the whole contract.*

Reference was made by defendant to the letter of the 26th September wherein the brokers stated that plaintiff would not accept the car as the buyers in Sherbrooke will not use any more of these potatoes (Cobblers). The defendant claims that this is a repudiation of the contract.

It is clear, as pointed out by White, J., that this statement referred to the potatoes shipped in the second carload, which were not shipped under the contract at all; and refusal to accept the same would not imply a repudiation of the contract.

In *Freeth* v. *Burr* (1), Coleridge, C.J., said:

In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest * * * I think it may be taken that the fair result of them is as I have stated * * * Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free.

The principle thus stated by Lord Coleridge was accepted and approved in *The Mersey Steel & Iron Company* v.

(1) (1874) L.R. 9 C.P. 208, at 213.

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Naylor, Benzon & Co. (1). Mr. Benjamin, speaking of this latter case, says:

All their Lordships as well as the Lords Justices accepted the principle stated by Lord Coleridge in *Freeth* v. *Burr* (2) as the true test; or, as it was expressed in the words of Lord Selborne: "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation, to an *absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind,* and whether the other party may accept it as a reason for not performing his part."

The terms of the contract and the circumstances of the case clearly show, without evidence to the contrary, that plaintiff never had the slightest intention of repudiating or rescinding the contract. On September 28, Dastous & Co. wrote to defendant as follows:

P.S. With regard to shipments against contract for Messrs. Thompson & Alix which are to commence the 1st of October, will you kindly note to ship the first car to them at Sherbrooke and the second two cars to be billed to Magog notify them at Sherbrooke and you will of course make all drafts with bill of lading attached on Messrs. Thompson & Alix at Sherbrooke.

To which defendant, on September 30, answered as follows:

We do not propose shipping Thompson Alix any potatoes.

(Signed) B. F. Smith.

On the same day, Dastous answered as follows:

Sherbrooke, Que., Sept. 30, 1927.

B. F. Smith,
East Florenceville, N.B.

Your wire received upon communicating contents to Thompson and Alix they require and insist that you fill contract they have with you they have number cars sold for early October delivery therefore request that you make first shipments as specified our letter twenty-eighth instant and previous wire to-day.

Dastous and Co. Regt.

Sherbrooke, Que., 30th Sept. 1927.
Canada.

B. F. Smith, Esq.,
East Florenceville, N.B.

Dear Sir,

We confirm our wires to-day as per copies attached and specially with reference to your wire in which you state as follows—"We do not propose shipping Thompson Alix any potatoes," to which we have wired you as per copy attached advising you that upon communicating contents of your wire to Messrs. Thompson they require and insist that you fill the

(1) (1884) 9 App. Cas. 434. (2) (1874) L.R. 9 C.P. 208.

contract as per our contract form duly signed by them which has been forwarded you.

Messrs. Thompson & Alix of course presume that your attitude is taken largely on account of the two cars which have arrived at Sherbrooke from you and which they have not accepted. In the first place, only one of these cars was ordered for them as there has evidently been some oversight on the part of your office in billing two cars to Sherbrooke when only one was ordered.

With regard to Messrs. Thompson and Alix not accepting either of these cars we would just like to mention that we have been doing business with these friends for a number of years and they are as straight a firm as can be found and certainly would not turn down any shipments unless they had mighty good reason for doing so and they wanted the potatoes very badly too as they had orders awaiting to be filled but after examining these cars and finding so much rot in them the writer personally went with Mr. Thompson and examined second car and in casually picking up at least a dozen of the large size potatoes and even some not as large, when they were cut there were at least ten or eleven which were all rotted in the centre so they said they could not handle these potatoes as they had had a great deal of trouble with the previous shipments already.

Under these circumstances we do not see how this has any thing to do with the contract, especially *as the contract calls for Grade A Stock and it was understood that these would be government inspected and the Inspector's certificate would be attached to your draft on the Buyers.*

We therefore trust that we may hear from you promptly that you are making shipments as we have already specified against contract for Messrs. Thompson & Alix, otherwise they will take immediate action to protect themselves in the matter, especially as we mentioned in our wire they have a number of cars sold for early October delivery.

We also mentioned in our wire that we had sent on the bill of lading for the second car which was mailed from here on the 28th by registered mail so that same should have reached you before now. We did all we possibly could to try and get this car sent on, on a diversion order but it was impossible to make this arrangement.

We now await your further word and prompt reply also quotation on the five cars we have already mentioned for October shipment.

Yours very truly,

Dastous & Co. Reg.
Per G. W. Stevenson.

Then again, on October 3, 1927:

B. F. Smith,
East Florenceville, N.B.

Referring our letter twenty-ninth ultimo Please wire if car for Veilleux has been shipped if not will you be sure get it away to-morrow Thompson and Alix request immediate reply our wire and letter thirtieth ultimo you have not replied our request for quotations five cars October shipment.

Dastous and Co. Reg.

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and next day:

Oct. 4-1927

B. F. Smith
East Florenceville NB

Thompson and Alix requests immediate wire advice as to whether or not you have shipped cars against their contract as per instructions contained in our letter twenty eight ultimo will you therefore kindly wire us immediately advising.

Dastous and Co. Reg.

These two telegrams were confirmed by letter. Smith, the defendant, on October 5, notwithstanding this request, wired as follows:

Dastous & Co. Regd.
Sherbrooke, Que.

See my telegram thirtieth decision final.

B. F. Smith.

On October 6, through their solicitors, the plaintiffs notified the defendant that they were proceeding to purchase potatoes in the open market to supply their demand and would hold him responsible for all damages that they might suffer by reason of the breach of contract.

I therefore reach the conclusion that with the material before us, and even admitting that there might be sufficient evidence to support the finding of the jury that the first and second carloads of potatoes had been shipped under the contract and equalled Grade A potatoes and should have been accepted by the plaintiff, this would not be sufficient in law to support defendant's contention, which he had to establish, that the whole contract had been repudiated. Nowhere in the record is found an absolute refusal by plaintiff to perform the contract such as would amount to a rescission, according to the test adopted by Lord Selborne in *Mersey Steel & Iron Co.* case above quoted. The onus has not been and could not be legally satisfied under the contract and the circumstances of the case, while the plaintiff has proven clearly: 1. the existence of the contract; 2. the breach of the contract; and 3. the quantum of damages.

No car was ever shipped with the required certificate. This certificate could be secured only in October and on the 30th September the defendant took upon himself to repudiate his obligation. I am not prepared to say that there was no evidence to go to the jury. But I am per-

fectly satisfied that the findings of the jury as to the two cars shipped (questions 2-3-4-5), as to the breach of the contract (question 6), as to the alleged custom (questions 7-8-9-10), as to part of question 11 that the contract was broken by plaintiff, as to justification and the absence of damages (questions 12-13), were either against the evidence or against the weight of evidence, and were such as no jury could reasonably find. We therefore remain with the written agreement, whose existence is affirmed by the jury in their first answer, and the damages which the jury assessed at $3,290, after the judge's special request. The defendant, having failed to establish that he was legally justified in repudiating the whole contract as he did, must suffer the consequences of his conduct and reimburse to the plaintiff the difference between the amount paid for the twenty carloads which they purchased and the price they would have paid to the defendant under the contract for the same potatoes.

I would therefore allow the appeal and dismiss the cross-appeal and restore the order of the trial judge that judgment be entered for the plaintiff and against the defendant for $3,290, with costs throughout.

CROCKET, J.—The whole substance of the defence to this action lies in the alleged repudiation of the contract of sale by the plaintiffs before the defendant's admitted refusal to deliver the twenty carloads of potatoes contracted for. The decisive question, therefore, on this appeal is as to whether there was any evidence upon which the jury could reasonably find that the plaintiffs did in fact repudiate the contract and thereby relieve the defendant from his obligation thereunder.

Whether the car which the defendant shipped to the plaintiffs after receiving their telegram of September 17 constituted a delivery under the contract, as the jury found in answer to question 2, or was an independent shipment outside the contract, is open to serious question, as the cogent reasoning of my brother Lamont in this regard so clearly demonstrates. It is apparent from the learned trial judge's instructions to the jury on that point that the words " under the contract " as used in the question merely meant against or on account of the contract, and had no

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reference to its being shipped in compliance with all its terms. The jury could have understood nothing else. The question involved not only the interpretation of the defendant's reply to the plaintiffs' telegram of September 17, which, if it was in any way ambiguous, was a question for the court, but the consideration as well of the conduct of both parties in connection with the plaintiffs' rejection of the shipment, which was a question for the jury. If the decision of the appeal depended on the validity of the jury's answer to this question, I am not at all sure, upon a consideration of the terms of the two telegrams, and the conduct of the parties regarding the rejection and disposition of the shipment, that this finding could not be fully justified.

Be that as it may, the shipment by the defendant of one of the twenty carloads of potatoes and its refusal by the plaintiffs after their own inspection as being of unsatisfactory quality, falls far short, in the circumstances of this case, of satisfying the onus which lay on the defendant to prove a repudiation of the whole contract by the plaintiffs or an intimation to the defendant of their intention to abandon it entirely. Assuming that the first car was shipped against the contract and the second car as well—though there is, to my mind, no justification whatever for the finding that the second car was so shipped—the question as to whether the rejection of one or both these cars amounted to a repudiation of the whole contract or was a severable breach giving rise to a claim for damages, is one, which, under the provisions of subsec. 2 of sec. 28 of the New Brunswick *Sale of Goods Act,* depends on the terms of the contract and the circumstances of the case, as pointed out by my brother Cannon.

Although no time for delivery was mentioned in the contract itself, it is perfectly clear from the correspondence between the parties and from the fact that the contract provided for government inspection and that the defendant's draft for each car as shipped should be accompanied by an official government certificate of grading, which was not possible under the terms of sec. 19 of the *Root Vegetables Act,* R.S.C., 1927, c. 181, before October 1, that the intention of the parties was that shipments under the contract should not begin before that date. Both parties must

be taken to have known that no cars inspected and certified in accordance with the terms of the contract could be refused by the plaintiffs as of unsatisfactory quality upon their own inspection, as in the case of the two cars referred to. No question could arise between them as to quality, once a car was shipped, officially inspected and certified as the contract required. How the rejection of two cars shipped in the month of September, uninspected and uncertified, before the time for the performance of the contract had arrived, could be treated by the defendant as an absolute refusal on the part of the plaintiffs to accept and pay for inspected and certified cars, in accordance with the terms of the contract, or as an intimation of an intention on their part to wholly abandon the contract, I find it difficult to understand, when the terms of the contract itself and the circumstances of the case are considered.

I can find nothing in the letters or telegrams of the plaintiffs' brokers (Dastous & Co.) to the defendant between September 23, when they advised him by wire of the rejection of the first car, and October 1, which could fairly or reasonably be taken to indicate any intention on the part of the plaintiffs of renouncing the contract. Having received an invoice for the second car after their telegram advising rejection of the first, they at once, in confirming this telegram, called the defendant's attention to what they assumed to be an error in billing two cars to them as " there was only one ordered and possibly the one which has already arrived was not intended for Sherbrooke at all ". The defendant having wired them the following day that if the plaintiffs refused the first car, he would release to them and have them forward it to Montreal, they telegraphed that plaintiffs would not accept the first car but that they would accept the second if quality was satisfactory. On September 26 they wired the defendant again, advising him that they had diverted the first car to Montreal as instructed by him and that the second car had arrived and the plaintiffs would not accept as 90% of the large potatoes cut rotten inside, and requesting wired instructions, to which the defendant simply replied on September 27 that he was releasing second car to them and requesting them to forward this to Toronto. On the same date they telegraphed him asking if he could offer a car

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of good sound potatoes for immediate shipment and to wire price and what kind. To this defendant replied: "My experience Sherbrooke cannot book further orders".

It is true that in a letter dated September 26, confirming their wire regarding the diversion of the first car and the plaintiffs' refusal of the second, Dastous & Co. stated: "They (plaintiffs) will not accept the car as they state the buyers here will not use any more of these potatoes", and added a statement of their own that "there have been several cars of these Cobblers come into Sherbrooke and they have been distributed around pretty well and no body wants any more of them". Also that in a letter, dated September 27, referring to their telegraphic request of that date for an offer for a car of good sound potatoes, they spoke of the Cobblers which had come in to the Sherbrooke market having caused a lot of trouble, and stated that they hardly thought the retail trade there would take any more of them unless they were sure that there would be no more potatoes with rot in the centre. There is, too, another letter, dated September 28, referring to the diversion of the second car to Toronto, in accordance with the defendant's request, which contains the following paragraph and postscript:

> Trusting the above is satisfactory and regretting the trouble there has been over these cars but Messrs. Thompson & Alix needed the potatoes very badly and would gladly have taken them if it was not for the trouble they have had on the previous cars which were rotted the same way and which the Trade here will not accept any further lots of the same stock.
>
> P.S. With regard to shipments against contract for Messrs. Thompson & Alix which are to commence the 1st of October, will you kindly note to ship the first car to them at Sherbrooks and the second two cars to be billed to Magog notify them at Sherbrooks and you will of course make all drafts with bill of lading attached on Messrs. Thompson & Alix at Sherbrooke.

This was followed by the following telegram of September 30, Dastous to defendant:

> With reference two cars ordered to Magog for Thompson as per our letter twenty-eighth instant please be sure ship these in bags all others unless specially instructed to be shipped bulk try ship two Magog cars same day early as possible next week mailed blading second released car Thompson twenty eighth wire lowest price five cars Grade A October shipment.

to which defendant replied on the same day:

> We do not propose shipping Thompson Alix any potatoes.

Several further telegrams and letters from Dastous & Co. insisting upon the defendant delivering the potatoes under the contract brought no response from the defendant until October 5, when he telegraphed:

See my telegram thirtieth decision final.

Far from indicating an intention on the part of the plaintiffs to abandon the contract these letters and telegrams, I think, point quite the other way, and afford no ground whatever for the jury's finding on question 13, that the defendant was justified by the statements and conduct of the plaintiffs in repudiating the entire contract before the time for its performance had arrived and relieved from making any further delivery thereunder.

The contract and the breach by the defendant having been conclusively proved, judgment should, therefore, be entered in favour of the plaintiffs for $3,290—the amount assessed by the jury as the difference between the contract price of the twenty carloads contracted for and the amount paid by them for the potatoes which they were required to purchase to replace them.

The plaintiffs' appeal should be allowed and the defendant's cross-appeal dismissed with costs and judgment entered in favour of the plaintiffs for the amount above stated with costs of the action and of the appeal to the Appeal Division of the Supreme Court of New Brunswick.

LAMONT, J. (dissenting).—This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick (1) directing a new trial. The facts are very simple: By a contract in writing, dated September 3, 1927, the respondent agreed to sell and the appellant to buy twenty car loads of white potatoes, Cobblers or Green Mountains, Canada Grade A, at 90 cents for ninety pounds, delivered at Sherbrooke, Quebec, at the rate of five cars per week. Payment was to be made in cash against shipping documents. All cars were to be Government inspected and a certificate of grading was to accompany the draft for each car as shipped. The contract was arranged by one G. W. Stevenson, a broker in Sherbrooke, who was trading under the name of Dastous & Co., Reg'd. No date was specified in the contract as to the time of shipment, but, as, under

(1) (1932) 4 M.P.R. 245.

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the *Root Vegetables Act*, R.S.C., 1927, ch. 181, Government certificates as to grade could not be obtained for new potatoes shipped between the 1st day of June and the 30th day of September, the parties may have expected the shipments to be made not earlier than October. Be that as it may, on September 17, 1927, Stevenson, acting for the appellant, wired the respondent as follows:

> Thompson and Alix would like you ship one car this coming Monday against their contract can you do so if not kindly wire immediately present price and conditions.

To this the respondent on the following day replied:

> Dastous & Co. Regd.
> Sherbrooke, Que.
>
> Will ship one car Thompson and Alix ninety per bag bulk tomorrow or Tuesday best can do.
>
> B. F. Smith.

On September 21 the first car was shipped, and was followed by another before the respondent had received any acknowledgement of the receipt of the first. Both cars, which contained Cobbler potatoes, were rejected on the ground that the potatoes were of inferior quality. The cars were re-shipped—one to Montreal and the other to Toronto—where they sold as Canada Grade A potatoes.

On the appellant's refusal to accept and pay for these two cars, the respondent refused to make any further shipments, claiming that the appellant had repudiated the contract and that he was no longer bound by it. The appellant, after notification, proceeded to buy twenty car loads of potatoes in the open market to fulfill its engagements. These it purchased at a cost of $3,290 above the respondent's contract price. To recover this $3,290 as damages for breach of contract this action was brought.

At the first trial the jury brought in a general verdict for the respondent. This was set aside by the Appeal Division (1) and a new trial ordered on the ground that, even if the first car load was improperly rejected, it would not justify the respondent's refusal to deliver the balance of the twenty cars. In its judgment the court construed the telegrams of September 17 and 18 as a refusal on the part of the respondent to ship the first car on account of the contract.

(1) (1929) 1 M.P.R. 510.

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At the second trial questions were submitted to the jury who answered them all in favour of the respondent. They found that both cars had been shipped under the contract; that both contained Grade A potatoes; that the respondent had not committed a breach of the contract, and that, owing to the statements and conduct of the appellant, the respondent was justified in considering the contract to be at an end and he was, therefore, relieved from making further delivery under it.

The trial judge was very strongly of opinion that the jury's finding that the two cars were delivered under the contract was in conflict with the construction placed on the telegrams by the Appeal Division. He, therefore, refused to give effect to the finding but, instead, entered judgment for the appellant. This judgment the Appeal Division set aside and again a new trial was ordered (1). Against that order the appellant now appeals to this Court and asks to have the judgment of the trial judge restored; while the respondent asks that effect be given to the verdict of the jury.

The prolongation of this litigation has been due, in my opinion, to an erroneous construction placed by the Court of Appeal upon the telegrams of September 17 and 18. The Court held that from the respondent's telegram the appellant "not only might reasonably have inferred, but was bound to infer, that the defendant (respondent) had refused to send the car against the twenty car contract." The car referred to was the first car shipped.

With deference, I am unable to spell out of the respondent's telegram a refusal on his part to ship against the contract. Where is the refusal? He is asked if he can ship one car as against the contract on the coming Monday. He replies that he will ship on Monday or Tuesday. That is no refusal, nor is it evidence of an intention to make a new contract. It is only because he mentions the price of 90 cents per bag that any plausible argument for the court's interpretation is possible. But the price he mentioned is the contract price. If he was not willing to ship under the terms of the contract he was to wire present price and conditions. This, to my mind, implies that "the present price" would be one different from the contract price and

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that the conditions called for would be a statement of the kind and quality of the potatoes and the terms of payment; in fact all the information necessary upon which to base a new contract. No conditions whatever are mentioned in the respondent's telegram. Does, then, the fact that he mentioned in his wire the contract price justify the conclusion that he was refusing to ship against the contract of September 3, and was making a new contract for this car load? In my opinion it does not. The respondent testified that he shipped both cars against the contract; and Mr. Stevenson, who was called for the appellant, gave this testimony:—

> Q. Now speaking of this first car that was shipped up there by Mr. Smith, * * * if that had been Canada Grade A in the judgment of the plaintiff would it have been applied to the contract?—A. Not necessarily.
>
> Q. Why wouldn't it have been?—A. We didn't know how we might apply it, we didn't know from that wire if it was to apply.
>
> Q. You remember giving evidence on another trial do you?—A. Yes.
>
> * * * * *
>
> Q. "Supposing that it had been for the sake of argument of Canada Grade A, it would have been a shipment on the contract, wouldn't it" and your answer "Well, the car would have been applied in that case." Didn't you make that answer at the last trial, didn't you make that statement?—A. If it is there I must have made it.

But more than that, if the respondent was not going to ship under the written contract his telegram of the 18th would be a proposal only, and would have to be accepted before he had a contract at all. The appellant acted as if they construed the respondent's reply to mean that he would ship against the contract. When the car arrived the appellant was on hand to inspect it and it was rejected—not because there was no contract for it, but because it was not Grade A in quality. If it was shipped under a new and independent contract there was no stipulation that the potatoes were to be Grade A, and the appellant had no right to reject it because it did not come up to that grade. I, therefore, think the jury were right in finding that the first car was shipped under the contract.

As to the second car the respondent says: that having been requested to ship one car under the contract, he concluded that shipments under the contract had begun with the first car delivered, and that he was called upon by the contract to ship five cars per week, of which this was one. The jury accepted his evidence and, in my opinion, were

right in finding that the second car was also shipped under the contract.

The appellant rejected both cars and refused to pay for them against the shipping documents. There was abundant evidence that both these cars contained Grade A potatoes. Both cars answered the contract in every respect save one, namely, that they had not been Government inspected and no certificate of grading accompanied the draft. Is this an objection of which the appellant can take advantage? In my opinion it is not. As I have already pointed out, Government inspection of new potatoes did not commence under the statute until after September 30. The obtaining of the certificate of grading was, therefore, impossible. Both parties are presumed to know the law and to know that certificates of grading could not be obtained at the date these cars were shipped. The request for shipment against the contract prior to October, therefore, constituted a waiver of the right to require Government inspection and the certificate, as was pointed out by White, J. in giving the first judgment of the Appellate Division. It cannot, therefore, be said that the respondent was in default under the contract in not having the Government certificate as to grade.

The last question is, was there evidence to support the jury's answer to Question 13? That question reads:

13. Q. Was the defendant by the statements and conduct of the plaintiffs, justified in repudiating the contract and relieved from making any further delivery under the contract?—A. Yes.

The *Sale of Goods Act*, R.S.N.B., 1927, ch. 149, section 28 (2), provides as follows:

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

In *Freeth* v. *Burr* (1), Coleridge, C.J., said:

In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an *intention to abandon* and altogether *to refuse performance*

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of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. * * * I think it may be taken that the fair result of them is as I have stated * * * Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free.

It is not contended that in every case a refusal to accept and pay for a partial delivery would of itself constitute a repudiation of the contract. The rule on this point is dealt with in *Millars' Karri & Jarrah Co.* v. *Weddel, Turner & Co.* (1), where, at page 29, Bigham J., with whom Walton J. agreed, said:

It is argued that it (the award) violates the well-known rule of law that where goods are sold to be delivered in different instalments a breach by one party in connexion with one instalment does not of itself entitle the other party to rescind the contract as to the other instalments. But I do not agree. The rule, which is a very good one, is, like most rules, subject to qualification. Thus, if the breach is of such a kind, or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. If, for instance, a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what may happen; he can at once cancel the contract and rid himself of the difficulty. This is the effect of section 31, subsection 2 of the Sale of Goods Act, 1893.

That section is identical with the New Brunswick section in question here. See also *Munro* v. *Meyer* (2). In the case at bar the appellant not only refused to accept and pay for either of the cars shipped, although they contained Grade A potatoes, but also stated that all deliveries of such potatoes would be refused. This is made clear by the evidence of Mr. Thompson himself who gave this testimony:

Q. This car of potatoes that you saw you say in your opinion wouldn't pass as Grade A?

Q. And even if it had been bought on the contract you would have rejected it just the same?—A. Yes.

* * * * *

Q. If that was the only kind and quality that Smith had to ship although he had shipped you wouldn't have taken them on the contract? —A. No.

Q. You would have rejected car after car?—A. Why yes, that kind of stuff.

The jury had before them the contract and the communications between the parties. The appellant did not

(1) (1908) 14 Com. C., 25. (2) [1930] 2 K.B. 312.

communicate with the respondent directly but only through Stevenson. The evidence shews that in sending the letters and telegrams Stevenson was acting for the appellant.

The contract, as the jury knew, provided that either Cobblers or Green Mountains might be shipped at the option of the respondent who had on hand enough Cobblers to fill the entire contract and was ready and willing to ship them. The jury had also before them the following communications from Stevenson:

Letter of September 3rd, in which he asked:

> Will you also kindly advise if you will be able to ship mostly Green Mountain potatoes against the contracts as our Trade prefer this variety if possible.

The evidence shews that Green Mountains, as a rule, brought from ten to twenty cents per barrel more than Cobblers.

Letter of September 6, which contained the following:

> With reference to contracts booked for October shipment, our Buyers would like some assurance regarding the quality of the potatoes you will ship as in shipments of the new crop of Cobblers from New Brunswick which have recently arrived we find that while the outside of the potatoes look very nice and sound, a very large per cent of them on being cut shows a large hole and rot right in the centre of the potatoes.
>
> This is a very serious defect and if it prevails generally in the crop of Cobblers throughout New Brunswick our Trade would not want this variety shipped against contract.
>
> Would you therefore be in a position to ship all Green Mountains and are they free from blight or any disease of a serious nature.

Letter of September 10, in which he says:

> You did not mention in your letter whether you would be able to supply mostly Green Mountains and as these are much preferred by our Trade would ask that you kindly bear this in mind and arrange to ship as many cars of Green Mountains as possible against contract we are enclosing for twenty cars for Messrs. Thompson & Alix.

In a letter dated September 26, he says:

> We regret to say that the second car of potatoes which was on the way to Sherbrooke has not turned out satisfactory and Messrs. Thompson & Alix will not accept these as on inspection and cutting some of the potatoes they found almost every one of the large ones to be rotten inside and quite a few of the medium size are the same way. They will not accept the car as they state the Buyers here will not use any more of these potatoes.
>
> There have been several cars of these Cobblers come into Sherbrooke and they have been distributed around pretty well and nobody wants any more of them.

In addition Stevenson reported, on September 23, that on inspection Thompson & Alix found more than half the first car to be very poor stock: very small, also wet and

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full of mud. The jury, on abundant evidence, found these statements to be far from the truth, so far indeed that they may well have concluded that the appellant had some ulterior motive for making them, and, from the correspondence above quoted, may have considered the motive to have been a desire to obtain Green Mountains instead of Cobblers. That the appellant wanted the twenty car loads of potatoes delivered is, I think, clear, but he did not want to take Cobblers as these were not desired by the trade.

In view of the terms of the contract, the declaration of the appellant Thompson that all cars containing similar potatoes would have been rejected, and the letters, it was, in my opinion, open to the jury to find that the refusal by the appellant to accept and pay for the two cars shipped evidenced an intention to repudiate the whole contract unless the respondent would fulfil it by shipping Green Mountains instead of Cobblers. The respondent was within his rights in refusing to do so.

The appeal should, therefore, be allowed in so far as the judgment below ordered a new trial but, on the answers of the jury, judgment should be entered for the respondent dismissing the action with costs throughout.

Appeal allowed and cross-appeal dismissed, with costs.

Solicitors for the appellant: *Hanson, Dougherty & West.*
Solicitor for the respondent: *Gage W. Montgomery.*

1932

*Oct. 19.

DAVID CHALMERS AND OTHERS *v.* THE KING

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

Criminal law—Jurisdiction—Conflict of decisions—Seditious words—Joint indictment—Criminal Code, R.S.C., 1927, c. 36, sections 133, 133a enacted by 20-21 Geo. V, c. 11 and 134 re-enacted by 20-21 Geo. V, c. 11.

APPEAL by the appellants from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), dismissing the appeal from their conviction by a jury and

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

(1) (1932) Q.R. 52 K.B. 244.

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their sentence by the Court of King's Bench, criminal side, Wilson J., for the offence of speaking seditious words.

The appellants were granted special leave to appeal to this court by Smith J., in chambers, on the ground that, at first sight, the judgment appealed from apparently conflicted with a judgment of the Court of Appeal of Ontario in a case of *The King* v. *Buck* (1).

On the appeal to this court, after hearing argument of counsel, the Court delivered judgment orally, quashing the appeal for want of jurisdiction, on the ground that such conflict did not exist.

Appeal quashed.

M. Garber for the appellants.

D. P. Gillmor K.C. for the respondent.

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*Feb. 20.
*Feb. 27.

JOSEPH DORZEK, BY HIS NEXT FRIEND JOHN DORZEK, THE SAID JOHN DORZEK, AND CLEMENTINE DORZEK (PLAINTIFFS) ..... } APPELLANTS;

AND

McCOLL FRONTENAC OIL COMPANY, LIMITED (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal—Jurisdiction—Amount in controversy in appeal—Claims for damages, by infant suing by father as next friend, and by father, in same action—Appeal by them from judgment reversing judgment at trial in their favour for a sum to each of less than $2,000, the sums together exceeding $2,000—Alternative motion for special leave to appeal.

The action was for damages resulting from the infant plaintiff being struck by defendant's motor truck. The infant, suing by his father as next friend, claimed for personal injuries, and his father claimed for hospital and medical expenses and loss of work. At trial the infant recovered $1,875, and the father $284.25. The Court of Appeal for Ontario reversed the judgment and dismissed the action. Plaintiffs appealed *de plano* to this Court. The present motion was by way of appeal from the Registrar's refusal to affirm jurisdiction.

Held: This Court had not jurisdiction. To give jurisdiction in regard to either appellant, the amount in controversy in the appeal with regard to him must exceed $2,000. Each cause of action was complete in itself and distinct from the other. Appellants were in the same position (as to jurisdiction) as if separate actions had been brought and separate judgments rendered. The amounts recovered at trial could not be added to give jurisdiction.

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*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

(1) [1932] 3 D.L.R. 97; 57 Can. Cr. C. 290.

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"L'Autorité," Limitée v. *Ibbotson,* 57 Can. S.C.R. 340, *Armand* v. *Carr,* [1926] Can. S.C.R. 575, and *McKee* v. *City of Winnipeg,* [1930] Can. S.C.R. 133, cited.

An alternative motion for special leave to appeal was refused.

On an application for special leave to appeal, within s. 41 (*f*) (amount exceeding $1,000) of the *Supreme Court Act,* the mere fact that an important point of law is involved in the appeal is not in itself a sufficient reason for granting leave, if the point has already been the subject of a decision in this Court or in the Judicial Committee of the Privy Council.

MOTION by way of appeal by the plaintiffs from the order of the Registrar declaring that the Supreme Court of Canada has not jurisdiction to hear and determine their appeal from the judgment of the Court of Appeal for Ontario, which reversed the judgment at trial in favour of the plaintiffs, and dismissed the action, which was for damages resulting from the infant plaintiff being struck by defendant's motor truck.

The material facts of the case for the purpose of this motion are sufficiently stated in the judgment now reported, and are indicated in the above headnote.

In the alternative, the plaintiffs moved for an order granting them special leave to appeal (leave having been refused by the Court of Appeal).

The motion was dismissed with costs.

W. F. Schroeder for the motion.

G. F. Henderson K.C. contra.

The judgment of the court was delivered by

RINFRET J.—This motion is made on behalf of the appellants by way of appeal from an order of the Registrar refusing to affirm the jurisdiction of this Court *de plano.*

In the alternative, the Court is moved for an order granting the appellants special leave to appeal.

As stated in the judgment of the Registrar, there are three plaintiffs-appellants: 1. The infant Joseph Dorzek, suing by his next friend John Dorzek; 2. John Dorzek, the father of the infant; 3. Clementine Dorzek, the mother of the infant.

By the trial judgment, the infant recovered from the defendant $1,875; and it was ordered that the sum should be brought into court and remain there until he attains the age of twenty-one years, the income thereon, in the

meantime, to be paid to him; John Dorzek recovered $284.25; and Clementine Dorzek recovered $46.87.

The Court of Appeal reversed the trial judgment and dismissed the action.

As pointed out by the Registrar, the claims of the three plaintiffs were separate and distinct, each claiming in respect of loss personal to each. The infant's claim was for damages resulting from the physical injuries suffered by him as a consequence of the accident. The father's claim was for damages made up of hospital and doctors' fees and charges, including two weeks' loss of work. The mother's claim was for loss of one month of her wages. Each plaintiff recovered for the separate damages they respectively suffered.

No amount recovered individually by the plaintiffs is sufficient to give jurisdiction to this court; but the appeal from the order of the Registrar is asserted upon the ground that the action was in the nature of a joint action brought by the father on behalf of himself and his infant son and that the two amounts awarded to the infant and to the father must be regarded as one for the purposes of an appeal to this court.

In circumstances such as the above, although there be but a single judgment, the appellants, for purposes of jurisdiction, are in the same position as if separate actions had been brought and separate judgments had been rendered. Each cause of action is complete in itself and distinct from the other. The amount of the matter in controversy in the appeal to this court must therefore exceed the sum of $2,000 with regard to each individual appellant. (*"L'Autorité," Limitée* v. *Ibbotson & others* (1); *Armand* v. *Carr* (2); *McKee* v. *City of Winnipeg* (3).

In the present case, the next friend by whom the infant sued also recovered against the defendant. The decision of the Registrar was that this did not "justify the contention that the two (amounts recovered) may be added for the purpose of giving this Court jurisdiction." We are of opinion that the Registrar has correctly stated the rule applicable in such cases.

(1) (1918) 57 Can. S.C.R. 340. (2) [1926] Can. S.C.R. 575.
(3) [1930] Can. S.C.R. 133.

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DORZEK v. MCCOLL FRONTENAC OIL CO., LTD.

Rinfret J.

The appeal from the order of the Registrar refusing to affirm jurisdiction ought, therefore, to be dismissed.

Dealing now with the alternative motion for an order granting special leave to appeal: Leave having been refused by the Court of Appeal of Ontario, the Supreme Court may grant such leave only if the matter in controversy in the appeal comes within one or the other of subsections *a, b, c, d, e* and *f* of section 41 of the *Supreme Court Act*. The only subsection applying here is subsection (*f*): where " the amount * * * in controversy in the appeal will exceed the sum of $1,000 "; and the subsection applies only to the case of the infant plaintiff. Moreover, section 41 provides for " a special leave to appeal," which implies the existence of special reasons for granting leave.

In the premises, the special ground put forward by the appellant is stated as follows:

This is a motor car accident. In such cases, the statute (*The Highway Traffic Act*—sec. 42 of ch. 251 of R.S.O., 1927) places upon the defendant the onus of proving that the loss or damage complained of did not arise through his negligence or improper conduct. In the face of a definite finding made by the jury that the defendant has failed to discharge the onus, a court of appeal has no right to disturb such finding and to substitute for it its own view of the facts. If, on the other hand, the court of appeal was of opinion that the verdict of the jury was perverse, the proper judgment was not to dismiss the action, but to order that there should be a new trial. It is submitted that, having regard to the large number of motor car cases throughout Canada, these are matters of public importance and would afford a sufficient reason to grant the special leave prayed for.

The question as to the effect of the provisions of sec. 42 of the Ontario *Highway Traffic Act* and of similar statutes has more than once been considered by the Supreme Court and by the Privy Council. Only recently, in the case of *Winnipeg Electric Co.* v. *Geel* (1), this Court and the Judicial Committee had occasion to state the law in this respect very fully and, at all events, with regard to each of its aspects in relation to the questions now sought to be discussed by the appellant. The Court should not grant

(1) [1931] Can. S.C.R. 443; [1932] A.C. 690.

special leave to appeal for the mere purpose of reasserting the law it has already expounded. The principles which are to govern were clearly exposed in the *Geel* case (1) and we have no doubt that the courts of this country are fully aware of their duty to apply them where occasion arises.

In this particular case, we do not find in the judgment of the Court of Appeal any statement in conflict with the judgment *re Winnipeg* v. *Geel* (1), or any intention of disregarding the law as it was there laid down.

But this further ought to be said: The mere fact that a point of law—important though it may be—is involved in the appeal is not in itself a sufficient reason why special leave should be granted, if the point has already been the subject of a decision in this Court or in the Judicial Committee.

The motion of the appellant should accordingly be dismissed with costs.

Motion dismissed with costs.

Solicitors for the appellants: *Chown & Chown.*
Solicitors for the respondent: *Henderson, Herridge & Gowling.*

RODOLPHE MOREAU (DEFENDANT).. APPELLANT;

AND

JOSEPH LABELLE (PLAINTIFF)..... RESPONDENT.

1932
*Nov. 10.
1933
*Feb. 27.

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

Negligence—Master and servant—Use of motor car—Disobedience—Act in course of employment—Master's liability—Distinction between "in the performance of the work" and "during the period of work"—Art. 1054 C.C.

The appellant was receiving guests at dinner, at his home, on New Year's eve. One C. had been invited with his wife, but she had been unable to come as she found the distance too great for walking. The appellant then offered to C. the use of his automobile to go and get her. C. took the car, but stopped on his way. One R.M., nephew of the appellant but not his employee as chauffeur or otherwise, happened to pass on the street where the car was parked, and, seeing nobody in charge, thought fit to notify his uncle by telephone. The appellant then gave the following instructions to his nephew: "Take

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

(1) [1931] Can. S.C.R. 443; [1932] A.C. 690.

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my automobile and bring it back here immediately and don't go anywhere else." The nephew took the car, but, instead of bringing it back immediately to his uncle's home, he left the direct route towards it and drove off to a neighbouring town with friends. After having left them there, he started his return trip alone; and, on his way back, he overtook a sleigh driven by the respondent, hit it from the rear and upset all the passengers including the respondent's minor daughter, who had to be extricated from under the sleigh and suffered serious injuries. The accident occurred before R.M. had reached the intersection of the road which would have been the direct road between the place where the appellant's car was parked and the latter's home. The respondent's action in damages was maintained for $4,000 by the trial judge, which judgment was affirmed by the appellate court.

Held, reversing the judgment of the Court of King's Bench (Q.R. 52 K.B. 183), that the appellant was not liable, for, at the time of the accident, the appellant's nephew was not "in the performance of the work" which had been entrusted to him. (Art. 1054 C.C.).

In interpreting the meaning of the last paragraph of article 1054 C.C., it would be an error in law to assimilate to an offence committed by a servant or workman "in the performance of the work for which they are employed," a similar offence committed "during the period" of that work. *Plump* v. *Cobden* ([1914] A.C. 62) ref.

Curley v. *Latreille* (60 Can. S.C.R. 131), *Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* ([1923] S.C.R. 414), *Cox* v. *Hall* (Q.R. 39 K.B. 231), *Clermont Motor Ltd.* v. *Joly* (Q.R. 45 K.B. 265) and *Prain* v. *Bronfman* (Q.R. 69 S.C. 187) referred to and valuable comments made upon these decisions.

APPEAL from the decision of the Court of King's Bench, Appeal Side, Province of Quebec (1), affirming the judgment of the Superior Court, Martineau J., and maintaining the respondent's action in damages for $4,000.

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

Aimé Geoffrion, K.C., and *Leon Garneau, K.C.*, for the appellant.

A. Fournier, K.C., for the respondent.

The judgment of the Court was delivered by

RINFRET, J.—Le problème qui nous est soumis va apparaître immédiatement par le simple exposé des faits essentiels. Nous en empruntons le récit au jugement de première instance:

Le défendeur donnait un dîner chez lui le soir du Jour de l'An. Il avait invité entre autres un nommé Charron avec son épouse. M. Charron étant venu seul parce que Madame Charron n'avait pu se rendre à

(1) (1932) Q.R. 52 K.B. 183.

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pieds, le défendeur demanda à M. Charron de l'aller chercher avec son auto. M. Charron prit l'auto, mais arrêta en chemin. Le nommé René Moreau, neveu du défendeur, passant près de l'endroit où Charron avait laissé l'auto et la voyant sans conducteur, en avertit son oncle par téléphone. Celui-ci lui répondit de la ramener tout de suite et de ne pas aller ailleurs. Le neveu prit l'auto, mais au lieu de la ramener au défendeur tout de suite, alla reconduire quelques amis à Hull. C'est sur le retour, qui eut lieu sans plus de retard, que conduisant son auto à une très grande vitesse ou de façon absolument aveugle et imprudente, et venant dans la même direction que le demandeur (ès-qualité), il frappa sa voiture à l'arrière, où était assise (sa fille) mineure avec quelques autres personnes qui n'eurent pas le temps de sauter et furent projetées sur le pavé;

Comme conséquence de cet accident, Lucienne Labelle eut les deux jambes fracturées; et la preuve indique qu'elle restera infirme.

La faute et la responsabilité de René Moreau, le neveu du défendeur, ne fait aucun doute. La question est de savoir si, dans les circonstances qui viennent d'être relatées, le défendeur lui-même peut être tenu responsable.

Le demandeur, qui a poursuivi en qualité de tuteur à sa fille mineure, a invoqué contre le défendeur le dernier paragraphe de l'article 1054 du code civil:

> Les maîtres et les commettants sont responsables du dommage causé par leurs domestiques et ouvriers dans l'exécution des fonctions auxquelles ces derniers sont employés.

Le procès s'est débattu et a été jugé uniquement sur le principe énoncé dans ce paragraphe.

La Cour Supérieure et la Cour du Banc du Roi (1) en appel ont maintenu l'action. Le défendeur s'est porté appelant devant cette Cour, et nous avons à examiner les deux jugements qui nous sont référés.

Pour mieux comprendre la situation, il est nécessaire de préciser certains détails:

René Moreau, le neveu, n'était ni l'employé, ni le chauffeur du défendeur appelant.

Pour les fins de cette cause, les seules relations entre René Moreau et l'appelant étaient celles qui résultaient du fait que l'appelant avait dit à son neveu de lui ramener sa voiture " tout de suite et de ne pas aller ailleurs."

Au moment où ces instructions furent données, la voiture de l'appelant était arrêtée devant la " station de pompes" ("power house") du village de la Pointe Gatineau, où demeurait l'appelant. La résidence de l'appelant

(1) (1932) Q.R. 52 K.B. 183.

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où le neveu devait conduire la voiture, était située sur la même rue que la " station ", à environ un demi-mille de là; et cette rue était l'unique chemin pour s'y rendre: " Il n'y a pas même un coin de rue à faire pour s'en revenir droit ". La ville de Hull, où le neveu s'est rendu avec ses amis, au lieu de ramener la voiture directement chez l'appelant, est située dans une direction opposée, à une certaine distance du village de la Pointe Gatineau. En laissant la " station de pompes " du village pour se rendre chez l'appelant et en suivant le chemin qui conduisait chez ce dernier, le neveu avait à dépasser l'endroit où se trouve le point de départ de la route qui relie le village de la Pointe Gatineau à la ville de Hull. Ce point de départ est un pont, sur lequel la route vers Hull franchit d'abord la rivière Gatineau. C'est en arrivant au point de rencontre du pont et de la rue conduisant chez l'appelant que le neveu aperçut ses amis et qu'il se décida à prendre avec eux la direction de la ville de Hull—direction tout à fait différente de celle qu'il lui fallait suivre pour ramener la voiture chez l'appelant, suivant les instructions de ce dernier. Il ne s'agissait pas là d'une simple déviation, c'est-à-dire: il ne s'agissait pas simplement du cas d'un conducteur qui, ayant à se rendre d'un endroit à un autre, a plusieurs routes à sa disposition et en choisit une qui est plus longue, au lieu de prendre la voie la plus directe. René Moreau, le neveu, ne pouvait pas se rendre de la " station de pompes " à la résidence de son oncle en passant par Hull, même en supposant une déviation anormale. La preuve démontre que, après être allé à Hull, il avait à refaire le même trajet en sens inverse et à revenir à son point de départ, le pont sur la Gatineau, pour prendre ensuite la rue qui conduisait à la résidence de l'appelant.

C'est en revenant de Hull, et alors qu'il était encore à une certaine distance du pont, que l'accident est arrivé.

Les seuls autres faits qu'il pourrait y avoir intérêt à mentionner sont que René Moreau avait dix-neuf ans et qu'il n'avait pas de permis de conducteur d'automobile; mais ces deux faits ne peuvent affecter le résultat de la cause telle qu'elle a été soumise. L'intimé n'a pas reproché à l'appelant d'avoir commis une faute ou une imprudence en confiant sa voiture à une personne inexpérimentée ou maladroite et qui ne connaissait pas le fonctionnement d'une automobile.

Il n'a pas invoqué l'article 1053 du code civil. D'ailleurs, René Moreau avait dépassé l'âge requis par la loi pour être autorisé à conduire un véhicule-moteur, et il est prouvé qu'il savait conduire et était habitué à conduire. Le fait qu'il n'avait pas de permis ne démontre pas, en soi, qu'il était inhabile. Il n'a pas été établi en preuve qu'un permis lui avait été refusé. (*City of Vancouver* v. *Burchill* (1).

L'appelant ne pouvait être condamné que si les circonstances que nous venons de relater entraînaient l'application du dernier paragraphe de l'article 1054 C.C. déjà cité plus haut.

Il n'était pas le maître de René Moreau, et ce dernier n'était ni son domestique, ni son ouvrier; mais l'appelant était un commettant; et, bien que notre code emploie le mot " ouvriers " au lieu du mot " préposés " (qui se trouve dans l'article correspondant du Code Napoléon: 1384), il ne saurait y avoir de doute que, suivant l'esprit de la loi et de la jurisprudence de la province de Québec, René Moreau, lorsqu'il fut chargé par l'appelant de lui ramener sa voiture, s'est trouvé placé dans la catégorie de ceux qui engagent la responsabilité de leurs commettants pour

tout dommage causé * * * dans l'exécution des fonctions auxquelles ces derniers (i.e. les domestiques et les ouvriers) sont employés.

D'autant plus que les règles énoncées à l'article 1054 C.C. s'appliquent de la même façon à la responsabilité des mandants pour les dommages causés par la faute de leurs mandataires (Art. 1731 C.C.)

La condition de la responsabilité du commettant ou du mandant, telle qu'elle est posée à l'article 1054 C.C., c'est que le préposé ou le mandataire ait causé le dommage " dans l'exécution des fonctions auxquelles il est employé ".

La portée de cette disposition du code civil a été étudiée à fond par cette Cour dans la cause de *Curley* v. *Latreille* (2). Les notes des juges qui ont rendu ce jugement sont complètes et nous dispensent d'avoir à revenir sur la discussion de l'aspect général de cette question. Tant que le texte du code civil demeurera la même, ou tant que l'interprétation qui en a été donnée dans cet arrêt n'aura pas été modifiée par un tribunal supérieur, cette Cour devra considérer qu'elle est liée par la décision qu'elle a rendue; et il restera seulement à appliquer les principes qui y ont été

(1) [1932] S.C.R. 620.

(2) (1920) 60 Can. S.C.R. 131.

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posés aux faits particuliers de chaque cause qui nous sera soumise.

En effet, comme l'a fort bien vu le savant juge qui a rendu le jugement de la Cour Supérieure qui nous est soumis: " Chaque cause en cette matière devient, en consequence, une question d'espèce ". Et c'est précisément ce qu'avait déjà signalé notre collègue, M. le juge Duff, dans son jugement dissident *re The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (1). Nous nous permettrons de citer de copieux extraits de ce jugement parce qu'il explique clairement le point de vue auquel nous nous plaçons; quoique, dans la cause de *Vaillancourt* (1), son appréciation personnelle de la preuve et des circonstances avait conduit M. le juge Duff à un résultat différent de celui de la majorité. Notre collègue commence par mettre en regard les textes du dernier paragraphe de l'article 1054 C.C. en français et en anglais; puis il dit:

There does not appear to be any necessary inconsistency between the French text and the English text. They are to be read together, and (if interpretation be necessary) each as explanatory of the other. *City of Montreal* v. *Watt & Scott Ltd.* (2). I doubt myself if exposition could make the meaning of the language used in either text plainer than it is. *Le fait dommageable* must be something done in the execution of the servants' functions as servant or in the performance of his work as servant. If the thing done belongs to the kind of work which the servant is employed to perform or the class of things falling within *l'exécution des fonctions*, then by the plain words of the text responsibility rests upon the employer. Whether that is so or not in a particular case must, I think, always be in substance a question of fact, and although in cases lying near the border line decisions on analogous states of fact may be valuable as illustrations, it is not, I think, the rule itself being clear, a proper use of authority to refer to such decisions for the purpose of narrowing or enlarging the limits of the rule.

I am emphasizing this because, in cases arising under these paragraphs, as in other cases under article 1054 C.C., counsel are accustomed to fortify their arguments by copious references to decisions of the French courts, many of which appear to be of little value either as illustrations of the application of the text or otherwise. In France the doctrine has been widely accepted and was more than once affirmed by the highest tribunal that the employer is responsible for acts done by his employee *à l'occasion* of his service. It cannot be insisted upon too strongly that an act done by an employee *à l'occasion* of his service may or may not be one for which the employer is responsible under article 1054 C.C., depending in every case upon the answer to the question: " Was the act done in the execution of the employee's service or in the performance of the work for which he was employed?"

(1) [1923] S.C.R. 414, at 416. (2) [1922] 2 A.C. 555, at 562.

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Puis, après avoir référé à quelques arrêts, M. le juge Duff poursuit:

On the other hand, if the act of the servant causing the injury complained of is an act having no relation to the duties of his employment as, for example, where two servants momentarily discontinue their work to engage in some sort of a frolic, then, although it might not improperly be said that the injurious act is something done *à l'occasion* of their employment, it would appear to be an abuse of language to describe it as done *dans l'exécution des fonctions* or in performance of the work for which they were employed.

Such cases are no doubt near the line, and the nearer the line one gets the greater the room of course for difference of opinion as to the application of the words of the text. But in substance the solution of the point involves nothing more than an accurate appreciation of the facts in their relation to the rule. There seems to be an increasing tendency in France (see Planiol, Revue Critique de Législation, vol. 38, pp. 298, 301) to refer the paragraph under discussion as well as the opening paragraph of Article 1384 C.N. to a doctrine of social responsibility, according to which the risk of injury arising from the prosecution of an enterprise, should fall upon the *entrepreneur* or proprietor because he enjoys the profits arising from it. I do not think considerations derived from this mode of reasoning can legitimately be applied in controlling the interpretation or the application of the text now under consideration.

Des citations qui précèdent, il convient de rapprocher une partie du jugement de M. le juge Mignault dans la même cause. Elle nous paraît d'autant plus importante qu'elle définit l'opinion du savant juge en référant au jugement qu'il avait rendu dans la cause de *Curley* v. *Latreille* (1). De cette façon, nous avons l'avantage de trouver dans les termes qu'il a lui-même employés l'exposition de la doctrine qui découle des deux jugements rendus dans *Curley* v. *Latreille* (1) et dans *Governor &c* v. *Vaillancourt* (2), auxquels ont référé, dans leurs notes sur la cause actuelle, la majorité des juges de la Cour du Banc du Roi. Voici le passage en question (p. 427):

Dans *Curley* v. *Latreille* (1), après avoir rapporté certaines solutions de la jurisprudence française et fait observer que la responsabilité de la faute d'autrui est de droit strict, je me suis exprimé comme suit sur la portée de l'article 1054 C.C., avec le plein concours de mon honorable collègue, M. le juge Anglin:—

"Etant donné que l'interprétation stricte s'impose en cette matière, je ne puis me convaincre que le texte de notre article nous autorise à accueillir toutes les solutions que je viens d'indiquer. Ainsi, dans la province de Québec, le maître et le commettant sont responsables du dommage causé par leurs domestiques et ouvriers *dans l'exécution des fonctions auxquelles ces derniers sont employés,* ou, pour citer la version anglaise de l'article 1054 C.C. *'in the performance of the work for which they are employed.'* Ceci me paraît clairement

(1) (1920) 60 Can. S.C.R. 131. (2) [1923] S.C.R. 414.

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exclure la responsabilité du maître pour un fait accompli par le domestique ou ouvrier à l'occasion seulement de ses fonctions, si on ne peut dire que ce fait s'est produit dans l'exécution de ses fonctions. Il peut souvent être difficile de déterminer si le fait dommageable est accompli dans l'exercice des fonctions ou seulement à leur occasion, mais, s'il appert réellement que ce fait n'a pas été accompli dans l'exécution des fonctions du domestique ou ouvrier, nous nous trouvons en dehors de notre texte. L'abus des fonctions, si le fait incriminé s'est produit dans l'exécution de ces fonctions, entre au contraire dans ce texte et entraîne la responsabilité du maître."

Je suis encore du même avis, et il ne me semble pas inutile de le dire encore à raison de certaines solutions de la jurisprudence française qu'on a invoquées pour donner à l'article 1054 C.C., quant à la responsabilité des maîtres et commettants, une interprétation extensive qu'il ne comporte pas dans mon opinion. Il faut bien reconnaître que la jurisprudence française a pris depuis quelques années une orientation qui l'écarte de plus en plus de la doctrine traditionnelle. Elle admet de nouvelles théories en matière de responsabilité civile, comme l'abus du droit, l'enrichissement sans cause et la responsabilité des irresponsables, enfants en bas âge et insensés (Phaniol, t. 2, no. 878). On peut même dire qu'elle tend à faire abstraction de la faute et à la remplacer par une conception du risque. Mais n'oublions pas que nous avons un code dont le texte doit nous servir de règle, et que si les opinions des auteurs et les décisions de la jurisprudence française ne peuvent se concilier avec ce texte, c'est le texte et non pas ces opinions et ces décisions que nous devons suivre. Je ne serais certainement pas partisan d'une interprétation de notre code qui en ferait prévaloir la lettre sur l'esprit, mais quand le texte est clair et sans équivoque on n'a pas besoin de chercher ailleurs.

Nous inspirant des principes posés et de l'interprétation qui a été donnée par cette Cour au texte du Code qui s'applique à l'espèce actuelle, nous sommes d'avis que l'appelant dans la présente cause n'est pas responsable du dommage qui a été causé à la fille de l'intimé par René Moreau parce que ce dernier n'était pas, au moment de l'accident, " dans l'exécution des fonctions auxquelles " il avait été préposé.

Nous devons suivre le jugement de cette Cour dans la cause de *Curley* v. *Latreille* (1). Nous ne considérons pas que la loi concernant la responsabilité des maîtres et commettants a reçu, de la part de cette Cour, une interprétation plus extensive dans la cause de *Vaillancourt* (2). Et nous sommes d'ailleurs d'avis que les faits de la cause actuelle sont encore plus favorables à Moreau qu'ils n'étaient favorables à *Latreille* dans la cause de *Curley* (1).

Bien respectueusement, nous allons tâcher de le démontrer en faisant l'analyse des jugements de *Curley* v. *Latreille* (1) et de *Governor &c* v. *Vaillancourt* (2), à laquelle nous

(1) (1920) 60 Can. S.C.R. 131. (2) [1923] S.C.R. 414.

sommes d'ailleurs contraints par suite de la portée qui nous paraît avoir été donnée à ces arrêts dans le jugement qui nous est maintenant déféré.

On se rappelle les faits dans la cause de *Latreille* (1). En voici le résumé d'après le rapport du jugement de la Cour du Banc du Roi (1).

Latreille demeurait à Montréal. Il avait à son service, depuis à peu près six mois, un chauffeur du nom de Lauzon, qui lui donnait généralement satisfaction. Le soir du 4 décembre 1915, le fils de Latreille, après s'être fait conduire par le chauffeur, lui ordonna de reconduire l'automobile au garage. La preuve était contradictoire sur la question de savoir si le chauffeur conduisit l'automobile au garage et la reprit ensuite, ou s'il se contenta de se rendre près du garage puis de procéder dans une autre direction. Après une étude attentive des jugements de la Cour du Banc du Roi et de ceux de cette Cour, nous croyons pouvoir affirmer que cette différence de détails n'a pas influé sur la décision concordante qui a été rendue par les deux cours. Ni l'une, ni l'autre des cours n'ont cru nécessaire de fixer exactement ce point de fait. Dans la soirée, étant resté en possession de l'automobile, le chauffeur partit avec des amis; et, entre minuit et une heure du matin, alors qu'il descendait le Boulevard Saint-Laurent à grande vitesse, arrivé à la rue Saint-Viateur, où un tramway était stationné, au lieu d'arrêter pour obéir à la loi, il continua son chemin sur le côté gauche de la rue et frappa le fils de Madame Curley, lui infligeant des blessures graves dont il mourut quelques heures plus tard. Après l'accident, Lauzon abandonna sa victime et fila à toute vitesse. Le jury décida que le chauffeur était, au moment de l'accident, dans l'exécution de ses fonctions. Le juge président le procès référa la cause à la Cour de Révision, qui donna effet au verdict, et maintint l'action (2).

La Cour du Banc du Roi en appel infirma le jugement de la Cour de Révision et débouta la demanderesse de son action (1).

La Cour Suprême du Canada confirma ce dernier jugement (3). L'action se trouva donc définitivement rejetée.

(1) (1918) Q.R. 28 K.B. 388. (2) (1917) 26 Rev. de Jur. 146
(3) (1920) 60 Can. S.C.R. 131.

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Dans cette cause, toute la question de l'abus dans les fonctions fut carrément posée par le résumé du juge au jury et fit l'objet de la discussion dans les notes des juges de la Cour du Banc du Roi (1), et de la Cour Suprême (2).

En Cour Suprême, l'honorable juge Brodeur était dissident; mais la lecture de son jugement est très importante, parce qu'elle fait voir qu'il s'appuie sur la théorie de l'abus, telle qu'elle s'est développée dans la jurisprudence contemporaine en France, et que c'était là précisément le point de divergence entre lui et ses collègues de la cour. Il voulait envisager la promenade de Lauzon somme un simple abus des fonctions du chauffeur, qui n'avait pas eu pour effet de soustraire le cas à l'application du dernier paragraphe de l'article 1054 C.C. Pour cette raison, il aurait maintenu l'action contre Latreille.

En somme, la Cour du Banc du Roi et la Cour Suprême décidèrent que Latreille, le propriétaire de l'automobile, n'était pas responsable de l'accident causé par la faute de son chauffeur, parce que, au moment de l'accident, il n'était pas dans l'exécution de ses fonctions. L'accident avait été causé au cours d'une promenade que le chauffeur effectuait avec ses amis hors la connaissance de son maître; et il n'existait aucune relation entre cette promenade et les fonctions du chauffeur.

A cause de la tournure prise par la cause actuelle devant la Cour Supérieure et devant la Cour du Banc du Roi, il est intéressant de référer à certains passages des jugements dans la cause de *Latreille* (2). Ils font sentir d'une manière très nette l'erreur qui assimilerait au délit commis dans l'exécution des fonctions du préposé le délit commis pendant le temps de ces fonctions.

L'honorable juge Cross, qui a rendu le principal jugement en Cour du Banc du Roi, rapporte certains exemples qui avaient été donnés par le président de la Cour de Révision et fait remarquer qu'il y a des cas où une simple déviation de la route que le chauffeur a reçu instruction de suivre " does not amount to a getting out of the scope of the service "; mais que c'est " a fundamental misconception " de dire que, dans le cas du chauffeur de Latreille,

(1) (1918) Q.R. 28 K.B. 388, at 393.

(2) (1920) 60 Can. S.C.R. 131.

the master left the chauffeur in possession of the car and that possession did not, on the evening in question, cease until long after ten o'clock, although perhaps it ought to have done so.

D'après M. le Juge Cross, il était évident que, dans les circonstances

> Lauzon's use of the car * * * while he was driving (his friends) here and there through the streets of the city, was no continuation of the possession which his master had given him, but was as much a new and distinct exploit as if he had first housed the car in the garage and had afterwards broken into the garage and taken it out. It does not appear that the learned judges who gave judgment in review addressed themselves to the question whether Lauzon's tort was done in the performance of the work for which he was engaged, though it is true that they say, with the jury, that it was done while he was doing that kind of work (p. 396).

La distinction qu'il faut faire nous paraît marquée d'une façon à la fois claire et concise dans un passage du jugement de Lord Dunedin dans la cause de *Plump* v. *Cobden Flour Mills Company* (1), cité par M. je juge Martin, et que nous aimons à reproduire parce qu'il nous paraît définir la situation d'une façon très heureuse:

> there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery and compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.

Et nous pouvons terminer cette revue de la cause de *Curley* v. *Latreille* (2) par la conclusion que tire M. le juge Mignault. Après avoir exposé les circonstances de la cause, il continue:

> Je suis forcé de dire qu'aucun jury ne pouvait, dans l'espèce, raisonnablement arriver à la conclusion que Lauzon, lors de l'accident, "was performing work for which he was engaged by the defendant." Il ne s'agit pas ici d'un cas d'abus, par le serviteur, des fonctions que son maître lui a confiées, mais d'un acte accompli entièrement en dehors de ces fonctions, etc.

La cause de Latreille fut décidée par la Cour du Banc du Roi en 1918, et par la Cour Suprême du Canada en 1920. Quelques années plus tard, la Cour du Banc du Roi fut saisie d'un cas semblable dans la cause de *Cox* v. *Hall* (3): (MM. les juges Dorion, Tellier, Rivard et Hall, M. le juge-en-chef Lafontaine étant dissident). L'honorable juge Demers, en Cour Supérieure, avait rejeté l'action du demandeur. M. le juge Tellier (maintenant juge-en-

(1) [1914] A.C. 62.

(2) (1920) 60 Can. S.C.R. 131, at 174, 180.

(3) (1925) Q.R. 39 K.B. 231.

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chef de la province de Québec), au cours de ses notes, dit ceci (p. 233):

Le chauffeur n'allait pas aux affaires de son maître, mais à ses amusements à lui. Il n'était pas dans l'exécution de ses fonctions. Même cas absolument que celui de *Curley* v. *Latreille* (1), dans lequel la Cour Suprême a exonéré le maître. Cette décision doit être suivie, elle fait jurisprudence.

Comme on l'aura remarqué, M. le juge Tellier déclare que, dans cette cause de *Cox* v. *Hall* (2), il s'agit d'un " même cas absolument que celui de *Curley* v. *Latreille* " (1).

M. le juge Dorion fait le même rapprochement et dit (p. 234):

D'après ce précédent, qu'il est inutile de discuter, Hall n'a pas encouru la responsabilité du dernier paragraphe de l'article 1054 C.C. Brooks (le chauffeur) n'était pas, au moment de l'accident, dans l'exécution des fonctions auxquelles il était employé.

Quant à M. le juge Rivard, il commence par faire allusion aux arrêts des tribunaux d'Angleterre et à la cause de *Harparin* v. *Bulling,* cause venue du Manitoba (3), puis il ajoute ce qui suit:

Ces décisions ne sauraient nous affecter; mais le jugement de la Cour Suprême, dans la cause de *Curley* v. *Latreille* (1), nous concerne; et spécialement pour les raisons données par M. le juge Mignault, je pense qu'il doit être suivi dans la présente espèce.

* * * * *

Alors que la doctrine française étend l'application de la règle à tout ce qui se rattache aux fonctions par quelque manière, et cela en conformité du texte du Code Napoléon, la rédaction de notre article 1054 nous force à restreindre les cas de responsabilité aux faits qui constituent l'exercice même des fonctions.

Encore un peu plus tard, en 1928, la Cour du Banc du Roi est de nouveau saisie de la même question dans la cause de *Clermont Motors Ltd.* v. *Joly* (4) (MM. les juges Howard et Cannon, M. le juge Létourneau dissident). Les faits de cette cause sont quelque peu différents; mais les jugements rapportés sont intéressants parce qu'ils contiennent la discussion des arrêts *re Curley* v. *Latreille* (1) et *re Cox* v. *Hall* (2) et la comparaison avec l'arrêt *re Governor &c.* v. *Vaillancourt* (5) qui avait été prononcé par cette Cour quelque temps auparavant. Le jugement *re Clermont Motors* (4) souligne le fait que, dans cette cause, l'employé had taken the Hudson car not for any purpose connected with the business of the (master) but expressly for a purpose of his own (p. 266).

(1) (1920) 60 Can. S.C.R. 131.
(2) (1925) Q.R. 39 K.B. 231.
(3) (1914) 50 Can. S.C.R. 471.
(4) (1928) Q.R. 45 K.B. 265.
(5) (1923) S.C.R. 414.

Monsieur le juge Cannon, maintenant notre collègue, et qui faisait partie de la majorité de la Cour du Banc du Roi, nous paraît indiquer correctement la distinction qu'il faut faire entre la cause de *Latreille* (1) et la cause de *Vaillancourt* (2):

> Il me semble que l'espèce actuelle diffère essentiellement de la cause de *Vaillancourt* (2), car ce dernier avait été blessé d'un coup de revolver par l'agent de la compagnie de la Baie d'Hudson dans l'établissement même de cette dernière, et, comme le dit le juge Mignault, l'abus de son autorité par l'agent de la compagnie entraîne la responsabilité de cette dernière, si le fait incriminé s'est produit dans l'exécution de ses fonctions.

Le savant juge réfère ensuite au passage du jugement de l'honorable juge Rivard dans la cause de *Cox v. Hall* (3), que nous venons de citer; et, après l'examen des faits et de la doctrine, il conclut, d'après la preuve, que Morency (l'employé) n'était certainement pas dans l'exécution de ses fonctions suivant le sens de l'article 1054 du code civil et l'interprétation qu'il convient de lui donner conformément au jugement de *Cox* v. *Hall* (3).

La référence faite par M. le juge Cannon à *Governor &c* v. *Vaillancourt* (2) nous amène maintenant à l'analyse de ce jugement qui, à moins que nous ne fassions erreur, paraît avoir été d'un grand poids dans la décision rendue par la Cour du Banc du Roi dans la cause actuelle.

Il n'est pas nécessaire de rappeler les faits de cette cause, qui sont relatés au long dans le rapport (2). Ils sont tout à fait différents des faits de la cause actuelle. Un point de divergence important est que, comme le fait remarquer M. le juge Mignault (p. 429), dans les espèces où un chauffeur d'automobile a causé à une tierce personne un dommage dont cette dernière veut tenir le maître responsable,

> on ne trouve pas la particularité que présente la cause (de *Vaillancourt,* (2)), c'est-à-dire la subordination entre la victime et le préposé qui a commis le délit, le maître commun ayant placé cette victime sous les ordres de ce préposé.

Mais ce qui est essentiel, dans le cas où l'on tente de faire un rapprochement entre la cause de *Vaillancourt* (2) et la présente cause, c'est de voir le motif qui a induit la majorité de cette cour à rendre le jugement qui a condamné la compagnie de la Baie d'Hudson, et le principe sur lequel, d'après son appréciation des faits, cette majorité s'est appuyée.

(1) (1920) 60 Can. S.C.R. 131. (2) (1923) S.C.R. 414.
(3) (1925) Q.R. 39 K.B. 231.

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M. le juge Idington a vu, dans l'acte de Wilson

> the mode of discipline the drunken agent in charge of the premises and all therein, including respondent, sought to apply to his subordinate (p. 415).

M. le juge Brodeur dit que Wilson, d'après ses fonctions, avait le suprême commandement; qu'il a vu dans l'acte de son subalterne un mépris de son autorité; et qu'il a voulu, en faisant usage de son arme à feu, affirmer cette autorité.

> C'était évidemment pour lui un acte d'autorité devenu désirable pour le prestige de la compagnie qu'il représentait. (Et plus loin:) Le préposé a cru nécessaire d'avoir recours à la force brutale pour accomplir les fonctions qui lui avaient été confiées.

Quant à M. le juge Mignault (pp. 426-432), il déclare que

> en rapport avec sa gérance, (Wilson) avait autorité sur l'intimé et sa mère, également employés de l'appelante, qui étaient tenus d'obéir à ses ordres légitimes.

Il dit qu'il ne s'agit pas d'un délit dont le préposé s'est rendu coupable en dehors de ses fonctions, puisque Wilson pouvait réprimer l'injure ou le manque de respect par des remontrances ou autres moyens raisonnables. Il a voulu les réprimer par des voies de fait. C'était l'exercice abusif de son autorité; mais c'était, quand même, de sa part, un acte par lequel il entendait exercer son autorité.

Après cette analyse peut-être longue, mais nécessaire, des deux arrêts prononcés par cette cour et auxquels la Cour du Banc du Roi s'est référée en rendant le jugement qui nous est soumis, il nous reste à appliquer aux faits de la cause actuelle les principes que nous avons trouvés exposés au cours de la revue que nous venons de faire.

Le savant juge de première instance a considéré que, dans les circonstances, l'accident qui est arrivé à la fille de l'intimé a été causé par la faute de René Moreau " qui était alors le préposé du défendeur et *dans le cours de l'exécution* de ses fonctions." Nous ne pensons pas qu'en employant l'expression: " dans le cours de l'exécution," le savant juge ait voulu indiquer une interprétation extensive de l'article du Code civil qui se lit: " dans l'exécution des fonctions." Cependant, dans ses notes, le savant juge dit que

> d'après la doctrine et la jurisprudence, le propriétaire d'une auto est responsable de l'acte dommageable commis par le préposé *au cours de la possession* qu'il en a légalement eue, si elle a été continue et ininterrompue, à moins que le propriétaire ne prouve qu'au moment de l'accident son préposé avait absolument fait sienne cette possession en convertissant l'auto à son usage exclusif.

Nous sommes d'avis qu'en l'espèce il faut décider que la possession légale du neveu de l'appelant n'a pas été continue et ininterrompue. Elle a cessé lorsqu'il s'est dirigé vers la ville de Hull, car, à partir de ce moment, il ne se servait plus de l'automobile pour les fins de son commettant mais il s'en emparait pour ses propres fins. Pour employer les expressions qu'on rencontre au cours des jugements de *Curley* v. *Latreille* (1):

he was not performing the work which had been entrusted to him; * * * it was no continuation of the possession which his employer had given him; but it was a new and distinct exploit.

Il n'était pas dans l'exécution de ses fonctions.

En plus, nous devons faire remarquer, comme nous l'avons mentionné au commencement, que le cas de l'appelant en cette cause-ci est plus favorable que celui de Latreille. Lauzon, qui a causé l'accident au fils de Madame Curley, était le chauffeur, c'est-à-dire l'employé régulier de Latreille. Toutes les causes qu'on nous a citées sont des causes où le dommage a été causé par le chauffeur ou l'employé régulier.

Ici, le neveu n'était ni le chauffeur ni l'employé régulier. Il était seulement chargé d'une tâche spéciale et précise. Il devait ramener la voiture de la " station de pompes " à la résidence de l'appelant. Cette distinction a son importance pour décider si le jeune Moreau était dans l'exécution de ses fonctions. En effet, un employé qui n'exécute pas les ordres de son maître ne cesse pas pour cela d'être son employé; mais il ne manque pas de cas où un simple préposé, investi d'un mandat spécial, qui n'exécute pas les ordres qu'il a reçus, cesse par le fait même d'être un préposé. Cela va de soi: les fonctions d'un préposé spécial sont beaucoup plus restreintes que les fonctions d'un employé régulier. Pour rapprocher cette idée du cas qui nous occupe: Les fonctions d'un chauffeur régulier sont évidemment plus étendues que l'étaient, en l'espèce, celles de Moreau, qui avait simplement reçu instructions de conduire la voiture de la " station " à la résidence de son commettant tout de suite, et de ne pas aller ailleurs.

Notre problème nous paraît donc se ramener aux questions suivantes:

Quelles sont les fonctions d'un chauffeur qui est un employé régulier? Elles consistent à prendre soin de la

(1) (1920) 60 S.C.R. 131.

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voiture de son maître et à conduire cette voiture pour les fins de son maître.

Lauzon, au moment de l'accident qui a causé la mort du fils de Madame Curley, ne conduisait pas la voiture pour les fins de son maître. Il était en dehors de ses fonctions et Latreille a été exonéré de toute responsabilité.

Quelles étaient les fonctions de Wilson, l'employé de la compagnie de la Baie d'Hudson? Elles consistaient à gérer l'entrepôt et à exercer son autorité sur les employés de la compagnie. Dans l'acte qu'il a commis, il a voulu exercer son autorité; et bien qu'il l'ait fait d'une façon abusive et exagérée, il était quand même dans l'exécution de ses fonctions; et c'est là le principe en vertu duquel la compagnie a été tenue responsable.

Quelles étaient les fonctions de René Moreau? Elles consistaient uniquement à ramener l'automobile de la "station de pompes" à la résidence de l'appelant. Il n'y avait qu'une manière de remplir cette fonction, en tenant compte de l'état des lieux: c'était de suivre l'unique route qui conduisait de la " station " à la résidence de l'appelant. Il n'y en avait pas d'autres. Encore une fois, ce n'est pas le cas où le préposé a plusieurs routes à sa disposition, où le commettant lui donne instructions de suivre l'une d'elles, et où, en désobéissance à ces instructions, le préposé suit une route différente qui mène au même but. Le jeune Moreau a abandonné complètement la route qu'il devait suivre pour rester dans l'exécution de ses fonctions et il en a pris une autre pour des fins entièrement différentes et qui n'avaient rien à voir avec la fonction dont il était chargé. Il agissait donc en dehors de ses fonctions et, comme l'accident est arrivé pendant cette période de temps, les conditions exigées par l'article 1054 C.C. ne se rencontrent pas et le commettant (ou l'appelant) n'est pas responsable du dommage qui a été causé.

Nous ne sommes pas en présence du cas où le préposé accomplit mal ou d'une façon abusive une charge qui lui a été confiée. Ici, le préposé n'accomplissait pas ce qu'il avait été chargé de faire. Il faisait quelque chose de différent et qui n'avait rien à voir avec ce qu'il avait été chargé de faire.

Il nous faut dire un mot du jugement de l'honorable juge Greenshields dans la cause de *Prain* v. *Bronfman* (1) sur

(1) (1931) Q.R. 69 S.C. 187.

lequel le savant juge de première instance a appuyé sa décision. Nous ne sommes pas d'avis que les circonstances de cette cause en font une espèce semblable à celle qui nous occupe. Lors de l'enquête, le chauffeur avait disparu et n'a pas été retracé. Il n'a pas été entendu comme témoin; et personne n'a pu raconter ce qui s'était passé entre le moment où il avait laissé son maître et le moment de l'accident. Au moment même de l'accident, dit M. le juge Greenshields,

he was proceeding to the garage to complete the performance of the work for which he was employed, viz: the storing of the car in the garage.

Cette circonstance nous paraît avoir été décisive dans le jugement de cette cause, puisque l'honorable juge y dit, au cours de ses notes:

Again, I concede that the extent of the deviation (i.e. celle d'un chauffeur qui s'écarte de sa route régulière) may be and should be considered.

Dans la cause actuelle, la preuve ne permet pas de décider si, au moment de l'accident, le jeune Moreau avait l'intention de se rendre à la résidence de son oncle. Il se dirigeait peut-être vers la route qui y conduisait et qu'il avait laissée dans le but d'aller à Hull; il revenait peut-être vers le point où il avait cessé d'exercer ses fonctions, mais il ne les avait pas encore reprises; et, au contraire, il se trouvait à un endroit où il n'avait aucune affaire à aller pour accomplir la mission que l'appelant lui avait confiée et pour rester dans l'exécution de ses fonctions.

Nous avons tâché d'exposer l'enseignement qui, suivant nous, se dégage des jugements dans les causes de *Latreille* (1) et de *Vaillancourt* (2). C'est cet enseignement que cette Cour doit suivre; et, en conséquence, l'appel doit être maintenu et l'action de l'intimée doit être rejetée avec dépens devant toutes les cours.

Appeal allowed with costs.

Solicitors for the appellant: *Dessaulles, Garneau & Hébert.*

Solicitor for the respondent: *Alphonse Fournier.*

(1) (1920) 60 S.C.R. 131 (2) [1923] S.C.R. 414.

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*Feb. 10.
*Mar. 8.

PHILIPPE DUBROFSKI .....DEBTOR;

v.

THE VIGER COMPANY.....PETITIONER;

AND

HERMAS PERRAS .....TRUSTEE.

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

Bankruptcy—Application to judge of Supreme Court of Canada for special leave to appeal—Order by which a debtor is adjudged a bankrupt—Jurisdiction—Bankruptcy Act, R.S.C., 1927, c. 11, s. 174.

A judge of the Supreme Court of Canada is competent, under section 174 of the *Bankruptcy Act*, to grant leave to appeal from the judgment of an appellate court affirming an order rendered by a bankruptcy court, by which a debtor was adjudged a bankrupt. Even although no actual amount may be in controversy, such an appeal involves the future rights both of the creditor and of the debtor, which are directly affected by the bankruptcy proceedings following as a consequence of the order.

APPLICATION for special leave to appeal to the Supreme Court of Canada from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming (two judges dissenting), the judgment of the Superior Court sitting in bankruptcy by which the debtor was adjudged a bankrupt. The material facts of the case, for the purposes of the present judgment, are sufficiently stated in the judgment now reported. The application was granted, costs to be costs in the appeal.

T. Brosseau K.C. for the motion.
D. Baril contra.

RINFRET J.—The debtor was adjudged a bankrupt by a judgment of the Superior Court sitting in bankruptcy in the district of Montreal. The judgment was affirmed by the Court of King's Bench (appeal side) by a majority of three judges against two. The debtor applies for special leave to appeal from those judgments to the Supreme Court of Canada.

At the outset, the point was raised that the appellate court was not competent to entertain the appeal and, therefore, no authority vested in a judge of the Supreme Court

*PRESENT:—Rinfret J. in chambers.

of Canada to grant leave to appeal from the judgment of the appellate court.

There were two issues in this case. The main issue was whether the debtor had committed any act of bankruptcy and whether, as a consequence, a bankruptcy order should be made against him. The court of first instance made the order, and this was confirmed by the Court of King's Bench.

While no amount of money was directly involved in the judgment of the latter court refusing to set aside the bankruptcy order (*The Cushing Sulphite Fibre Company* v. *Cushing* (1)), a second issue was whether the debtor was indebted to the petitioner in the sum of $2,741.24, as alleged in the petition. This was contested; and the resulting controversy, it is argued, concerned a sum of money amounting to more than $500. However, in the nature of the proceedings, the amount could not be made the subject of a demand in the conclusions of the petition; and it may yet be a question whether, under the circumstances, the petitioner's claim ought truly to be considered a matter involved in the appeal.

It is not necessary for me to decide that point. Even if it should not be said that any sum of money is involved, the bankruptcy order is an order from which, in my opinion, an appeal will lie to the appellate court under section 174 of the *Bankruptcy Act,* because the appeal involves the future rights both of the creditor and of the debtor, which are directly affected by the bankruptcy proceedings following as a consequence of the order. (*In re Union Fire Insurance Company* (2); *In re J. McCarthy & Sons Co.* (3), and cases there referred to; *Marsden* v. *Minnekahda Land Co.* (4).)

I think, therefore, the objection to the jurisdiction of the appellate court as well as to my authority to grant leave must be overruled.

It remains to consider the special reasons for granting leave in the premises.

The question whether, on the facts established in this case, the applicant was rightly decided to be a debtor of

(1) (1906) 37 Can. S.C.R. 427.
(2) (1886) 13 Ont. App. Rep. 268, at 295.
(3) (1916) 38 Ont. L.R. 3, at 6.
(4) (1918) 40 D.L.R. 76.

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DUBROFSKY v. THE VIGER COMPANY.

Rinfret J.

the petitioner presents, in my view, a question of law of certain importance. Other questions are raised in the appeal involving the interpretation of the *Bankruptcy Act* in respect to the character of the debt essentially required to entitle a creditor to present a bankruptcy petition; in respect to the debtor's occupation and whether he was a trader according to the Act; also in respect to the true meaning of the word "goods" in subsection (*t*) of section 2 of the Act and whether it includes immovable property, having regard to the apparent discrepancy between the French and the English version of the Act. These questions, in my opinion, afford special and sufficient reasons why leave to appeal should be granted to the applicant.

There will therefore be an order granting the application and a stay of proceedings. The appellant will not be required to provide security for costs; but should he elect to give security so as to get the benefit of subsection 4 of section 174 of the Act, I fix the amount of the security at $500. Any security already provided when the appeal was lodged in the Court of King's Bench shall remain in force in any event. Costs of this application to be costs in the appeal.

Application allowed.

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*Nov. 14, 15, 16, 17.

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*Feb. 7.

THE NOVA SCOTIA CONSTRUCTION COMPANY LIMITED (PLAINTIFF).. APPELLANT;

AND

THE QUEBEC STREAMS COMMISSION (DEFENDANT) ..... RESPONDENT.

AND

THE ROYAL BANK OF CANADA (MISE-EN-CAUSE).

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

Contract—Building of dam—Tender—Fixed price—Additions or deductions to be at the rates of the tender—Extras—Quantum meruit—False representations—Contract not void, but voidable.

A party to a contract, as soon as he has knowledge of any fraud or false representations, must decide at once either to continue to carry out

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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the contract or take immediate steps to repudiate it. If he continues to carry out the contract, he cannot later, on the ground of such fraud or false representations, ask for payment on a basis different from that provided for in the contract or on *quantum meruit* or as damages arising from the fraud or misrepresentations. *United Shoe Machinery Co.* v. *Brunet* ([1909] A.C. 330) followed.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Sévigny J., and maintaining the appellant's action in part.

The respondent, The Quebec Streams Commission, is an instrumentality of the Crown in the right of the province of Quebec and has been incorporated to build improvements in the rivers and streams of the province; and, under statutory provisions, it was authorized to erect certain structures designed to raise the high water level of Lake Kenogami to a certain height and to regulate and control the discharge of the lake at its outlet. The respondent called for tenders, after preparing plans and specifications. The appellant put in a tender much lower than the other offers received by the Commission which had estimated the cost at $1,324,513, its tender being for $880,682, a difference of more than $225,000 between it and the lowest of the other tenders submitted which had been prepared on the same estimates and quantities. The Chief Engineer of the Commission warned the appellant that he considered their price too low and that he did not feel that the Commission should accept their tender. However the appellant insisted to do the work and signed a contract by which it agreed to do the work embraced by its tender and contract for the sum of $880,682 and to proceed at such rate of progress as to enable the waters of Lake Kenogami to be raised to elevation 108 on April 1st, 1924, for the further sum of $105,000, making a total of $985,682, and further agreed that all *subsequent additions to or deductions from the quantities indicated in the said form of tender should be figured at the rates appearing in its said tender.* The trial judge found that the Commission paid upon the progress estimates the sum of $1,176,994.84, and that it also paid $351,451.59 of which it advanced $168,992.34, guaranteed by plaintiff's deposit of $150,000, or $18,992.34 more than the deposit. The appellant, however, was not satisfied with the payments made and sued to recover either as extras

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under the contract, or as damages arising from misrepresentations, or on the basis of *quantum meruit*, an additional sum which had been transferred to the mise-en-cause, The Royal Bank of Canada, of $442,600.60. The trial judge granted, on different heads, a total sum of $30,756.91. As the Commission should be credited with the sum of $18,992.34 which it advanced to appellant in excess of $150,000, it left to the credit of appellant a sum of $11,764.57, for which judgment was given by the trial judge. That judgment was affirmed by the appellate court.

L. A. Forsyth K.C., O. L. Boulanger K.C. and *H. Hansard* for the appellant.

Chs. Lanctot K.C. and *Louis St.-Laurent K.C.* for the respondent.

The judgment of Rinfret, Cannon and Crocket JJ. was delivered by Cannon J., and the judgment of Lamont and Smith JJ. was delivered by Smith J.—The Court was unanimous in dismissing the appeal with costs.

Mr. Justice Cannon, after stating the facts as concisely as possible (the case being printed in seventeen volumes), added the following remarks:

CANNON J.—* * * Can a *quantum meruit* be recovered in this case?

The contract would first have to be set aside either by mutual consent of the parties or by a judgment. Arts. 1022 (3) and 1138 C.C. The works have been executed and the case of *United Shoe Machinery* v. *Brunet* (1) is authority to the effect that, even in case of false and fraudulent representations, a contract is not void, but merely voidable at the election of the person defrauded, after he has had notice of the fraud.

Unless and until he makes his election, and by word or act repudiates the contract or expresses his determination not to be bound by it (which is but a form of repudiation), the contract remains as valid and binding as if it had not been tainted with fraud at all.

In the present case, the appellant asked for an extension of time, as provided in the contract, to complete the works, which was granted; but never at any time did elect to have

(1) [1909] A.C. 330, at 339.

the contract cancelled for the error alleged in the declaration, and the action itself does not pray for such cancellation by the Court. On the contrary, appellant elected to treat the contract as subsisting, claiming that it executed it in its entirety and cannot and does not now asked to avoid it. Art. 1000 C.C. Error, fraud and violence or fear are not causes of absolute nullity in contracts. They only give a right of action, or exception, to annul or rescind them.

* * *

Moreover, in this case, clause 37 protects the respondent completely and binds the appellant to suffer the consequences of any miscalculation or misinformation *bona fide* contained in the call for tenders or plans. We have here a "marché sur devis" defined as follows by Planiol and Ripert, "Traité de droit civil français," 1932, tome XI, p. 163, no. 917:

> 917. Suite. Marché sur devis.—Au lieu de fixer définitivement par avance la somme globale à payer, les parties peuvent se contenter de simples prévisions, basées sur le coût d'exécution des divers détails. L'entrepreneur présente ces prévisions dans un écrit appelé devis, et le marché est dit "marché sur devis." Le prix total dépendra le l'ensemble des travaux accomplis conformément au devis. Il peut donc varier par l'addition de détails nouveaux, de travaux supplémentaires. On peut dire que dans ce cas encore il y a marché à prix fait, mais article par article, et non plus en bloc; chaque détail du travail a son prix particulier, et le total à payer ne pourra être connu qu'après exécution, suivant que tels ou tels travaux auront été faits. Il est fixé après coup, et non d'avance comme dans le forfait. Le marché sur devis concerne presque exclusivement les entreprises de travaux matériels.

If appellant had wished to protect itself and secure a possible increase in the unit price, it should have done what its witness Swan says at page 120, line 28, vol. III:

> In actual practise myself, I invariably stipulate if there is some question of depth that we do not know about and that there is likely to be a variation in the depth of the foundation, we invariably put in a clause to the effect that unit rates under the contract would be applicable down to five feet below what is shown on the plans, and anything beyond that, then you have got to take the matter into consideration and try and meet the cost and work out what is a fair and reasonable price to allow for the additional cost. That is my own personal practice and has been with my chiefs for all my career.

Nothing of the sort happened; appellant took a chance and its speculation brought it a loss. Who is to suffer for its miscalculation?

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Cannon J.

Article 1012 C.C. enacts:

Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only.

What I have said disposes, in my opinion, of any attempt to recover for the alleged tort, under 1053 of the Code, because the information that the appellant says it relied upon was, in its view, grossly inaccurate and misleading. *Grant* v. *The Queen* (1), under circumstances more favourable to the petitioner, was decided in favour of the Crown. It should have consulted an experienced engineer to prepare a well considered tender and understood that the honest belief and hope of the Respondent's engineer did not amount to a warranty as to plans and quantities; forsooth, it could have found that out by reading, with enough attention to understand them, the specifications and standard form of contract placed at its disposal. This case is distinguishable from *Pearson & Sons* v. *Dublin Corporation* (2), as it is impossible to find here fraudulent representations. The contract in this case stands as the law of the parties. In *Bush* v. *Whitehaven Trustees,* reported in Hudson's On Building contracts, vol. 2, p. 122, there was a finding by the jury, that the conditions of the contract were so completely changed, in consequence of the defendants' inability to hand over the sites of the work as required as to make the special provisions of the contract inapplicable. Here the contract was made with anticipation of the circumstances of which the appellant complains and provided for them; it is therefore applicable and must be applied. I refer to these English cases because they have been quoted and discussed before us and below, although this case must be, and our decision is governed by the law of Quebec.

* * *

These findings, on matters of fact, unanimously concurred in by the Court of King's Bench, cannot be disturbed by us, unless we reach the conclusion that they are clearly wrong or against the evidence. The appellant has failed to establish either of these two conditions.

Under the statute 3 Geo. V, c. 6, secs. 6 and 16, any change in the consideration or price of the contract for extra work, not covered by the terms of the contract or the

(1) (1891) 20 Can. S.C.R. 297. (2) [1907] A.C. 351.

unit price, had to be approved by the Lieutenant-Governor in Council. The engineer, even if acquiescing to any change, could not bind the Crown and change the contract. See *De Galindez* v. *The King* (1).

The province paid appellant large sums over and above the price of its tender. It is not entitled to more, unless the respondent agrees to it. We cannot, by a judgment, order a thing, which, under the contract, can be done only by mutual consent, expressed by Order in Council, according to the special statute limiting the capacity to contract of the respondent. Arts. 360-364-366 C.C. We agree with the arguments and conclusions contained in the very able and complete judgment of the learned trial judge and the clear cut exposition of the law of contracts of the province of Quebec of the ex-Chief Justice Lafontaine and we concur when he says:

> un principe primordial doit dominer tout le litige. C'est celui de la sécurité des contrats que les tribunaux ont pour mission de maintenir, et non pas de refaire pour venir en aide à un contractant malheureux.

Plaintiff can get no relief from the courts. His case might bring further adjustments by mutual consent, if the respondent agrees to reconsider the matter. On the evidence, it is impossible to differ from the conclusions unanimously arrived at by the provincial courts and the appeal must be dismissed with costs.

Mr. Justice Smith agreed with Mr. Justice Cannon that the appeal should be dismissed, being of the opinion that "in view of the provisions of the contract, there was no misrepresentation and no difference of conditions to warrant the setting aside of the contract entered into by the parties, and that the appellant must be paid for the work done according to the terms of the contract, except as varied by mutual consent."

Appeal dismissed with costs.

Solicitors for the appellant: *Boulanger, Marquis & Lessard.*

Solicitor for the respondent: *Louis St. Laurent.*

(1) (1906) Q.R. 15 K.B. 320; 39 Can. S.C.R. 693.

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*Feb. 20, 21.
*Feb. 27.

THE CAPITAL BREWING COMPANY, LIMITED (DEFENDANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Lease—Clause giving right to increase rent on law being changed so as to facilitate sale of the products manufactured by the lessee—Construction of clause—Effect of change in the law by Liquor Control Act, Ont., 1927, c. 70—Sufficiency of notice by lessor (the Crown) as to increase of rent.

In 1912 the Crown (Dom.) expropriated land of appellant in Ottawa, Ontario, on which appellant carried on a brewing business. Appellant remained in occupation and a yearly rental of $11,292.60 was fixed. At that time the law in Ontario permitted free sale of intoxicating liquors by licensed persons. After the *Ontario Temperance Act* (1916, c. 50) came into force, which prohibited sale for beverage purposes in Ontario of products such as appellant manufactured, a lease to appellant was made, and renewed in 1921, at rentals lower than the sum aforesaid. At expiry of the renewal lease in 1926, appellant continued in occupation, thereby becoming a yearly tenant on the terms in the lease. The lease contained a clause that, should the provincial legislature pass any Act amending or repealing the *Ontario Temperance Act*, "so as to allow or facilitate the manufacture or sale of the products manufactured by the said lessee," the Crown should have the right to increase the yearly rent to $11,292.60, or to any figure which might be agreed upon, the increased rental to become due from the date of the repeal or amendment. On June 1, 1927, the *Liquor Control Act*, Ont. (1927, c. 70) came into force, and on June 13, 1927, a notice, signed by the Assistant Chief Architect of the Department of Public Works (Dom.), was sent to appellant, stating: "As the Ontario Temperance Act has been repealed, your company according to the above quoted clause [that above mentioned] is liable for rental from 1st June, 1927, at the annual rate of $11,292.60." After unsuccessful negotiations by appellant to fix the rental at what it was paying or at less than the sum claimed, the Crown brought action for the balance due for rent on the basis set out in said notice, and recovered judgment in the Exchequer Court ([1932] Ex. C.R. 171). On appeal:

Held: (1) The words "products manufactured by the said lessee" in said clause in the lease, on proper construction, meant, not the actual products of appellant's brewery, but products of the kind manufactured by appellant.

(2) The change effected in the law by the *Liquor Control Act* was such as to facilitate the "sale of the products manufactured by" appellant (construed as above) within the meaning of said clause in the lease, and justified the increase of rent.

(3) The notice given was effective for the purpose of increasing the rent.

Judgment of the Exchequer Court (*supra*) affirmed.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

APPEAL by the defendant from the judgment of the Exchequer Court of Canada (Angers J.) (1), holding that the plaintiff was entitled to recover from the defendant the sum of $13,478.56, and interest, the said sum being a balance alleged to be due to the plaintiff from the defendant for rent. The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

J. Shirley Denison K.C. and *A. M. Latchford* for the appellant.

R. V. Sinclair K.C. for the respondent.

The judgment of the court was delivered by

SMITH J.—In 1912, the Crown expropriated certain lands and premises in the city of Ottawa belonging to the appellant, on which the appellant carried on a brewing business. The compensation allowed by the Exchequer Court in 1914 was $233,852.83, and, the appellant having remained in occupation, the judgment fixed the yearly rental at the rate of five per cent. on this sum, less a reduction of $400 for a small portion of the lands not occupied by the appellant, thus making the yearly rental $11,292.60.

At that time there was in force in Ontario a statute known as *An Act respecting the Sale of Fermented or Spirituous Liquors* (R.S.O., 1914, ch. 215), which permitted free sale of intoxicating liquors by all persons licensed under the Act.

In the year 1916, the *Ontario Temperance Act* (6 Geo. V, ch. 50) came into force on the 20th of September, which prohibited the sale in the province of products such as were being manufactured by the appellant, for beverage purposes, thereby curtailing the output of appellant's products in Ontario.

On representation to the government to this effect, an Order in Council was passed on the 28th day of December, 1916, authorizing a lease to the appellant of the premises, for a term of five years, from the 10th August, 1916, at an annual rental of $5,000. The lease contained the following clause:

(1) [1932] Ex. C.R. 171.

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Smith J.

Should the Legislature of the Province of Ontario pass any act amending or repealing the Ontario Temperance Act, Chapter 50 of Provincial Statutes of Ontario, 1916, so as to allow or facilitate the manufacture or sale of the products manufactured by the said Lessee, the Lessor shall have the right to increase the rent hereby reserved to the sum of eleven thousand, two hundred and ninety-two dollars and sixty cents ($11,292.60) per annum or to any such figure which may then be agreed upon by the parties to these presents, the increased rental to become due from the date the said act is repealed or the amending act is passed and goes into effect whichever first happens.

At the expiry of this lease, the appellant applied for a renewal for another term of five years from the 10th of August, 1921, and a renewal lease for this term was made accordingly, but at a rental of $8,000 instead of $5,000 per year. This lease also contains the clause set out above, and expired on the 10th of August, 1926. The lessee continued to occupy the lands, and thereby became a yearly tenant on the same terms.

On the 1st day of June, 1927, the *Liquor Control Act* (Statutes of Ontario, 1927, Ch. 70) came into force, and on the 13th day of June, 1927, a notice, signed by the Assistant Chief Architect of the Department of Public Works, was sent to the appellant, setting out the fact that the appellant was a yearly tenant of the premises, and that the lease contained the clause already quoted. The notice then proceeds:

> As the Ontario Temperance Act has been repealed, your Company according to the above quoted clause is liable for rental from 1st June, 1927, at the annual rate of $11,292.60.

This notice was followed by negotiations by the appellant for the fixing of the rental at either the same amount then being paid, or at a lesser amount than the amount claimed. These negotiations were not successful, and the present action is to recover $13,478.56, with interest, representing the balance due for rent on the basis set out in this notice of the 13th of June, 1927. The appellant contends that it is not liable for any rent beyond the $8,000 per year mentioned in the lease.

The first contention is that the notice of the 13th of June, 1927, was not a sufficient notice under the terms of the clause of the lease quoted above, because not signed with the formalities required by law to bind the Department, and because the language of the last clause of the notice, quoted above, is not a definite statement that the

rental will be increased, but merely that it is liable to be increased. We were all of opinion, on the argument, that this objection could not prevail.

The appellant's further contention is that the clause quoted refers only to products actually manufactured by the appellant, and that it was therefore incumbent upon the respondent to establish as a fact that the change in the law had actually allowed or facilitated the manufacture or sale of the appellant's own products, and that no evidence had been offered to establish this fact.

In my view, the appeal turns upon the construction to be placed upon the language of the clause of the lease in question. I was much impressed by the argument that the words " products manufactured by the said lessee " must mean the precise products manufactured by the lessees themselves, but on fuller consideration I have concluded that this language refers to products of the kind manufactured by the lessee. On behalf of the appellant it was argued that, to arrive at the true meaning of this language as used in the lease, the surrounding circumstances, under which the lease was made, ought to be taken into consideration, and that these circumstances would point to the conclusion that the language of the clause deals only with the actual products of appellant's brewery, particularly as the lease should be regarded as dealing only with the rights and interests of the parties to it.

It was further argued that what was contemplated by the parties by the introduction of this clause was a change in the law of Ontario such as would permit a free sale of these products for beverage purposes to the public under conditions similar to those that prevailed prior to the *Ontario Temperance Act,* whereas the *Liquor Control Act,* that came into force on the repeal of the *Ontario Temperance Act,* permits a sale only to a single customer, namely, the government, represented by the Liquor Sale Commission, and therefore does not facilitate a sale of these products to the general public.

In my view, the parties had not in mind, in placing this clause in the lease, any particular kind of change in the law of Ontario that might take place, and were not in a position to foresee what change, if any, might take place; and therefore undertook to define, by the terms of the lease,

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Smith J.

the nature of the legislation that they had in view; and we must be guided by the description that the parties have adopted. Looking at the surrounding circumstances we have, at the time the lease was made, an Act of the Ontario Legislature in force, which absolutely prohibited the sale in Ontario for beverage purposes of products of the kind manufactured by the lessee. That Act, in the language of the clause of the lease, has been repealed, and a new law has been substituted, which expressly permits a practically unlimited sale of these products in Ontario for beverage purposes. This change necessarily opens in Ontario a general market for these products that did not exist at all under the *Ontario Temperance Act*. I am of opinion, therefore, that the Act itself, as compared with the *Ontario Temperance Act*, discloses that the sale of such products in Ontario has been facilitated. The appellant argues that the change of law does not allow or facilitate the manufacture of the products referred to, but it is sufficient, by the language of the clause, if the sale alone is facilitated.

For these reasons I have concluded that the judgment appealed from is right, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. M. Latchford.*

Solicitor for the respondent: *R. V. Sinclair.*

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*Oct. 20, 21.

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*Feb. 7.

BURT BUSINESS FORMS LIMITED (PLAINTIFF) ..... APPELLANT;

AND

AUTOGRAPHIC REGISTER SYSTEMS LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Infringement—Invalidity—Novelty and utility—Evidence of invention—Commercial success—Making or selling of an element of a patent.

Novelty and utility, without something more requiring the exercise of inventive ingenuity, is not sufficient to make an article a good subject-matter of a patent. The patentee must show an inventive step.

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*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

Commercial success is nothing more than a question of fact depending upon several factors; and although it may assist in determining whether there is invention, it cannot afford a basis for controverting the conclusion that the alleged improvements of a known article are not of such a character as to show invention in a pertinent sense.

The making or the selling, without more, of an element of a patented combination does not of itself constitute an infringement of the combination.

APPEAL from the judgment of the Exchequer Court of Canada (1), dismissing an action by the plaintiff appellant to have it ordered and adjudged that the defendant respondent is infringing its patents No. 246,547 and No. 237,913.

The material facts of the case are fully stated in the judgment now reported.

W. N. Tilley K.C. and *A. J. Thomson K.C.* for the appellant.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the respondent.

The judgment of the court was delivered by

RINFRET J.—The appellant, who is the owner of two letters patent nos. 237,913 and 246,547, brought this action to restrain the respondent from infringing certain claims of the first patent and the whole of the second patent.

The particulars of breaches were that the respondent, at its factory, in the city of Montreal, in the province of Quebec, had manufactured and sold manifolding books or pads covered by the claims of these patents.

The defence was a denial of the alleged infringement; and, moreover, that, having regard to the common knowledge of the art and to the prior patents, publications and uses set forth in the particulars of objection, there was nothing new and there was no invention in the letters patent invoked by the appellant.

The learned President of the Exchequer Court of Canada dismissed the action on the grounds of anticipation and lack of subject-matter.

Patent 237,913 is a patent for an alleged new and useful improvement in manifolding devices. The specification discloses a machine adapted to receive and handle manifold

(1) [1932] Ex. C.R. 39.

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sales-books, pads, etc., and especially multiple form books and pads of the type employing continuous zigzag folded sheets.

The machine is said to be especially designed for the reception and handling of books or multiple forms of this character and involves means for receiving and supporting a manifolding book, a writing tablet or support, means for advancing the several sheets of the book over the surface of the tablet, means for separating the sheets as they leave the book, means for interleaving the sheets with carbon paper, means for manually registering the printed forms on the several sheets when the first set of forms is to be written upon, means for automatically maintaining such registry on the succeeding forms, means for separating the sheets after they have been written upon, and for transferring one or more sheets to a locked secret compartment, and means for severing the remaining sheets to permit removal for recording, filing or otherwise. The only claims under this patent in respect of which infringement is alleged are claims nos. 1, 13 (*a*), 14 and 15.

The other patent is for an alleged new and useful improvement in a "Manifolding book." The specification relates to record supply devices for use with manifolding machines and, with respect to its more specific features, to a manifolding book or pad for use in manifolding autographic registers and other machines which are adapted for the feeding of paper strips into position for the making of two or more records simultaneously by impression transfer to a lower strip of a record made on an upper strip. The supply pad is described as consisting in a plurality of similar continuous strips of printed forms superposed, interengaged, zigzag folded, each strip being provided with one or more apertures adjacent the longitudinal margin of the leaf and in transverse alignment. It is stated that the apertures serve a dual purpose: first, to arrest the feed of the forms in the register; and, second, to assist in maintaining registry between the different sheets of the form and between sets of forms throughout the pad. The pad, which is flat, is placed in a compartment at one end of the autographic register, and the leaves of the top set of the pad are threaded over the plates and engaged with the feeding mechanism. In operation, each set of leaves is serially ad-

vanced as a unit across the plates (or writing tablet) by the disc feed mechanically operated by a lever or handle until the apertures in the form are reached, when feeding stops because of the cessation of the friction between the discs and the forms. The form, which usually consists of sets of three or more superposed strips on all of which appears printed matter, is then in proper writing position on the platen and the various strips of the form are in registry one with the other.

The writing on the top strip is reproduced on the lower strips by means of sheets of carbon paper transversely inserted between the strips of the form; so that one invoice, for instance, can be made out on the top strip and the strips underneath it are fac-similes of the written strip. Then, by means of the mechanism, the strips are passed along the top of the apparatus to a place where the top strips come out and can readily be detached from the remainder of the strips.

But the lowermost strip of the completed form, commonly called the audit form, is ordinarily deflected downwardly into a locked compartment which is beyond the control of the operator; and such audit strip is there refolded and retained integrally connected across the platen with the unused portion of the supply pad.

This patent contains thirteen claims, upon all of which the appellant relied. Claim no. 2 may however be selected as typical and as describing the essential characteristics of the pad in question. It is in the following terms:—

> 2. A supply pad for manifolding machines including, in combination, a plurality of record strips folded zig-zag, the folds of one interengaged with those of the other so as to provide superposed sets of superposed leaves connected end-to-end, each strip having a longitudinal series of printed forms and a series of form-registering apertures in fixed relation to said forms, respectively.

The only infringement alleged in the particulars of breaches is the manufacture and sale of the book or pad (or in other words of the record "supply device" alone); the action is not for an infringement of the machine.

The utility of the pad is admitted and it will not therefore be necessary or useful to discuss its advantages. The questions are anticipation and subject matter.

The learned trial judge examined in detail and with the most minute attention the prior patents and uses alleged

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as anticipations. He gave particular attention to Sherman (U.S.A., 1922), Holmes (U.S.A., 1902), Bentel (U.S.A., 1899) and Shirek & al (U.S.A., 1901), all anterior to patent no. 237,913 issued on February 19, 1924; and to patent no. 246,547, on 3rd February, 1925. In the course of a careful analysis of these patents, the learned President said (N. B. Wiswall, to whom he refers, was the original applicant for the patents in suit): *(Here follow quotations from the judgment of the learned President)* (1).

* * *

In fact, the appellant, both in its factum and at bar, conceded that

> the principle of superposed, inter-engaged zig-zag folded forms was old and the principle of feed-arresting, form-registering apertures was also old;

but the appellant claimed

> the combination of the two was new, so that the various patents relating to the first principle and the Shoup-Oliver patent relating to the second principle are not anticipations of Wiswall.

For the better appreciation of the situation, the Shoup-Oliver patent (Can. no. 225,649), just referred to, should now be described. This patent issued on the 7th day of November, 1922, on an application filed on the 23rd day of February, 1921. It covers a special type of autographic register in which the feed of the continuous strips depends upon the co-operation with the strips of two pairs of circular discs which grip the strips together between them and, upon the manual operation of a handle, cause them to be drawn forward. In the paper strips designed for use in this device, there are a series of holes in appropriate relation to each form and in register with one another. These holes are in the track of the discs, which, upon the holes reaching them, lose their grip and cause the progress of the strips to stop, notwithstanding that the discs continue to be turned. The holes are so placed that stoppage occurs at points such that the last set of forms used is in a position for ready detachment and the next following set in a position for use on the writing plate. A special arrangement is provided whereby, after this fresh set of forms has been written upon, the strips are moved slightly forward by a simple mechanism, so that the gripping discs escape from

(1) [1932] Ex. C.R. 39, at 48, 49, 50, 51, 52.

the holes and renew their traction on the strips until they are reached by a fresh set of holes in the latter.

Under the corresponding United States Shoup-Oliver patent, the American Sales Book Company Limited, with which the plaintiff company is associated, had obtained a licence from the Autographic Register Company, of which the defendant is a subsidiary, and both companies had, from about 1918 on, been manufacturing and selling in competition autographic registers incorporating the Shoup-Oliver invention and supplies of paper for use in such registers. During these years, the paper supply made and sold by both companies was in the form of rolls; but, in or about 1923, the appellant commenced selling flat stationery and, in 1925, the respondent began to sell a similar zig-zag folded flat paper supply, either this form or the rolled form being adapted for use in its machines by the mere omission of the spindles, when the first form was used.

Bearing in mind the above facts and the purport and object of the Shoup-Oliver patent, we may now return to the appellant's contentions.

In a supplementary memorandum, the appellant declared he did

not claim as Wiswall's invention either (*a*) The interleaving of a number of strips of printed paper forms. Numerous counter sales book and register supply pad patents show this, including the U.S. patents to Lawson, Rogers, Shoup 561,350, Sherman, and Smith; or (*b*) The zigzag folding of interleaved printed forms into a book or pad. This is shewn in the U.S. patents to Copeland, Bentel, Begg, Brakespear, McDowell, Holmes and Shirek; or (*c*) A record strip having a longitudinal series of form-registering feed-controlling apertures. This is shewn in the U.S. patents to Konerman, Shoup and Oliver, and Schlichter.

But the appellant does claim as Wiswall's invention

The combination of interleaved strips of printed forms folded zigzag, having form-registering, feed-controlling apertures in fixed relation to the printed forms on the strips, the apertures in one strip being interlocked or interengaged with the corresponding apertures in the other strips of the forms before they are placed in the autographic register, and maintain such registration during the passage of the forms through the register.

The combination of elements, the interlocking of a number of series of form-registering apertures, and such interlocking in alternate sets of forms constitute novel subject matter.

The invention as now defined, however, differs from that defined in the patent and goes beyond the patent claims, to which it adds new characteristics not to be found in the claims themselves.

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It need not be repeated that the claim in a specification is primarily designed for delimitation and that the monopoly is confined to what the patentee has claimed as his invention. (*Mailman* v. *Gillette Safety Razor Company* (1), and cases there referred to). If we turn to the patent claims; and if we look at claim no. 2 already set out above and selected as fairly describing the essential characteristics of the pad in question, we find that the thing or combination which the applicant regarded as new and in which he claimed an exclusive property and privilege (*Patent Act*, s. 14 (*c*)) was a supply pad including, in combination,

(*a*) A plurality of record strips;
(*b*) Strips folded zigzag;
(*c*) The folds of one strip interengaged with those of the other, so as to provide superposed sets of superposed leaves connected end to end;
(*d*) Each strip having a longitudinal series of printed forms;
(*e*) Each strip having a series of form-registering apertures in fixed relation to said forms.

The specification in the patent in suit refers to the "form-registering" apertures in this way:

As hereinafter explained, the apertures serve not only as form-registering apertures but also as feed-control apertures, and are of sufficient diameter to accommodate the feeding and registering mechanism of the machine with which the pad is used as will appear hereinafter.

* * * * *

By placing the apertures clear of the weakened lines at the folds, the tearing off of the leaves does not affect the apertures, and hence the succeeding set of leaves will be retained with their apertures in engagement with the discs and consequently with their forms in registry relation.

* * * * *

For filing purposes this is a great convenience because a pointed filing pin may be readily thrust through the interrupting leaf material whereas it would be more difficult to thrust such a pin through the thickness of the pad were there no apertures.

The expression "feed-control aperture" does not appear in the claims.

Now, if one compares the characteristics described in the patent claims with the disclaimers made by the appellant in its memorandum, it will at once become apparent that there was nothing new in the pad as described in the specification and that the only claim of novelty consisted in the

(1) [1932] S.C.R. 724, at 729, 730 and 731.

so-called combination of elements, every one of which was old and every one of which had been designed and used for a purpose which was old and well known in the art.

Assuming the maintenance of an integral connection between the refolded strip in the locked compartment and the supply pad as a whole was not previously claimed as new, it was suggested and disclosed in the prior publications. The prior art completely disclosed the pad as claimed in the patent in suit, with the possible exception of the provision for apertures or holes in the pad (although it might be contended that the apertures in Bentel's or Sherman's supply pads were sufficiently within the terms of the appellant's patent). But be that as it may, the combination now claimed by the appellant would consist, if we understand it correctly, in the addition to the flat pad of apertures already known and already in use for the same purpose in the roll type of paper supply for autographic registers of the same character; and the question which the learned President had to determine and which is now submitted to us, is whether there is in the so-called combination sufficient novelty to support the patent.

Granting this was a new combination—and, in our view it discloses a composite article rather than a combination in the patent sense—novelty and utility, without something more requiring the exercise of an inventive faculty, would not be sufficient to make it invention. The patentee must shew an inventive step. In this case, admittedly, the idea of the supply pad was lying ready in the prior art, the form-registering feed-controlling apertures were already disclosed and in use in the roll form of supply paper. The pad was there and the apertures were there. And the patentee added the apertures to the pad for the identical and analogous purpose for which these apertures had been disclosed and were being used in the rolls. Moreover, these holes or apertures would be necessary to co-operate with a machine equipped with disc rollers for purposes of traction. Obviously they would be required to adapt them to the Shoup-Oliver type of disc feed. That is something which would follow of necessity from the device of the mechanism. (*Lamson Paragon Supply Co. Ltd.* v. *Carter-Davis Ltd.* (1).)

(1) (1931) 48 R.P.C. 133, at 147.

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We think it impossible to ascribe to the adaptation of the apertures to the flat packet the character of patentable invention. No doubt mere smallness or simplicity will not prevent a patent being valid; but if you apply a known device in the ordinary way to an analogous use, without any novelty in the mode of applying it, you may get a useful article, you may get an article which, in a sense, is improved and novel, but unless you shew invention, that is to say, that in adapting the old device there were difficulties to overcome or there is ingenuity in the mode of making the adaptation, you do not shew a valid subject-matter of a patent. Such we take it to be the law as laid down by Lord Halsbury in *Morgan* v. *Windover* (1), by Lindley L.J. in *Elias* v. *Grovesend Tinplate Co.* (2), by Romer J. in *Wood* v. *Raphael,* the well-known eye-glass case (3), and finally by the House of Lords in *Riekmann* v. *Thierry* (4) (Lord Halsbury L.C., Lord Macnaghten, Lord Shand and Lord Davey), where Lord Davey referred to the decisions of the House, in *Harwood* v. *Great Northern Railway Company* (5), and said that the law upon this subject was all to be found in that case.

The appellant pointed to the commercial success of the pad covered by the patent. In any event, commercial success would not afford a basis for controverting the conclusion that the alleged improvements were not of such a character as to shew invention in the pertinent sense (*Guettler* v. *Canadian International Paper* (6).) The relation, however, between commercial success and the novelty or the merit of an invention is nothing but a question of fact. In this case, the finding of fact of the trial judge is that the commercial success was due, not to the invention itself, but to several other extraneous causes. We would be unable to disagree from that finding, for the evidence points strongly as factors of success, to the awakening of new demands in the commercial enterprises and to the fact that the appellant was specially energetic in business.

We were referred to a judgment of the United States District Court, Southern District of New York, in a case of

(1) (1890) 7 R.P.C. 131 at 134.
(2) (1890) 7 R.P.C. 455.
(3) (1896) 13 R.P.C. 730, at 735.
(4) (1896) 14 R.P.C. 105.
(5) (1865) 11 H.L.C. 654.
(6) [1928] S.C.R. 438.

American Sales Book Company Limited v. *Autographic Register Company* (1), and which upheld the United States patent for what was stated before us as being a similar pad. While that judgment is certainly entitled to great respect, the claims in the United States patent are somewhat different from those in the Canadian patent; and it is apparent that the facts presented must have been different, for we can find no foundation in the present case for some of the holdings of the learned judge presiding in the District Court. But there is yet a more important point of distinction which must be emphasized. It would appear from the reasons of judgment that, in the New York court, the case was fought and submitted almost exclusively, if not entirely, upon the question of anticipation and that there was no legal contest on the point of subject-matter—which was the main ground for the judgment rendered by the learned President of the Exchequer Court of Canada.

We would be disposed to go a step further than the learned President and to say that there was sufficient anticipation in the prior art to defeat the validity of the patent no. 246,547; but we are content to rest our judgment on the objection upheld by him and which is: that if there be distinction between what Wiswall claimed and what other patentees had previously described, published and used, it is nowhere suggested that there was any technical difficulty to overcome and, at all events, the advance is so slight as not to call for that degree of inventive genius as to justify a monopoly.

It remains to consider patent no. 237,913 in respect of which the learned President said:

I fail to conceive of any ground upon which the plaintiff should succeed in its claim that there was infringement of this patent.

The patent was granted for an improvement in a manifolding machine.

The claims of the patent alleged to have been infringed by the respondent cover a combination of the machine and a "pad of the type employing continuous zigzag folded sheets." The application for the patent was filed almost two years before the application for the pad patent in suit (246,547). The specification states that the machine is

(1) (1931) 54 Fed. R. (second series) 782.

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adapted to receive and handle * * * multiple form books and pads of the type employing continuous zigzag folded sheets

and, to that extent, it supplies cogent evidence of the fact that this type of books and pads were already in use in the trade; but the specification expressly declares that the machine "forming the subject-matter of the invention" is designed for the handling of manifold books

regardless of whether the several sheets are zigzag folded, interfolded, separately folded, rolled or otherwise,

so that it is entirely immaterial what the form of paper supply is. The respondent is not charged with infringement of the machine nor with infringement of the combination of the character described. The learned President declares that these conditions were not put in issue at the trial. The particulars of breaches limit the issues to the manufacture and sale of the books or pads. Nor could we readily understand, in the circumstances, a charge for infringement of the combination based solely on the manufacture and sale of a pad used in the respondent's machine which is not in any way in issue here, and more particularly where the subject-matter of the appellant's invention is described as a device absolutely

regardless of whether the several sheets are zigzag folded, interfolded, separately folded, rolled or otherwise.

It was urged upon us, in the appellant's supplementary memorandum, that the claims of patent no. 237,913, on which the appellant relied, describe the combination of the machine and supply pad as including a locked compartment at the forward end of the register to take the refolded audit copy of the forms after they have passed over the writing platen. It was further urged that in the advertising matter issued by the respondent, the use of similar registers with the flat packet supply pads and with the locked compartment is illustrated and its advantages are emphasized. It is now argued from that that the respondent has invited prospective customers to purchase and use the pads of their manufacture with a similar machine of the disc feed type, which they also manufacture and, thus, to induce the purchasers to infringe the combination claims of the appellant in the patent in question.

We think the respondent is justified in answering that the trial did not proceed on that footing and that it was not called upon to meet that kind of a case. Had such a charge

of infringement been made *in limine litis* it would have been open to the respondent to adduce evidence and to shew reasons why it was not available to the appellant company.

The infringement, as defined by the appellant, was stated to consist in the manufacture and sale of the pad; and no evidence was directed towards shewing, on the part of the respondent, an intention of manufacturing and selling the pad for the purpose of using it in the appellant's register or, generally, of infringing the appellant's combination described in the claims referred to.

The question whether, under Canadian Patent law, the making or selling of a separate element of a combination constitutes, under given circumstances, an infringement of the invention, does not arise here. In our view, that question was not raised by the appellant; nor could it properly be raised on the record submitted. Surely, under the patent in question, it could not be contended that using any flat packet pad supply with any manifolding machine (even fitted with the secret compartment) would constitute infringement of the combination protected by the claims relied on. The invention which is claimed and which is protected, assuming the claim is valid—consists in the combination of the manifolding machine described in the relevant claims with the manifolding pad therein described. Making or selling the machine alone, without more, is not of itself infringing the combination. Making or selling the pad alone is not of itself infringing the combination (*Townsend* v. *Haworth* (1); *The Dunlop Pneumatic Tyre Co. Limited* v. *David Moseley & Sons, Ltd.* (2)), confirmed in appeal (3); and neither does the making or selling of the pad for use with another similar machine constitute infringement of the combination (and that is to say: of the invention claimed and protected), unless indeed it be also shewn that the other machine is itself an infringement of the particular machine described in the combination. That is not the sort of infringement charged by the appellant or made part of the issues in the present

(1) (1875) 48 L.J. Ch. 770. (2) [1904] 1 Ch. Div. 164.
(3) [1904] 1 Ch. Div. 612.

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case. The right of the respondent to make, use or sell its autographic register of the disc feed type was not in dispute.

In our opinion the action as brought was rightly dismissed. The appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Tilley, Johnston, Thomson & Parmenter.*

Solicitors for the respondent: *Smart & Biggar.*

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*Apr. 13.
*Apr. 15.

DONAT THIFFAULT .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Appeal—Leave to appeal to Supreme Court of Canada—Criminal law—Court of appeal judgment conflicting with judgment of another court of appeal in like case—Both judgments not necessarily in similar cases, but upon similar questions of law—Section 1025 Cr. C.

In order to obtain leave to appeal to the Supreme Court of Canada in a criminal case under section 1025 Cr. C., it is not necessary that the judgment from which it is sought to appeal and that of any other court of appeal should have been rendered in cases in all respects the same; but there should be a conflict between the two judgments upon a question of law similar in both cases.

Barré v. *The King* ([1927] S.C.R. 284) foll.; *The King* v. *Boak* ([1926] S.C.R. 481) and *Liebling* v. *The King* ([1932] S.C.R. 101) ref.

MOTION under section 1025 of the Criminal Code for leave to appeal to this court from the judgment of the Court of King's Bench, appeal side, province of Quebec, upholding the conviction of the appellant. Leave to appeal was granted by the judgment now reported.

Lucien Gendron K.C. and *L. Pinsonneault* for the motion.

V. Bienvenue K.C. contra.

*PRESENT:—Cannon J. in chambers.

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CANNON J.—Le requérant, se basant sur l'article 1025 du code criminel, demande à un juge de cette cour permission d'appeler parce que le jugement de la Cour du Banc du Roi de la province de Québec renvoyant, le 31 mars 1933, son appel en droit est en opposition avec un jugement de la cour d'appel de la province d'Ontario dans une cause de même nature. Le requérant allègue que la Cour du Banc du Roi a énoncé le principe que le juge au procès pouvait exercer sa discrétion quant à l'admissibilité d'une déclaration comme preuve sans avoir épuisé toutes les circonstances qui ont entouré sa déclaration. Il cite à l'appui ce qu'a dit l'honorable juge Galipeault en rendant le jugement de la cour:

Il est évident que le juge a été satisfait que la déclaration de l'accusé a été faite volontairement et il a pu et dû s'enquérir par les témoignages de Lemire et de Mitchell de *toutes les circonstances* dans lesquelles cette déclaration aurait été faite. S'il n'eût pas été convaincu, il lui aurait été permis de faire appeler les deux autres témoins qui assistaient à cette déclaration, mais il a usé de sa discrétion, suivant son droit.

Dans la cause de *Seabrooke* (1), la cour d'appel d'Ontario, le 9 août 1932, a décidé ce qui suit:

In considering whether statements made by an accused to the police are admissible in evidence, it is the duty of the trial judge to inquire thoroughly into their voluntary character, using all available sources of information, and where on the evidence of only one detective, the trial Judge admits statements made before five detectives and a clerk without questioning the others as to their voluntary character or examining the written report, a new trial was ordered.

Je crois que les deux cours d'appel sont d'accord que, en principe, *toutes* les circonstances qui ont entouré la déclaration doivent être scrutées par le juge présidant au procès, avant qu'il exerce sa discrétion quant à l'admissibilité de la déclaration du prévenu.

La Cour du Banc du Roi croit que le juge pouvait se contenter des témoignages de Lemire et de Mitchell pour satisfaire sa conscience, s'il était convaincu que ces deux témoignages lui fournissaient toutes les circonstances. La cour d'appel d'Ontario, au contraire, se basant sur le jugement de cette cour dans *Sankey* v. *The King* (2), a dit que le juge présidant au procès

should have had before him the evidence of the other detectives and the clerk who were present during the interrogation of the accused and also the written record of the examination made by the clerk, and should also have afforded the accused the option of giving his version of the occur-

(1) (1932) 58 Can. Cr. Cas. 363.

(2) (1927) 48 Can. Cr. Cas. 195, [1927] S.C.R. 436.

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rences connected with his examination and the substance of his statements.

Dans l'espèce, la déclaration a été prise par le greffier Chouinard après une mise en garde par le sous-chef Tremblay. Répondant aux interrogations du chef Lemire, le prévenu a signé cette déclaration en présence de deux témoins, Mitchell et Tremblay. C'est cette déclaration portant sa signature qui a été produite au procès, au cours du témoignage de Lemire, avant d'entendre Mitchell.

L'on reproche au juge d'avoir permis cette production et la lecture de cette déclaration aux jurés avant d'avoir entendu le témoin Mitchell, et sans entendre Tremblay, qui aurait mis en garde le prévenu, ni le greffier Chouinard, qui aurait clavigraphié les réponses de l'appelant, alors détenu comme témoin important pendant l'enquête du coroner, mais n'étant pas encore en état d'arrestation, ni accusé du meurtre de sa femme.

Le juge de première instance a-t-il eu tort de se déclarer satisfait de la preuve faite par le seul Lemire pour conclure à l'admissibilité de cette déclaration écrite signée par le prévenu, ou aurait-il dû épuiser d'abord toutes les sources d'information, c'est-à-dire examiner, non seulement Lemire, mais aussi Mitchell, Tremblay et le greffier Chouinard?

A première vue, la décision dans l'affaire de *Seabrooke* (1), qui est une cause de même nature, même si l'analogie n'est pas parfaite avec celle qui nous occupe, semble opposée à la procédure suivie par le juge en la présente cause avec l'approbation de la cour d'appel. La question a beaucoup d'importance. Le conflit apparent de ces deux points de vue au sujet de l'étendue de l'enquête, ou de la nature et de l'espèce de preuve que le juge présidant au procès doit imposer à la Couronne, à qui incombe totalement ce fardeau, avant de permettre la preuve d'admissions ou de déclarations faites par l'accusé à une personne en autorité devrait, je crois, être soumise à cette cour pour établir une pratique uniforme pour toutes les provinces. Il est important de décider si, oui ou non, la règle posée par cette cour *re Sankey* (2) est d'application générale et a été posée comme condition préalable à l'exercice de la discrétion du juge quant à l'admissibilité de la déclaration. Voici ce que disait le juge-en-chef Anglin à la page 441:

We think that the police officer who obtained that statement should have fully disclosed all that took place on each of the occasions when

(1) (1932) 58 Can. Cr. Cas. 363. (2) [1927] S.C.R. 436.

he "interviewed" the prisoner; and, if another policeman was present, as the defendant swore at the trial, his evidence should have been adduced before the statement was received in evidence. With all the facts before him, the learned judge should form his own opinion that the tendered statement was indeed free and voluntary as the basis for its admission, rather than accept the mere opinion of the police officer, who had obtained it, that it was made "voluntarily and freely."

It should also be borne in mind that while, on the one hand, questioning of the accused by the police, if properly conducted and after warning duly given, will not *per se* render his statement inadmissible, on the other hand, the burden of establishing to the satisfaction of the court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown. *The King* v. *Bellos* (1); *Prosko* v. *The King* (2). That burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer, who obtained it, that it was made freely and voluntarily.

Pour exercer l'autorité que me confère l'article 1025 du Code criminel, je ne me préoccupe en aucune façon du bien ou du mal fondé du jugement *a quo;* mais on doit me démontrer que ce jugement entre en conflit avec l'arrêt d'un autre tribunal d'appel. Il n'est pas nécessaire que cet arrêt ait été prononcé dans une cause identique; mais il faut, au moins, qu'une question de droit analogue, servant de base à chacun des arrêts, ait été tranchée par chaque cour d'appel dans un sens différent. *Barré* v. *The King* (3); *The King* v. *Boak* (4); *Liebling* v. *The King* (5).

La question à décider, où il paraît y avoir conflit, serait donc la suivante:

Le juge présidant au procès doit-il, pour se rendre compte de *toutes* les circonstances qui ont précédé et accompagné une déclaration de l'accusé, épuiser *toutes* les sources d'information, examiner *tous* les témoins disponibles, même si la déclaration a été signée par l'accusé lui-même et commence par une mise en garde de ne tenir compte d'aucune promesse ou menace qui aurait pu lui être faite et un avertissement du danger que cette déclaration pourrait être utilisée au procès contre lui? Ou bien, peut-il se contenter de cette déclaration écrite après avoir entendu un témoin pour prouver les circonstances de l'interrogatoire, la prise et la lecture de la déclaration et l'apposition de la signature du prévenu devant témoins, sans entendre l'officier qui

(1) [1927] S.C.R. 258.
(2) (1922) 63 Can. S.C.R. 226.
(3) [1927] S.C.R. 284.
(4) [1926] S.C.R. 481.
(5) (1932) S.C.R. 101, at 105.

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aurait mis le prisonnier en garde, ni le greffier qui aurait pris la déclaration, ni l'officier ayant eu sous sa garde le prévenu après son arrestation et avant son interrogatoire?

Je n'exprime aucune opinion quant au mérite; mais je crois devoir accorder et j'accorde la permission d'appeler. Cette cause devra être inscrite pour audition en tête de la liste de la province de Québec au prochain terme de cette cour.

Motion granted.

ROBERTSON *v.* LA COMMISSION DES LIQUEURS DE QUEBEC

1932

*Oct. 27.
*Nov. 28.

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

Penal law—Illegal conveying of liquors—Boat confiscated and later stolen—Revendication by the owner

APPEAL by the plaintiff appellant from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Bouffard J., and dismissing the appellant's action.

The action was brought by the appellant against the respondent to recover possession of a vessel which he alleged he owned and which was seized at the instance of the respondent when transporting alcohol contrary to the provisions of a provincial statute.

The trial judge held that the appellant had not established title to the vessel, and his judgment was affirmed by the appellate court.

On the appeal to this Court, after hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal with costs, holding that, if the evidence did not establish who the real owners of the vessel were, it did establish that the appellant was not the real owner and that, consequently, his action must fail.

Appeal dismissed with costs.

Armand La Vergne K.C. and *Jos. La Vergne* for the appellant.

Charles Lanctot K.C. and *F. Choquette K.C.* for the respondent.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

(1) (1932) Q.R. 5 4 K.B. 10.

HIRAM WALKER & SONS LIMITED....APPELLANT; 1933

AND

THE CORPORATION OF THE TOWN OF WALKERVILLE .....} RESPONDENT.

*Feb. 15.
*Mar. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Assessability of "racks" for storage of barrels of whisky during maturing and aging process, elevator, fan, sprinkling system, electric wiring—Assessment Act, R.S.O., 1927, c. 238—"Real property" (s. 1 (h) (4))—Exemption of "fixed machinery used for manufacturing purposes" (s. 4 (19)).

Held, that certain structures, known as "racks," for storage of barrels of whisky during the maturing and aging process, were, along with the erections enclosing them, assessable under the *Assessment Act,* R.S.O., 1927, c. 238, as being real property, and the racks not being "machinery" within the exemption in s. 4 (19) of "fixed machinery used for manufacturing purposes"; but that the maturing and aging of the whisky was a part of the process of manufacture, and an elevator (for hoisting the barrels, etc.) and a fan (for the circulation of heated air), being used in connection with such process, came within said exemption; that the sprinkling system and electric wiring were not machines, therefore not exempt, and were assessable.

APPEAL from the judgment of the Court of Appeal for Ontario (1) which set aside the judgment of the Ontario Railway and Municipal Board (which had varied the judgment of Coughlin C.C.J.) and restored the judgment of Coughlin C.C.J., holding that the property in question of the present appellants was real estate and not personalty, and that it was not "fixed machinery used for manufacturing purposes" within the exemption provided by s. 4 (19) of the *Assessment Act,* R.S.O., 1927, c. 238, and that therefore the property was assessable under the said Act. The nature of the property in question is described in the judgment now reported. Subject to a certain variation of the judgment below, the appeal to this Court was dismissed with costs.

Section 1 (*h*) of the said Act provides:

"Land," "Real Property" and "Real Estate" shall include:—

* * *

(4) All buildings, or any part of any building, and all structures, machinery and fixtures, erected or placed upon, in, over, under, or affixed to land;

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

(1) (1931) 41 Ont. W.N. 6.

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HIRAM WALKER & SONS LTD. v. THE TOWN OF WALKERVILLE.

Section 4 provides:

All real property in Ontario * * * shall be liable to taxation, subject to the following exemptions:—

* * *

(19) All fixed machinery used for manufacturing or farming purposes, including the foundations on which the same rests; but not * * *

J. B. Aylesworth for the appellant.

N. C. MacPhee for the respondent.

The judgment of the court was delivered by

SMITH J.—The appellant carries on business at Walkerville as a distiller and vendor of whiskies, and requires the subjection of its products to a process known as maturing and aging, and, for the carrying on of this process, has had constructed what are known as racks, by which each barrel of liquor is held in suspension with free circulation of air and ready accessibility to every barrel.

The question which arises is whether these racks and certain electrical and other equipment in two of these racks are assessable under the *Assessment Act*, R.S.O., 1927, ch. 238, as land. The racks in question consist of upright timbers in parallel rows, so designed that between each two such rows the barrels of liquor can be suspended on their sides on wooden cross pieces, or barrel slides bolted to the uprights. On either side of each such pair of rows, and separating them from the next pair, sufficient room remains for a walkway from which each barrel may be inspected or identified. The uprights in all the lowest or first rows are "dowelled" to an oak sill which supports them, which sill in turn rests upon a concrete ridge or wall underneath the row. To each pair of uprights are three tiers of barrels. Superimposed on the rows of uprights is a second storey of similar rows, with similar cross pieces and barrel slides, and so on until there are in all nine storeys or tiers of these uprights, with their cross pieces and barrel slides, reaching a height of some 86 feet.

This network of timbers and cross-pieces is all bolted or spiked together in such a way that, when completed, it makes a strong structure, one of those in question accommodating 55,000 barrels of whisky. This structure, and the walls surrounding it, are erected together, the outer wall being fastened to the uprights of the rack next the walls

by means of bolts protruding inwardly from the wall on each side of an upright, across which bolts a strap of iron is placed and fastened on the inner side of the upright. This fastening is repeated at proper intervals throughout the length of the walls and at each storey. The outer walls are of brick, 22 inches thick at the bottom, tapering to 12 inches at the top. The roof of the building rests, not on the walls, but upon the rack.

I am of opinion, notwithstanding the able argument of appellant's counsel, that the Court of Appeal was right in concluding that the rack and building constitute a single structure, so interlaced and bound together that one cannot be separated from the other so that it may be said that the rack is a chattel separate from the building.

It is no doubt true, as argued, that the rack could be dismantled by unbolting the various pieces that are bolted together, and withdrawing the spikes or nails so that the material might be reconstructed into a similar rack upon another site. Before this could be done, it would be necessary to take the roof off, because the rack is its only support. Then it would be necessary to unfasten all the bolts by which the walls are tied to the uprights of the rack. The final result would be that there would be left a building 173 feet long by 142 feet wide and 86 feet high, without a roof. These walls, of course, without internal connections or external buttresses, would necessarily collapse ultimately through wind pressure.

I am unable to conclude that this process of removing the racks could be done without damaging the building, which, it is admitted, is part of the land.

It is argued, however, that these racks are fixed machinery, used for manufacturing purposes, and therefore exempt from assessment under subsection 19 of section 4 of the Act, which is in part as follows:

> All fixed machinery used for manufacturing or farming purposes, including the foundations on which the same rests; * * *

I am of opinion that maturing and aging is part of the process of manufacture of the whisky, as the liquor is not in condition to be placed upon the market until that process is completed, but I agree with the Court of Appeal that the racks are not machinery, within the meaning of the Act.

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Smith J.

In the case of *Chamberlayne* v. *Collins* (1), quoted in the reasons by the Court of Appeal, Davey, L.J., defined machinery:

> * * * to be the adaptation of mechanical means to a particular end by the application of natural forces.

I agree with what is said by the Court of Appeal that it would be straining the word "machinery" out of its true significance as used in the statute to apply it to this system of racks for the storage of barrels of liquor. The section is one providing for an exemption, and the word "machinery" should not be given a wider meaning than its ordinary signification.

I am unable, however, to agree with the opinion expressed in the Court of Appeal and by the learned county judge that the use of the elevator has nothing to do with the process of manufacture. In my view, as already stated, the maturing and aging of the whisky is a part of the process of manufacture. The placing and keeping of the barrels in these racks with the necessary attention to a circulation of heated air is all in connection with the manufacturing process, and any fixed machinery used for the carrying on of that process is, in my view, fixed machinery used for manufacturing purposes. The elevator therefore is, I think, exempt.

The circulation of heated air throughout the building is carried on by means of a fan, which distributes the heated air throughout the building, and causes circulation. The fan is certainly fixed machinery and is used in connection with the aging process, and therefore for manufacturing purposes, so that this heating apparatus also is, in my view, exempt.

The sprinkling system and the electric wiring are not machines, and have therefore been rightly held to be not exempt.

With the slight variation indicated, the appeal will be dismissed with costs.

Appeal dismissed with costs, subject to a certain variation in judgment below.

Solicitors for the appellant: *Bartlet, Aylesworth & McGladdery.*

Solicitors for the respondent: *MacPhee & Riordan.*

(1) (1894) 10 T.L.R. 233.

GEORGE WESTCOTT, SOLE SURVIVING EXECUTOR OF THE ESTATE OF ARCHIBALD McCORMICK, DECEASED (DEFENDANT). } APPELLANT;

1933
*Feb. 22.
*Mar. 15.

AND

MARTIN LUTHER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Promissory note—Nature of agreement—Effect of document—Conditional or unconditional promise—Consideration—Onus—Collateral engagement—Request by maker not to produce note until after maker's death—Bills of Exchange Act, R.S.C., 1927, c. 16, ss. 176, 58.

Respondent, who had long worked for M. on M.'s farm, sued, after M.'s death, on an alleged promissory note to him from M., dated January 13, 1927, for $5,000, payable one year after date. Respondent (believed by the trial judge) testified that M. made the note on the occasion of one of their yearly settlements to fix the balance due respondent on wage account, that the balance found due for wages was $206.87, that respondent, asked by M. if he needed the money, replied that he did not as long as he remained there, that M. then said that he wanted to give respondent something, referred to services for M. of respondent's mother (who had recently died) and had respondent fill out (on M.'s directions) a note form and signed it, but stated that he wanted to keep it for a while, to which respondent agreed; that M. kept the note until January, 1928, when he handed it to respondent, asking him not to tell anyone that he had it, and not to produce it until after M.'s death and then only if there was more than enough in M.'s estate to support M.'s sister, and if he would remain on the farm at his present wages until M. died; to all of which respondent agreed. M. died in February, 1929, leaving an estate of $50,000. His sister died soon after. Respondent then presented the note and sued thereon.

Held: Respondent's evidence that the note was signed by M. was abundantly corroborated in the evidence. The note was a promissory note within the *Bills of Exchange Act* (R.S.C., 1927, c. 16, s. 176) and respondent was entitled to recover thereon.

Respondent's acceptance of M.'s requests amounted to no more than a collateral engagement not to enforce his rights until the requests had been complied with. That did not make the document any the less an unconditional promise in writing by M. to pay at a fixed time a sum certain in money to respondent. The agreement not to enforce payment while M. lived was no part of the note. The terms of the note imported a present and unqualified obligation, and there was nothing in the evidence to justify the conclusion that its delivery by M. was conditional upon the fulfilment of his requests. Even if respondent could have been enjoined from enforcing payment in M.'s lifetime, the document was still a promissory note within the meaning of the Act. As such, it imported that valuable consideration had been given for it (s. 58), and the onus (thus shifted) to establish want of

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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consideration had not been met. Consideration being presumed until the contrary was shewn, M.'s obligation on the note was contractual, and not by way of testamentary gift.

APPEAL by the defendant, the sole surviving executor of the estate of Archibald McCormick, deceased, from the judgment of the Court of Appeal for Ontario (1), allowing the plaintiff's appeal from the judgment of His Honour, Judge Ross, Acting Judge of the County Court of the County of Kent, dismissing the plaintiff's action, which was brought to recover upon an alleged promissory note given by the said deceased to the plaintiff. The material facts of the case are sufficiently stated in the judgment now reported. The defendant's appeal to this Court was dismissed with costs.

A. G. Slaght K.C. and *J. H. Clark* for the appellant.

R. S. Robertson K.C. and *G. P. Campbell* for the respondent.

The judgment of the court was delivered by

LAMONT J.—The questions involved in this appeal are, (1) whether the document handed to the respondent under the circumstances detailed by him, by the late Archibald McCormick (hereinafter called the Deceased) is a promissory note within the *Bills of Exchange Act*, and (2), whether there was corroboration of the plaintiff's evidence that the document was signed by the deceased, sufficient to satisfy the requirement of section 11 of the Ontario *Evidence Act?*

A promissory note is defined by section 176 of the Act as follows:—

176. A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

Section 11 of the *Evidence Act* provides:—

11. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, 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.

(1) (1931) 40 Ont. W.N. 559.

The document in question here is:—

$5000. Due Jan. 13th 1928 Jan. 13th 1927.

One year after date I promise to pay to the order of Martin Luther Five Thousand Dollars at The Royal Bank of Canada for value received with interest at the rate of 5 per cent per annum as well after as before maturity.

A. McCormick.

The respondent had lived with the deceased on his farm during his whole life, some 43 years. After he quit attending school he received wages which were increased until he was getting $500 a year, a free house and garden, with liberty to pasture and feed his stock without charge if there was feed for them. The respondent worked the farm under the deceased's direction and took care of the stock. He lived in the house with the deceased and his sister Kate until he got married some fifteen years ago, and from that time he lived in the tenant's house which was close by. During the year it was customary for the deceased to give the respondent, from time to time as he required them, advances on account of his wages and an account of these sums was kept by each of the parties. Then, in the early part of January in the following year, they had a final settling up. The deceased's sister Kate kept the accounts for him.

On January 13, 1927, the respondent went to the deceased's house for a settling up of the accounts for the year 1926. Both account books shewed that there was a balance of $206.87 due to the respondent. According to the respondent's testimony the deceased asked him if he needed the money and he replied that he did not as long as he remained there. The deceased then said that he wanted to give him something; that he owed his mother something; that he had not given her anything for the last two years and only $1.50 per week at any time; that he was going to give him a note and if he did not need the money he would let it go on the note. The deceased went to an adjoining room and got a note form and gave it to the respondent to fill up, as the deceased could only write his name; that he filled it out, the deceased telling him to make it for $5,000 and to put in 5% interest. This he did, and the deceased signed it. It might here be pointed out that the

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respondent's mother had worked for the deceased for over forty years, and that she had died in 1926.

The respondent further testified that the deceased stated he wanted to keep the note for a while. To this the respondent was agreeable, and the deceased kept the note until January, 1928, when the respondent went over to settle up for the year 1927. On that occasion the question of the note was brought up and the deceased said that, as he was repairing the buildings on the place from which the respondent would obtain considerable benefit, he did not think he should pay interest on the note for that year. Whereupon the respondent indorsed on the back of the note a receipt for the payment of one year's interest. The interest had not been paid. The deceased then handed the note to the respondent and asked him not to tell anyone that he had it and not to produce it until after his (deceased's) death, and then only if there was more than enough in his estate to support Kate. The deceased also asked him if he would remain on the farm at his present wages until the deceased died. To all these requests the respondent agreed.

The deceased died on February 8, 1929, leaving an estate worth $50,000. Six weeks later his sister Kate died. The respondent then presented his note to the appellant who is the sole surviving executor of the deceased's estate. The appellant required strict proof of the respondent's claim. The respondent then brought this action on the note.

The County Court Judge, before whom the matter came, believed the story of the respondent and found that the note had been duly executed by the deceased, and delivered to the respondent as stated by him. He, however, thought that, on the respondent's own evidence, the note was not to be paid until the death of the deceased. From this he concluded that the respondent was setting up a parol agreement entirely different from that disclosed by the note on its face. Furthermore he was unable to find any corroboration of the statement of the respondent that he had given valuable consideration for the note, namely, the unpaid balance of his wages for 1926, and his promise to continue working on the farm, at his then wages, until after the death of the deceased. For these reasons he dismissed the action. This decision was reversed by the Court of Appeal.

Before this Court the burden of the argument on behalf of the appellant was that, according to the respondent's evidence, the real agreement between the parties was that the note was to be paid only after the deceased's death and then only conditionally; that this was not the agreement set out on the face of the note; that the note was, therefore, a false and misleading document, the falsity of which prevented it from being a promissory note within the meaning of the *Bills of Exchange Act* and, therefore, no presumption could arise, under section 58 of the Act, that the respondent was a holder for value.

In my opinion this contention cannot be upheld. What the respondent agreed to when the note was handed to him was: (*a*) that he would not mention to anyone the fact that he held it; (*b*) that he would not produce it until after the death of deceased; and (*c*) then only if there was in the deceased's estate more than sufficient to support his sister.

The deceased's reason for making the requests contained in (*a*) and (*b*) presumably was to prevent any unpleasantness with those nephews and nieces who will be entitled to the money if respondent does not succeed in establishing his claim, and to whose importunity he may have feared he would be exposed if it were known that he had benefited a stranger to the prejudice of his own blood relations. The reason for requiring (*c*) was a desire to make sure that his sister would not come to want.

It will be observed that nowhere did the deceased suggest that the note was not to be a present obligation in favour of the respondent. All he does is to request the respondent not to enforce his rights until after he himself has passed away, leaving an estate more than sufficient to support his sister. The acceptance by the respondent of these requirements amounts, as the Court of Appeal held, to no more than a collateral engagement on his part not to enforce his rights until the requests had been complied with. That does not make the document any the less an unconditional promise in writing by the deceased to pay at a fixed time a sum certain in money to the respondent. There is no ambiguity in the note itself. The respondent's agreement not to enforce payment while the deceased was living, was no part of the note, the terms of which import a present and unqualified obligation, and there is nothing in the evidence to justify the conclusion that the delivery

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Lamont J.

of the note by the deceased was conditional upon the fulfilment of his requests. He was satisfied that the respondent would respect his wishes.

Whether the agreement of the respondent not to enforce the note in the deceased's lifetime would have afforded any defence to the note had action been brought upon it before the deceased's death, we need not inquire, for, even if it would and the respondent could have been enjoined from enforcing his rights, the document was still a promissory note within the meaning of the *Bills of Exchange Act*, and, as such, it imports that valuable consideration has been given for it (section 58). This shifts to the appellant the onus of establishing want of consideration, as was pointed out by Riddell J. in *Mercier* v. *Campbell* (1). That onus the appellant has not met. Consideration being presumed until the contrary is shewn, the deceased's obligation on the note was contractual, and not by way of testamentary gift, as the trial judge held.

The respondent's evidence, that the note was signed by the deceased, was abundantly corroborated by the testimony of experts in handwriting, and by Dr. MacPherson, who testified that, before his death, the deceased told him that he had seen the respondent well provided for by a note, and had divided the rest of his estate between Colin and Kate.

It was also argued for the appellant that if the document was a promissory note importing that it had been given for value and was thus an enforceable contract, there should be a new trial for the reason that the claim had been framed and the action had been conducted throughout on the basis that the respondent was seeking to enforce a gift and not a contractual right. There is no substance in this contention. The appellant knew, from the statement of claim and the examination for discovery of the respondent, just what the respondent was claiming and the grounds upon which he based his claim, and was not in any way taken by surprise.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McTague, Clark, Springsteen, Racine & Spencer.*

Solicitors for the respondent: *Shaw & Shaw.*

(1) (1907) 14 Ont. L.R. 639, at 652.

BIGGS ET AL. ..... PLAINTIFFS; 1932 *Nov. 29, 30. *Dec. 1.

AND

THE LONDON LOAN AND SAVINGS COMPANY OF CANADA ET AL. ..... DEFENDANTS. 1933 *Mar. 29.

THE LONDON LOAN AND SAVINGS COMPANY OF CANADA ET AL. (PLAINTIFFS BY COUNTERCLAIM) ..... APPELLANTS;

AND

BRICKENDEN ET AL. (DEFENDANTS BY COUNTERCLAIM) ..... RESPONDENTS.

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

Solicitor and client—Benefit to loan company's solicitor from loan made by company—Liability of solicitor to company—Basis of damages.

A transaction between solicitor and client, in which the solicitor takes a benefit, cannot be supported unless the solicitor has taken care that his client is fully acquainted with the facts and properly advised upon them, and the onus of proving this is upon the solicitor. (*Ward* v. *Sharpe,* 53 L.J. Ch. 313, at 319).

Where (as found by this Court) the solicitor for a loan company had benefited from a loan made by the company to B., by receiving out of the proceeds of the loan payment of certain mortgages from B. to the solicitor and certain commissions and fees in connection with said mortgages, it was *held,* under the circumstances of the case, that the solicitor must be held to have been guilty of a breach of duty to the company and that he was liable to it for loss suffered through the transaction.

The majority of the court (Rinfret, Lamont and Smith JJ.) held that the company was entitled to recover from the solicitor (with right of the solicitor to subrogation) the full amount of damages sustained (*Nocton* v. *Lord Ashburton,* [1914] A.C. 932), this being (the loan turning out to be a highly improvident one) the full amount of the loan and interest less the amount of a bonus retained by the company out of the loan and less an amount based on a reduction (for the purpose of calculating the damages) of the interest rate payable to the company under its mortgage. Cannon and Crocket JJ. were in favour of limiting, under the circumstances, the amount recoverable to the amount which the solicitor had received out of the proceeds of the loan and interest at said reduced rate (with right of the solicitor to subrogation).

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*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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LONDON LOAN & SAVINGS CO. OF CANADA v. BRICKENDEN.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which, in respect of the matter in issue in the present appeal, reversed the judgment of Raney J. (2). Raney J. had held that the interest of the defendant by counterclaim, Brickenden, in a certain loan transaction was in conflict with his duty as solicitor for the London Loan and Savings Company of Canada, one of the plaintiffs by counterclaim, and that under the circumstances in question he was liable for loss suffered by the company in connection with the loan, and gave judgment against him for the balance owing on the mortgage given to the company to secure the loan, the mortgage to be assigned to him upon payment by him.

The material facts of the case, as found by this Court, for the purposes of the present judgment, are sufficiently stated in the judgment of Crocket J. now reported.

The appeal to this Court was allowed with costs here and in the Appellate Division, and the judgment of Raney J. restored with a variation as set out in the judgment of Smith J. (Cannon and Crocket JJ. differed from the majority of the court as to the amount recoverable, being in favour of further limiting the amount, as set out in the judgment of Crocket J.)

W. N. Tilley K.C. and *G. T. Walsh K.C.* for the appellants.

I. F. Hellmuth K.C. and *G. F. Macdonell K.C.* for the respondents.

The judgment of Rinfret, Lamont and Smith JJ. was delivered by

SMITH J.—I am in agreement with what my brother Crocket has written in this case, except as to the remedy.

I am of opinion that the appellant Loan Company should be placed as nearly as possible in the position in which the appellants would have been had there been no breach of duty on the part of Brickenden; that is, that the appellant Loan Company is entitled to the full amount of damages sustained. *Nocton* v. *Lord Ashburton* (3).

(1) (1932) 41 Ont. W.N. 48. (2) (1930) 39 Ont. W.N. 126.
(3) [1914] A.C. 932.

Under this case, I do not think the amount to which the appellant is entitled can be limited to the amount that the respondent received out of the transaction, but is to be measured by the amount of loss sustained by the appellant.

I am of opinion, however, that the $1,000 bonus retained by the appellant Loan Company out of the loan, and the full 8% interest mentioned in the mortgage, are not losses sustained by the appellant Loan Company. If the transaction had not gone through, they would have received no such bonus, nor would they have been able to invest the $12,500 on proper security at 8%. Properly speaking, there should, perhaps, be a reference to ascertain the actual rate of interest that could have been earned on proper security; but, to avoid the delay and expense of such a reference, I am of opinion that justice would be done by allowing the legal rate of 5%.

There should, therefore, be a reference back for recalculation of the amount payable by respondents on the mortgage, by deducting the $1,000 from the principal and calculating the interest at 5%, instead of 8%.

With this variation, the appeal should be allowed and the judgment of the trial judge restored with costs to the appellant of both appeals.

The judgment of Cannon and Crocket JJ. was delivered by

CROCKET J.—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario setting aside a judgment of Raney J., which held the respondents liable for all moneys due upon two mortgages made by one Walter H. Biggs and his wife, of London, on November 8, 1924, in favour of the appellant, The London Loan and Savings Company, to secure a loan to Biggs amounting to $13,500.

There is really but one respondent, G. A. P. Brickenden, "G. A. P. Brickenden & Co.," being merely a firm name under which he practised law. Notwithstanding the joinder of so many parties in the counterclaim and the numerous charges of fraud and collusion stated therein against him in conjunction with Mr. and Mrs. Biggs and George G.

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LONDON LOAN & SAVINGS CO. OF CANADA v. BRICKENDEN.

Crocket J.

McCormick, his father-in-law and president of the Loan Company, in respect of two previous mortgage loans of $18,000 and $12,000 made by the Company to Biggs, as well as in respect to the later one of $13,500, this appeal concerns only his conduct as an interested solicitor in connection with the last mentioned loan, the learned trial judge having based his judgment against him on the ground that he had a personal interest in the transaction which was in clear conflict with his duty as solicitor for the Company and did not make a full disclosure of all material facts in connection therewith. He held that there was no legal claim against Brickenden in respect of the two earlier mortgages, and dismissed the counterclaim as against McCormick.

That Brickenden was the general solicitor of The London Loan and Savings Company and acted as solicitor for the Company as well as solicitor for Biggs in connection with the putting through of the two previous mortgage loans as well as the $13,500 loan directly in question, is not disputed. Neither is it disputed that when he sought this loan from the Company for Biggs he held four registered mortgages in his own name, as security for three loans which he had personally made to Biggs, for $5,000, $2,000 and $1,200 respectively, after the Loan Company itself had declined an application for a further loan of $8,400 in addition to its $18,000 and $12,000 loans, which mortgages covered the properties Mr. and Mrs. Biggs had previously mortgaged to the Loan Company. The $5,000 loan was secured by two mortgages dated July 13, 1923, and the $2,000 and $1,200 loans by mortgages dated respectively August 24, 1923, and January 13, 1924. The $5,000 loan was payable, under the terms of the two mortgages by which it was secured, in two years from date, and the interest quarterly, with the privilege to the mortgagors of paying the whole or any part of the principal on any interest day. The $2,000 and $1,200 mortgages provided for the re-payment of the principal moneys in monthly instalments with interest payable quarterly. All three loans bore interest at eight per cent. Brickenden admitted, in his discovery examination, having exacted a bonus or commission of $1,000 from Biggs on the $5,000 loan, $120 commission on the $2,000 loan in addition to $73.85 for fees

and disbursements, and $300 on the $1,200 loan, and that he settled a claim which Mr. and Mrs. Biggs subsequently brought against him for these bonuses and commissions and other overcharges by paying them back $1,000.

The record also conclusively shews that when Biggs sought the $13,500 loan from the Company through Brickenden in November, 1924, he had fallen behind in his interest payments on the Company's $18,000 and $12,000 mortgages to the amount of $1,636.14, but had kept down the interest on the three Brickenden mortgages and had made all his monthly payments as they fell due on the principal of the $2,000 and $1,200 mortgages, so that these had been reduced to $800 and $600 respectively; and that, when the loan was put through, Brickenden received from its proceeds $1,993.33, in payment of the balance due on the two last mentioned mortgages and a charge he made of $500 for fees, commissions and disbursements (the disbursements amounting to but $8.85) for putting through this latest loan, while the Loan Company retained $5,000, for which it assumed his $5,000 mortgage, besides a bonus payment of $1,000, which it exacted from Biggs on the loan, and $1,636.14 in payment of the overdue interest on its $18,000 and $12,000 mortgages.

Brickenden's position as the solicitor of both the borrower and the lender in the negotiation and completion of a mortgage loan in which he was so directly and largely interested, was one which could only be justified by the observance on his part of the utmost frankness and good faith towards both parties. That it was his imperative duty in such circumstances to fully disclose to his clients all material facts within his knowledge in relation to the transaction and treat with them upon a perfectly equal footing cannot be doubted. Moreover, it must now be taken as an established rule of law that when a solicitor acts for a client in a matter in which he is himself financially interested the onus rests upon him, if the propriety of the transaction is called in question, to shew that the negotiations were honestly conducted and that the transaction was fair and just and in no way disadvantageous to his client. This is the clear effect of the judgments in *Gib-*

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son v. *Jeyes* (1); *Edwards* v. *Meyrick* (2); *McPherson* v. *Watt* (3); *Ward* v. *Sharpe* (4); and *In re Haslam & Hier-Evans* (5). The law for the purposes of this case is perhaps most concisely summed up in the following extract from the judgment of North, J., in *Ward* v. *Sharpe* (4):—

> A transaction between solicitor and client, in which the latter [former] takes a benefit, cannot be supported unless the solicitor has taken care that his client is fully acquainted with the facts and properly advised upon them; and the onus of proving this is upon the solicitor.

Another passage which may usefully be quoted in the present case is the following from the judgment of Lord O'Hagan in *McPherson* v. *Watt* (3):—

> An attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property he does so at his peril. He must be prepared to shew that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self interest; that he has not misrepresented anything or concealed anything; that he has given an adequate price, and that his client has had the advantage of the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded. And, although all these conditions had been fulfilled, though there has been the fullest information, the most disinterested counsel and the fairest price, if the purchase be made covertly in the name of another without communication of the fact to the vendor, the law condemns and invalidates it utterly. There must be *uberrima fides* between the attorney and the client, and no conflict of duty and interest can be allowed to exist.

Notwithstanding the grave charges made against him in the counterclaim, Brickenden refrained on the trial from even so much as attempting to vindicate his conduct in the negotiation and completion of the loan transaction, and left the case for decision upon the testimony offered in behalf of the appellants, which included portions of the evidence he had given on his examination on discovery. He left quite unsolved the mysterious fact that while the two mortgages to the Loan Company, by which the $13,500 loan was secured, were executed and acknowledged by Mr. and Mrs. Biggs on November 8, on which date he obtained from Biggs an order on the Loan Company to pay him his $1,993.33, covering the balances due on his $2,000 and $1,200 mortgages and his $491.15 bonus or commission and other charges, the application for the loan was laid over by the Board of Directors for consideration on November 11, and

(1) (1801) 6 Ves. 266, at 278.
(2) (1842) 2 Hare 60, at 69.
(3) (1877) 3 App. Cas. 254, at 266.
(4) (1884) 53 L.J. Ch. 313, at 319.
(5) [1902] 1 Ch. 765, at 769.

was not actually authorized by the Board until November 17, as shewn by the Company's minute books, during which interim, on November 12, he registered the two new mortgages to the Loan Company, and the certificates discharging his $2,000 and $1,200 mortgages and signed his certificate of title to the Loan Company before presenting for payment on November 13, his $1,993.33 order from Biggs.

The application for the loan is unsigned, but the record shews that there is no doubt it was made through Brickenden. It bears no date on its face, but has the following memorandum endorsed upon it:—

Nov. 17, 1924. E. & W. Biggs $13,500. Wanted. Lend at 8% with bonus of $1,000. Geo. C. McC., President.

Presumably the application was prepared before the new mortgages were executed. It stated that the money was to be applied to pay the arrears of interest on the Company's present mortgages of $18,000 and $12,000, and sundry accounts amounting to $7,500, and a second mortgage of $5,000 held by Brickenden which will mature about March, 1925, and that as security the Company would receive a new mortgage for $13,500 on the property already mortgaged to the Company.

Although the properties proposed as security were stated in the application to be subject to two other mortgages than those which the Loan Company already held, one by Ed. Barrell for $7,000 and the other by Huron and Erie for $10,000, no mention was made therein of either the Brickenden $2,000 or $1,200 mortgages, which were not discharged on the records until November 12, or of the fact that any portion of the proceeds of the loan was to be applied towards paying off the amounts due Brickenden upon them, though it is stated that $5,000 of the loan money is to be applied to the payment of the $5,000 mortgage. No mention is made either of the fact that Biggs was to be required to pay Brickenden $500 for fees, commissions and disbursements in addition to the $1,000 bonus he promised to pay the Company.

The result of the transaction, so far as Brickenden is concerned, was that he got his $5,000 mortgage loan, and the balances due on two subsequent mortgages paid off by the London Loan & Savings Company, besides receiving a bonus or commission of $491.15 and legal fees from the proceeds of the loan—a total of $6,993.33. The Loan Com-

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pany received a bonus of $1,000 and $1,636.14 overdue interest on its $18,000 and $12,000 mortgages, leaving $3,870.53 for Biggs with which to pay the "sundry accounts amounting to $7,500" mentioned in the application. Apparently the "sundry accounts" covered not only the balance of Biggs' mortgage indebtedness to Brickenden but his bonus and commission as well.

Brickenden's certificate of title was dated, as already stated, on November 12, the day on which his $2,000 and $1,200 mortgages were discharged before his order of November 8 for $1,993.33 had been accepted by the Company, and made no mention of these two mortgages, though it set out nine different mortgages, which were on that date outstanding against different parcels of the lands comprised in the new mortgages to the Loan Company, amounting in all to $61,300, including his own $5,000 mortgage, numbered the ninth, and which last mortgage he stated in the certificate the London Loan was assuming. To his certificate of title he added a note to the Loan Company, stating that all the mortgages listed were to be removed except the Barrell and Huron & Erie mortgages for $7,000 and $10,000 respectively, and the Loan Company's $18,000 and $12,000 mortgages. If all other mortgages than those indicated were removed, there would still remain on the mortgaged premises five mortgages for a total of $47,000, to which the Company was to add two more to secure the new loan of $13,500, making a grand total of $60,500.

It is perfectly obvious that the intention from the beginning was that Brickenden was not only to unload his $5,000 mortgages upon the Loan Company, but that he was to be paid the balances of principal and interest due on his two subsequent mortgages out of the proceeds of the proposed loan, as well as his exorbitant commission money. Brickenden has not testified that he advised the manager of the Loan Company or any of its directors or officers of this fact, which was surely a very material fact, having regard to the much encumbered state of the title of the properties of Mr. and Mrs. Biggs. On the contrary, the application itself would seem to have concealed both these material facts by the statement that $7,500 of the proceeds of the loan was to be applied to the payment of "sundry accounts." This statement the record shews was untrue.

Why did the application not mention the $2,000 and $1,200 Brickenden mortgages as well as the $5,000 mortgage? Why was it that the application was laid over at the Directors' meeting on November 11, and the certificate of title held back till November 12—four days after the execution of the new mortgages, and until Brickenden discharged his third and fourth mortgages, before presenting his order from Biggs for $1,993.33 to the Company's manager for payment? Brickenden has chosen not to explain any of these things and must be held to have been guilty of a breach of duty to his client, the London Loan and Savings Company.

It is quite apparent that Brickenden must have obtained the consent of the managing director (Kent) to put the loan through, cash his $1,993.33 order from Biggs and arrange for the Company's assumption of his $5,000 mortgages, without waiting for the authorization of the Board of Directors. How he did so is left entirely to conjecture. Unfortunately Kent passed away before the trial of the action and Brickenden vouchsafes no information. The consent of the managing director does not help him unless it is shewn that it was obtained upon full disclosure of all material facts and this is not shewn. Kent himself may or may not have been influenced to violate his own duty to the Company, and it may be that, but for a breach of duty on his part and on the part of other directors and officers of the Company, the loan would not have been made. The learned trial judge has found that at the time of the loan there was no equity in the mortgaged properties above the prior mortgages, not including Brickenden's $5,000 mortgages. I take this to mean he held the new mortgages to be worthless, which would surely point to a marked laxity and dereliction of duty on the part of the managing director and other officers of the Company, for the record shews that the managing director was advised by Brickenden's certificate of title before the completion of the loan of the prior mortgages, including the Brickenden $5,000 mortgages, though not of his $2,000 and $1,200 mortgages. While it may for this reason well be said that Brickenden was not wholly responsible for the unfortunate transaction, he cannot invoke the connivance or dereliction of others as an excuse for his own breach of duty. It only renders his own

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breach of duty the more indefensible. He assuredly ought not to be allowed in such circumstances to excuse himself on the ground that the managing director or any other director or officer of the Company with whom he negotiated ought not in any event to have accepted his proposal.

That the transaction was highly improvident and one which was fraught with disaster to both Biggs and the Loan Company, and advantageous only to himself, is perfectly obvious from the documentary evidence concerning the transaction itself and the subsequent history of the mortgages and the Loan Company. The Loan Company was obliged by the Provincial Government Inspector to clear off its first two mortgages for $18,000 and $12,000, and it did so by arranging in December, 1927, with the Consolidated Trusts Corporation, of which McCormick and Brickenden were also president and solicitor respectively, to make a new loan to Biggs to the amount of $33,600 on two fresh mortgages at six and one-half per cent. on the same properties, for $20,000 and $13,600, of which $33,542.26 was paid to the London Loan for the amounts then due it for principal and interest, and by itself guaranteeing the new loans and giving additional security. The $13,500 mortgages the London Loan retained until it assigned all its remaining assets to the Huron & Erie Mortgage Corporation on July 3, 1929. On November 1 of the latter year the total indebtedness of Mr. and Mrs. Biggs on these three mortgage loans was found by the local master, to whom the mortgage accounts were referred for investigation, to amount to $56,887.23.

On November 6, 1929, the Consolidated Trusts Corporation transferred all its assets to the Canada Trust Company, this transfer covering the $20,000 and the $13,600 Biggs mortgages above referred to, as replacing the original $18,000 and $12,000 Biggs mortgages, guaranteed by the Loan Company as aforesaid. Both these corporations were joined with the London Loan and Savings Company as co-plaintiffs in the counter-claim, together with the Huron & Erie Mortgage Corporation and the London Loan Assets Limited. The last mentioned company was incorporated under the provisions of the Ontario *Loan and Trust Corporations Act* for the particular purpose of carrying out the terms of an agreement which was entered into on July 3,

1929, between the London Loan and Savings Company, the Huron & Erie Mortgage Corporation and the newly created company, for the liquidation of the affairs of the London Loan and Savings Company, and which provided for the transfer of all its assets, first, to the mortgage corporation and then to the new company, including all rights of action which were capable of assignment.

There can be no doubt of Brickenden's breach of duty to the London Loan and Savings Company or that the Company suffered a serious loss in consequence thereof.

The difficulty is to determine the amount of that loss which is fairly attributable to him. Having regard to the subsequent transfer of these two $13,500 mortgages, together with all the Company's other assignable assets, to the Huron & Erie Mortgage Corporation and the London Loan Assets Limited, for the liquidation of its indebtedness, under the agreement of July 3, 1929, and to the large increase of the mortgage indebtedness which the accumulation of the mortgagors' interest, taxes and other arrearages have since produced while these mortgages have remained in the hands of the assignees unrealized and presumably unrealizable, I cannot satisfy myself that Brickenden can justly be charged with all of these arrearages as the learned trial judge has decreed.

I am satisfied that he should not be charged with the $1,000 which the Loan Company withheld out of the proceeds of the loan in payment of its bonus charge, nor, in the circumstances, with the $1,636.14, which it also withheld to pay itself the arrears of interest on its two prior Biggs mortgages. The latter amount cannot, in my opinion, fairly be said to have been lost to the Company as a result of the loan.

That Brickenden, on the other hand, ought not in the circumstances to be allowed to retain any of the benefits which he personally derived from the transaction and should indemnify the Loan Company to this extent at least is clear to my mind. As already stated, he received $6,993.33 of the proceeds of the loan, including the $5,000 for the first two of his four Biggs mortgages. It is true that he cannot now be restored precisely to his former position in respect of these mortgages, but these were in effect all merged in the larger $13,500 mortgages, which, it must

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be taken, the Loan Company was induced by his breach of duty to accept, and which, it is clear from the Master's report and the evidence throughout, were practically worthless as a security for the moneys advanced.

While in strictness of law the right of action for damages resulting from Brickenden's breach of duty lay in the London Loan and Savings Company and did not pass to its assignees under the agreement of July 3, 1929, the worthless mortgages did pass, with all other assignable assets of that Company, but only for the purpose of liquidation in the Company's interest. The Huron & Erie Mortgage Corporation and the London Loan Assets Limited are both parties to the counter-claim and before the Court on this appeal, and I can see no objection to treating the moneys which improperly came into Brickenden's hands out of the proceeds of the loan for his own use and benefit as moneys of the London Loan and Savings Company, for which he is still liable to account to that Company or to its assignees under the agreement referred to, or in subrogating him, to the rights of that Company or its assignees under these mortgages to the extent of the moneys he may be required to pay back. One or other of the corporations named is entitled to the fruits of the action, and, having regard to the terms of the assignment, it makes no difference in the result which of them actually receives the money. In the end it goes to the London Loan and Savings Company or to the London Loan Assets Limited for its benefit.

In my opinion, the ends of justice would, in the circumstances, best be served by a decree requiring Brickenden to restore to the London Loan and Savings Company or to the Huron & Erie Mortgage Corporation or the London Loan Assets Limited the $6,993.33, which he improperly received out of the proceeds of the loan, together with interest at the statutory rate from November 12, 1924, the date of the completion of the loan, until judgment, and declaring that upon payment of the said sum and interest, he shall be subrogated to that extent to the rights of the London Loan and Savings Company or its assignees under the said mortgages.

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The appeal should be allowed and the judgment of the trial judge varied as here indicated, costs throughout to be paid by the respondent.

Appeal allowed with costs, and judgment of trial judge restored with variation as set out in judgment of Smith J.

Solicitors for the appellants: *Braden & McAlister.*

Solicitors for the respondents: *Slaght & Cowan.*

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*Mar. 15.
*Mar. 29.

IN THE MATTER OF A REFERENCE AS TO THE EFFECT OF THE EXERCISE BY HIS EXCELLENCY THE GOVERNOR GENERAL OF THE ROYAL PREROGATIVE OF MERCY UPON DEPORTATION PROCEEDINGS.

Crown—Criminal law—Immigration—Release of convict from prison prior to completion of term of sentence without his consent—Validity and effect—"Endured the punishment adjudged" (Cr. C., s. 1078)—Expiry of sentence or term of imprisonment within s. 43 of Immigration Act—Liability to deportation proceedings upon serving sentence or upon release from prison prior to expiry of term of sentence.

The act of clemency by the Governor General, in the exercise of the royal prerogative of mercy, in releasing a convict from prison prior to the completion of the term of his sentence may be valid and effective in law without the convict's consent.

A convict so released would not be deemed to have "endured the punishment adjudged," within the meaning of s. 1078 of the *Cr. Code.*

The sentence or term of imprisonment of a convict so released would be deemed to have expired, within the meaning of s. 43 of the *Immigration Act,* R.S.C., 1927, c. 93.

If a convict be other than a Canadian citizen and be subject to be deported under s. 42 of the *Immigration Act* as belonging to that one of the "prohibited or undesirable classes" which is defined by the words (in s. 40), "any person who has been convicted of a criminal offence in Canada," he does not cease to be so subject to be deported, upon serving his sentence in full or upon his release from prison under a valid exercise of the royal prerogative prior to the expiration of his sentence. The question is one of construction of the language of s. 40, and, in view of the fact that the liability to proceedings under s. 42 is not contemplated by the Act as one of the penal consequences of a conviction for a criminal offence, that this liability is not attached *de jure* to the fact of conviction but is placed by the Act under the control of an administrative discretion, and in view of the unrestricted language of s. 43, there is no admissible ground for a construction requiring a restriction of the words of s. 40 by exclud-

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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ing from their scope cases where the punishment adjudged has been endured or has been remitted through an exercise of the royal clemency. (*Immigration Act*, ss. 40, 42, 43; *Cr. Code*, ss. 1076, 1078; *The Queen* v. *Vine*, L.R. 10 Q.B. 195; *Hays* v. *Justices of the Tower*, 24 Q.B.D. 561; *Leyman* v. *Latimer*, L.R. 3 Ex. D. 15, 352, discussed. *Marion* v. *Campbell*, [1932] Can. S.C.R. 433, at 451, referred to).

REFERENCE by His Excellency The Governor General in Council to the Supreme Court of Canada, for hearing and consideration, pursuant to the authority conferred by s. 55 of the *Supreme Court Act*, R.S.C., 1927, c. 35, of certain important questions of law. The questions are set out at the beginning of the judgment now reported.

I. F. Hellmuth K.C. and *C. B. Smith K.C.* for the Crown.

J. Shirley Denison K.C. and *R. D. Williams contra.*

The judgment of the court was delivered by

DUFF C.J.—We have to give our opinions in answer to certain Interrogatories addressed to us by His Excellency the Governor General in Council. They are as follows:—

1. Is it competent to the Governor General in the exercise of His Majesty's royal prerogative of mercy, to release from prison without his consent a convict undergoing sentence for a criminal offence (*a*) conditionally, (*b*) unconditionally?

2. Would a convict so released, whether with or without his consent, be deemed to have "endured the punishment adjudged," within the meaning of section 1078 of the *Criminal Code?*

3. Would the sentence or term of imprisonment of a convict so released be deemed to have expired, within the meaning of section 43 of the *Immigration Act*, Revised Statutes of Canada, 1927, chapter 93?

4. If such a convict be other than a Canadian citizen, and be, by reason of having been convicted of a criminal offence in Canada, subject to be deported under the provisions of section 42 of the *Immigration Act*, would he cease to be so subject

(1) upon serving his sentence in full,

(2) upon release from prison in the exercise of the royal prerogative prior to the expiration of his sentence (*a*) conditionally, (*b*) unconditionally?

These Interrogatories, speaking broadly, concern the effect of the release of a convict from prison who is undergoing a sentence for a criminal offence by an act of clemency in exercise of the royal prerogative. We will first say a word about the legal character of such a release.

The terms of Art. 5 of the Instructions to His Excellency suggest that all remissions, total or partial, of penalties, other than pecuniary penalties or forfeitures of property, take effect as "free" pardons or pardons "subject to lawful conditions." It has been more than once held in the United States that an unconditional release from prison (unconditional, that is to say, in the sense of being subject to no express condition) by the President of the United States in exercise of the pardoning power with which he is invested under the constitution necessarily implies a "free" pardon of the offence. (For example, *Hoffman* v. *Coster* (1); *Jones* v. *Harris* (2).

On the other hand, there is the great authority of Hawkins' Pleas of the Crown that the act of clemency may be limited to pardoning the "execution." "It hath been clearly adjudged," it is said (Book 2, ch. 37, s. 12), "that the King may, if he think fit, pardon the execution, and no more." In this view it would appear that the effect (as regards the offence) of the unconditional remission of the punishment, or of a conditional remission where the condition has been performed, is a question of intention; and it is upon this assumption that the practice in Canada has proceeded. A release from prison, pursuant to a valid act of clemency, necessarily involves a remission, total or partial, of the punishment awarded, but we see no reason to think that the assumption alluded to above on which the Canadian practice has been based is not well grounded.

The Interrogatories speak of releases which are conditional and releases which are unconditional. In the case of a conditional release, the condition may be of such a character as to involve the voluntary act of the convict himself. In other words, such that the performance of it can only be effected with the consent of the convict. We assume from the course of the argument before us that the real purpose of the Interrogatories is to elicit the opinion of the court as to the effect, in respect of the matters set forth

(1) (1837) 2 Whar. 453. (2) (1846) 1 Strob. 160.

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therein, of a release from prison of a convict before the expiration of the term of imprisonment imposed by his sentence in pursuance of a valid exercise of the royal prerogative; and it would serve no useful purpose in these circumstances to explore the various hypotheses suggested by the term "conditional release"; and we beg the leave of Your Excellency to limit our answers accordingly.

Interrogatory numbered one we shall treat as addressed to the question whether or not the act of clemency in releasing a convict from prison prior to the completion of the term of his sentence may be valid and effective in law without the consent of the convict. The answer to the interrogatory so put is in the affirmative.

The contention that a free pardon of a convict takes effect, as in the case of a private gift, only upon acceptance by the grantee has been based upon passages in books of authority which seem to say that a free pardon can be waived by the grantee, e.g., in 2 Hawkins P.C., ch. 37, ss. 58-9:

> As to the third general point, *viz.* Whether a pardon may be waived.
>
> 58. I take it to be agreed, that a general pardon by parliament cannot be waived, because no one by his admittance can give a court a power to proceed against him, when it appears there is no law to punish him.
>
> 59. But it is certain, that a man may waive the benefit of a pardon under the great seal; as where one who has such a pardon doth not plead it, but takes the general issue, after which he shall not resort to the pardon.

We think the passages in the books in which it is laid down that a pardon can be waived, strictly turn upon the necessities of pleading, and that a doctrine more consonant with the true nature of the King's prerogative is set forth in a decision of the reign of Edward IV, reported in Jenkins, 145 Eng. R., No. 62, p. 90. The report is in a paragraph and is in these words:

> If the King pardons a felon, and it is shewn to the court; and yet the felon pleads not guilty, and waives the pardon, he shall not be hanged; for it is the King's will that he shall not; and the King has an interest in the life of his subject. The books to the contrary are to be understood, where the charter of pardon is not shewn to the court.

The nature of prerogative is, in our opinion, rightly set forth by Mr. Dicey at p. 420 of his Law of the Constitution (8th ed.):

> The "prerogative" appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. The King was originally in truth what he still is in name, "the

sovereign," or, if not strictly the "sovereign" in the sense in which jurists use that word, at any rate by far the most powerful part of the sovereign power.

By the terms of the Instructions to His Excellency he is directed, before pardoning or reprieving an offender, to receive first, in capital cases, the advice of the Privy Council, and in other cases, of one at least of his Ministers; and in modern times all such advice is, of course, given subject to the accountability of the Council or the Ministers to the House of Commons. A sentence in the judgment of Holmes J., speaking for the Supreme Court of the United States in *Biddle* v. *Perovich* (1) applies equally to the exercise of the prerogative of mercy in Canada. A pardon, said that most learned and eminent judge,

> is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.

We think it is not consistent with this view of the nature of the prerogative in question to regard an unconditional pardon as in the same category, in point of law, as an act of benevolence proceeding from a private person.

We do not think the authorities require us to hold that an unconditional pardon of an offence can take effect only upon acceptance by the grantee; and that, for example, a convict under the capital sentence can, in point of law, insist on being hanged, so that the only escape from such a result is by statute or by a colourable and unconstitutional exercise of the prerogative in granting successive reprieves.

It has been suggested that partial remissions of punishment can validly take effect only as conditional pardons. This view was advanced by Mr. Taney, Attorney-General (afterwards Chief Justice) of the United States, in his very able argument in *United States* v. *Wilson* (2). But, although the learning on the subject of pardon seems to have been very diligently collected for the purposes of the argument in that case, no authority was adduced in support of this proposition; and we have found none.

Moreover, the statements in the books to the effect that a conditional pardon is operative only with the consent of the grantee are illustrated by references to cases in which the condition is in the nature of a substituted punishment.

(1) (1927) 274 U.S. 480, at 486. (2) (1833) 7 Peters 150, at 155-8.

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At common law, the King cannot commute the sentence of the court by the substitution of another and different penalty, because he has no power at common law to compel the convict, against his will, to submit to a punishment which has not been imposed upon him by a court of law. (See the opinion of Sir A. E. Cockburn and Sir Richard Bethell, May 3d, 1854, Forsyth, 462,3.) Obviously, in the simple case of a partial remission, which is, in terms, unconditional, the convict is not subjected to any penalty or punishment beyond that which the sentence of the court has awarded against him. We do not pursue the discussion further.

"So far as a pardon legitimately cuts down a penalty," said Holmes J. in the judgment (1) already quoted in part, it affects the judgment imposing it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced, and that the convict's consent is not required.

We think this is indisputable.

As to the second Interrogatory, we think it is clear that the phrase "punishment adjudged" in s. 1078 of the *Criminal Code* does not describe a punishment reduced by an act of the royal clemency but is intended to designate the punishment nominated by the original sentence.

For the purpose of considering the questions raised by the Interrogatories numbered 3 and 4, it will be necessary to refer briefly to the enactments of the *Immigration Act*.

By s. 40 (R.S.C., 1927, ch. 93) provision is made for complaint to the Minister of Immigration of the presence in Canada of persons of specified descriptions ("other than a Canadian citizen or person having Canadian domicile") by "any officer cognizant thereof" and by "the clerk, secretary or other official of any municipality in Canada wherein such person may be." Such classes of persons include (*inter alia*) the inmates and managers of houses of prostitution, persons practising or sharing in the earnings of prostitution, persons importing or attempting to import any person for the purpose of prostitution or other immoral purpose, and any person who "enters or remains in Canada contrary to any provision of this Act," and any person "who has been convicted of a criminal offence in Canada,"

(1) *Biddle* v. *Perovich*, (1927) 274 U.S. 480, at 486-7.

or who " has become an inmate of a penitentiary, gaol, reformatory, prison."

Section 42 empowers the Minister of Immigration or his Deputy to order any person, in respect of whom a complaint has been received alleging such person to belong to " any prohibited or undesirable class," to be taken into custody and detained for an investigation of the facts alleged in the complaint by a Board of Inquiry. By the same section, if the Board is satisfied that such person belongs to " any of the prohibited or undesirable classes " mentioned in ss. 40 and 41, such person " shall be " deported forthwith, subject to a right of appeal to the Minister.

It seems to be clear that any one of the classes of persons in respect of whom it is the duty of the proper official " to send a written complaint to the Minister " pursuant to the provisions of s. 40 is a " prohibited or undesirable " class within the meaning of s. 42. *Ex facie,* therefore, a person who has been convicted of a criminal offence in Canada, and a person who is an inmate of a penitentiary, jail, reformatory or prison in Canada and in respect of whom " a written complaint " has been " sent " to the Minister pursuant to s. 40, is a person in relation to whom the powers of the Minister and Deputy Minister, under the first subsection of s. 42, may be exercised. That is to say, such person may be placed in custody and detained for an investigation of the facts alleged in the complaint against him. Furthermore, as observed above, if the allegations are established to the satisfaction of the investigating tribunal the statute directs that, subject to an appeal to the Miniser, such person shall be deported.

S. 43 is in these terms:

Whenever any person other than a Canadian citizen, or a person having Canadian domicile, has become an inmate of a penitentiary, gaol, reformatory or prison, the Minister of Justice may, upon the request of the Minister of Immigration and Colonization, issue an order to the warden or governor of such penitentiary, gaol, reformatory or prison, which order may be in the form F in the schedule to this Act, commanding him after the sentence or term of imprisonment of such person has expired to detain such person for, and deliver him to, the officer named in the warrant issued by the Deputy Minister, which warrant may be in the form G in the schedule to this Act, with a view to the deportation of such person.

2. Such order of the Minister of Justice shall be sufficient authority to the warden or governor of the penitentiary, gaol, reformatory or prison, as the case may be, to detain and deliver such person to the officer named in the warrant of the Deputy Minister as aforesaid, and such warden or

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governor shall obey such order, and such warrant of the Deputy Minister shall be sufficient authority to the officer named therein to detain such person in his custody, or in custody at any immigrant station, until such person is delivered to the authorized agent of the transportation company which brought such person into Canada, with a view to deportation as herein provided.

This section, it will be noticed, deals specifically with the procedure applicable where the person to be deported is an inmate of a penitentiary, jail, reformatory or prison. In such case the Minister of Justice is, in a word, authorized, upon the request of the Minister of Immigration, to direct the warden or governor of the place of detention to detain the inmate after " the sentence or term of imprisonment of such person has expired," and to deliver such person to the officer named in a warrant issued by the Deputy Minister of Immigration with a view to deportation.

As to Interrogatory No. 3, it appears to us that, according to a natural reading of the words, the phrase " sentence or term of imprisonment," in s. 43, is intended to embrace both the case where the convict has undergone the full term of imprisonment imposed by the sentence and the case where the term of imprisonment imposed has been reduced by the operation of some general statutory provision or by a valid act of clemency. In this view the order of the Minister of Justice under s. 43, in form F, may, where the term of imprisonment imposed by the sentence has been brought to an end by an act of clemency, authorize the detention of the person to whom the order relates by the warden or governor and delivery of him to the officer named in the warrant.

The answer to Interrogatory No. 3, ought, therefore, to be in the affirmative.

The question to which Interrogatory No. 4 is directed is whether or not a convict, after serving his sentence in full, or upon his release prior to the expiry of his sentence under a conditional or unconditional act of clemency in exercise of the royal prerogative, becomes removed from the category of persons belonging to that one of the " prohibited or undesirable classes " mentioned in ss. 40 and 41 which is defined by the words " any person who has been convicted of a criminal offence in Canada."

The neat point is whether the service of the term of the sentence, or the release pursuant to the exercise of the royal

clemency, has the effect of making inappropriate to such person the description found in the words quoted from s. 40. In examining this question, three sections of the *Criminal Code* are material,—ss. 1076, 1078 and 1080, the relevant parts of which it will be convenient to reproduce textually:

1076. The Crown may extend the royal mercy to any person sentenced to imprisonment by virtue of any statute, although such person is imprisoned for non-payment of money to some other person than the Crown.

2. Whenever the Crown is pleased to extend the royal mercy to any offender convicted of an indictable offence punishable with death or otherwise, and grants to such offender either a free or conditional pardon, by warrant under the royal sign manual, countersigned by one of the principal Secretaries of State, or by warrant under the hand and seal-at-arms of the Governor General, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall, as to the offence of which he has been convicted, have the same effect as a pardon of such offender under the great seal.

1078. When any offender has been convicted of an offence not punishable with death, and has endured the punishment adjudged, or has been convicted of an offence punishable with death and the sentence of death has been commuted, and the offender has *endured the punishment* to which his sentence was *commuted,* the punishment so endured shall, as to the offence whereof the offender was so convicted, have the like effect and consequences as a pardon under the great seal.

1080. Nothing in this Part shall in any manner limit or affect His Majesty's royal prerogative of mercy.

Where the convict has served his sentence in full he falls within s. 1078 as a person who "has endured the punishment adjudged" and it follows, therefore, that the "punishment so endured" has, "as to the offence whereof the offender was * * * convicted * * * the like effect and consequences as a pardon under the great seal."

Where the convict has been released by an unconditional act of clemency, or by a conditional one in respect of which the condition has been performed, it is argued that, here again, this has, as to the offence in respect of which the conviction was obtained, "the same effect as a pardon" of the offender "under the great seal."

It may be conceded, for the purpose only of simplifying the immediate discussion, that the release from custody involves a free pardon or a conditional pardon (the condition of which has been purged) within the meaning of s. 1076; so that the precise point to which we are to address ourselves is whether or not a pardon under the great seal of a

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person convicted of a criminal offence within the meaning of s. 40 has the effect of exempting such person from the provisions of ss. 42 and 43.

A pardon under the great seal

> if general in its purport and sufficient in other respects, obliterates every stain which the law attached to the offender. Generally speaking, its puts him in the same situation as that in which he stood before he committed the pardoned offence; and frees him from the penalties and forfeitures to which the law subjected his person and property. (Chitty, Prerogatives of the Crown, p. 102);
>
> takes away *poenam et culpam;* (2 Hale P.C. 278);
>
> does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness * * * (2 Hawkins P.C., s. 48).

The question before us is, in truth, a question of statutory construction. We have to consider whether, having regard to the scope and purpose of the *Immigration Act,* the literal meaning of the words in s. 40 is displaced by force of the rule of law that a pardon under the great seal wipes out the offence of the grantee in the sense conveyed in the passages quoted.

It is, perhaps, almost unnecessary to observe that the group of sections under consideration is not concerned with the penal consequences of the acts of individuals. They are designed to afford to this country some protection against the presence here of classes of aliens who are referred to in the statute as " undesirable." The broad conception upon which they are based is indicated by the summary already given of the enactments of s. 40. Persons convicted of crime in this country, persons who are inmates of prisons in this country, are classed with persons who are inmates of asylums for the insane, with persons implicated in the trade of prostitution, with persons known to have been convicted elsewhere of offences involving moral turpitude, with persons who are remaining in this country in defiance of the prohibitions of the *Immigration Act.*

Moreover, the results which follow from proceedings under s. 42 are not attached to the criminal offence as a legal consequence following *de jure* upon conviction for the offence or imposable therefor at the discretion of a judicial tribunal. They follow, if they follow at all, as the result of an administrative proceeding initiated at the discretion of the Minister at the head of the Department of Immigration.

The terms of s. 43, it should be observed, are general. They apply to every person, other than a Canadian citizen or a person having a Canadian domicile, who has become an inmate of any of the institutions mentioned. The authority given to the Minister of Justice, according to the ordinary meaning of the language employed, is exercisable where the inmate is incarcerated pursuant to a sentence under a conviction for a criminal offence within the meaning of s. 40. If this be the effect of s. 43, then that section contemplates the operation of s. 42 by an order for deportation founded on a conviction for a criminal offence in Canada which is to take effect after the expiration of the sentence or term of imprisonment resulting from such conviction has been fully endured or, in the view already expressed as to the meaning of the words "sentence or term of imprisonment," after such term of imprisonment has been terminated pursuant to an act of clemency.

There is nothing in the language of the statute, or in the object or purpose of the statute, inconsistent with this view of s. 43. Any other view, indeed, would greatly restrict the scope of the section, leaving it operative only in a probably not very numerous class of cases where the convict, while serving a sentence of imprisonment for one criminal offence, has standing against him a conviction for another offence in respect of which he has neither endured the punishment adjudged nor been lawfully relieved from that punishment.

This view of section 43 is, of course, inconsistent with the contention that a conviction in respect of which the punishment has been endured or remitted by an act of clemency cannot be a foundation for proceedings under s. 42.

As to the effect of s. 40, some authorities were cited which we proceed to discuss. The first is *The Queen* v. *Vine* (1). In that case it was held that a person who had been convicted of felony and had served his sentence was disqualified from holding a licence for the selling of spirits under a statute which disqualified "every person convicted of felony." The statute of 9 Geo. IV (s. 1078, *Cr. C.*) was not referred to, but it is difficult indeed to suppose that the statute could have escaped the attention both of Mr. Poland, who acted as counsel for the applicant, and of the court. The point especially discussed was whether or not

(1) (1875) L.R. 10 Q.B. 195.

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the disqualification applied to persons convicted before the Act was passed. That was held to be so upon the explicit ground that the disqualification was not penal in its nature but was intended to protect the public from having persons of doubtful character engaged in the sale of spirits by retail.

In a subsequent case, *Hays* v. *Justices of the Tower* (1), a closely similar question arose. There, the applicant for a licence had been convicted of a felony. He had served part of his sentence and then received a "free pardon" under Her Majesty's sign manual. It was held that the statutory disqualification was inoperative by force of 7-8 Geo. IV, c. 28, s. 13, the parent enactment of s. 1076, by which a pardon under the royal sign manual has "the effect of a pardon under the great seal."

Hawkins, J., who with Pollock, B., constituted the Divisional Court before which the appeal was heard, treats the disqualification (in contradiction to the view of the court in *Regina* v. *Vine* (2)) as one of the penal consequences of the conviction and bases his judgment principally on the reason that the legislature could not have intended to impose disqualification in the case of a pardon granted upon the ground that the conviction was wrongful.

Neither of the learned judges disagrees with the decision in *Regina* v. *Vine* (2). Indeed, Hawkins J. emphatically concurs with it, and, with regard to both these licensing decisions, it should be observed that the point is considered as entirely a question of the proper construction of the licensing statute. The enactment imposing the disqualification in question there differed radically from the enactment now under consideration. In that case the disqualification took effect *ipso jure*. Here, as already observed, the existence of the conviction marks the convict as belonging to a class of persons in respect of whom the Minister of Immigration has a discretion to institute proceedings under s. 42. The legislature could hardly have conceived the possibility of such proceedings being instituted pursuant to such a conviction if there had been a pardon in consequence of established innocence.

(1) (1890) 24 Q.B.D. 561. (2) (1875) L.R. 10 Q.B. 195.

The other case is *Leyman* v. *Latimer* (1), in which the passages cited above from Chitty, Hale and Hawkins were given effect to by holding that a person convicted of felony, after enduring the punishment, is, in law, no longer a "felon," by force of 9 Geo. IV, c. 32, s. 3, which is in substance re-enacted in s. 1078 of the *Criminal Code*.

The action was for libel, the alleged libel being in the description of the plaintiff, the editor of a newspaper, as a "felon editor." To the defendant's allegation, in justification, that the plaintiff had been convicted and sentenced to twelve months' hard labour, the plaintiff replied that, after his conviction, he underwent his twelve months' imprisonment and so "became as clear from the crime and its consequences as if he had received the Queen's pardon under the great seal." The case was, for convenience, tried before Lord Blackburn (then Mr. Justice Blackburn) sitting as judge without a jury, and his decision was expressed in this sentence (p. 22):

> I think that the statement in the newspaper means that he was convicted, and is literally true, and therefore the plaintiff cannot recover damages.

In the Divisional Court, Cleasby and Pollock BB. held that, in contemplation of law, the plaintiff was not at the time of the libel a "felon" and that, therefore, the allegations in the defence were no justification. But they considered it would have been a different matter if the libeller had simply declared he has been convicted of felony. The judgment reads (p. 21):

> It would have been a different matter if the defendant had written of the plaintiff that he had formerly committed a felony or been convicted of felony. That would have been strictly true, and could have been justified, although the fact of the sentence having been suffered was withheld.

In the Court of Appeal, Bramwell, L.J., agreed with Lord Blackburn that the defendant had a valid justification in respect of the phrase "convicted felon" because it was literally true. Brett, L.J., and Cotton, L.J., disagreed upon the point of the construction of the words, holding that the question was one of fact for the jury, but Brett, L.J., is plainly in agreement with the two other distinguished common law judges in holding that, if Lord Black-

(1) (1878) L.R. 3 Ex. D. 15 and 352.

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burn's interpretation of the words were correct, the fact of the conviction was a sufficient justification. These three eminent judges are plainly in agreement with the view that, *prima facie,* the service of a sentence under a conviction for felony does not, by force of the statute of 9 Geo. IV, take the person convicted out of the category of persons who have been convicted of felony although, in point of law, it does remove him from the category of " felon."

The judgments in that case are useful in illuminating the points now before us. They seem to establish conclusively, if authority be needed for that purpose, that neither s. 1076 nor s. 1078 of the *Criminal Code* in declaring in the one case that a free or conditional pardon under the sign manual, and, in the other case, that the " enduring of the punishment adjudged," shall have the like effect and consequence as a pardon under the great seal, lays down a rigorous rule of construction which requires us to restrict the words of s. 40 by excluding from their scope cases where the punishment adjudged has been endured or where it has been remitted through an exercise of the royal clemency. Effect was given to this view by our brother Smith in his judgment in *Marion* v. *Campbell* (1).

Adverting to the consideration that the question before us is a question of the proper meaning of the language of s. 40, it seems to us, in view of the fact that the liability to proceedings under s. 42 is not contemplated by the statute as one of the penal consequences of a conviction for a criminal offence, that this liability is not attached *de jure* to the fact of conviction but is placed by the statute under the control of an administrative discretion, and in view of the unrestricted language of s. 43, there is no admissible ground for a construction effecting such an exclusion.

The answer, therefore, to the first branch of the Interrogatory numbered four is in the negative; and to the second branch, remodelled so as to read:

(2) upon release from prison under a valid exercise of the royal prerogative prior to the expiration of his sentence?

in the negative also.

(1) [1932] Can. S.C.R. 433, at 451.

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The Court unanimously answered the questions as follows:

"We interpret the interrogatory numbered one as presenting the question whether or not the act of clemency in releasing a convict from prison prior to the completion of the term of his sentence may be valid and effective in law without the consent of the convict.

"The answer to the question so framed is in the affirmative.

"The answer to the interrogatory numbered two is in the negative.

"The answer to the interrogatory numbered three is in the affirmative.

"The second branch of the interrogatory numbered four we read as presenting case (2) in these terms,

"(2) Upon release from prison under a valid exercise of the royal prerogative prior to the expiration of his sentence?

"Upon this reading, the interrogatory, in both branches, is answered in the negative."

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DAME ELEANOR CURRAN AND OTHERS ÈS-QUAL. (DEFENDANTS AND MIS-EN-CAUSE) ..... APPELLANTS;

*Oct. 28.
*Nov. 2, 3.

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AND

P. MEYER DAVIS (PLAINTIFF)..... RESPONDENT.

*Apr. 25.

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

Trust—Donation—Acceptance by trustee—Revocation by donor—No acceptance by beneficiary—Arts. 755, 981a, 1029 C.C.

A trust created by a trust deed under the provisions of Art. 981a C.C. is perfect and complete after it has been accepted by the trustee; acceptance by the beneficiary is not necessary to make the stipulation in his favour effective and irrevocable, unlike cases of donation under article 755 or of contracts under article 1029 C.C.

Judgment of the Court of King's Bench (Q.R. 53 K.B. 231) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judgment

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*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

(1) (1932) Q.R. 53 K.B. 231.

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of the Superior Court, De Lorimier J., and maintaining the respondent's action.

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

A. R. Holden K.C., W. F. Chipman K.C. and *W. K. McKeown K.C.* for the appellants.

Aimé Geoffrion K.C. for the respondent.

The judgment of the court was delivered by

RINFRET, J.—Par acte reçu à Montréal, le 21 octobre 1922, devant maître Edouard Cholette, notaire public, Sir Mortimer Davis, se désignant comme "donor" a transporté à quatre personnes, qu'il a nommées et appelées "trustees", des propriétés mobilières décrites comme suit: "Three million dollars face value of the twenty-year six per cent notes of Sir Mortimer Davis Incorporated". Voici en quels termes le transport est exprimé dans l'article I de l'acte:

Article I. The donor, subject to the conditions hereinafter expressed, hath by these presents given as a donation inter vivos and irrevocable unto the trustees thereof accepting the following property, namely: three million dollars face value of the twenty-year-six-per-cent notes of Sir Mortimer Davis Incorporated.

Which said property so donated and any property which may take the place thereof is hereinafter for brevity referred to as the "trust property."

Which said trust property the trustees acknowledge to have received and undertake to hold the same in trust for the purposes and on the conditions and for the benefit of the persons as herein expressed.

L'acte stipule que les "trustees" devront payer au donateur sa vie durant les revenus annuels nets provenant de la "trust property"; et que, après la mort du donateur, ces revenus seront payés, sous forme de rente annuelle viagère, à trois personnes: Lady Henriette Marie Meyer Davis, épouse du donateur; Mortimer B. Davis (fils du donateur); et Philippe Meyer Davis (fils adoptif du donateur). Ce dernier est le demandeur en la présente cause; et il convient de reproduire la clause qui le concerne:

The trustees shall pay the revenues derivable from the trust property as follows:

(4) To the donor's adopted son Philip Meyer Davis an annuity during his lifetime at the rate of three thousand dollars per annum until he reaches the age of twenty-one years; and after he reaches the age of twenty-one years and until he reaches the age of twenty-five years the annual sum of five thousand dollars; and after he reaches the age of twenty-five years the sum of ten thousand dollars per annum.

After his death the annuity which he would have received had he been alive shall continue in favour of his widow so long as she remains such and after her death or remarriage shall be paid in equal shares to his lawful children, the lawful issue of any predeceased child to take the parent's place and share, but such annuity shall in any event cease on the death of the last surviving child of the said Philip Meyer Davis in the first degree.

Après avoir ainsi pourvu à l'emploi des revenus, l'acte stipule que

subject to the terms, provisoes and substitutions hereinbefore and hereinafter contained, the capital of the trust property and any accumulated revenues are hereby bequeathed to the son of the donor, the said Mortimer B. Davis.

Mais ce capital est l'objet de toute une série de dispositions. Il est pourvu qu'il demeurera

absolutely vested in the hands of the trustees for a period of at least fifty years from the date of the death of the donor and during that period no beneficiary shall be entitled to demand any partition thereof.

Discrétion absolue et sans contrôle est cependant attribuée aux "trustees" de procéder au partage partiel ou total de la "trust property" avant l'expiration de la période de cinquante ans, s'ils le jugent à propos.

Les revenus qui ne seront pas requis pour pourvoir aux rentes prévues par l'acte doivent s'accumuler et être ajoutés au capital. Après avoir atteint l'âge de trente ans, le fils, Mortimer B. Davis, aura droit aux revenus annuels nets de la "trust property", déduction faite des rentes stipulées en faveur de Lady Henriette Marie Meyer Davis et de Philippe Meyer Davis.

A la mort du fils, Mortimer B. Davis, le capital devient la propriété de ses enfants légitimes, à parts égales par souches, puis il va aux enfants de ses enfants. Cependant ce capital continue de demeurer "vested in the hands of the trustees", et seuls les revenus qui en proviennent leur sont payés par les "trustees".

L'acte contient ensuite des stipulations en faveur des veuves du fils, Mortimer B. Davis, et de ses enfants (les petits-enfants du donateur). Il pourvoit à l'accroissement, au cas où l'un des petits-enfants mourrait sans laisser de descendance légitime; puis il contient la clause suivante, qui est importante et qu'il faut reproduire textuellement:

Subject to the payments to the said Lady Davis and to Philip M. Davis required to be made herein the donor stipulates the right of taking back the trust property and any accumulated revenues so given should the said Mortimer B. Davis and his lawful descendents die before him, the donor, and subject to like payments should the said Mortimer B.

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Davis survive the donor and die without lawful issue or lawful children as representing such issue then the capital and any accumulated revenue shall revert to the estate of the donor and be governed by the terms of his will.

La clause suivante pourvoit à la réduction des rentes respectives en cas d'insuffisance des revenus, et déclare qu'elles seront incessibles et insaisissables.

Le reste de l'acte réfère aux "trustees"; leur nombre est fixé à quatre tant que Mortimer B. Davis vivra. Après sa mort, ce nombre sera réduit à trois. Toute la procédure pour remplir une vacance parmi les "trustees" est minutieusement arrêtée. Suivant le cas, ce sont les autres "trustees" ou un juge de la Cour Supérieure pour la province de Québec, dans le district de Montréal, qui doivent procéder à cette nomination. La seule réserve à l'égard du donateur est exprimée dans les termes suivants:

During the lifetime of the donor, vacancies in the trust shall be filled with his approval.

La majorité des "trustees" a le pouvoir de décider toute question. En cas d'égalité des voix entre eux sur une question particulière, il est pourvu à la nomination d'un tiers pour les départager.

Chaque "trustee" est autorisé à renoncer, même après avoir accepté sa charge; et, dans ce cas, il n'est tenu à rendre compte que de l'argent ou des valeurs qui ont passé entre ses mains.

Les "trustees" ne sont responsables que de leur bonne foi dans l'administration et sont relevés de toute autre responsabilité.

Vient ensuite l'énumération des pouvoirs des "trustees." En plus de tous ceux qui sont conférés aux "trustees" en général par la loi ou par les statuts, l'acte leur attribue les plus amples pouvoirs de vendre ou d'échanger, d'acquitter ou de radier les hypothèques, de faire le placement des fonds ("and from time to time to sell, alter and vary "investments"), d'emprunter, de prêter ou avancer au trust, le tout à leur gré et suivant la plus entière discrétion, de former le compte du capital ou des revenus.

Ils sont autorisés à requérir l'assistance professionnelle ou autre dès qu'ils jugent à propos, et

to determine all questions and matters of doubt which may arise in the course of their administration, realization, liquidation, partition, or winding up of the trust; and their discretion, whether made in writing or implied from their acts, shall be conclusive and binding on all beneficiaries.

La clause qui confère les pouvois ci-dessus aux "trustees" se termine comme suit:

The powers hereinabove given to the said trustees shall be exercised by them with the consent of the donor during his lifetime, and after his death in their own and absolute discretion.

Par la clause VIII, le fils, Mortimer B. Davis, intervient et accepte la donation pour lui-même et pour ses enfants nés et à naître.

Le 10 octobre 1927 (à savoir environ cinq ans après l'acte dont nous venons de donner le résumé), Sir Mortimer Davis comparut devant maître Edward Phillips, notaire à Montréal; et, par un acte unilatéral, prétendit révoquer, canceller et annuler "in the most effective manner possible" ce qu'il appelle dans ce document

the said donation in favour of the said Philip Meyer Davis and his widow and his children and any of them,

à savoir: la rente annuelle viagère prévue en faveur de ces derniers à l'acte du 21 octobre 1922 dans la clause qui a été citée textuellement.

Sir Mortimer Davis est mort le 22 mars 1928. Par son testament, il a nommé les appelants ses exécuteurs testamentaires et légataires fiduciaires, à qui il a légué tous les biens qui composaient sa succession lors de son décès.

L'intimé a intenté la présente action pour faire déclarer nul et de nul effet l'acte de révocation du 10 octobre 1927. Il a dirigé son action contre les exécuteurs testamentaires et légataires fiduciaires nommés par le testament de Sir Mortimer Davis, bien que, dans le bref de sommation, il les ait désignés seulement comme légataires fiduciaires.

Il a mis en cause les "trustees" nommés par l'acte du 21 octobre 1922, ou leurs remplaçants. Il a conclu aux frais seulement contre les défendeurs.

Les mis-en-cause n'ont pas plaidé. Seuls les défendeurs (exécuteurs testamentaires et légataires fiduciaires) ont contesté l'action en prétendant qu'ils n'étaient nullement concernés en cette affaire et qu'il n'existait aucun lien de droit entre eux et le demandeur à raison des allégations de la déclaration. Ils n'en ont pas moins plaidé, au surplus, que la stipulation invoquée par le demandeur ("the so-called gift") était nulle, comme ne devant avoir effet qu'après la mort de Sir Mortimer Davis; mais que, à tout événement, la révocation que ce dernier en avait faite était efficace et valide parce que, à ce moment-là, la stipulation

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n'avait pas encore été acceptée par le demandeur; et l'acceptation que les "trustees" avaient prétendu faire était insuffisante pour lui donner effet.

La Cour Supérieure et la majorité de la Cour du Banc du Roi ont décidé que, en l'espèce, le contrat du 21 octobre 1922 était parfait sans acceptation de la part de l'intimé et que sa révocation partielle par le donateur était illégale et de nul effet. En conséquence, l'action a été maintenue et l'acte de révocation a été annulé.

Les exécuteurs testamentaires, légataires fiduciaires, en appellent de cette décision, et soumettent à l'encontre les arguments suivants:

1. L'action est mal dirigée. Elle devait s'adresser aux "trustees" chargés de l'exécution de l'acte du 21 octobre 1922, et non pas aux légataires fiduciaires nommés dans le testament;

2. La libéralité en faveur de Philippe Meyer Davis était une *donatio mortis causa,* et, comme telle, absolument nulle;

3. Tout le contrat du 21 octobre 1922 constitue une stipulation au profit d'un tiers qui est la condition d'un contrat fait par Sir Mortimer Davis pour lui-même ou d'une donation faite à un autre; et Sir Mortimer Davis pouvait la révoquer tant que le tiers (Philippe Meyer Davis) n'avait pas signifié sa volonté d'en profiter;

4. Si le contrat du 21 octobre 1922 doit être envisagé uniquement comme un contrat de fiducie, il est, comme tel, en vertu de la loi, soumis expressément aux conditions de la donation du code civil de la province de Québec; et seule l'acceptation par Philippe Meyer Davis pouvait rendre irrévocable la donation dont il était le bénéficiaire.

Nous allons examiner chacun de ces points dans l'ordre où ils sont énumérés.

Le moyen résultant du fait que l'action est dirigée contre les légataires fiduciaires fut partiellement accueilli par le juge de première instance, qui a maintenu le plaidoyer des défendeurs ès-qualité, quant aux frais seulement, mais en ordonnant que ces frais seraient taxés comme ceux d'une inscription en droit.

En Cour du Banc du Roi, monsieur le juge Hall était d'avis qu'il n'existait aucun lien de droit entre le demandeur et les défendeurs ès-qualité, et il aurait rejeté l'action de ce

seul chef. Les autres juges n'ont pas parlé de ce moyen de défense.

Il n'y a pas eu d'appel de la part de l'intimé de cette partie du jugement de la Cour Supérieure qui le condamnait aux frais d'une inscription en droit; mais nous ne pouvons ignorer ce premier point de la défense, parce que les appelants l'ont de nouveau fait valoir à l'audition devant cette cour.

A notre humble avis, l'action de l'intimé a été intentée contre ses véritables contradicteurs. Rappelons, en effet, les conclusions de cette action: Elle demande simplement l'annulation de l'acte de révocation, et elle met en cause les "trustees" de l'acte du 21 octobre 1922 pour entendre prononcer le jugement.

La révocation fut l'acte de Sir Mortimer Davis cinq ans après le contrat de fiducie accepté par les "trustees" et par le bénéficiaire du capital de la "trust property". Ni ces "trustees", ni ce bénéficiaire, n'ont été parties à l'acte de révocation; ni les uns, ni les autres ne l'ont adopté. Comme nous l'avons vu, ce fut l'acte uni-latéral de Sir Mortimer Davis. Si l'action eût été intentée du vivant de ce dernier, il est évident qu'il eût fallu la diriger contre lui. Après sa mort, il était nécessaire pour le demandeur de diriger son action contre les représentants de Sir Mortimer Davis. Ces représentants sont ses exécuteurs testamentaires et légataires fiduciaires en vertu de son testament. Les "trustees" de l'acte du 21 octobre 1922 ne le sont pas; ou, à tout événement, ne le sont que pour les fins spéciales mentionnées dans cet acte. C'est la succession de Sir Mortimer, et non pas la "trust property", qui doit répondre des conséquences de l'acte de révocation, si cet acte est illégal.

Nous croyons donc que les exécuteurs testamentaires étaient les seuls légitimes contradicteurs et que c'est contre eux que l'action devait être dirigée.

Nous n'avons pas besoin d'ajouter que nous ne nous arrêterons pas pour un seul instant à l'objection soulevée par les appelants que, dans le bref de sommation, ils auraient été désignés seulement

in their quality of trustees under the will of the said late Sir Mortimer B. Davis.

L'objection est que, dans cette désignation, on aurait omis de les désigner également comme exécuteurs testamentaires.

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Ce sont les mêmes personnes qui sont à la fois exécuteurs testamentaires et légataires fiduciaires. Ce sont elles qui sont devant la cour à titre de défendeurs. Tout au plus, s'il y avait insuffisance de désignation, cette objection aurait-elle pu faire l'objet d'une exception à la forme devant la cour de première instance. Nous n'avons aucun doute, étant données les conclusions de cette action, que les appelants étaient les véritables défendeurs que le demandeur devait assigner, et que c'est contre eux que le jugement annulant l'acte de révocation devait être prononcé.

D'ailleurs, il n'y a pas, en vertu du code de procédure civile, de différence essentielle entre des défendeurs et des mis-en-cause. Tout dépend des conclusions qui sont prises dans l'action. Dans l'espèce, la cour a devant elle toutes les parties qui sont nécessaires pour prononcer la nullité de l'acte "en déclaration de jugement commun".

Ce premier moyen des appelants doit donc être écarté.

En ce qui concerne le second moyen des appelants, admettons pour les besoins de la discussion que la libéralité en faveur de l'intimé doive être envisagée comme une donation entre vifs subordonnée à toutes les règles du code civil (titre 2, c. 2). Nous constatons au contrat que nous avons résumé au commencement que Sir Mortimer a transporté aux "trustees" des biens présents:

> three million dollars face value of the twenty-year-six-per-cent notes of Sir Mortimer Davis Incorporated,

que les "trustees" ont acceptés et qu'ils ont reconnu avoir reçus. Il n'y a pas eu donation directe d'une rente à Philippe Meyer Davis. Les "trustees" ont accepté la mission de lui payer une rente à prendre sur les revenus de la "trust property". Du côté de Sir Mortimer, le désaisissement de son droit de propriété des "$3,000,000 notes" a été actuel et complet dès la signature de l'acte. Du côté des "trustees" il est vrai que la rente à Philippe Meyer Davis est payable seulement à compter du décès de Sir Mortimer Davis; mais cet événement est mentionné uniquement pour fixer la date où la rente commencera à être payée. Dès le transport de la "trust property", l'obligation des "trustees" de payer la rente est née et est devenue une dette à l'égard de Philippe Meyer Davis. Par l'acte constitutif, l'obligation de la rente est stipulée, non-seulement envers ce dernier, mais envers sa veuve et ses enfants légitimes.

L'existence de cette dette était certaine; seule l'époque du paiement était subordonnée à un événement futur certain.

En vertu du dernier alinéa de l'article 777 du code civil:

> La donation d'une rente créée par l'acte de donation, ou d'une somme d'argent ou autre chose non déterminée que le donateur promet payer ou livrer, dessaisit le donateur en ce sens qu'il devient débiteur du donataire.

A fortiori doit-on décider qu'il y a eu dessaisissement actuel dans le cas d'une rente stipulée de la manière que nous venons de décrire. Il n'y a pas eu *donatio mortis causa.*

Le troisième moyen des appelants s'appuie sur l'article 1029 du code civil, qui se lit comme suit:

> 1029. On peut pareillement stipuler au profit d'un tiers, lorsque telle est la condition d'un contrat que l'on fait pour soi-même, ou d'une donation que l'on fait à un autre. Celui qui fait cette stipulation ne peut plus la révoquer si le tiers a signifié sa volonté d'en profiter.

Pour répondre à cet argument des appelants, il suffirait de dire qu'il est manifeste que Sir Mortimer Davis n'a nullement eu l'intention de faire une stipulation au profit de Philippe Meyer Davis en vertu de l'article dont nous venons de reproduire le texte. Il est absolument clair que le contrat du 21 octobre 1922 a été passé en vertu du chapitre IV (A), "De la fiducie", (articles 981*a* à 981*n* du code civil). Si le "trust deed" pouvait être fait et s'il rencontre les exigences du chapitre IV (A), il importe peu de se demander si les parties contractantes auraient pu également se prévaloir de l'article 1029 C.C.

Mais, incidemment, nous ne voyons pas comment la stipulation dont il s'agit pourrait entrer dans le cadre de cet article. Elle n'est pas la condition d'un contrat que Sir Mortimer Davis a fait pour lui-même. Il s'est dessaisi de son droit de propriété aux "notes" qu'il a transportées aux "trustees." Il s'en est réservé l'usufruit ou les revenus pendant sa vie. Il s'ensuit qu'il n'a pas transporté l'usufruit pour cette période de temps, et c'est tout. Cet usufruit, dès lors, n'a pas été l'objet du contrat. A l'égard de la chose qui en a été l'objet, le dessaisissement a été absolu et le contrat n'a pas été "fait pour" Sir Mortimer.

D'autre part, ce contrat ne tombe pas non plus sous la seconde alternative prévue par l'article 1029 C.C. Il faudrait pour cela que le transport des "notes" fût une donation que Sir Mortimer eût faite aux "trustees" et dont la

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stipulation de rente au profit de Philippe Meyer Davis serait l'une des conditions. L'idée que le transport des "notes" constituerait une donation aux "trustees" est exactement aux antipodes de la conception que se font les appelants du contrat consenti par Sir Mortimer. La base même de leur argumentation est qu'il n'y a pas donation aux "trustees", mais donation aux bénéficiaires. C'est précisément à cause de cette prétention qu'ils soumettent que les règles d'acceptation en matière de donation s'appliquent à l'espèce actuelle. Les appelants ne peuvent donc logiquement prétendre que la stipulation au profit de Philippe Meyer Davis est la condition d'une donation qui aurait été faite aux "trustees."

Ajoutons d'ailleurs que, sur ce point, nous sommes d'avis que les appelants ont raison. Il n'y a pas eu, en faveur des "trustees" une donation dans le sens du chapitre 2 du titre 2 du code civil. "Il est de l'essence de la "donation", telle qu'elle est envisagée par ce chapitre, "que le donateur se dessaisisse actuellement de son droit de propriété à la chose donnée en faveur du donataire" (Arts. 755 et 777 C.C.).

Les droits des "trustees", leur nature et leur caractère sont évidemment différents de ceux du donataire pur et simple. C'est ce qui nous reste à examiner en discutant le dernier moyen des appelants.

Comme nous l'avoms déjà dit, le contrat du 21 octobre 1922 est de toute évidence, dans l'intention des parties, un contrat fait en vertu des dispositions du chapitre "De la fiducie" (art. 981*a* jusqu'à 981*n* du code civil), et la véritable question dans ce litige est:

Une stipulation dans un contrat de fiducie ("trust deed"), comme celui qui est en cause, peut-elle être révoquée par l'acte unilatéral du donateur, après que ce contrat a été accepté par les fiduciaires ("trustees") et sous prétexte que le bénéficiaire n'a pas encore accepté la stipulation à son profit?

Pour répondre à cette question, il faut d'abord s'appliquer à bien saisir l'intention des parties contractantes. C'est dans les termes du contrat que l'on doit chercher cette intention; et, pourvu que la forme qu'ils ont donnée à leur contrat soit permise par la loi (ce qui revient à dire: pourvu qu'elle ne soit pas prohibée), les tribunaux doivent donner

effet à cette intention telle qu'elle a été exprimée. Ici, les parties ont entendu faire un contrat de fiducie, c'est-à-dire un contrat régi par les articles 981*a* et suivants du code. Personne ne prétend que le contrat qu'ils ont fait est contraire à la loi. Il faut donc se demander quelle est exactement la nature du contrat que Sir Mortimer Davis a volontairement adopté pour accomplir ce qu'il entendait faire, et quelles étaient, en vertu de la loi, les obligations des parties dans le but de le rendre complet et efficace.

Si l'on prend le contrat à la lettre, Sir Mortimer a donné, à titre de donation entre vifs et irrévocable, aux "trustees", qui les ont acceptées, les "notes" qui ont fait l'objet du contrat. L'article I est explicite:

> The donor subject to the conditions hereinafter expressed hath by these presents given as a donation inter vivos and irrevocable unto the trustees thereof accepting the following property, namely: three million dollars face value of the twenty-year-six-per-cent notes of Sir Mortimer Davis Incorporated.

Cette donation aux "trustees", ou, si l'on veut, ce transport (pour employer l'expression de l'article 981a C.C.), est, dans les termes mêmes de l'acte, déclaré "irrévocable" par le donateur lui-même. Les conditions auxquelles cette donation est subordonnée sont que le "chose donnée", appelée "trust property", sera détenue en fiducie par les "trustees" pour les fins et pour le bénéfice des personnes en faveur de qui le "trust" est constitué. Les "trustees" n'en seront cependant pas propriétaires, dans le sens absolu du mot. Les "trustees", bien que seuls propriétaires apparents à l'égard des tiers, n'auront ni l'*usus*, ni le *functus*, ni l'*abusus* de la "trust property". Cette "property" toutefois est à leur nom; et, dans le cas particulier qui nous occupe, elle ne sera jamais au nom de Philippe Meyer Davis. Ce dernier n'a aucun droit de propriété sur la chose donnée. Au moment de la création du "trust", il a simplement acquis une créance contre ce "trust". A son égard, il y a eu une stipulation qui participe de la constitution de rente, bien qu'elle ne corresponde pas à la définition qu'en donne l'article 1786 du code civil, parce qu'elle ne résulte pas d'un contrat fait entre le constituant et le crédirentier, ni d'une convention par laquelle le constituant s'engage à payer la rente au bénéficiaire. Cet engagement est pris par les "trustees", et, de leur part, n'est pas une obligation personnelle, mais un engagement de payer sur les revenus de la

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"trust property". En conséquence, Philippe Meyer Davis n'a aucun droit de propriété sur la "trust property". Il n'a que des droits conservatoires; et l'on peut se demander s'il a le droit de suite, ce qu'il n'est pas nécessaire de décider pour les fins de ce litige. Par la signature de l'acte, un droit de créance lui est dévolu. Il est devenu crédirentier, s'il veut se prévaloir de la stipulation.

Le propriétaire de fait de la "trust property" est le fils du donateur, Mortimer B. Davis, qui a été constitué le bénéficiaire du capital; mais il n'est qu'un propriétaire nominal. Il est stipulé que

> the capital of the trust property shall remain absolutely vested in the hands of the trustees,

non-seulement pendant la vie de ce bénéficiaire, mais également qu'il continuera d'être "vested in the hands of the trustees" pendant la vie des petits-enfants de Sir Mortimer Davis, et, à tout événement, pendant une période d'au moins cinquante ans à dater du décès de ce dernier. A la mort de chacun des petits-enfants, sa part du capital est dévolue aux arrière petits-enfants du donateur à parts égales et par souches.

Pendant toute cette période de temps, les "trustees" ont véritablement tous les droits du propriétaire sur la chose donnée, sauf qu'ils ne peuvent en tirer aucun avantage personnel, et avec, en plus, cette particularité qu'ils ont l'obligation d'administrer les biens au profit des bénéficiaires; nous voulons dire: qu'ils ne sauraient les laisser dépérir sans s'exposer à être démis par la cour. Ils ont le devoir de remplir les fonctions qu'ils ont acceptées et de faire fructifier la propriété qui leur a été transportée. Les "trustees", en vertu du contrat qui nous est soumis, ont la saisine de la "trust property", et les bénéficiaires ne peuvent revendiquer contre eux ni la possession de la "property", ni même, pendant la durée de la fiducie, aucun autre droit que celui du paiement de leur créance, ou ceux qui résulteraient de la dissipation ou du gaspillage de la "trust property". Mais, dans ce dernier cas, le trust ne prendrait pas fin, et les "trustees" seraient remplacés par d'autres. Dans l'intervalle, ils peuvent vendre, échanger, remplacer, emprunter, hypothéquer à leur gré, sans l'intervention des bénéficiaires, et suivant la discrétion la plus absolue. Ils ont le pouvoir pratiquement illimité "of ad-

ministration, realization, liquidation, participation or winding up", et toutes leurs décisions, expresses ou implicites, "shall be conclusive and binding on all beneficiaries".

Il est évident que la situation créée par ce contrat n'avait pas d'équivalent dans le droit de la province de Québec avant l'introduction et l'adoption du statut 42-43 Vict. ch. 29, intitulé: "Acte concernant la fiducie". Cette constatation avait déjà été faite avant nous par les juges qui ont rendu jugement dans la cause de *Mathison* v. *Shepherd* (1), M. le juge Lynch dit (p. 42):

> This is not a deed of donation within the meaning of our civil law. * * * We must, of course, have recourse to the law under which alone such a deed as the one under consideration could be passed, namely articles 981a and following C.C.

Et M. le juge Hutchinson dit (p. 52):

> Of course, previous to the Act 42-43 Vict., chap. 29 (1879), a trust deed of the kind in question could not have been made.

Ce n'est pas le *fideicommissum* du droit romain, non plus que la fiducie du droit français, dont Laurent (vol. 14, p. 444) disait que l'usage s'est perdu. Ce n'est ni la donation, ni le mandat, ni le dépôt du code civil. Il participe de chacun de ces contrats auxquels il emprunte sans doute quelques-uns de leurs éléments; mais il ne les contient en entier ni les uns, ni les autres, et il se sépare de chacun d'eux sur plus d'un point essentiel. Sir Mortimer Davis n'a pas voulu faire une donation, ni constituer un mandat ou un dépôt. Il a entendu créer un "trust" ou une fiducie telle qu'elle est prévue dans le statut de Québec 42-43 Vict., qui est maintenant incorporé au code civil dans les articles 981*a* et suivants. Il s'agit donc d'un contrat particulier avec ses stipulations et son caractère essentiellement différents des contrats antérieurement connus au code.

C'est à la lumière des articles concernant la fiducie qu'il nous faut interpréter le contrat que Sir Mortimer a fait et que ce chapitre particulier du code l'autorisait de faire.

La question vient pour la première fois devant cette cour. Dans *Valois* v. *DeBoucherville* (2) nous avons eu à examiner l'effet d'une fiducie créée par testament et la portée de l'article 869 C.C. Dans *Laliberté* v. *Larue* (3), nous avons étudié la loi des pouvoirs spéciaux de certaines corporations contenue au chapitre 227 des statuts refondus de Qué-

(1) (1908) Q.R. 35 C.C. 29. (2) [1929] S.C.R. 234.
(3) [1930] S.C.R. 7.

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bec de 1925, et nous avons eu alors l'occasion de référer au chapitre de la fiducie dans le code civil (Voir pp. 17 à 20). Mais cette cour n'a pas encore eu à se prononcer sur un cas comme celui qui nous occupe.

Dans la jurisprudence de la province Québec, on nous a cité quatre jugements:

I. *Smith* v. *Davis* (1).

L'acte qui fait l'objet de ce litige était une transaction à la suite d'un jugement en séparation de corps, par laquelle le mari assurait le pension alimentaire de sa femme, au moyen d'une somme de $20,000 remise en fidéicommis, dont le revenu était payable à la femme et le capital aux enfants issus du mariage.

En ce qui nous concerne ici, il suffit d'en retenir que la cour d'appel fut d'avis qu'il n'y avait pas eu donation parce qu'il n'y avait pas eu dessaisissement actuel de la part du mari; que les fidéicommissaires étaient de simples administrateurs; et que la convention était d'ailleurs annulée par l'effet de la réconciliation entre les époux. D'après le jugement tel qu'il est rapporté, il faut conclure que les parties contractantes n'avaient pas fait un contrat en vertu des articles 981*a* et suivants du code civil. Il n'est nullement question de ces articles dans les "raisons" de la Cour Supérieure, ou dans celles de la Cour du Banc du Roi.

Il est évident que ces jugements ne peuvent servir de précédents sur la question qui nous est soumise, vu qu'elle n'y est nullement discutée et ne paraît même pas y avoir été envisagée.

2. *Mathison* v. *Shepherd* (2), que nous avons déjà mentionné. Dans cette cause, le donateur avait transporté à des fiduciaires une certaine propriété immobilière, avec mission qu'elle fût détenue par eux pour qu'on y érigeât un "parsonage". Le donateur demanda la révocation du contrat, en alléguant à la fois renonciation et inexécution des obligations.

En Cour Supérieure, M. le juge Lynch conclut sur la question de fait qu'il y avait eu inexécution des obligations, et sur la question de droit que la révocation pouvait être prononcée en conséquence, sans qu'il fût nécessaire d'une stipulation à cet effet dans l'acte, nonobstant l'article 816 du code civil.

(1) (1893) Q.R. 2 K.B. 109. (2) (1908) Q.R. 35 S.C. 29.

Il dit qu'il s'agit d'une convention de fiducie qui tombe sous l'effet de la loi 42-43 Vict., c. 29, introduite dans le code sous les numéros 981*a* et suivants. Avant cette loi, une stipulation de ce genre pouvait se faire par testament (articles 869 et 964 C.C.); *Abbott* v. *Fraser* (1). Il ajoute:

But the power to do so by gift *inter vivos* is not covered by the code, either directly or indirectly; in fact, such a power would seem to be repugnant to the spirit of our civil law on that subject which required acceptance by the donee in order to render the contract perfect.

Il examine alors successivement les différents moyens invoqués par le donateur pour faire prononcer la résiliation judiciaire de son contrat. Et il est amené à se demander s'il peut y avoir révocation pour cause d'inexécution des obligations vu que ce droit de révocation n'est pas stipulé à l'acte et que, d'après l'article 816 du code civil, cette stipulation est nécessaire dans le cas d'une donation entre vifs ordinaire. Il répond (p. 42):

My view is that our law respecting gifts *inter vivos* does not apply to trusts such as these which are governed by arts. 981*a* to 981*n* C.C.

Il fait la déclaration que nous avons reproduite plus haut à l'effet qu'il ne s'agit pas d'une donation "within the meaning of our civil law"; qu'une convention de ce genre ne pouvait être consentie qu'en vertu des articles 981a C.C. et suivants, puis il ajoute:

Those articles merely lay down general principles on the subject; and for their elucidation we must refer to the authorities and precedents which have grown up under like systems in other countries, and notably England and United States.

La cause fut portée à la Cour de Révision, où elle fut entendue par MM. les juges Mathieu, Robidoux et Hutchinson.

M. le juge Mathieu partagea l'opinion de la cour de première instance à l'effet

que ces dispositions de la fiducie viennent du droit anglais et qu'on doit les interpréter d'après les règles du droit anglais.

Mais il fut d'avis d'infirmer le jugement parce qu'il lui parut

établi dans la cause que la fiducie n'était pas encore devenue caduque.

M. le juge Hutchinson arriva également à la conclusion que l'acte ne pouvait être révoqué, mais pour la raison que l'article 816 du code civil contenu dans la chapitre des donations devait lui être appliqué et qu'en vertu de cet article

(1) (1874) 20 L.C.J. 197.

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la révocation des donations n'a lieu pour cause d'inexécution des obligations contractées par le donataire, comme charges ou autrement, que si cette révocation est stipulée à l'acte, etc.

Son raisonnement peut être résumé comme suit: Les articles 981a C.C. et suivants ont été introduits par les statuts refondus comme amendements au titre second du troisième livre du code civil qui traite des donations entre vifs et testamentaires, en y ajoutant comme chapitre 4A le chapitre de la fiducie. En conséquence, dit-il, ces articles font maintenant partie, dans leur ordre régulier, de l'ensemble des articles du code groupés sous le titre "Des donations entre vifs et testamentaires".

And there is not a word in the whole Act to indicate that it introduces a new system incompatible with our prior law on the subject of gifts *inter vivos* and that for the elucidation of this Act recourse must be had to the law and practice in England; and this being the case, it must be presumed to be read and elucidated with the help of and in conformity with the provisions of our code.

Il fait ensuite l'admission que nous déjà mentionnée:

Of course, previous to the Act 42-43 Vict., c. 29 (1879), a trust deed of the kind in question could not have been made.

Puis il en vient au fond de son raisonnement: Certains articles du chapitre des donations s'appliquent nécessairement à un contrat de fiducie,

and consequently there must be a connection between the provisions of our code respecting gifts *inter vivos* and the provisions contained in this statute.

En tout respect, ce raisonnement nous paraît pécher par plus d'un côté. Aucune présomption ne résulte du seul fait que la loi 42-43 Vict., c. 29, a été subséquemment incorporée au code comme un chapitre du titre des donations entre vifs et testamentaires. La loi concernant la revision des statuts repousse cette présomption (Statuts de Québec, 50 Vict., c. 5, art. 8).

En outre, il est sans doute exact de dire que certains articles du code concernant les donations ou les testaments (tels que les articles 763, 768, 771, 776 et 778, auxquels le savant juge réfère spécialement) s'appliquent au contrat de fiducie; mais c'est parce que cette application s'impose en vertu du texte même de l'article 981a, que nous n'avons pas encore cité au cours du jugement et qu'il convient de reproduire maintenant:

981*a*. Toute personne capable de disposer librement de ses biens, peut transporter des propriétés mobilières ou immobilières à des fiduciaires, par donation ou par testament, pour le bénéfice des personnes en faveur de qui elle peut faire valablement des donations ou des legs.

Il ne s'ensuit donc pas du tout que tous les autres articles du code doivent régir un contrat qui transporte des propriétés à des fiduciaires par donation. Le fait est que, si l'on considère l'article 816 du chapitre des donations, qui était précisément en discussion dans la cause de *Mathison* v. *Shepherd* (1), nous voyons quelque difficulté à dire, avec M. le juge Hutchinson, que la révocation n'a lieu pour cause d'inexécution des obligations contractées que si cette révocation est stipulée à l'acte, vu que l'article 816 C.C. parle d'obligations "contractées par le donataire comme charges ou autrement" et que, dans la fiducie, on ne peut assimiler le fiduciaire à un donataire. Le code lui-même (art. 981b) donne plutôt cette désignation (donataire ou légataire) au bénéficiaire.

Quant au rapprochement qu'il fait entre les articles 869 et 964 C.C., d'une part, et les articles 981a jusqu'à 981n C.C., d'autre part, il y a tout de même cette distinction que les premiers sont contenus dans le chapitre des testaments et en font partie intégrale, tandis que les autres sont contenus dans un chapitre distinct, avec des dispositions particulières et qui réfèrent aux autres chapitres du code chaque fois que le législateur l'a cru nécessaire.

Le législateur a procédé de la même façon dans la loi des pouvoirs spéciaux de certaines corporations (S.R.Q., 1925, c. 227) que nous avons étudiée dans la cause de *Laliberté* v. *Larue* (2), et, en autorisant l'extension de l'hypothèque conventionnelle aux biens mobiliers et aux biens futurs, et l'extension du nantissement ou du gage à des biens qui peuvent également être futurs, mais surtout à des biens dont le débiteur conservait la possession et l'usage, il a expressément déclaré (art. 12, c. 227):

> Les droits que confèrent sur les immeubles l'hypothèque et le nantissement (en question) sont déterminés dans le code civil.

On ne peut donc déduire une conclusion du fait que la loi 42-43 Vict. est devenue un chapitre du code, ni que certains articles du chapitre des donations et des testaments s'appliquent à la fiducie. On ne peut certainement pas en tirer une conclusion inévitable ("unavoidable"), suivant l'expression de M. le juge Hutchinson. Le fait que le chapitre de la fiducie réfère expressément à quelques-unes des parties du chapitre des donations et des testaments con-

(1) (1908) Q.R. 35 C.C. 29. (2) [1931] S.C.R. 7.

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duirait plutôt à la conclusion contraire et serait susceptible d'être interprété comme voulant dire que les autres parties de ces chapitres ne s'appliquent pas. Or, l'article 981a C.C. ne fait aucune mention de l'acceptation du bénéficiaire.

Pour revenir au rapport dans la cause de *Mathison* v. *Shepherd* (1), il n'indique pas si le troisième juge, M. le juge Robidoux a adopté le raisonnement de M. le juge Hutchinson. La seule information qu'il nous donne est le *jugé,* qui est calqué sur les notes de ce dernier, en ajoutant: " Mathieu J. *dissentiente*". Comme les trois juges étaient unanimes à refuser le droit de révocation, cela laisse supposer que M. le juge Robidoux avait accepté les vues de M. le juge Hutchinson. Mais, au point de vue jurisprudence, le résultat serait seulement que les opinions des quatre juges se sont partagées également.

3. *City of Westmount* v. *Bishop* (2). D'après le rapport, l'action demandait l'annulation d'un contrat de fiducie *inter vivos* parce qu'il n'avait pas été fait en la forme notariée. L'action fut maintenue par la Cour Supérieure (Philippe Demers, J.). Ce jugement fut confirmé par la Cour de Révision (Archibald, C.J., St-Pierre et Mercier, JJ.).

Le jugement de la Cour de Révision est à l'effet qu'une fiducie ne peut être établie que par donation ou par testament (c'est le texte même de l'article 981a C.C.) et que si elle est établie par donation, le contrat doit être fait en la forme notariée, suivant l'article 776 du code civil. Le jugement ajoute que le fiduciaire n'avait pas le pouvoir d'accepter la donation pour les enfants mineurs bénéficiaires et que

his pretended acceptance is null and without effect and the said minors should not be considered as parties to the deed.

Ce jugement ne nous aide pas. Le motif que l'acte n'était pas en la forme notariée était suffisant pour justifier la conclusion. L'autre motif est surrérogatoire; et il est, en plus, ambigu. Il peut être interprété comme voulant dire que l'acceptation du fiduciaire était inefficace parce que les bénéficiaires étaient mineurs. C'est ce que semble indiquer la référence, faite dans ce "considérant", aux articles 789, 790, 792 et 793 du code civil. Si le contrat était

(1) (1908) Q.R. 35 S.C. 29. (2) (1915) 22 R.L. n.s. 355.

nul par défaut de forme essentielle, il importait peu qu'il eût été accepté ou non.

4. Il ne reste plus qu'à mentionner le jugement du Conseil Privé dans la cause de *O'Meara* v. *Bennett* (1). On se rappelle que, dans cette cause, le Comité Judiciaire décida qu'on ne pouvait prétendre que la conception du trust tel qu'il existe en droit anglais avait été incorporée dans son entier par l'adoption de la loi de fiducie. Lord Buckmaster, qui prononça le jugement, s'appuya principalement sur l'emploi du mot "transporter" ("convey") dans l'article 981a C.C., et fit remarquer que cela écartait, au moins, la création d'un trust par un acte unilatéral bien connu en droit anglais sous la désignation de "declaration of trust".

Ce jugement est précieux pour appuyer l'opinion, déjà émise par cette cour dans *Laliberté* v. *Larue* (2) que le trust anglais, avec sa complexité et ses multiples aspects, n'a jamais existé dans le système légal de la province de Québec, sauf dans la forme restreinte où on le trouve au chapitre de la fiducie. Mais, en outre, ce jugement est intéressant parce qu'il réfère à un passage de Mignault, *Droit Civil Canadien*, vol. 5, p. 157, déjà signalé par M. le juge Lynch dans *Mathison* v. *Shepherd* (3). Lord Buckmaster cite ce passage pour démontrer davantage que le trust unilatéral est étranger à l'économie du droit de Québec. Mais nous voulons insister surtout sur le fait que la citation est celle où Mignault émet l'opinion que l'acceptation du bénéficiaire n'est pas requise en vertu de l'article 981a du code.

Cette question de l'acceptation ne se posait pas dans la cause de *O'Meara* v. *Bennett* (1). Iln'était danc pas nécessaire pour Lord Buckmaster d'approuver l'opinion énoncée dans Mignault. On peut toutefois remarquer qu'il réfère à ce passage de l'ouvrage; et le moins qu'on puisse dire, c'est qu'il ne le désapprouve pas. Il est, en tout cas, certain que Mignault, en traitant du chapitre de la fiducie dans le code civil (vol. 5, p. 151 à 171), affirme:

> On se tromperait si on cherchait ailleurs qu'en Angleterre la source des dispositions de ce chapitre. * * * et il est établi que notre législateur s'est, en grande partie, inspiré des dispositions anglaises (pp. 153 & 154).

L'auteur est amené à discuter les conditions de validité de la fiducie et il conclut que la fiducie est parfaite par l'accep-

(1) [1922] 1 A.C. 80. (2) [1931] S.C.R. 7, at 18.
(3) (1908) Q.R. 35 S.C. 29.

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tation du fiduciaire et que, dès ce moment, elle ne peut être révoquée par le donateur.

Après la revue que nous venons de faire de la jurisprudence et de la doctrine dans la province de Québec sur la matière de ce litige, il est difficile de ne pas conclure que le chapitre de la fiducie dans le code est vraiment d'inspiration anglaise. Il est certain que le droit romain ou le droit français ne nous ont rien transmis d'identique; et, comme l'admet lui-même M. le juge Hutchinson dans la cause de *Mathison* v. *Shepherd* (1), un contrat de ce genre n'eût pas été possible en vertu du code, avant l'adoption de la loi de 1879. Il est donc conforme aux principes ordinaires d'interprétation, tels qu'ils sont constamment admis dans la jurisprudence des tribunaux du Québec, lorsqu'ils sont appelés à considérer la portée d'un article du code, de l'envisager en fonction de son origine et de son histoire et de chercher la solution des difficultés dans la jurisprudence où notre propre législation a pris sa source. Dans le trust anglais, l'acceptation du bénéficiaire n'est pas nécessaire pour la formation du contrat. Comme conséquence logique, il faudrait décider que, dans le trust du Québec, cette acceptation n'est pas, non plus, exigée.

Mais nous voudrions appuyer cette conclusion en nous basant, en plus, sur l'interprétation interne de la loi. Nous nous inspirons par là de l'avis du Conseil Privé dans l'arrêt de *Quebec Railway, Light, Heat & Power Company Ltd.* v. *Vandry* (2):

> Still the first step, the indispensable starting point, is to take the Code itself and to examine its words, and to ask whether their meaning is plain. Only if the enactment is not plain can light be usefully sought from exterior sources. Of course it must not be forgotten what the enactment is, namely, a Code of systematized principles and rules, not a body of administrative directions or an institutional exposition. Of course also the code, or at least the cognate articles, should be read as a whole, forming a connected scheme; they are not a series of detached enactments. Of course, again, there is a point at which mere linguistic clearness only masks the obscurity of actual provisions or leads to such irrational or unjust results that, however clear the actual expression may be, the conclusion is still clearer that no such meaning could have been intended by the Legislature. Whether particular words are plain or not is rarely susceptible of much argument. They must be read and passed upon. The conclusion must largely depend on the impression formed by the mind that has to decide.

(1) (1908) Q.R. 35 S.C. 29. (2) [1920] A.C. 662, at 672.

Si l'on interprète le chapitre de la fiducie suivant ce conseil et si l'on conclut que l'acceptation du bénéficiaire n'est pas requise pour compléter le contrat, l'on n'est conduit à aucun résultat déraisonnable ("irrational or unjust results"). Au contraire, ce résultat se produirait si l'on exigeait l'acceptation du bénéficiaire; et, dans bien des cas, l'usage de la fiducie serait rendu impossible pour donner effet à la libre volonté du stipulant. Dans un contrat comme celui-ci, par exemple, et en supposant que les fils bénéficiaires ne seraient pas mariés—ce dont nous ne savons rien—la stipulation en faveur de leurs veuves et la stipulation en faveur des enfants nés ou à naître seraient compromises par la difficulté pour elles ou pour eux d'en faire une acceptation qui serait conforme aux règles concernant l'acceptation dans le chapitre des donations entre vifs. En effet, il est bon de faire remarquer qu'il ne s'agit pas ici d'un contrat de mariage; et, par conséquent, ce contrat ne bénéficie pas de la faveur que le code accorde aux donations par contrat de mariage.

L'article fondamental, dans le chapitre de la fiducie, est l'article 981*a* C.C. Il est rédigé avec soin. Il paraît bien contenir tout ce qui est nécessaire pour définir le contrat de fiducie. Il indique d'une façon précise les personnes et l'objet du contrat. Il faut "une personne capable de disposer librement de ses biens" et "des fiduciaires." Ce sont là les deux parties contractantes. L'objet est de

> transporter des propriétés mobilières ou immobilières * * * pour le bénéfice de personnes en faveur de qui elle peut faire valablement des donations ou des legs,

indiquant implicitement qu'il n'y a pas donation à ces personnes.

Récapitulons maintenant et comparons. Dans la donation, pour avoir un "contrat parfait", il faut

(*a*) un donateur

(*b*) qui se dépouille de sa propriété à titre gratuit

(*c*) en faveur d'un donataire

(*d*) dont l'acceptation est requise.

Ce qui précède est la prescription impérative des articles 755, 765, 777, 787, 795, 821 et 823 du code civil. Et l'on remarquera comme chacun de ces articles insiste sur la nécessité de l'acceptation du donataire. Sans elle, il n'y a pas de contrat. La donation "dépouille le donateur" seule-

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ment "au moyen de l'acceptation", et elle "ne produit d'effet "qu'à compter de l'acceptation".

Au contraire, en adaptant la même méthode d'analyse à l'article 981*a* du code, pourvu que l'on ait

(*a*) une personne capable de disposer librement de ses biens,
(*b*) un transport des biens,
(*c*) des fiduciaires,
(*d*) un document fait en la forme d'une donation ou d'un testament,
(*e*) une stipulation de bénéfice au profit de personnes en faveur de qui on peut faire valablement des donations ou des legs,

on a la fiducie parfaite, telle qu'elle est requise par l'article du code.

L'accord des volontés est fait entre le stipulant et les fiduciaires et le contrat est formé. Le lien se crée avec les fiduciaires. Ce n'est pas pour le stipulant, c'est pour le bénéficiaire qu'ils s'engagent à administrer et à qui ils doivent compte. C'est à l'égard du bénéficiaire qu'ils assument les obligations imposées par l'acte. Même si l'on envisage comme une pollicitation la stipulation au profit du bénéficiaire, cela nous ramène à l'article 1029 du code civil et au raisonnement que nous avons fait plus haut en étudiant ce moyen invoqué par les appelants.

Il n'y a pas de rapport direct entre le bénéficiaire et le donateur, qui ne prend personnellement aucun engagement à son égard et qui a accompli tout ce qu'il devait faire dès le moment où il a transporté les propriétés aux fiduciaires. Pour prendre un exemple concret, il n'y a pas de rapport direct entre Sir Mortimer Davis et Philippe Meyer Davis. Sir Mortimer oblige les "trustees" à payer une rente à Philippe Meyer sur les fonds provenant des biens qu'il transporte aux "trustees". Dès que ces derniers acceptent, Sir Mortimer est dessaisi de ces biens et ce sont les "trustees" qui en "sont saisis" (981*b* C.C.). Tel est le cas dans tout contrat de fiducie fait en vertu des articles 981*a* C.C. et suiv. Le transport se fait "par donation ou par testament"; mais il suffit d'envisager la nature de ce transport pour voir qu'il ne s'agit pas d'une donation ou d'un legs dans le sens jusque là compris dans le code, et encore moins d'une donation ou d'un legs auxquels on peut appli-

quer les règles ordinaires du code civil. La personne qui crée le trust ne se dépouille pas du droit de propriété entre les mains du fiduciaire, ce qui est essentiel dans la donation entre vifs ou dans le testament, tels qu'on les comprend ailleurs dans le code (articles 755, 756, 777 et 873 C.C.).

Il n'y a donc pas donation ou legs aux fiduciaires, suivant l'acceptation ordinaire des mots. Ce que l'article 981a C.C. veut véritablement dire par l'emploi des mots "par donation ou par testament", c'est que le contrat de fiducie doit être fait en la forme requise pour une donation ou pour un testament.

C'est l'interprétation que lui a donné M. le juge Demers et la Cour de Révision dans la cause de *City of Westmount* v. *Bishop* (1), et le Conseil privé, dans la cause de *O'Meara* v. *Bennett* (2). De même lorsque l'article 981a C.C. réfère aux fiduciaires comme "dépositaires et administrateurs", et aux bénéficiaires comme " donataires ou légataires", il est impossible d'entendre ces mots dans la pleine et entière acception qu'ils ont dans les autres chapitres du code. Il est évident que les fiduciaires sont toute autre chose que des dépositaires ou des administrateurs ordinaires. En fait, ils possèdent à peu près tous les droits du propriétaire sans en avoir le titre; et il serait oiseux de démontrer que le titre du dépôt, du code civil, n'a qu'une bien lointaine analogie avec la situation créée aux "trustees" par le chapitre de la fiducie.

Quant aux bénéficiaires, il est clair qu'ils ne sont pas des donataires ou légataires comme on les comprend habituellement. Ils sont, à tous égards, des tiers au profit desquels le créateur du trust a fait une stipulation. Et ce que nous venons de dire de la fiducie en général s'applique tout particulièrement au contrat en litige.

Il est important de signaler jusqu'à quel point, dans ce contrat, Sir Mortimer Davis s'était, dès la signature de l'acte, complètement dépouillé et dessaisi entre les mains des "trustees" de tous ses droits de propriété et de contrôle sur les biens qu'il a transportés. Dès le début, il déclare que ce transport est irrévocable, et les "trustees" l'acceptent comme tel. De ce moment, les "trustees" son absolument

(1) (1915) 22 R.L. n.s. 355. (2) [1922] 1 A.C. 80.

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investis de tous les droits et de tous les pouvoirs possibles sur les biens transportés, sauf du titre de propriété lui-même; et Sir Mortimer leur transmet actuellement tous ces droits et pouvoirs pour être exercés à leur gré et suivant la plus entière discrétion. Il fait seulement la réserve que, de son vivant, les pouvoirs seront exercés avec son consentement; mais il ne peut plus prendre lui-même la moindre initiative. Il ne stipule aucune condition résolutoire. Il déclare expressément, en vertu des termes de l'acte, que le droit de retour de la "trust property" ne pourra plus être exercé en sa faveur que si son fils, Mortimer B. Davis, et les descendants légitimes de ce dernier meurent avant lui, ou en faveur de sa succession, si son fils lui survit mais meurt sans laisser d'enfants ou de petits-enfants.

Disons, en passant, que l'avènement de ces conditions ne s'est jamais produit en fait.

Il ne peut même pourvoir lui-même au remplacement des "trustees" au cas où il y aurait vacance. Il mentionne seulement que le remplaçant devra recevoir son approbation.

A tous les points de vue, les biens sont sortis de son patrimoine d'une façon absolue et sont définitivement affectés aux fins qu'il a définies dans le contrat que les "trustees" se sont engagés à accomplir. Il n'est plus le maître. Bien plus, dans le cas particulier, le titre de propriété et le droit aux revenus accumulés sont attribués au fils, Mortimer B. Davis et à ses enfants nés ou à naître; et Mortimer B. Davis intervient et accepte, tant en son nom qu'au nom de ses enfants. En sorte que si la révocation de la rente constituée en faveur de Philippe Meyer Davis devait être efficace, ce n'est pas à Sir Mortimer que le bénéfice devrait en retourner, mais ce bénéfice devrait aller au fils à qui il avait cédé le titre de propriété. Il s'ensuit donc que, par l'acte de révocation qui est attaqué dans cette cause, Sir Mortimer a prétendu exercer un contrôle et un droit qu'il n'avait plus sur les biens qu'il avait transportés, contrôle et droit incompatibles avec l'acte qu'il avait consenti, et dont il s'était départi sans réserve par la force même de cet acte.

Dans la donation ordinaire, le contrat est révocable tant qu'il n'a pas été accepté par le donataire, parce que, dans la nature même des choses, le donataire est alors l'autre

partie contractante; et tant qu'il n'a pas signifié sa volonté de l'accepter, le contrat n'est pas formé; la chose n'est pas sortie du patrimoine du donateur. Il a donc encore le droit de changer d'avis et de garder sa chose.

Dans le contrat de fiducie, l'autre partie contractante est le fiduciaire ou le "trustee". Dès que ce dernier accepte, le transport est effectué, complet et définitif. Le créateur du trust est dessaisi de la chose qui en a fait l'objet. Cette chose ne fait plus partie de son patrimoine. Elle est dès lors subordonnée à l'affectation qu'il en a faite. Il ne peut plus la reprendre. Il ne peut avoir le droit de révocation que suivant les termes et les conditions qu'il a fixées.

Nous sommes donc d'avis que, en vertu du contrat du 21 octobre 1922, la "trust property" a été transportée irrévocablement aux "trustees", qui l'ont acceptée; que le contrat s'est formé par cette acceptation sans que l'intervention du bénéficiaire fût nécessaire; que la rente a été dès lors constituée au profit de Philippe Meyer Davis, s'il voulait s'en prévaloir; et que Sir Mortimer Davis, qui s'était dessaisi de tous ses droits et qui n'avait pas stipulé de réserve à cet effet, n'avait pas le droit de révocation qu'il a prétendu exercer.

En conséquence, l'appel doit être rejeté avec dépens.

Another judgment was delivered by this court the same day on another appeal between the same appellants and Dame Beatrice Davis. The decision is similar as to the questions of law. This judgment is published below, as the words in the trust deed and the mode of transfer are somewhat different from those in the other deed.

The judgment of the court in that second appeal was delivered also by

RINFRET J.—No distinction in the legal sense can be made between this case and that of *Curran* v. *Philippe Meyer Davis* in which the Court is giving judgment at the same time.

The words in the trust deed whereby Sir Mortimer Davis conveys the trust property and, to a certain extent, the mode of transfer itself are somewhat different from those used or adopted in the other deed. In our view, however, the legal effect is the same.

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The material articles of the deed read as follows:

Article 1. The donor subject to the conditions, payments and provisos hereinafter expressed hath by these presents given as a donation *inter vivos* and irrevocable unto the donee and to his children as hereinafter set out the sum of one million two hundred thousand dollars which he promises to pay and to deliver for the purposes of this gift to the said trustees on demand and any part thereof which may remain unpaid at his death shall then immediately become due and exigible. The donor reserves the right in place of paying cash to pay and to deliver to the trustees securities satisfactory to the trustees and of the value in their opinion at the time of delivery equal to the amount in cash which such securities are to take place of and in like manner the trustees may at the death of the donor should any part of the said amount hereby donated remain unpaid accept in lieu of cash securities under like conditions, all of which said property so donated is hereinafter called the "trust property."

Article II. For the purposes of this gift the donor hereby promises to pay and to deliver the said trust property to the trustees in the manner expressed in the preceding paragraph and the trustees are to hold the trust property on the terms and conditions as in this donation expressed.

Article III. The trustees shall reduce the trust property as and when received and as demanded by them under their control and shall pay the net annual revenues derivable therefrom to the donor during his lifetime.

Article IV. After the death of the donor the trustees shall provide and pay as regards the trust property as follows:

* * * * *

"To pay to the sister of the donor, Dame Beatrice Davis, widow of the late S. Lustgarten, an annuity at the rate of five thousand dollars per annum payable during her lifetime."

As will have been observed, according to the terms of these articles, the donation is made "unto the donee and to his children." In the Philippe Meyer Davis' case, the trust property was "given as a donation * * *, unto the trustees." But, in both cases, the property is delivered to the trustees and held by them for the purposes of the trust "on the terms and conditions * * * expressed," which, so far as concerns the pertinent questions involved in the suit, are identical in the two deeds.

There is no doubt, therefore, that here as in the other case, Sir Mortimer Davis intended to constitute a trust under articles 981*a* and following of the civil code.

Under those articles, however, the donor must "convey" the trust property; and one of the dissenting judges in the Court of King's Bench pointed out that, by the present deed, Sir Mortimer did not "convey," he only

promised to pay and to deliver * * * to the said trustees, on demand; and any part thereof which may remain unpaid at his death shall then immediately become due and exigible.

Then, again, the exact nature of the trust property is not definite. In place of paying cash the donor reserves the right

to pay and to deliver to the trustees securities satisfactory to the trustees and of the value in their opinion, at the time of delivery, equal to the amount in cash which such securities are to take the place of, etc.

On that account, the learned judge concluded there was no actual transfer of the trust property, at the time of the deed, and, therefore, no valid trust was created by the deed.

We have not to express any opinion as to what would be the legal situation, if matters were left in that state.

By article III of the deed, the trustees agreed and undertook to reduce the trust property under their control and to hold it for the purposes mentioned, "as and when received and as demanded by them." It follows that the trust property would, immediately upon being received, become subject to all the terms and conditions of the trust, which would at once be binding upon the trustees. One of these conditions, whereby the trustees would be bound, is the obligation to pay to the respondent, Beatrice Davis, the annuity provided for in the deed and in respect of which she brought her action.

Now, it must be noticed that nowhere in the written pleadings, nor throughout the trial, was it even suggested that the money was not paid to the trustees or that the securities were not delivered or, in other words, that the trust property was not conveyed to them. In fact, the trustees filed no plea and the only contestation in the proceedings was made by the testamentary executors on altogether different grounds—indeed on grounds which assumed that the trust deed had taken effect. The reasons stated for opposing the action were not that the trust deed was invalid or had never become operative; but, on the contrary and amongst other points raised, the defence was that the deed had been revoked by the donor and the trustees had acquiesced in the revocation.

When the point was raised in this court, Mr. Geoffrion, counsel on behalf of the respondent, stated that "the whole case must be argued on the assumption that the trustees

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got the money". The assertion did not bring any adverse reply from counsel for the appellants. We, therefore, take this to be the fact and, in our view, subsequent payment of the money or subsequent *delivery of the securities,* in compliance with the deed, was sufficient to make the trust effective and to bring it into operation. "As and when received" by the trustees, the trust property became affected *ipso facto* by the terms and conditions of the deed. This made the trust complete and all that was said in the Philippe Meyer Davis case—and which need not be repeated here—thereby applied. But there is, here, a further reason to strengthen our conclusion. The persons designated as donees in the deed are Mortimer B. Davis (son of the donor), and his children. By article IX of the deed, Mortimer B. Davis

> accepts the present gift in his favour as well also in favour of his children born or to be born.

The acceptance by Mortimer B. Davis for himself, alone was sufficient to render the gift perfect (Art. 755 C.C.) so far at least as he was concerned and—what is still more important—to actually divest the donor "of his ownership of the thing given" (Art. 777 C.C.) and to make the gift irrevocable. By force of article 777 of the code

> the gift of an annuity created by the deed of such gift, or of a sum of money or other indeterminate thing which the donor promises to pay or to deliver, divests the donor in the sense that he becomes the debtor of the donee.

Through the acceptance of Mortimer B. Davis, the promise to pay the money or to deliver the securities according to the term of the trust deed was a complete gift under the Quebec law. The consent of the parties was sufficient without the necessity of delivery (Art. 777 C.C.). The gift became a debt enforceable at the instance of Mortimer B. Davis, who thereafter had the absolute right to compel the payment or the delivery into the hands of the trustees, where it became at once subject to all the conditions of the trust. That situation persisted throughout, even if we assumed that the money was not subsequently paid to the trustees. If not paid during the life of Sir Mortimer, it became a debt of his estate. In the eye of the law Sir Mortimer was absolutely divested (Art. 777 C.C.) and could no longer hold back or retake the trust property (Arts. 779, 811 C.C.), as he attempted to do by his own unilateral act.

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CURRAN v. DAVIS.

Rinfret J.

The trustees signed the deed purporting to revoke the stipulation in favour of the respondent. They declared they were doing so for the purpose of "accepting notification". They did not acquiesce. Once they had accepted the trust and, always on the assumption that it had become effective, they could not acquiesce, at least without the concurrence of all parties concerned. They were "obliged to execute the trust which they (had) accepted", unless they renounced their position of trustees in accordance with the provisions of the deed or with the prescriptions of the law (Art. 981h C.C.).

For these reasons and also for those given in the case of Philippe Meyer Davis, we think the appeal ought to be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Meredith, Holden, Heward & Holden.*

Solicitors for the respondents: *Geoffrion & Prud'homme.*

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

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*Mar. 24.
*April 25.

AND

THE BANK OF MONTREAL (DEFENDANT) APPELLANT;

AND

THE ROYAL BANK OF CANADA (THIRD PARTY) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Exchequer Court—Jurisdiction—Third party procedure—Defendant sued by Crown—Defendant claiming indemnity against third party under Bills of Exchange Act, R.S.C., 1927, c. 16, s. 50—Jurisdiction of Exchequer Court in respect of claim against third party—Exchequer Court Act, R.S.C., 1927, c. 34, ss. 30, 87 (as enacted by 18-19 Geo. V, c. 23, s. 5), 88—Exchequer Court Rules 234 to 241.

The Crown took action in the Exchequer Court to recover from the defendant bank the amounts of certain cheques signed by the Crown's proper officers and paid by the bank and charged by it to the Crown's

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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account, the Crown alleging that the payees' endorsements on the cheques were forged. The bank, purporting to act under rules 234 to 241 of the Exchequer Court, served a third party notice on another bank, claiming indemnity (for which claim it relied on s. 50 of the *Bills of Exchange Act*) against any liability, alleging that the cheques (purporting to be duly endorsed by the payees) were presented by the other bank to the defendant bank and paid by the defendant bank to it. The third party notice was set aside in the Exchequer Court. The defendant bank appealed.

Held (affirming the judgment below): The Exchequer Court had not jurisdiction in respect of the claim in the third party notice. Sec. 30 (*d*) of the *Exchequer Court Act*, by which that court possesses "concurrent original jurisdiction" in actions "of a civil nature * * * in which the Crown is plaintiff" did not make it competent for that court to deal with the claim in question. The proceeding against a third party on such a claim is a substantive proceeding and not a mere incident of the principal action. Rules for third party procedure are in essence rules of practice, not of law, introduced for the purposes of convenience and to prevent circuity of proceedings. Secs. 87 and 88 of the *Exchequer Court Act*, notwithstanding their comprehensive language, do not invest the judges of that court with power, by promulgating a rule, to enlarge the scope of the subject matters within that court's jurisdiction. Nor was the claim in question within the intendment of s. 30 (*a*), giving jurisdiction "in all cases relating to the revenue in which it is sought to enforce any law of Canada."

APPEAL by the defendant, the Bank of Montreal, from the judgment of Maclean J., President of the Exchequer Court of Canada, setting aside the third party notice herein.

The action was brought by the Crown, by information in the Exchequer Court of Canada, against the defendant to recover from the defendant the amounts of certain alleged cheques alleged by the plaintiff to have been wrongfully and improperly charged during the years 1928, 1929 and 1930 against the account kept by the plaintiff with the defendant, on the alleged ground that, although the cheques were signed by the proper officers of the plaintiff, the signatures of such officers were obtained by fraudulent means and that, although the cheques purported to be endorsed by the parties to whom they were made payable, the endorsements of the payees were forgeries; and that the cheques were therefore not properly chargeable against the plaintiff's account; and on the further alleged ground that by a special agreement with the plaintiff the defendant was an absolute guarantor of endorsements on all Government cheques drawn on and paid by the defendant.

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By third party notice, the defendant claimed, if it should be adjudged liable to the plaintiff in respect of all or any part of the amount mentioned in the information, to be indemnified by the Royal Bank of Canada (hereinafter called the "third party") against such liability and to be entitled to relief over against it, and to recover such amount from it; alleging that the cheques were presented for payment by the third party to the defendant and were paid by the defendant to it, the cheques when so presented and paid purporting to be regularly drawn upon the plaintiff's account with the defendant and purporting to be duly signed by the duly authorized officers of the plaintiff and purporting to be duly endorsed by the respective payees thereof.

On motion by the third party, Maclean J., President of the Exchequer Court, made an order setting aside the third party notice, without prejudice to any existing right of indemnity which the defendant might have against the third party. From this order the defendant appealed to this Court.

By the judgment now reported the appeal was dismissed with costs.

M. G. Powell K.C. and *F. D. Hogg K.C.* for the appellant.

E. G. Gowling and *D. K. MacTavish* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—The Crown is proceeding by way of information for the recovery from the defendant, the Bank of Montreal, of certain sums charged by the defendant to His Majesty's account as disbursed in payment of cheques purporting to be drawn by the authority of His Majesty and duly endorsed. These cheques were signed by the proper signing officers, but the endorsements are alleged to be forged. The appellant, the Bank of Montreal, claims indemnity from the Royal Bank of Canada under section 50 of the *Bills of Exchange Act:*

50. If a bill bearing a forged or unauthorized endorsement is paid in good faith and in the ordinary course of business, or by or on behalf of the drawee or acceptor, the person by whom or on whose behalf such payment is made shall have the right to recover the amount so paid from the person to whom it was so paid or from any endorser who has endorsed

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the bill subsequently to the forged or unauthorized endorsement if notice of the endorsement being a forged or unauthorized endorsement is given to each such subsequent endorser within the time and in the manner in this section mentioned.

2. Any such person or endorser from whom said amount has been recovered shall have the like right of recovery against any prior endorser subsequent to the forged or unauthorized endorsement.

3. Such notice of the endorsement being a forged or unauthorized endorsement shall be given within a reasonable time after the person seeking to recover the amount has acquired notice that the endorsement is forged or unauthorized, and may be given in the same manner, and if sent by post may be addressed in the same way, as notice of protest or dishonour of a bill may be given or addressed under this Act.

The appellant, accordingly, purporting to act under the Rules, 234 to 241, of the Exchequer Court, served a third party notice on the Royal Bank of Canada. The learned President of the Exchequer Court set aside this notice on the application of the Royal Bank. From this order the Bank of Montreal appeals.

The rule making authority exercised by the Exchequer Court is derived from sections 87 and 88 of the *Exchequer Court Act,* which are as follows:

87. (1) The Judges of the Court may, from time to time, make general rules and orders,

(*a*) for regulating the practice and procedure of and in the Exchequer Court;

(*b*) for the effectual execution and working of this Act, and the attainment of the intention and objects thereof;

(*c*) for the effectual execution and working in respect to proceedings in such Court or before such Judge, of any Act giving jurisdiction to such Court or Judge and the attainment of the intention and objects of any such Act;

* * * *

88. Such rules and orders may extend to any matter of procedure or otherwise, not provided for by any Act, but for which it is found necessary to provide in order to ensure their proper working and the better attainment of the objects thereof.

2. Copies of all such rules and orders shall be laid before both Houses of Parliament within ten days after the opening of the session next after the making thereof.

3. All such rules and orders and every portion of the same not inconsistent with the express provisions of any Act shall have and continue to have force and effect as if herein enacted, unless during such session an address of either the Senate or House of Commons shall be passed for the repeal of the same or of any portion thereof, in which case the same or such portion shall be and become repealed: Provided that the Governor in Council may, by proclamation, published in the *Canada Gazette,* or either House of Parliament may, by any resolution passed at any time within thirty days after such rules and orders have been laid before Par-

liament, suspend any rule or order made under this Act; and such rule or order shall, thereupon, cease to have force and effect until the end of the then next session of Parliament.

We have no doubt that, notwithstanding the comprehensive language of these sections, they do not invest the judges of the Exchequer Court with power, by promulgating a rule, to enlarge the scope of the subject matters within the jurisdiction of the Exchequer Court. The question of substance is whether the claim of the appellant set forth in the third party notice under section 50 of the *Bills of Exchange Act* is a claim in respect of which the Exchequer Court has jurisdiction. That jurisdiction is defined by section 30 of the Act which, in so far as material, is in these words:

> 30. The Exchequer Court shall have and possess concurrent original jurisdiction in Canada
>
> (*a*) in all cases relating to the revenue in which it is sought to enforce any law of Canada, including actions, suits and proceedings by way of information to enforce penalties and proceedings by way of information *in rem*, and as well in *qui tam* suits for penalties or forfeiture as where the suit is on behalf of the Crown alone;
>
> * * * *
>
> (*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

The principal contention of counsel for the appellants was that, the proceeding under the information being an action or suit "of a civil nature * * * in which the Crown is plaintiff * * *," the Court has, by the explicit words of the section, "concurrent original jurisdiction" with the courts of the provinces,—in this case with the Supreme Court of Ontario, in which province the cause of action arose. In such an action, that court would have jurisdiction to try and give judgment upon such a claim as that presented by the third party notice, and it is argued therefore that the Exchequer Court is invested with a like jurisdiction.

We cannot accede to this ingenious argument. The Supreme Court of Ontario has jurisdiction, by virtue of the statutes and rules by which it is governed, to entertain and dispose of claims in what are known as third party proceedings. Claims for indemnity, for example, from a third party, by a defendant in respect of the claim in the principal action against him, can be preferred and dealt with in the principal action. But there can be no doubt that

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the proceeding against the third party is a substantive proceeding and not a mere incident of the principal action. These rules are in essence rules of practice, not of law, introduced for the purposes of convenience and to prevent circuity of proceedings. We think, therefore, that section 30, in virtue of the sub-paragraph mentioned, by which the Exchequer Court possesses "concurrent original jurisdiction * * * in * * * actions * * * of a civil nature * * * in which the Crown is plaintiff," does not make it competent to the Exchequer Court to deal with the claim in question.

The remaining point concerns the language of sub-paragraph (*a*) by force of which the Court is given jurisdiction

> in all cases relating to the revenue in which it is sought to enforce any law of Canada * * *

We do not doubt that the words "to enforce any law of Canada" would have, standing alone, sufficient scope to include a claim under section 50 of the *Bills of Exchange Act*. No doubt the principal action is strictly within the words "cases relating to the revenue." There is also, no doubt, a sense in which the third party claim relates to the revenue since it is a claim to have the third party indemnify the defendant in respect of a debt which the defendant is called upon to pay to the Crown. There is a great deal to be said also on grounds of convenience in favour of investing the Court with jurisdiction to entertain such claims for indemnity. On the whole, however, we think, having regard to the context, that this claim is not within the intendment of sub-paragraph (*a*).

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Powell & Matheson.*

Solicitors for the respondent: *Brown, Montgomery & McMichael.*

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CITY OF HALIFAX AND HARRY KITZ (DEFENDANTS) ..... } APPELLANTS; *Oct. 17, 18.

1933

AND

*Feb. 7.

MARY HYLAND (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Assessment and taxation—Land offered at tax sale bid in by municipality —Alleged offer of redemption—Alleged misrepresentation by municipal official preventing redemption—Claim to have conveyance by municipality set aside and for right of redemption—Conflict of testimony.

APPEAL by the defendants the City of Halifax and Kitz from the judgment of the Supreme Court of Nova Scotia *en banc* (1) which reversed the judgment of Graham J. (1) in favour of the defendants.

Certain property owned by the plaintiff, on which taxes were in arrear, had been, pursuant to the provisions of the Halifax City Charter, offered for sale by public auction by the Collector of Taxes for the City of Halifax and, there being no bidders, had been bid in for the City by the Collector, pursuant to s. 466 of the Charter. The last day for redemption, under s. 458 (1) of the Charter, was July 6, 1929.

On July 5, 1929, (the day before the last day for redemption), the defendant Kitz, who wished to purchase the property, attended at the Collector's office, gave his cheque for the amount which the City would require for redemption of the property, and an assignment of the City's rights in the property was made out to him, and signed by the Mayor and City Clerk. The assignment was not delivered to Kitz at that time but was kept in the Assistant Collector's desk. Receipts were given to Kitz for the amount, reading as follows: "Received from Mary Hyland per H. Kitz the sum of * * * dollars."

At a time subsequent to the last day for redemption the City conveyed the property to Kitz.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

(1) 5 M.P.R. 174; [1932] 3 D.L.R. 760.

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CITY OF HALIFAX v. HYLAND.

On the morning of July 6, 1929, the last day for redemption, the plaintiff's son, William Hyland, went to the City Hall. One Smith, who, it was stated, was going to put up the money to redeem the property, also went there. Hyland met the Collector's Assistant, Young, in the hallway and asked him about the property, and said he wanted to redeem it. Young asked him to go inside, when he would look up the sale book and give him full information on it. Hyland and Young went into the office, Smith remaining out in the hall, and there was a conflict of evidence between Young and Hyland as to what occurred in the office. In the appeal to this Court, the case turned on the question, on conflicting evidence, as to what was said in the conversation in the office between Hyland and Young.

The plaintiff alleged that her agent attended at the Collector's office on the forenoon of the last day for redemption and stated that the plaintiff was prepared to pay the amount required for redemption, but was informed that it was too late to redeem, that the property had been already sold to Kitz; and that as a result of this false representation the amount required for redemption was not paid. These allegations were denied. Young, in his evidence, stated that he got the sales book out, turned up the page where the sale of the property was recorded, told Hyland that a transfer had been made out to Kitz, and that if they did not redeem before the time expired, a deed would be made out and given to Kitz afterwards, that he made out a full memorandum of the amount necessary to redeem and gave it to Hyland.

The action was brought for a declaration that the conveyance of the property by the City to Kitz was null and void and for a declaration giving the plaintiff the right to redeem on payment of the amount owing for taxes, and (by amendment) alternatively for damages.

The trial had been commenced before Harris C.J., who heard all the witnesses except Young. Harris C.J. having been taken ill during an adjournment of the trial, the case was taken over by Graham J., who decided it upon the record of the trial as far as it had proceeded before Harris C.J., and upon the evidence of Young heard by himself. He accepted Young's version, rather than Hyland's, of what was said, as being the more probable. He dismissed

the action (1). His judgment was reversed by the Court *en banc,* which gave judgment for the plaintiff (Ross J. dissenting) (1).

On the appeal to the Supreme Court of Canada, after hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment, allowing the defendants' appeal and restoring the judgment of the trial judge. Crocket J. dissented.

The judgment of the majority of the court was delivered by Smith J., who, after discussing the evidence at length, stated that he could see no reason for reversing the finding of the trial judge, who heard Young's testimony as to what was said, and accepted it; looking at the whole situation, it was difficult to find any reason for doubting the accuracy of Young's testimony. (In the course of his discussion of the evidence, and dealing with the remark in the judgment of the Court *en banc* that "This is certain, that Hyland and Smith went to the City Hall on the morning of July 6 for the purpose of redeeming the property and Smith was prepared and ready to pay the amount," Smith J. stated that he was satisfied upon the evidence that Smith and Hyland, on the morning of the 6th, went to the Collector's office merely for the purpose of ascertaining the correct amount required, and not for the purpose of then and there paying it, that Smith was not prepared or ready to pay it, and had no intention of paying it on that particular visit.)

Dealing with the assignment made out to Kitz on July 5, Smith J. agreed with the Court *en banc* that the City had no power to make it, but pointed out that the transaction was in accordance with a not unusual practice which was thought by the city officials to be legal and proper, and did not indicate any ill motive; the assignment was a mere nullity, and, whether a nullity or not, had no bearing on the right to redeem. As to the particular form of the receipts given to Kitz, in view of the undoubted facts of the matter no weight should be attached to it; there was no ground for holding that the payment by Kitz was made for the benefit of the owner.

Crocket J. dissented. He discussed the facts at length. He pointed out that, having regard to the fact that the learned trial judge did not have the advantage of person-

(1) 5 M.P.R. 174; [1932] 3 D.L.R. 760.

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ally hearing the testimony of Hyland or of Smith and professedly based his finding wholly on the balance of probability, there was no objection to the Court *en banc* freely reviewing that finding on a pure question of fact or to this Court now doing so. He stated that, after carefully considering the evidence in all its details and the reasons stated in the judgments of the learned trial judge and of the Court *en banc* for their opposite findings upon the question, he had reached the same conclusion as the majority of the appeal judges that Hyland's was the true version of what took place, and that Young by his statements prevented Hyland from paying the money to redeem the property; a tender was unnecessary under the circumstances. (*Nocton* v. *Lord Ashburton* (1), cited). *Derry* v. *Peek* (2) is not an authority for the proposition that an action for damages for misrepresentation without an actual intention to deceive may not lie in a proper case (*Nocton* v. *Lord Ashburton* (3)) (*Swinfen* v. *Lord Chelmsford* (4) cited). If Young made the false representation and prevented Hyland from paying the money to redeem the property, the City ought to be required to make good whatever loss the plaintiff had thereby suffered; that the City was liable for the misrepresentation and its consequences admitted of no doubt in the circumstances disclosed (*Lloyd* v. *Grace, Smith & Co.* (5); *Percy* v. *Glasgow Corporation* (6)).

Appeal allowed with costs.

F. H. Bell K.C. for appellants.

B. Russell K.C. for respondent.

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(1) [1914] A.C. 932, at 962.

(2) (1889) 14 App. Cas. 337.

(3) [1914] A.C. 932.

(4) (1860) 5 H. & N. 890, at 920-921.

(5) [1912] A.C. 716, at 737: that the principal is liable to third persons "for the frauds, deceits, concealments, misrepresentations * * * and omissions of duty of his agent in the course of his employment, although the principal did not authorize * * *."

(6) [1922] A.C. 299.

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF TISDALE..... } APPELLANT;

AND

HOLLINGER CONSOLIDATED GOLD MINES LIMITED ..... } RESPONDENT.

1933
*Feb. 16, 17.
*April 25.

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

Assessment and taxation—Assessment Act, R.S.O., 1927, c. 238, s. 40 (4)—Exemption (from assessment) of "the buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground" and "concentrators."

A system for disposal of the slimes from which mineral had been extracted, *held* to be an absolutely essential part of the effective separation of the minerals from the dross, and therefore part of a "concentrator" within s. 40 (4) of the *Assessment Act*, R.S.O., 1927, c. 238, and exempt from assessment. (Definition of "concentrator," within s. 40 (4), in *Re McIntyre Porcupine Mines Ltd. and Morgan*, 49 Ont. L.R. 214, at 218, adopted and applied). The Act aims at exempting such means as may be adopted at the mining location to aid in the concentrating of the ore mass.

The scope of the exemption in said s. 40 (4) of "the buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground," discussed, with regard to the general scheme of taxation as disclosed in s. 40 (4), (5) and (6). *Held*, that said exemption covers all buildings, plant and machinery (situated upon mineral lands) which form an essential part of the system actively in operation in obtaining the minerals, and is not confined to what is used *directly* in getting out the minerals.

Buildings, plant and machinery held exempt in the present case included (*inter alia*): a "change house," boiler house and heating system, power line, electric railway, powder magazine, and a "conveyor system" (to transport sand or gravel to fill in the space left in the mine by extraction of rock; and including, *inter alia*, compressor house, locomotive and cars, electric shovel, railway track, power transmission lines, and conveyor equipment, including steel towers, cables, buckets, etc.)

No appeal lies from a decision of the Ontario Railway and Municipal Board under s. 83 of said Act on a question of fact; therefore where the Board has found as a fact that lands in question were mineral lands within the meaning of s. 40 (4), an appellate court (if finding no error of law or of statute construction involved in the Board's finding) is precluded from interfering with such finding.

Judgment of the Appellate Division, Ont., [1931] O.R. 640, affirmed, on above grounds.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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TOWNSHIP OF TISDALE v. HOLLINGER CONSOLIDATED GOLD MINES LTD.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing an appeal by the present appellant and allowing an appeal by the present respondent from an order of the Ontario Railway and Municipal Board on appeals to the said Board from decisions of His Honour Judge Caron, Judge of the District Court of the District of Temiskaming, in respect of assessment by the appellant township for the year 1929 of certain property of the respondent mining company.

The material facts of the case and the questions in dispute are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

Peter White K.C. and *G. H. Gauthier* for the appellant.

R. S. Robertson K.C. and *P. C. Finlay* for the respondent.

The judgment of the court was delivered by

CANNON J.—This is an appeal from the judgment of the First Appellate Division of the Supreme Court of Ontario (1) dismissing an appeal by the present appellant and allowing an appeal by the present respondent from an order of the Ontario Railway and Municipal Board delivered on the 28th of October, 1930, on appeals to the said Board by both the appellant and the respondent from decisions of His Honour Judge Caron, delivered in September, 1929, in respect of assessment by the appellant township for the year 1929 of certain property of the respondent mining company.

Section 83 (6) of chap. 238, R.S.O., 1927, enacts that

> An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law or the construction of a statute, * * *.

The disputed assessments are in respect to land, including the buildings, plant and machinery thereon.

The respondent claims:

(1) that it is not assessable under section 40, subsection 4, of same Act, which reads as follows:

> 40 (4). The buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant, and, subject to subsection 8, the minerals in, on or under such land, shall not be assessable.

and

(1) [1931] O.R. 640; [1931] 4 D.L.R. 239.

(2) that it is not assessable with respect to chattel property, and

(3) that, in any case, property situated on the land of other owners was not legally assessed at all by the appellant.

The questions as to whether or not the buildings, plant and machinery are in or on mineral land, and are used mainly for obtaining minerals from the ground, or form part of the concentrators, are not exclusively of fact. The Ontario Railway and Municipal Board having found that the property attempted to be assessed is situate on "mineral land," it seems, as found by the Supreme Court of Ontario, that, upon the evidence adduced and the findings of the Board, we would be precluded from interfering therewith, if we agree, in law, with their view as to the meaning of the statute. The construction of a statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its term is a question of fact.

The County Judge and the Board have also found that the slimes disposal system formed part of the "concentrators," which are not defined by the Act, but were defined by the Appellate Division of the Supreme Court of Ontario, in *Re McIntyre Porcupine Mines Ltd. and Morgan* (1), as follows: Any process the purpose of which is the separation of the valuable mineral from the dross is a concentrating process, and the buildings and plant used for that purpose are, within the meaning of subsection 4, a concentrator. We feel that this should also apply to the machinery used to dispose of the refuse in this case. The *Assessment Act,* in this particular, aims at exempting such means as may be adopted at the mining location to aid in the concentrating of the ore mass. It is for the court to interpret the statute as best they can.

Now, upon the evidence and the unanimous findings of the District Judge, the Railway Board and the Appellate Division, the fact must be recognized that this disposal system of the slimes from which the mineral has been extracted is an absolutely essential part of the effective separation of the minerals from the dross. Without such

(1) (1921) 49 Ont. L.R. 214, at 218.

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TOWNSHIP OF TISDALE v. HOLLINGER CONSOLIDATED GOLD MINES LTD.

Cannon J.

system, it would be impossible to continue operating the mine, which would become choked with refuse; and the obtaining of minerals from the ground would be stopped.

Another large item in dispute is the conveyor system and the buildings, plant and machinery in connection therewith, which is $147,614, $140,389 of which assessment is in appeal, the respondent accepting the assessment of $6,770 on three buildings and the assessment of $454 on the change house at the gravel pit. The respondent excavates 4,400 tons of mineral bearing rock per day; and, in order to avoid a collapse of the whole work, they have to fill the vacant space left by the rock excavated, in order to continue the mining operations. In view of the nature of the tailings which are slimes the respondent has to fill back with sand or gravel, which is carried by an overhead conveyor from sand claims located at more than two miles from the workings.

The sand is mined on the "Sand Claims," being dug out of the side of the bank by an electrically operated shovel, as the bank recedes it is moved nearer the bank so as to be always near enough to load the sand from the face of the bank to the cars on the other side. The cars into which the sand is loaded are a special type of side dump cars which are heated in the winter time. These cars are on a narrow gauge railway track laid on ties and sleepers, and as the sand bank recedes the track must be moved continuously towards the bank. These cars are drawn along the railway by the dinky locomotive from the electrically operated shovel to the lower hopper into which the sand is dumped. From this hopper there is a belt conveyor which inclines down to another hopper which is covered with bars for screening, and a belt comes from the under side of one hopper to the upper side of the other in order to elevate the sand and get it in the bottom of the hopper. The sand is loaded from the hopper by machinery into the buckets which are attached to the conveyor and carried to the central shaft.

The compressor house referred to in the Assessment Schedule houses the compressor which is used for the purpose of operating the loading gate and the gate in the hopper that loads the buckets. The oil house on the "Sand Claims" is used for storing oil in drums. The gravel load-

ing station, face of gravel bin, is a galvanized iron shed placed in front of the bin to protect men from the weather and rain. The 6 H.T. Transformers are used for transforming the high tension current to 500 V. for use by the electric shovel and driving the compressor. The one-third power transmission line to the shovel is carried on poles with a short piece of cable from the pole to the electric shovel. This is movable as of necessity as the electrically operated shovel is a caterpillar type and moves around under its own power.

The sand is transported from the "Sand Claims" to the central shaft in detachable buckets carried on an endless cable hung over wheels attached to two sides of four cornered steel towers. The full bucket runs along one side to the central shaft where it is dumped and returns along the other side to the "Sand Claims" to be refilled. The steel towers are approximately 350 feet apart and rest on small concrete foundations to which they are bolted, all of which is movable.

The power transmission line to the plant, including poles, insulators and all overhead equipment, all of which is movable, parallels the conveyor system and runs between the Hollinger Mines and the transformer station at the "Sand Claims" and furnishes the power to operate the conveyor and the necessary power used to mine and load sand in the buckets.

The owners of the mining properties between the "Sand Claims" and the central shaft have never given the respondent permission to install, operate or maintain the conveyor system and power transmission line. The respondent intended to purchase a right-of-way but to date has not done so.

The question as to whether the properties assessed or on which the buildings, plant and machinery are found are "mineral lands" is one of fact, as well as that whether or not any particular substance is a "mineral" within the meaning of the statute in which the word is used, there being no definition in the Act. (*Union Natural Gas Company of Canada* v. *Corporation of the Township of Dover* (1).) We agree with the late Mr. Justice Grant of the Appellate Division, when he says (2):

(1) (1920) 60 Can. S.C.R. 640, at 642.

(2) [1931] O.R. at 645.

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Upon the evidence which was adduced, and upon the findings made by the Ontario Railway and Municipal Board, it appears to me quite clear that the Board must be taken to have decided that the lands in question were mineral lands, within the meaning of section 40, subsection 4; and as their finding in that regard is one of fact, this Court is precluded from interfering therewith.

The respondent's buildings, plant and machinery, although being on mineral lands, must also, to be exempted, unless they form part of the concentrators or sampling plant, be "used mainly for obtaining minerals from the ground or storing the same."

The Appellate Division reached the conclusion that the Legislature intended to relieve from municipal taxation all buildings, plant and machinery, situate upon mineral lands, which form an essential part of the system actively in operation in obtaining the minerals. Counsel for the appellant contends that the section covers only that which was used *directly* in getting out the minerals.

The provisions of subsections 4, 5 and 6 of section 40 indicate that the Legislature, in enacting them, provided a plan of taxation which would be equitable and just as between the owner of agricultural land and the owner of mineral lands. It is not mineral lands which are made non-assessable, but the minerals in, on or under such lands. Both farming lands and mineral lands are assessable at their actual value; but, in the case of mineral lands, their assessed value must not include anything of the value of buildings, etc., used for the purposes mentioned in subsection 4 nor of the value of minerals in, on, or under such land; provided also that they must be assessed at not less than the value of farming land in use in the neighbourhood.

In lieu of the assessment of such buildings, concentrators, minerals, etc., at their actual value, it is provided by subsection 6 that the income from a mine or mineral work shall be assessed by, and the tax leviable thereon shall be paid to, the municipality in which such mine or mineral work is situated. Therefore, under the general scheme of the Act, mineral land, whether worked or unworked, is taxable without reference to the minerals in them; but, when worked, the minerals as such are taxable indirectly on the basis of the income derived from the mine or mineral work, and therefore the exemption clause covers all buildings, plants and other elements of the system used to obtain such income from the mining property.

. . . . .

Having explained our view of the law, we now have to dispose accordingly of the assessments in controversy before us:

I.

(*a*) The Change House, $2,900, is a building erected on the respondent's property to provide accommodation for the men employed in the mine conveniently to dry and change their clothes and for washing, in pursuance of rule 113 of sec. 161 of the *Mining Act*, R.S.O., 1927, ch. 45. This being required by law in order to properly conduct its mining operations, we agree with the Appellate Division that, being used solely by workmen who obtain minerals from the ground, this Change House is not assessable.

(*b*) Boiler House and Heating System, $1,500. This is located near the Change House for the purpose of providing it with heat and water and to provide heat for the Shaft House and the Hoist Room, at the head of the shaft. At the argument, this Court agreed with the Appellate Division that these items also came within the exemption.

II.

Slimes Disposal System, Electric Railway, Powder Magazine, etc.

(*a*) Pump House and machinery, transformers, pipe line and installation, $34,430.

This assessment was disallowed by the District Judge, by the Railway Board and by the Appellate Division, for the reasons above stated; and we see no reason to change their finding.

(*b*) Power Lines and Equipment, $3,387.

(*c*) Electric Railway to Pump House and Powder Magazine, $6,726.

(*d*) Powder Magazine, $5,011.
Heating System, $2,262.
Telephone System to disposal plant, $50, (not in appeal).

The power line carries power to operate the electrically operated shovel; the powder magazine is used to store explosives used to obtain minerals from the ground; the electric heating system is used for keeping the powder maga-

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zine at a constant temperature. The electric railway was erected to furnish transportation from the main shaft of the Hollinger Mine to the McKay Veteran Claim; it parallels the Launder and is used principally to transport explosives from the powder magazine to the mining shafts and supplies to the pump house and other apparatus on the McKay Veteran Claim. These items must be considered as non-assessable as forming part of the plant and machinery used for obtaining minerals from the ground or as part of the concentrator.

III.

Gravel Conveyor System

(*a*) We are not concerned with the assessment of three dwellings ($6,770) and Change House ($455), as no appeal was taken from these assessments.

(*b*) Compressor House, Right of Way, Oil House, Gravel Loading Station, Transformers, Locomotive and Cars, Electric Shovel, Railway Track, Power Transmission Lines and Conveyor Equipment, including steel towers, cables, buckets., etc., $140,389.

As explained above, all the items included in the assessment known as the Conveyor System are necessary to transport sand or gravel to the grounds to fill in the vacant space left in the mine by the rock extracted; and it was clearly proven that the mining operation could not be carried on unless the excavations were filled. R. E. Dye, mining engineer, swears that

> it would be impossible to mine the ore entirely out without filling the openings made by removal of the ore. Otherwise the walls would collapse, and the ore could not * * * be reached without sand or some suitable filling work.

And Mr. J. H. Stovel, General Superintendent of the Dome Mine, also states that the sole purpose of these operations is to enable the respondent

> to extract the ore or mineral-bearing rock from the mine.

This conveyor system is therefore not liable to assessment, as it is on mineral land; and the evidence is conclusive that it is necessary to the extraction of mineral by the respondent.

It is not necessary, in view of our decision on the first point, to deal with the other grounds urged by the respondent.

We therefore reach the conclusion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Gordon H. Gauthier.*

Solicitors for the respondent: *Holden, Murdoch, Walton & Beatty.*

1933
*March 17.
*April 25.

THERESA EMMELINE GOURLAY AND JOHN GORDON BILLINGS, EXECUTORS AND TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF SOPHIA JANE MCDONALD, DECEASED (DEFENDANTS) ..... APPELLANTS;

AND

THE CANADIAN DEPARTMENT STORES LIMITED (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Landlord and tenant—Covenant in lease for renewal—Construction—Indefiniteness as to duration of renewal term—Covenant void for uncertainty.

A covenant in a lease, which provides for a renewal of the term, in order to be valid must designate with reasonable certainty the date of the commencement and the duration of the renewal term to be granted. This certainty as to duration must appear from the express limitation of the parties or from reference to some collateral matter—itself certain or capable of being made so before the renewal lease takes effect—which may, with equal certainty, be applied in measurement of the continuance of the term.

In the present case (where the lease was of certain rooms and hallway in the lessor's building which adjoined the lessee's hotel, the leased premises being used in connection with the hotel) it was *held* that the language used shewed that the intention was to provide for a right of renewal for such period as the lessees should need the use of the rooms for purposes specified, and that, as there was nothing in the covenant which enabled the court to determine the duration of the lessees' need for the rooms, the covenant was too indefinite to be enforced, and was therefore void for uncertainty. (*Semble*, had the

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon and Crocket JJ.

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provision been for renewal "for such further term as the lessees may request or demand," it would not have offended against the rule requiring certainty, for the duration of the term would be made certain by the request or demand for renewal.)

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of Orde J.A.) held that the renewal provisions contained in a certain lease were too indefinite to be of legal effect. The renewal provisions in question are set out in the judgment now reported. The appeal was dismissed with costs.

J. W. Pickup for the appellants.

G. W. Mason K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—This is a friendly action and the facts are not in dispute. The question involved in the appeal is the proper construction of a covenant in a lease made between the appellants and the respondent's predecessor in title which provides for its renewal. The covenant reads as follows:—

It is hereby agreed that this Lease and the term hereby created shall at the option of the Lessees be renewed (1) for such further term as the Lessees may require the said bedrooms and the hallway for use in connection with the said hotel, and whether used as an hotel, boarding-house or apartment house; (2) and for such further term as shall correspond with the term of any lease that may be given by the said Lessees to any tenant in respect of the said hotel premises and (3) thereafter from time to time so long as the said bedrooms may be required for hotel, boarding-house or apartment house purposes at a rental equivalent to one-eighth part or portion of the rental received from time to time for the said hotel, boarding-house or apartment house.

The numbers (1), (2) and (3) set out above are not in the covenant but were inserted by the trial judge for convenience, and have been here retained.

The leased premises consist of sixteen bedrooms and a hallway in the respondent's building immediately adjoining the appellants' hotel in the Town of Lindsay, Ontario, and have, for some years, been used in connection with the hotel.

The respondent contends that " the covenant is too vague and indefinite to create a right of renewal, that it does not

(1) (1932) 41 Ont. W.N. 204.

give the appellant any such right and is void for uncertainty." On the other hand the appellants submit that so long as the term of each renewal lease can be made certain at the time the lessees call for it, that is sufficient to meet all the requirements of the law regarding certainty.

It has been long established that a covenant in a lease, which provides for a renewal of the term, in order to be valid must designate with reasonable certainty the date of the commencement and the duration of the term to be granted. This certainty as to duration must appear from the express limitation of the parties or from reference to some collateral matter—itself certain or capable of being made so before the lease takes effect—which may, with equal certainty, be applied in measurement of the continuance of the term.

The trial judge construed the clause as being sufficiently certain to give the appellants, as lessees, a right of renewal. He said:—

> I think a reasonable and proper construction to put upon this language is that the lessees are entitled, and, of course, bound, to indicate, so far as this particular part of the covenant is concerned, when applying for the renewal, the precise period during which they will "require" the demised premises for use in connection with the hotel.

He thus construed the first part of the covenant, that is (1), as though it read: "For such further term as the lessees may request or demand." Had that been the language of the clause, it would not, in my opinion, have offended against the rule requiring certainty, for the duration of the term would be made certain by the request or demand for renewal. That, however, is not the language of the clause. The term provided for in (1) is

> such further term as the lessees may require the said bedrooms and the hallway *for use* in connection with the said hotel,

whether it is used as a hotel, boarding-house or apartment house. While that provided for in (2) and (3) is the period covered by a lease or leases granted by the lessees from time to time so long as the bedrooms may be required for hotel, boarding-house or apartment house purposes. It is the phrases "require * * * for use" and "may be required for hotel, boarding-house or apartment house purposes" which manifest the purport of the words "require" and "required," and shew that the notion expressed is rather that of "need" than that of "request" or "demand." I think it is quite clear from the language used

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that what the parties had in mind was to provide for a right of renewal for such period as the lessees should need the use of the rooms for the purposes specified. As there is nothing in the covenant which enables us to determine the duration of the lessees' need for the rooms, the covenant is too indefinite to permit of its being enforced. It is therefore void for uncertainty.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *R. I. Moore.*

Solicitors for the respondent: *Mason, Foulds, Davidson, Carter & Kellock.*

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*Feb. 28.
Apr. 25.

HIS MAJESTY THE KING (RESPONDENT) .APPELLANT;

AND

GEORGE MASON (SUPPLIANT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Dredging operations—Fishing net—Damages—Negligence—Jurisdiction—Public work—Interference with navigation—Exchequer Court Act, section 19 (c)—Fisheries Act, s. 33.

At Livingstone Cove, Nova Scotia, is a breakwater owned by the Crown to provide a shelter for boats of shallow draught. In this cove the respondent had set a salmon trap net under licence from the Department of Marine and Fisheries, the leader of the net being attached to the breakwater. Dredging operations were being carried on in the vicinity of the Department of Public Works under the supervision and direction of one of its officers. The tug A., hired by the Crown, whilst moving a loaded scow to the dumping grounds, came into contact with the respondent's net, seriously damaging it. The action is to recover the value or cost of repairing the net and the loss of its use for about one month.

Held that the Exchequer Court of Canada had jurisdiction to hear the case. According to the circumstances, the master and crew of the tug A., the crew of the scow and the master and crew of the dredge were servants of the Crown acting within the scope of their "duties of employment" upon a "public work" within the meaning of section 19 (*c*) of the *Exchequer Court Act.*

Held, also, that the accident was attributable to the negligence of the servants of the Crown in the management of the tug and scow under the circumstances and conditions existing at the time of the accident, and that the respondent was entitled to damages for the injury caused to his net and damages for the loss of its use.

*PRESENT:—Duff, Rinfret, Lamont, Smith and Crocket JJ.

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Held, further, that, upon the evidence, the respondent's net was not an interference with navigation within the meaning of section 33 of the *Fisheries Act.* That section should not be interpreted as relieving those in charge of any vessels of the duty to exercise due care to avoid damage to the property of others, whether that property constitutes an obstruction to navigation or not.

Judgment of the Exchequer Court of Canada ([1933] Ex. C.R. 1) affirmed.

APPEAL from the judgment of the Exchequer Court of Canada (1), maintaining the respondent's petition of right with costs.

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

H. McInnes K.C. and *F. P. Varcoe K.C.* for the appellant.

J. L. Ralston K.C. for the respondent.

The judgment of the court was delivered by

CROCKET J.—This is an appeal from a judgment of the Exchequer Court of Canada (1), adjudging that the suppliant was entitled to recover from His Majesty the King the sum of $1,500 and costs as compensation for damages claimed to have been sustained by him through the partial destruction of a salmon trap-net by a tug boat and scow while employed in dredging operations in the vicinity of a breakwater at Livingston's Cove, Antigonish Co., N.S., during the summer of 1930.

Although the jurisdiction of the court does not appear to have been challenged on the trial or in the appellant's factum on this appeal, objection was taken on the argument before us that the case was one which did not fall within the terms of clause (*c*) of section 19 of the *Exchequer Court Act,* R.S.C., c. 34. If it did not there is no other clause or provision of the Act which empowers that court to entertain a petition in such a case as the evidence discloses. The jurisdictional point, therefore, turns entirely upon the construction of that clause, which, enumerating

(1) [1933] Ex. C.R. 1.

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one of the matters the court "shall have original jurisdiction to hear and determine," reads as follows:—

> Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

Mr. Varcoe contended that the captain and crew in charge of the tug and scow were not in the circumstances servants of the Crown, and that the work in which they were engaged was not a public work within the meaning of this clause.

It was expressly admitted by counsel for the Crown at the trial before the learned president of the court that the breakwater in question was owned by the Crown in right of the Dominion; that the dredging operations were being carried on by the Federal Department of Public Works under the supervision and direction of an officer of that department, and that the tug and crew were employed in the operation and under the direction of the officer in charge. John Nickerson, an officer of the Public Works Department, testifying as a witness for the Crown, stated that the tug was hired by the department, and was acting in this operation under the direction of the man in charge of the dredge for the department. In view of the course taken at the trial, we do not think it is now open to the Crown to contend that the captain and crew of the tug and the men on the scow were not, at the time of the grievance complained of, servants of the Crown acting within the scope of their "duties or employment," within the meaning of section 19 (*c*).

It was in reference, however, to the contention that the work in which they were engaged was not a public work within the meaning of clause (*c*) that the objection was chiefly stressed. The case of *Paul* v. *The King* (1), relied upon by the appellant, considered the clause before the amendment of 1917 (7-8 Geo V, c. 23) effected a very material change in its meaning, as pointed out by Mignault J. in *The Wolfe Company* v. *The King* (2), and by the same learned judge in delivering the judgment of this court in *The King* v. *Schrobounst* (3). The latter case decides that the words "upon

(1) (1906) 38 Can. S.C.R. 126.
(2) (1921) 63 Can. S.C.R. 141. (3) [1925] S.C.R. 458.

any public work," as they now appear in the subsection, are not to be given the restricted meaning which they bore before the amendment, and that a claim for personal injuries caused by the negligence of the driver of a motor truck, the property of the Crown, while transporting workmen in the employment of a department of the Government of Canada to a public work being carried on by that department, fell within the meaning of the subsection. We think that this claim also falls within its terms, and that the words " upon any public work," as now used in the clause, are not to be limited to a physical structure belonging to the Government, and that they are broad enough to comprehend, at least, a dredging operation such as that with which we are concerned, and which was being carried on in a defined area.

It was not disputed that the tug and scow on the occasion in question came into contact with the net and so damaged it as to render it altogether useless until repaired and to necessitate the suspension of the suppliant's fishing operations until he could replace it, so that, with the admissions above referred to, the whole controversy between the parties on the trial as to liability may be said to have been confined substantially to the question of the alleged negligent navigation of the tug, and whether or not the suppliant in a conversation he had with the captain of the dredge a few days before the accident, when the latter asked him to move his net, had agreed to accept the risk of any injury resulting from the collision of the tug with the net in its then existing position.

Although the Crown contended that the suppliant's net was an unlawful hindrance to navigation, no question was raised that the suppliant had not a valid licence, issued under the authority of the Dominion *Fisheries Act*, for the berth in which it was placed, or that the net was set off the Government wharf in practically the same position and in precisely the same manner as it had been under similar licences issued to the suppliant annually since the year 1923. The fishery inspector for the district, whose duty it was to countersign all licences issued in the district and to see to the observance of all fishery laws and regulations therein, testified that he saw the net and leader set and that they were set absolutely in the manner prescribed in

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the licence, though some question appears to have been raised as to whether the licence itself authorized the attachment of the rope to the wharf and as to the precise direction the rope and leader thence followed, the captain of the tug having sketched a plan shewing the direction more northwesterly than the suppliant claimed.

A departmental plan in evidence shews the breakwater running almost due west from the shore line with the wharf at the westerly end, the length of the whole structure being about 376 feet. The wharf is about 40 feet wide and forms a rectangular jog on the southerly side of the breakwater about 90 or 100 feet east of the face of the wharf.

The dredging was being done along the south side of the wharf and breakwater to secure a depth of 8 feet at low water O.S.T., for the purpose, it seems, of affording shelter for boats and crafts of shallow draught.

On the day in question the dredge was working behind the jog close to the south side of the breakwater. It had a scow filled with dredged material ready for towing to the dumping ground more than half a mile northwest of the breakwater. The tug, which had been employed in the work for about two weeks for the purpose of towing the scows to the dumping ground and returning them to the dredge, and which drew about 9 feet aft and 5 feet forward, having received its signal from the dredge during the afternoon when the tide was within about half an hour of dead low water, as the evidence clearly shews, proceeded into the breakwater, bow on, and, after getting its anchor line fastened to the laden scow, backed out beyond the west end of the wharf with her tow in a northwesterly direction to get into position to pull the scow around the outer end of the breakwater and out to the deep water for dumping. There was no dispute about these facts, and it was common ground that it was during this manoeuvring that the scow drifted or swung down on the net.

The tug captain swore that only the scow ran into the net, but another witness, McEachern, a local seaman, employed in the operations, who saw the accident, swore that the scow and tug both ran into it.

There was a tide of 4 feet in the cove. The plan, prepared by the department for the dredging operations, shewed two lines of soundings running from the southwest

corner of the wharf a distance of 300 feet—one in prolongation of the south side of the wharf almost due west, and the other southwest. The first of these lines shewed depth markings varying from 7 feet 8 inches at the face of the wharf to 13 feet 3 inches and the second from 8 feet 2 inches to 9 feet 8 inches. There was evidence that between these two courses there was a channel of 12 feet depth, and that this and the other tugs previously employed in the work usually backed out in a westerly or southwesterly direction and that in such a movement there would be no danger of the tug or scow running into the net; that there was ample sea-room for both tug and scow to move out from inside the breakwater towards the southwest, and that had they done so they would not have drifted on the net as they did. There was also the evidence of one of the two men employed on the scow that the scow's anchor first caught the net and that the tug swung around on top of the net at a point roughly half way out on the leader.

The contention of the Crown, of course, was that there was no negligence in the management of the tug or scow, and that the damage was wholly attributable to the conditions of tide, current and wind prevailing at the time.

The learned president found that if the conditions of wind, current and tide were such as described by the tug captain, the tow should not have commenced when it did, and that in any event, when it was found that the tug and tow were likely to drift upon the net, the scow, which was equipped with anchors, at least should have anchored, and that the collision would thereby have been avoided.

> I am rather disposed to think (His Lordship states in his reasons), that conditions were not quite so unfavourable as described by the master of the tug; I do not think they were very unusual or occasioned any real difficulty in handling the tow. I am unable to appreciate just why the tug and tow could not emerge from behind the breakwater upon such a course as would compensate for the counteracting forces of wind and current, and had this been done, and I believe it might have been done, the accident would have been avoided. Upon this aspect of the case, I therefore think the accident was attributable to the negligence of the servants of the respondent,

which sufficiently shews that the negligence to which he attributed the damage was negligence in the management of the tug and scow in the circumstances and conditions as he believed them to exist. We are of opinion that the evidence discloses ample justification for this finding.

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This being so, it is a matter of no consequence whether the suppliant had or had not the right to attach his leader to the wharf in the manner above indicated. It was contended by the Crown that he was not authorized to do so, and that his net was therefore an unlawful obstruction to navigation. It is quite evident, as the learned president points out, that the fact of the rope being tied to the wharf had no causal connection with the damage, and that the same thing as did happen would have happened had the leader been attached to a rock or pole in the water immediately adjacent to the wharf, as the suppliant undoubtedly had a right to attach it.

The fact of the damage having been proved to have been caused by the negligent navigation of the tug also renders it unnecessary to consider the argument which Mr. McInnes addressed to us on his submission that the licence conferred no right to put the leader and trap in such a position as to interfere with navigation, and that the tug's rights of navigation in the waters in question were paramount to the suppliant's rights of fishery under his licence from the Fisheries Department of the Government. It is sufficient to say that the learned president found upon the evidence that the suppliant's net was not an interference with navigation, and that in no view can s. 33 of the *Fisheries Act* be properly interpreted as relieving those in charge of any vessels of the duty to exercise due care to avoid damage to the property of others, whether that property—be it a fishing net or anything else—constitutes an obstruction to navigation or not. We pronounce no opinion upon the suggestion of the learned president that if the conditions were as described by the captain of the tug, the latter, acting under the orders of the superintendent in charge of the dredging operations, owed a duty to the owners of the same to delay the departure of the dredge to await better conditions of wind and weather.

As to the defence founded on the maxim *volenti non fit injuria,* it is plain that the maxim has no application here. The proximate cause of the damage complained of was the negligent navigation of the tug. There is nothing in the evidence to indicate the acceptance of the risk attending such negligence. The conversation narrated had no relation to any such contingency.

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Counsel for the Crown also contended that compensation must be confined in any event to the damage to the net itself, and that no damages were recoverable for loss of profits resulting therefrom. We are of opinion that this contention is inadmissible. Under the language of ss. (*c*) of s. 19 above quoted, the Exchequer Court had jurisdiction to hear and determine,—and to award of course appropriate compensation for—"any claim (for damages) arising out of any * * * injury to * * * property resulting from the negligence of any officer," etc. There is clearly nothing in these words to restrict the compensation for the injury to the property itself, if any further damage can be proved to have resulted from the negligence as the natural and direct consequence thereof under the well established rule governing the award of damages for wrongful injuries, whether to person or to property. It may be true that in some cases, as in *The Anselma De Larranga* (1), cited in the appellant's factum, and in *The Columbus* (2), where a vessel or other property used in the earning of business profits is totally destroyed and full value is given as for a total loss, the claimant could not recover anything more to compensate him for the loss of the use of his vessel, but it has never been held, so far as I know, in a case where a vessel or any other chattel used for the carrying on of business has been damaged to such an extent as to render it useless until repaired and as to necessitate the suspension of the business in the carrying on of which it was used, that the owner is not entitled to recover any and all damages which he sustains as a natural and direct consequence of the injury complained of. See *Owners of Steam, Sand Pump Dredges* v. *The owners of SS. "Greta Holme"* (3). In this case where the dredge was injured owing to a collision with a ship, the House of Lords held that its owners, though they were not out of pocket in any definite sum, were entitled to recover damages for the loss of the use of the dredge. Lord Herschell said:—

> I take it to be clear law that in general a person who has been deprived of the use of a chattel through the wrongful act of another is entitled to recover damages in respect thereof, even though he cannot prove what has been called "tangible, pecuniary loss," by which I under-

(1) (1913) 29 T.L.R. 587. (2) (1849) 3 W. Rob. 158.
(3) [1897] A.C. 596.

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stand is meant that he is a definite sum of money out of pocket owing to the wrong he has sustained.

The suppliant here claimed $1,000 for the damage to the net and $1,500 for the resultant loss of its use. The learned president awarded $1,000 as the cost of restoring the net and $500 as compensation for the loss of its use for one month. There was, we think, ample evidence to warrant his conclusion that the suppliant sustained damage to the latter amount in addition to the cost of repairing the net as a direct and natural consequence of the negligence complained of on the part of the Crown's servants.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Hector McInnes.*

Solicitor for the respondent: *C. J. Burchell.*

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*Mar. 1.
*Apr. 25.

SMITH *v.* SHANKLIN

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Conveyance—Allegation of fraud in execution—Confidential relationship between the parties—Conveyance set aside—Lack of independent advice.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of New Brunswick (1), dismissing the defendant's appeal from the judgment of Baxter J. (2) in favour of the respondent plaintiff.

The respondent, as executor of the late G. W. Shanklin and in his own right, brought an action to set aside a certain conveyance made by the said G. W. S. to the appellant, the grantee named in the conveyance. The action was tried before Mr. Justice Baxter who ordered the conveyance set aside, finding that the execution of the conveyance had been obtained by fraud and that, owing to the circumstances of the case, the late G. W. Shanklin should have had independent advice. The Appellate Division dismissed the defendant's appeal from that judgment.

*PRESENT:—Duff, Rinfret, Lamont, Smith and Crocket JJ.

(1) (1932) 5 M.P.R. 204.

(2) (1932) 5 M.P.R. 205.

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SMITH v. SHANKLIN.

On the appeal to the Court, after hearing argument of counsel, the Court reserved judgment; and, on a subsequent day, delivered judgment dismissing the appeal with costs. Written reasons were delivered by Lamont J. for the court, in which the learned judge, after making a complete review of all the facts of the case, concluded in saying that "under these circumstances and in view of the evidence, it cannot be said that the Appellate Division was wrong in affirming the judgment of the trial judge."

Appeal dismissed with costs.

P. J. Hughes K.C. for the appellant.

D. King Hazen for the respondent.

THE CORPORATION OF THE CITY OF WINDSOR ..... APPELLANT;

1933

*March 21.
*April 25.

AND

THE CORPORATION OF THE TOWN OF WALKERVILLE AND OTHERS.... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Jurisdiction of Board of Railway Commissioners for Canada—Railway Act, R.S.C., 1927, c. 170, s. 39—Whether municipality "interested or affected" (and liable to be assessed for part of cost) by order for construction of subway in another municipality.

The matter of where traffic through a subway under a railway originates and the volume of it from various districts is not a factor in deciding whether or not a particular municipality is "interested or affected" by the work of constructing the subway, within the meaning of s. 39 of the *Railway Act*, R.S.C., 1927, c. 170. (*City of Toronto* v. *Village of Forest Hill*, [1932] Can. S.C.R. 602). In the present case it was *held* that the Board of Railway Commissioners for Canada had no jurisdiction to order the appellant city to pay a portion of the cost of a subway wholly situate within the limits of the respondent town and at some distance from the limits of the appellant city, notwithstanding that access to and from the appellant city (having a large population) from and to other municipalities might be largely through said subway.

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*PRESENT:—Duff C.J. and Lamont, Smith, Cannon and Crocket JJ.

1933

CITY OF WINDSOR v. TOWN OF WALKERVILLE.

APPEAL, by leave of the Board of Railway Commissioners for Canada, from an order of that Board (No. 48,736, of June 14, 1932) (1), by which it ordered that a certain portion of the cost of constructing and maintaining a subway under the Pere Marquette Railway lines, which subway was wholly situate within the limits of the Town of Walkerville (respondent), be paid by the appellant, the City of Windsor.

The question upon which leave to appeal was granted by the Board, which, in the opinion of the Board, was a question of law, read as follows:

Had the Board, in the circumstances of this case, jurisdiction under the Railway Act to provide in Order No. 48736, dated June 14, 1932, that the Corporation of the City of Windsor should contribute to the cost of constructing and maintaining the work therein mentioned and as therein provided?

The appeal was allowed with costs, and the question answered in the negative.

B. J. S. Macdonald for the appellant.

N. C. MacPhee for the respondent the Town of Walkerville.

E. C. Awrey K.C. for the respondents The Pere Marquette Ry. Co. and The Lake Erie and Detroit River Ry. Co.

The judgment of the court was delivered by

SMITH J.—This is an appeal, by leave of the Board of Railway Commissioners for Canada, from an order of that Board, by which a portion of the cost of a subway under the Pere Marquette Railway lines, wholly situate within the town of Walkerville, was assessed against the appellant City of Windsor.

Wyandotte street runs east and west through the town of Sandwich, the city of Windsor and the town of Walkerville, and connects at the easterly limit of the latter town with Ottawa street, in the city of East Windsor, which latter street runs easterly through the city of East Windsor and through the adjoining town of Riverside. These two streets, therefore, form a continuous highway, running through these five municipalities.

(1) Reasons for order of Board: 40 Can. Ry. Cas. 88.

The subway in question is near the easterly limit of the town of Walkerville, and, consequently, nearly the full width of the latter town from the easterly limit of the appellant City of Windsor.

The sole question involved in the appeal is whether or not, under these circumstances, the City of Windsor is " interested or affected " by the order in question, within the meaning of sec. 39 of the *Railway Act,* which is as follows:

39. 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 or 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.

The argument is that the City of Windsor, with a very large population, has its eastern boundary only a little over 3,000 feet from the subway, and that access to and from that city, from and to the four other municipalities, is largely through the subway in question.

This was the precise argument urged in *The City of Toronto* v. *The Village of Forest Hill* (1). In that case, the order of the Board had reference to a bridge, which carried a street of the village of Forest Hill over a railway. This bridge was situate wholly within the limits of the village of Forest Hill, and the point nearest to this bridge in the limits of the city of Toronto is the westerly limit of that part of the city of Toronto that was formerly North Toronto, which is 500 feet away.

It was argued there that, by reason of the large population in that part of Toronto formerly called North Toronto, and the still larger population of that part of Toronto lying south of Forest Hill, there was a great deal of traffic to and from these particular portions of the city of Toronto passing over the bridge in question.

(1) [1932] Can. S.C.R. 602.

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CITY OF WINDSOR v. TOWN OF WALKERVILLE.

Smith J.

The submission by Mr. Grant on behalf of the railway company was that all municipalities in which traffic passing over the bridge in question would normally originate, in substantial magnitude, would be subject to the jurisdiction of the Board as being "persons interested or affected by the order."

Mr. Justice Duff, as he then was, after quoting this argument, says, at p. 605:

> That is a principle, in my opinion, not laid down or contemplated by the statute.

Again, in the reasons, the following appears at page 609:

> Counsel for Forest Hill complained that because of what was said by Mr. Geary, as quoted by the Chairman of the Board, he was precluded from offering evidence as to the origin and volume of traffic likely to use the bridge. He thought he could have established that traffic over the bridge would originate largely with people of the northern and western part of the city, making use of this avenue and Spadina Road as a main connecting link between these parts of the city. In my opinion this, if a fact, would not affect the question in the slightest degree, as the matter of where traffic over the structure originates and the volume of it from various districts is not a factor in deciding whether or not a particular municipality is interested or affected by the works within the meaning of the Act.

Counsel for the respondent, the Town of Walkerville, referred to *The Highway Improvement Act,* R.S.O., 1927, ch. 54. I have looked through this somewhat lengthy Act, but do not find that it has any application to the question involved in the present case. It provides for establishing, in the manner set out, provincial and county highways and suburban roads, and for apportioning the cost of constructing and maintaining such highways between the province and the county, town or city municipalities through which they pass.

Section 37 provides for payment of the expenditure upon all work on such suburban roads outside of the limits of a city or town, in part by the county, in part by the city or town, and in part by the province.

All that need be said here is that the streets in question are not provincial or county highways or suburban roads, so that the effect of the Act in reference to railway crossings on such highways or roads need not be dealt with.

The appeal must be allowed, with costs; and the answer to the question submitted is in the negative.

Appeal allowed with costs.

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Smith J.

Solicitor for the appellant: *B. J. S. Macdonald.*

Solicitors for the respondent, the Town of Walkerville: *MacPhee & Riordon.*

Solicitors for the respondents, Pere Marquette Ry. Co. and Lake Erie & Detroit River Ry. Co.: *Furlong, Furlong, Awrey & St. Aubin.*

Solicitor for the respondents, Hydro Electric Power Commission of Ontario and Sandwich, Windsor & Amherstburg Ry. Co.: *I. B. Lucas.*

1933

*May 29.
*June 16.

IN THE MATTER OF THE "ADOPTION ACT" (BRITISH COLUMBIA)

AND

IN THE MATTER OF THE PETITION OF HERBERT WEBSTER AGNEW AND ANNIE HEATON AGNEW, HIS WIFE, TO ADOPT AN INFANT, AUDREY BLAND.

JEAN BLAND AND CHARLES ASHTON BLAND ..... } APPLICANTS;

AND

HERBERT WEBSTER AGNEW AND ANNIE HEATON AGNEW..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Appeal—Jurisdiction—Special leave to appeal under proviso of s. 41 of Supreme Court Act, R.S.C., 1927, c. 35—"Other matters by which rights in future of the parties may be affected."

An application, under the proviso of s. 41 of the *Supreme Court Act* (R.S.C., 1927, c. 35), for special leave to appeal from the judgment of the Court of Appeal for British Columbia ([1933] 1 W.W.R. 681; [1933] 2 D.L.R. 545), dismissing the applicants' appeal from an order allowing the adoption by respondents of the applicants' daughter, was dismissed, on the ground of want of jurisdiction, the rights in dispute not coming within the meaning of the phrase "other matters by which rights in future of the parties may be affected," having regard to its context, in s. 41. The scope of the phrase discussed, and the opinion indicated that it is restricted, pursuant to the formula *noscitur a sociis,* to matters involving something in the nature of a pecuniary or economic interest. *Davis* v. *Shaughnessy,* [1932] A.C. 106, discussed and distinguished.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon, Crocket and Hughes JJ.

1933

BLAND v. AGNEW.

APPLICATION, under s. 41 of the *Supreme Court Act*, R.S.C., 1927, c. 35, for special leave (refused by the Court of Appeal for British Columbia) to appeal from the judgment of the Court of Appeal for British Columbia (1) dismissing the present applicants' appeal from the order of D. A. McDonald J. granting the petition of the present respondents for the adoption of the infant daughter of the present applicants under the provisions of the *Adoption Act*, R.S.B.C., 1924, c. 6.

The application to this Court was dismissed with costs, on the ground of want of jurisdiction.

T. A. Beament K.C. for the applicants.

E. F. Newcombe K.C. for the respondents.

The judgment of the court was delivered by

DUFF C.J.—Section 41 of the *Supreme Court Act*, under which the application for leave to appeal is made, is, so far as pertinent, in these terms:

> 41. Special leave * * * may be granted in any case * * * by the highest court of final resort having jurisdiction in the province * * * Provided that in any case whatever where the matter in controversy on the appeal will involve
>
> (*a*) the validity of an Act of the Parliament of Canada or of the legislature of any province of Canada or of an Ordinance or Act of the council or legislative body of any territory of Canada; or
>
> (*b*) any fee of office, duty, rent or revenue, or any sum of money payable to His Majesty; or
>
> (*c*) the taking of any annual rent, customary or other fee, or, other matters by which rights in future of the parties may be affected; or
>
> (*d*) the title to real estate or some interest therein; or
>
> (*e*) the validity of a patent; and
>
> (*f*) in cases which originated in a court of which the judges are appointed by the Governor General and in which the amount or value of the matter in controversy in the appeal will exceed the sum of one thousand dollars;
>
> if a special leave to appeal has been refused by the highest court of final resort in the province the Supreme Court may nevertheless grant such leave * * *.

The Court of Appeal for British Columbia has refused leave. The preliminary question arises as to our jurisdiction to grant leave under the proviso of section 41. The immediate point upon which our decision must turn is

(1) [1933] 1 W.W.R. 681; [1933] 2 D.L.R. 545.

whether "other matters by which rights in future of the parties may be affected" comprehend all such matters, or whether the scope of the phrase is restricted pursuant to the formula *noscitur a sociis* to matters involving something in the nature of a pecuniary or economic interest.

The present section applies to appeals from all the provinces. But the phrase "other matters by which rights in future of the parties may be affected" or a phrase not distinguishable in any relevant sense appeared in section 29 (*b*) of the old statute of 1886 as amended in 1892 which affected exclusively appeals from the province of Quebec. Section 29 excluded appeals from that province except in cases where the matter in controversy amounted to the sum or value of $2,000 or involved the validity of some legislative enactment or

> (*b*) * * * relates to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents and other matters or things where the rights in future might be bound.

The effect of the words in this section "unless the matter in controversy * * * (*b*) relates to * * * other matters or things where rights in future might be bound" was, long prior to the enactment of s. 41 (in 1920), considered by this Court in a series of decisions which have never been departed from.

It was held (*inter alia*) that these words, in the collocation in which they were there placed, did not invest this Court with jurisdiction to entertain an appeal from a judgment in an action by a husband for "*séparation de corps*" from his wife (*O'Dell* v. *Gregory* (1), and *Talbot* v. *Guilmartin* (2)); in an action "*en declaration de paternité*" (*Macdonald* v. *Galivan* (3)); in a petition for cancellation of the respondent's appointment as tutrix to her minor children (*Noel* v. *Chevrefils* (4)).

It is true that under another enactment of the *Supreme Court Act* (now sections 36 and 42) this Court may be called upon to deal with questions touching the right to the custody of children when such questions are raised in appeals in habeas corpus. But the current of decision (apart from the special cases of mandamus, habeas corpus,

(1) (1895) 24 Can. S.C.R. 661.
(2) (1900) 30 Can. S.C.R. 482.
(3) (1898) 28 Can. S.C.R. 258.
(4) (1900) 30 Can. S.C.R. 327.

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certiorari and prohibition and cases in which the validity of some legislative Act is in controversy) has, subject to the authority to give leave to appeal under s. 48 in appeals from Ontario, been uniformly in the sense that no appeal would lie unless the matter in controversy involved or affected something in the nature of a pecuniary or economic interest present or future.

Section 41 does not profess in terms to introduce any change in this respect. With the single exception of matters touching legislative jurisdiction, all the matters specifically enumerated in that section as affording a foundation for the jurisdiction of this Court to grant leave are matters involving some kind of interest of an economic character. It seems reasonable to assume that if the legislature had intended to enlarge the jurisdiction of this Court by introducing a radical change, that intention would have been more explicitly set forth. Since the decisions in *O'Dell* v. *Gregory* in 1895 (1) and the other cases mentioned, the statute has been re-enacted many times; and there is no evidence in any of those re-enactments that the interpretation of s. 46 by which appeals were excluded from judgments in proceedings of the character exemplified in those cases was not regarded as conforming to the legislative intention. Indeed, by the Act of 1920 the authority of this Court was, in any view of s. 41, restricted in one important respect. The authority to grant leave under the old s. 48 (which dealt with appeals from Ontario) was, as already mentioned, unlimited, except probably by implied reference to s. 36. By s. 41 as enacted in 1920, that unlimited authority in respect of Ontario appeals was confined to those cases enumerated in s. 41.

The judgment of the Judicial Committee in *Davis* v. *Shaughnessy* (2) was not concerned with the effect of the *Supreme Court Act.* The passage quoted from the judgment involves, it is true, a ruling that the rights contemplated by the words " other matters in which the rights in future of the parties may be affected " are not " necessarily," in the context in which they appear in Art. 68 of the *C.C.P.* of Quebec, *ejusdem generis* with " titles to lands or tenements, annual rents "; in other words, they are not necessarily limited to rights of a character similar to rights

(1) 24 Can. S.C.R. 661. (2) [1932] A.C. 106.

1933

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in or issuing out of land. This does not necessarily involve a decision that, in construing them, the whole text of the article (which includes other matters) is to be disregarded. In truth, their Lordships hold that

> the future rights of the appellants are affected since, if the judgment stands, the respondents may again vote themselves sums of money contrary to their duty as *ex hypothesi* they have already done.

There is here no suggestion that "rights in future" even in Art. 68, with which, strictly, we are not at all concerned, comprehend rights of the character the applicants desire to assert in the proposed appeal.

The application is dismissed with costs.

Application dismissed with costs.

Solicitor for the applicants: *C. H. O'Halloran.*

Solicitor for the respondents: *H. A. Beckwith.*

1933.

* June 14.
* June 16.

THE CORPORATION OF THE CITY OF LONDON ..... APPELLANT;

AND

HOLEPROOF HOSIERY COMPANY OF CANADA, LIMITED ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal—Jurisdiction—Final judgment—Appeal from pronouncement by Court of Appeal for Ontario on questions submitted in case stated by arbitrator under Arbitration Act, R.S.O., 1927, c. 97, s. 26—Construction by Court of Appeal in England of English statutory enactment reproduced in Canadian statute.

The appeal was from the pronouncement of the Court of Appeal for Ontario, given in exercise of that court's jurisdiction under s. 26 of the *Arbitration Act*, R.S.O., 1927, c. 97, in answer to certain questions of law submitted to it by the arbitrator, arising in the course of a reference to determine the amount of compensation from appellant city to be awarded to respondent (in pursuance of the *Municipal Act* and the *Municipal Arbitrations Act*, R.S.O., 1927, c. 233 and c. 242) for alleged damages resulting from respondent's lands being injuriously affected by certain works. On motion by appellant to affirm the jurisdiction of this Court:

Held: This Court had not jurisdiction to entertain the appeal, as the pronouncement of the Court of Appeal was not a final judgment in the sense that it bound the parties to it and concluded them from

* PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon, Crocket and Hughes JJ.

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CITY OF LONDON v. HOLEPROOF HOSIERY CO. OF CANADA LTD.

taking exception to any ultimate award by the arbitrator founded thereon. *In re Knight and Tabernacle Permanent Bldg. Soc.*, [1892] 2 Q.B. 613; *British Westinghouse Electric & Manufacturing Co. Ltd.* v. *Underground Electric Rys. Co. of London Ltd.*, [1912] A.C. 673, at 686, cited.

The observations in *Trimble* v. *Hill*, 5 App. Cas. 342, at 344-345, as to the authority which in this Court should be ascribed to the decision of the Court of Appeal in England upon the construction and effect of an English statutory enactment which has been reproduced in a Canadian statute, commented on as being a little too absolute. (*Robins* v. *National Trust Co.*, [1927] A.C. 515, at 519, referred to.)

MOTION on behalf of the Corporation of the City of London for an order affirming the jurisdiction of this Court to hear its appeal from the judgment of the Court of Appeal for Ontario (1). The motion was referred by the Registrar to the Court, under the enabling provision in Rule 1 of the Rules of the Court.

The proceedings arose out of a claim of the respondent (Holeproof Hosiery Co. of Canada Ltd.) for $50,000 for compensation for damages resulting from its lands being injuriously affected by reason of grade separation of the Canadian National Ry. Co.'s tracks through the city of London, resulting in street-closing and other acts. The respondent applied to the Senior Judge of the County Court of the County of Middlesex for an appointment to determine the amount of compensation to be awarded to it in pursuance of the *Municipal Act*, R.S.O., 1927, c. 233, and the *Municipal Arbitrations Act*, R.S.O., 1927, c. 242.

In the arbitration proceedings the learned County Court Judge stated a case for the opinion of the Court, pursuant to the *Arbitration Act*, R.S.O., 1927, c. 97, and particularly s. 26 thereof; and submitting two questions for the opinion of the Court.

The parties to the arbitration agreed, but only for the purpose of having settled the questions of law raised, that it be presumed that the lands of respondent had been injuriously affected by the acts referred to in certain admissions of fact set out in the stated case.

The reasons for judgment of the Court of Appeal, stating the facts, the questions submitted, and its answers thereto, was as follows:

The City of London, Ontario, having requested the C.N.R. to build a new station in that city, the C.N.R. agreed to do so, and an agreement to that effect was entered into, January 6, 1930; on the application of

(1) [1933] Ont. W.N. 139.

the city this was given statutory authority by the Act (1930), 20 Geo. V, cap. 86 (Ont.), the agreement appearing as Schedule "B" to that Act.

In and by this agreement, the C.N.R. was obligated to do certain work; and the statute empowered the city to "pass the necessary by-laws for carrying out the terms and conditions of the agreement" sec. 4.

The C.N.R. proceeded to implement its agreement, thereby as is on this motion admitted, occasioning injury to the Holeproof property—the city, however, did not pass the by-laws which were technically necessary for the formal closing of certain streets required for the work. There was, however, no interference with the practical and effective closing of the streets on the ground by the C.N.R.; nor, indeed, could there be, if the C.N.R. was to carry out its agreement.

The Holeproof Hosiery Company claimed compensation from the city; and the matter came on before His Honour Judge Wearing as arbitrator. On objection by the city that it was not responsible, as it had not closed the streets, the arbitrator stated a case under R.S.O., 1927, cap. 97, sec. 26, as follows:—

"1. Am I right in holding that the lands of the claimant have been injuriously affected by the exercise of any of the powers of The Corporation of the City of London under The Municipal Act, being R.S.O., 1927, chapter 233, or under the authority of any general or special act in consequence of which I am empowered by The Municipal Act, being R.S.O., 1927, chapter 233, sections 342 and 350, to determine as arbitrator the amount of the compensation to be made?

"2. If question Number One be answered in the affirmative, am I right in holding that the damage caused by any part of the work physically effected by the Canadian National Railway Company, may be attributed to The Corporation of the City of London and compensation assessed against that corporation accordingly?"

In view of the objection of the Court to answer hypothetical questions [cases referred to], we might regularly decline to answer these questions, as it is not stated that the injury complained of was in fact the result of the operations stated; but, as it is admitted for the purposes of this application that such is the case, we may accede to the request, confident that this consent will not be withdrawn for other purposes.

The statute under which the Holeproof Company claims the right it asserts is R.S.O., 1927, cap. 233, sec. 342, which reads:

"Where land * * * is injuriously affected by the exercise of any of the powers of a corporation under the authority of this Act or under the authority of any general or special Act, * * * the corporation shall make due compensation to the owner * * *"

We are, of course, to take the actual language of the Legislature, and have no concern with alleged hardship, moral right, etc.; the modern method of interpreting and applying statutes is to consider that the legislators knew what they wished to enact, and had sufficient knowledge of the English language to enable them to employ the correct terminology to carry out their intention.

Whatever may have been the case before the legislation of 1930, the aforesaid "Special Act," cap. 86, gave power to the municipality to have the agreed work done; this power was exercised by the municipality; and I am unable to see that the work which injuriously affected the land spoken of, was not an exercise of the power so given, so as to come within the very words of the statute, as quoted.

The question 1, then, must be answered in the affirmative.

The answer to question 2 is obvious from the remarks above.

The City of London should pay the costs of this application.

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CITY OF LONDON v HOLEPROOF HOSIERY CO. OF CANADA LTD.

It may be added that it was not and could not successfully be contended that the railway company performed the work complained of under statutory obligation; it is clear that the validation of an agreement by the Legislature has the effect only of making it as effective as if it had been valid *ab initio*, and the parties to it may deal with it by insisting on it being carried into effect, by modifying it or by entirely abrogating it. "The agreement between the parties though ratified by an Act of the Legislature still remains a private contract;" [cases referred to].

The appellant gave security for costs on the appeal to this Court, and the same was allowed as good and sufficient security, reserving, however, to the respondent the right to object to the jurisdiction of this Court to hear the appeal.

The appellant then moved the Court of Appeal for special leave to appeal to this Court, and the motion was dismissed "without prejudice to any motion that has been or may hereafter be made to the Supreme Court of Canada."

The appellant moved before the Registrar for an order affirming the jurisdiction of this Court to hear its appeal, which motion was referred by the Registrar to the Court as above stated.

R. S. Robertson, K.C., and *K. G. Morden* for the motion.

G. F. Macdonell, K.C., contra.

The judgment of the Court was delivered by

DUFF C.J.—This is an application to affirm the jurisdiction of this Court to entertain an appeal from a pronouncement of the Court of Appeal for Ontario dated 17th of February, 1933.

The pronouncement of the Court of Appeal was given in exercise of that court's jurisdiction under s. 26 of the *Arbitration Act*, ch. 97 (R.S.O., 1927), which is in these words:

> An arbitrator or an umpire may at any stage of the proceedings and shall, if so directed by the court, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference and an arbitrator or umpire appointed under the authority of a statute or by a court or judge shall, when so directed by the court, state the reasons for his decision and his findings of fact and of law.

This section originally appeared in the *Arbitration Act* of 1897 (60 V., c. 16) as s. 41, reading as follows:

> Any County Judge, referee, arbitrator or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

By an amendment in 1927, the section was altered and brought into the form in which it appears in the Revised Statutes of Ontario, 1927, as quoted above. The amendment does not materially affect the point I am about to discuss. The section, in its original form, in s. 41 of c. 16 of the Statutes of 1897, was taken almost verbatim from s. 19 of the *Arbitration Act* of 1889 (Imp.), the only difference being that,

> Any referee, arbitrator, or umpire may at any stage of the proceedings * * *

in s. 19, was altered to read,

> Any County Judge, referee, arbitrator, or umpire may at any stage of the proceedings * * *

in s. 41.

In 1892, the Court of Appeal had to consider in *In re Knight and Tabernacle Permanent Building Society* (1) whether an opinion pronounced by a Divisional Court in exercise of the jurisdiction given by s. 19 of the *Arbitration Act* of 1889 was a judgment from which an appeal would lie to the Court of Appeal. The Court, Lord Esher, M.R., Bowen and Kay, LL.J., held that it was not. Lord Esher points out that the question of law is not under the statute stated "for the 'determination' or 'decision' of the Court," and he held that no determination or decision amounting to an appealable judgment was contemplated by the section.

Bowen, L.J., said (p. 619) that the submission of the case is

> an interlocutory proceeding in the reference, and I do not think that it can have been intended that, whenever a case is stated under this section for the opinion of the Court, such opinion when taken is to be treated as an absolute determination of the rights of the parties with the result that there may be an appeal from it which may be carried to the House of Lords.

Kay, L.J., said (p. 621),

> I think that it is impossible, looking to the language of the Arbitration Act, to say that the opinion given on the special case stated under s. 19 is a judgment or order. I do not think that the section contemplates that the Court should give any judgment or make any order, but simply that it should express an opinion.

These views, expressed by the judges of the Court of Appeal, constitute the ratio of the decision in that case.

As we have seen, s. 41 of the Ontario *Arbitration Act* of 1897 reproduces with no material modification the words of

(1) [1892] 2 Q.B. 613.

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Duff C.J.

s. 19. The note in the margin shows the origin of s. 41. Indeed, the *Arbitration Act* of 1897 is in great part a reproduction of the English *Arbitration Act* of 1889.

It is now, perhaps, permissible to say that the observations of Sir Montague Smith in *Trimble* v. *Hill* in the Judicial Committee (1), as to the authority which in this Court should be ascribed to the decision of the Court of Appeal upon the construction and effect of an English statutory enactment which has been reproduced in a Canadian statute, are a little too absolute. *Robins* v. *National Trust Co.* (2). Nevertheless, it is difficult to suppose that the framers of the *Arbitration Act* of 1897 were unaware of the construction which had been attributed to s. 19 of the English *Arbitration Act* of 1889; and, be that as it may, the reasoning of the eminent judges who considered s. 19 in 1892 appears to me to be unanswerable.

It follows that the pronouncement of the Court of Appeal for Ontario in this matter is not a final judgment in the sense that it binds the parties to it and concludes them from taking exception to any ultimate award by the arbitrator founded on that opinion.

It may be observed further that this view is confirmed by the judgment of Lord Haldane in *British Westinghouse Electric & Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London Ltd.* (3).

The application must be dismissed with costs.

Application dismissed with costs.

Solicitor for the appellant: *T. G. Meredith.*

Solicitors for the respondent: *Ivey, Elliott & Gillanders.*

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(1) (1879) 5 App. Cas. 342, at 344-345.

(2) [1927] A.C. 515, at 519.

(3) [1912] A.C. 673, at 686.

JOSEPH ONESIME DEPATIE (PLAINTIFF) . APPELLANT;

AND

F. J. HERBERT (DEFENDANT)

AND

DUPUY & FRERES AND OTHERS (MIS-EN-CAUSE) ..... RESPONDENTS.

1933

*Mar. 25.
*Apr. 25.

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

Contract—Building—Advances made by builder to contractor by way of mortgage—Transfer of the mortgage to third party—Notice to be served by transferer to debtor—Evidence—"Contradicting or varying terms of writing"—Arts. 1156 (3), 1190, 1234, 1571, 2013 (d) (e) C.C.

The appellant D., by private writings, entered into a contract on the 6th of July, 1929, whereby H. the defendant undertook to build tenements for $10,900 and agreed as to the mode of payment with moneys secured through hypothecs on the improved property. On the 14th of September, work being sufficiently advanced, D. gave a first mortgage of $6,750 from the proceeds of which he paid H. $6,503.68. On the 20th of September, H., representing that he needed a further guarantee for the benefit of his creditors, prevailed upon D., although the work was not completed, to give a second mortgage for $4,150, which was executed on that day and registered on the 14th of October. The appellant D., on the 16th of November, caused a protest to be served upon H., which was registered on the 18th, notifying him *inter alia* that the sum due under the second mortgage was not to be paid unless H. paid the overdue accounts for work and material and requesting him not to negotiate the same in any manner. But H., who was indebted to the (respondents) mis-en-cause D. & F., had transferred and assigned to them on the 29th of October this second mortgage as collateral security for his indebtedness; however, it was not until the 9th of December that the respondents D. & F. served upon the appellant D. notification of this transfer. H. absconded some days after receiving the protest of the 18th of November and left the contract uncompleted. The appellant D. then discovered that the settlement of privileged claims registered against the property and the cost of the uncompleted work increased the cost of the buildings to a sum exceeding the contract price, and that therefore the debt guaranteed by the second mortgage of $4,150 was extinguished. D. took the present action against H. as defendant, and D. & F. as mis-en-cause, for a declaration that the mortgage if not null and void should be cancelled or paid by compensation, with an order to the registrar to enter such cancellation in his book.

Held, reversing the judgment of the Court of King's Bench (Q.R. 53 K.B. 81) that the appellant's action should be maintained.—The principle laid down in *Lamy* v. *Rouleau* ([1927] S.C.R. 288), where it was held that "the transferee acquires possession available against (the debtor) only upon service of the transfer being made upon the debtor,"

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

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applied. Accordingly D. & F. were in the same position towards D. as if the deed of transfer to them had been passed on the day of its service to D., i.e., on the 9th of December, 1929. Therefore any cause of extinction of the debt in whole or in part operating between H. & D. and anterior to such service has had the effect of liberating D.—Article 1234 C.C. does not apply to the evidence adduced to prove such extinction as between D. and H., as such evidence does not "contradict or vary the terms of" the second mortgage, but on the contrary has the effect of affirming that deed by proving its extinction.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, at Montreal, Désaulniers J., and dismissing the appellant's action.

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

O. P. Dorais K.C. for the appellant.

Chs. Champoux K.C. for the respondent.

The judgment of the court was delivered by

CANNON J.—Appel d'un jugement de la Cour du Banc du Roi confirmant, avec la dissidence de MM. les juges Hall & Létourneau, le jugement de la Cour Supérieure renvoyant, quant aux mis-en-cause, l'action en radiation d'hypothèque du demandeur-appelant.

Le défendeur Herbert, par écrits sous seing privé, s'engagea, en juillet 1929, à construire pour l'appelant une maison à trois logements pour le prix de $10,900; et le mode de paiement fut réglé comme suit:

1. The owner will mortgage the property and will pay to the contractor, the full amount of the said first mortgage.

2. The balance of the money due to the contractor when the building is completed, will be converted into a second mortgage in favour of the contractor. The owner will there make equal payments of about $50.00 per month (Feb. 14) until the amount of the second mortgage and the interests computed at 7 per cent have been entirely paid for. The interest will be paid every six months.

The amount to be covered by the second mortgage, will depend on the amount of the first mortgage, and the final details will be settled when the deed of the second mortgage is prepared for signature by both parties.

Le 20 septembre 1929, la seconde hypothèque prévue fut consentie en faveur de l'entrepreneur pour $4,150, que l'ap-

(1) (1932) Q.R. 53 K.B. 81.

pelant reconnut avoir reçu et promit de rembourser à raison de $50.00 par mois, commençant le 1er décembre 1929, avec intérêt à 7% du 1er novembre 1929 payable semi-annuellement. Cet acte porte hypothèque sur les lots 162-1824, 1825, 1826 et 1827 du cadastre de la paroisse de Saint-Antoine-de-Longueuil, "with a three tenement building *now in course of construction thereon erected.*" Le propriétaire-appelant souscrivit à la condition suivante:

The borrower shall not permit any builder's privilege to be created upon the said property under pain of causing the present loan to become forthwith exigible.

Cette obligation hypothécaire fut enregistrée le 14 octobre 1929. La construction et les paiements par l'entrepreneur n'allant pas à sa satisfaction, l'appelant fit protester, le 16 novembre 1929, le défendeur d'avoir à payer toutes les réclamations en souffrance pour matériaux ou main-d'œuvre relatifs à la construction, le notifiant qu'il le tenait responsable de toute somme qu'il était appelé à payer, de même que du coût des travaux qui restaient à faire, lui enjoignant aussi de ne pas négocier ou se dessaisir en aucune manière de la somme de $4,150 faisant l'objet de l'obligation susmentionnée. Ce protêt fut enregistré le 18 novembre 1929. Le défendeur, à la suite dù protêt, abandonna complètement les travaux, et semble avoir laissé la province. Ce n'est que le 9 décembre 1929 que l'appelant reçut signification, de la part de Dupuy & Frères, les mis-encause intimés, d'un acte notarié du 29 octobre 1929, leur transportant en garantie collatérale cette créance de $4,150. Ce transport fut enregistré le 30 octobre 1929, et comporte, en faveur des intimés, une subrogation aux droits, privilèges et hypothèques du cédant Herbert en vertu du dit acte d'obligation.

Le demandeur-appelant s'est pourvu en justice pour mettre de côté cet acte, alléguant mauvaise foi et dol de la part de l'entrepreneur et faisant de plus valoir, à l'encontre de l'obligation et de l'hypothèque, son accessoire, si valides, les paiements qu'il a été obligé de faire aux ouvriers et aux fournisseurs de matériaux au lieu et à l'acquit du défendeur et pour terminer le contrat que ce dernier avait abandonné.

Devant le juge de première instance, le demandeur a, en fait, essayé de prouver que l'obligation hypothécaire sous forme de prêt n'était, en réalité, que l'exécution de la promesse écrite faite à Herbert de lui consentir une seconde

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hypothèque pour lui faciliter le paiement des frais de construction. L'on a refusé d'admettre une preuve à l'encontre de la cause ou considération mentionnée à l'écrit, mais le demandeur a pu prouver les réclamations privilégiées et le paiement qu'il avait allégués dans son action, et nous demande aujourd'hui, non pas de lui accorder toutes les conclusions de son action, mais de déclarer que la créance de Herbert constatée par l'obligation était éteinte au temps de la prise de possession effective par les mis-en-cause, et qu'en conséquence ces derniers doivent voir cette cour dire et déclarer que, à la date de la signification du transport, le débiteur cédé ne devait rien au prétendu créancier cédant.

Dans l'affaire *Lamy* v. *Rouleau* (1), cette cour a décidé ce qui suit:

When a debt is transferred, the debtor is a "third person" within the meaning of art. 1571 C.C., and the transferee acquires possession available against him only upon service of the transfer being made upon the debtor. Mere registration of the transfer is not sufficient.

So long as the transfer has not been served (or has not been accepted by the debtor) the transferor, with regard to third persons, remains the possessor and the owner of the debt.

As a result, the debtor is liable to the transferee only in so far as he is obligated to the transferor at the time when the transfer is served. As against the debtor, the transfer must be considered as having taken place only on the date of its signification to him.

Any mode of extinction of the debt (as, for example, compensation) operating between the debtor and the transferor previous to the service of the transfer upon the debtor has the effect of discharging the debtor, even as against the transferee.

En vertu de cette décision, Dupuy & Frères sont donc dans la même position, vis-à-vis de Dépatie, que si le transport avait eu lieu le jour de la signification, à savoir le 9 décembre 1929. Jusque là, pour Dépatie, le créancier était Herbert. Le paiement à ce dernier l'eût libéré. Toute extinction de la créance due à Herbert devait profiter à Dépatie, car le paiement n'est que l'une des manières par lesquelles l'obligation s'éteint. Tout autre mode d'extinction de la créance opérant entre Herbert et Dépatie antérieurement à la signification doit logiquement avoir le même résultat; et, comme le dit Pothier, vol. 3, no. 558:

Le débiteur peut opposer au cessionnaire la compensation de tout ce que lui devait le cédant avant la signification du transport.

C.C. 1192 (2). Le transport non accepté par le débiteur, mais qui lui a été signifié, n'empêche que la compensation des dettes du cédant postérieures à cette signification.

(1) [1927] S.C.R. 288.

En l'espèce, comme dans celle de *Lamy* v. *Rouleau* (1), il s'agit donc de savoir si, avant la signification du transport, quelque chose s'est produit entre Dépatie et Herbert qui a eu pour effet d'éteindre la créance. La preuve des paiements faits a été admise par la cour de première instance; car il s'agissait, non pas de contredire l'écrit ou de nier l'obligation constatée par l'écrit, mais de la confirmer en en prouvant l'extinction, par ce qui s'est passé entre créancier et débiteur du 30 septembre au 9 décembre 1929. Nous pouvons donc éliminer, et nous éliminons pour la décision de cette cause, l'article 1234 C.C., car nous la décidons en adoptant un point de vue qui ne comporte aucune contradiction de l'écrit suivant sa forme et teneur.

Mais, nous dit l'intimé, à chaque jour suffit sa peine. Vous pourrez faire valoir cette extinction, ce paiement par compensation ou autrement le jour où les mis-en-causes voudront exiger paiement de l'obligation. Vous n'avez pas intérêt à prendre l'initiative pour demander que cette obligation soit déclarée éteinte et que l'hypothèque soit radiée.

Les mis-en-cause ayant fait enregistrer cette créance sur les immeubles en question, le demandeur appelant a un intérêt actuel à faire disparaître cette charge qui diminue d'autant la valeur de sa propriété et qui devenait due et exigible dès qu'un privilège était enregistré sur la propriété.

Il nous faut donc constater, par la preuve au dossier, si possible, de quel montant le demandeur-appelant et Herbert se trouvaient mutuellement débiteur et créancier l'un de l'autre le 9 décembre 1929, afin de déterminer jusqu'à quel point la compensation s'est opérée de plein droit de façon à éteindre les deux dettes jusqu'à concurrence de leurs montants respectifs. Cette compensation, d'après 1190 C.C., a lieu quelle que soit la cause ou considération des dettes ou de l'une ou de l'autre, excepté dans trois cas qui ne s'appliquent pas en l'espèce. Il ne faut pas oublier, en cette matière, qu'après la signification, le cessionnaire reste vis-à-vis du débiteur le simple représentant du cédant; le débiteur cédé ne doit payer au cessionnaire que ce qu'il doit au cédant resté son créancier, et garde vis-à-vis de celui-là toutes les exceptions qu'il pouvait opposer à celui-ci, d'où la conséquence que s'il ne doit rien au cédant, il n'a rien à payer au cessionnaire. La bonne foi du cessionnaire ne peut

(1) [1927] S.C.R. 288.

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rien changer à ces règles. Il a cru que le cédant était véritablement créancier? Cela ne suffit pas pour que la dette existe; et si le débiteur, lors de la signification du transport, ne devait rien au cédant, il ne peut se trouver obligé de l'acquitter.

Ceci ressort de l'arrêt de la Cour de cassation du 29 juin 1881, dans la cause de *Goin et consorts* c. *Hons Olivier* (1), où il a été statué:

> Attendu, en droit, qu'il est de principe que nul ne peut céder à autrui plus de droits qu'il n'en a lui-même; qu'en matière de cession de droits incorporels, le cessionnaire, nanti par la cession de tous les avantages afférents à la créance cédée, est aussi passible des exceptions que le débiteur cédé pouvait opposer au cédant; qu'il importe peu que la cession ait été signifiée au débiteur, si celui-ci ne s'est pas, en acceptant la cession, rendu débiteur personnel du cessionnaire, la signification prescrite par l'article 1690 (C.N.) n'ayant d'autre effet que de saisir le cessionnaire vis-à-vis du débiteur cédé, comme de tous autres, des seuls droits qu'avait le cédant; que, si la bonne foi du cessionnaire doit lui assurer un recours contre celui-ci, elle ne saurait obliger le débiteur envers lui, plus qu'il ne l'était envers le cédant;

Quelle était la situation respective de l'appelant et de son entrepreneur lorsque ce dernier, après la signification du protêt, abandonna son contrat de disparut complètement? Il n'y a pas de doute, d'après les conventions de juillet 1929, que les deux hypothèques sur le terrain où devaient se faire les constructions ont été données pour procurer à Herbert l'argent et le crédit dont il avait besoin pour acheter les matérieux et payer ses ouvriers. Sur la première hypothèque, le demandeur paya directement à Herbert $5,600, plus $600 sur un billet de $2,000 qu'il lui avait consenti. Lors de la disparition du défendeur, le demandeur, comme propriétaire, fut assailli de réclamations privilégiées de la part de ceux dont le débiteur semblait avoir quitté la province de façon à leur faire perdre leur recours contre lui. En vertu de l'article 2013(d) du Code civil, le propriétaire, qui était en même temps son propre architecte, avait le droit de retenir, pendant toute la durée et à la fin des travaux, sur le prix du contrat, un montant suffisant pour acquitter les créances privilégiées; et le constructeur Herbert ne pouvait exiger aucun paiement sur le prix du contrat avant d'avoir fourni au propriétaire un état, sous sa signature, de tous les montants dus par lui pour construction et matériaux. Et, sous l'article 2013(e) du même code, pour

(1) (1881) Sirey, 1882-1-125, at 128.

faire face aux créances privilégiées des fournisseurs de matériaux, le demandeur avait le droit de retenir sur le prix du contrat de construction un montant suffisant pour le payer; et ce tant que le défendeur ne lui aurait pas remis soit une quittance, soit une renonciation à leur privilège signée par eux.

Le demandeur a prouvé sans contradiction que ces réclamations privilégiées à lui dénoncées se montent à $1,547.19, plus $3,513.93, formant un total de $5,061.12, que le demandeur propriétaire avait droit de retenir dès avant le transport et qu'il a effectivement été obligé de payer au lieu et à l'acquit de son entrepreneur en fuite. Il n'y a pas de doute que le demandeur était tenu de payer ces dettes à même les argents du contrat dont partie était le montant de la deuxième hypothèque qui nous occupe. Il était tenu en vertu de la loi de retenir ces montants pour les créanciers de son entrepreneur " avec qui ou pour qui il était tenu de payer ces dettes, qu'il avait intérêt d'acquitter." La subrogation s'est donc opérée en sa faveur par l'effet de la loi et sans demande (Art. 1156 par. 3 C.C.) contre le cédant défendeur et ses représentants mis-en-cause.

Malheureusement pour les mis-en-cause Dupuy & Frères, comme nous l'avons exposé plus haut, ils ne peuvent exercer plus de droits que ceux possédés par le cédant contre le demandeur le 9 décembre 1929. A cette date, l'obligation du 20 septembre 1929, au montant de $4,150 était éteinte, vu la co-existence de deux dettes liquides et exigibles laissant en faveur du demandeur une différence de $911.12. Je ne tiens pas compte de la somme de $755 que le demandeur pourrait réclamer pour les déboursés à faire pour compléter la construction que le défendeur s'était obligé de lui livrer pour $10,900. Je ne crois pas qu'au 9 décembre cette réclamation en dommages pour inexécution partielle du contrat fût suffisamment liquide et exigible pour être sujette à une compensation de plein droit. Ce montant, d'ailleurs, n'était pas nécessaire pour éteindre, dès avant le 9 décembre, toute réclamation que le défendeur Herbert aurait pu essayer de faire valoir en vertu de la deuxième obligation hypothécaire contre le cédant.

D'après l'arrêt de la Cour de cassation cité plus haut, même la bonne foi du cessionnaire ne saurait le mettre dans une situation meilleure que celle du cédant; et, à moins

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d'une acceptation formelle par le débiteur qui équivaut à une promesse de payer au nouveau créancier, et à une renonciation aux exceptions qu'il pouvait faire valoir contre son premier créancier, nous ne pouvons ignorer les responsabilités de Herbert vis-à-vis du demandeur découlant de sa conduite qui pourrait, sans exagération, être qualifiée de dolosive et malhonnête. Dès que le demandeur s'est aperçu qu'il était victime d'un abus de confiance, il a pris les mesures voulues pour se protéger et protéger le public, en enregistrant le protêt du 16 novembre 1929 et en retenant l'argent que le défendeur n'avait pas le droit de recevoir au détriment de ceux qui avaient réellement érigé l'édifice mentionné à l'hypothèque. Peu importe que cet enregistrement ait été connu de Dupuy & Frères. A cette date, et jusqu'au 9 décembre, le demandeur appelant pouvait et devait les ignorer.

Nous sommes donc d'avis que l'action aurait dû être maintenue en partie et que le demandeur a droit à ce qu'il soit dit et déclaré qu'il ne doit pas au défendeur, ni aux mis-en-cause la somme de $4,150, montant de l'obligation du 20 septembre 1929; à ce qu'ordre soit donné au régistrateur du comté de Chambly d'en radier l'enregistrement sur la propriété du demandeur, savoir les lots de terre connus et désignés sous les numéros dix-huit cent vingt-quatre, dix-huit cent vingt-cinq, dix-huit cent vingt-six et dix-huit cent vingt-sept de la subdivision officielle du lot originaire numéro cent soixante-deux (nos. 162-1824, 1825, 1826 et 1827) des plan et livre de renvoi officiels de la paroisse de St-Antoine de Longueuil, comté de Chambly, de même que l'enregistrement des deux transports en faveur des mis-en-cause; et à ce que l'enregistrement du présent jugement équivaille à la radiation de la dite obligation et des deux transports; le tout avec dépens contre les mis-en-cause dans toutes les cours.

Appeal allowed with costs.

Solicitor for the appellant: *J. H. O. Papillon.*

Solicitor for the respondent: *Chs. Champoux.*

COLONIAL FASTENER COMPANY, LIMITED, AND G. E. PRENTICE MANUFACTURING COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

LIGHTNING FASTENER COMPANY, LIMITED (PLAINTIFF) ..... } RESPONDENT.

1932
*Dec. 12, 13, 14.
1933
*April 25.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Novelty—Matter covered by the invention—Infringement.

The judgment of Maclean J., President of the Exchequer Court, [1932] Ex. C.R. 89, in favour of the plaintiff in an action brought for alleged infringement of its patent, which was for an invention relating to a machine and method for producing straight and curved fastener stringers, was reversed, on the ground that, having regard to the prior art, the only invention disclosed by plaintiff's patent was a particular method and a particular mechanism for achieving a known result, which method and mechanism were not infringed by defendant's machine.

APPEAL by the defendants from the judgment of Maclean J., President of the Exchequer Court of Canada (1), in favour of the plaintiff in an action for alleged infringement of patent. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed, and the action dismissed, with costs throughout.

D. L. McCarthy, K.C., A. Geoffrion, K.C., and *S. A. Hayden* for the appellants.

O. M. Biggar, K.C., R. S. Smart, K.C., and *H. G. Fox* for the respondent.

The judgment of the court was delivered by

SMITH, J.—The respondent brought this action in the Exchequer Court for infringement by appellants of Letters Patent of Canada No. 210,202, dated 5th April, 1921, and obtained judgment (1) for an injunction with a reference as to damages.

From this judgment the appeal is taken.

*PRESENT:—Rinfret, Lamont, Smith and Crocket JJ., and Latchford C.J. (Supreme Court of Ontario) *ad hoc.*

(1) [1932] Ex. C.R. 89.

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COLONIAL FASTENER CO. LTD. ET AL. v. LIGHTNING FASTENER CO. LTD.

Smith J.

The invention covered by respondent's patent relates to a machine and method for producing straight and curved fastener stringers, such as shown in Letters Patent of the United States No. 1,219,881, and also the curved stringers shown in application for Letters Patent of Canada No. 219,986. These fasteners are commonly known as "Zipper" fasteners, and physical exhibits "E" and "F" are specimens of respondent's fasteners and exhibits 21 and 22 are specimens of appellants' fasteners.

The fastener consists of two lengths of cloth tape disposed on opposite edges of the opening to be fastened, each tape edge next the opening bearing a series of spaced metal units, the units on one tape being staggered in position with respect to the units on the other tape, all the units being so shaped as to interlock the series on one length with the series on the opposed length of tape, when brought together with a slider which envelopes the two interlocking edges, and is manually movable thereon. Each unit has jaws at one end to straddle and be compressed on the corded edge of the tape. The projecting interlocking end of each unit is formed with a projection on one side and a socket on the other, so that the opposing series of units are interlocked through the action of the slider by meshing the projection of each unit of one series in the socket of the adjacent unit of the other series.

The completed fastener of both appellants and respondent is the subject matter of a British Patent No. 14,358 of 1912, Exhibit "U," issued to Katharina Kuhn-Moos. The latter did not patent her invention in Canada or the United States, but the Sundback United States Patent, No. 1,219,881, seems to cover the same subject matter.

We are not, however, here concerned with the fasteners themselves, but with the machine for making them. In this machine we have a punch press for cutting out and forming the units from a flat strip of metal, which was the ordinary method of making the units long before the date of respondent's patent.

The problem that remained, after these small units had been made by a punch press, was that of getting the jaws astride the corded edge of the tape and compressing them there in succession with the correct space between each unit. A means of placing fastener units on the corded edge of a tape in succession with equal spaces between units

is disclosed in the Aronson Canadian Patent No. 107,456, dated September 17, 1907 (Ex. B.) There the units, after being made, are placed by hand in what is called a magazine, which is combined with a machine in such a manner that the jaws of the units are successively placed astride the corded edge of the tape held taut in the machine and moved along, step by step, each unit, as placed astride the edge of the tape, being compressed there by two reciprocating plungers. A method of clamping the units to the tape in succession in regulated spaces after getting the jaws of the units astride the edge of the tape, was therefore not the problem that required to be solved by Sundback. The problem was a means of carrying the units, when formed, automatically to a position where the jaws of each unit would be placed successively astride the corded edge of the tape, to be there automatically compressed, the space between units being regulated by feeding the tape along step by step, as shown in the Aronson patent.

Methods of cutting units with jaws from flat metal strips and automatically carrying such units on, so as to place these jaws astride a wire and compress them there with regulated spacing, were disclosed long before the date of respondent's patent, chiefly in connection with the manufacture of barbed wire.

It is at once argued that there is no similarity between the making of barbed wire and the making of these zipper stringers. It is, of course, plain enough that these stringers could not be made on a barbed wire machine without much change or modification of the machine. An examination, however, discloses that the principles involved in the working of the two machines have much in common. This was not overlooked by the inventor of respondent's machine, Sundback. His United States patent, No. 1,331,884, dated February 24, 1920, is, as the evidence discloses, for the same invention as the Canadian patent of respondent in question. In the specifications to the United States patent, he says:

> The present invention is not limited in its broad aspects to the production of the particular fastener members referred to, nor to the setting of such members on tapes, but is of general application wherever it is desired to automatically and cheaply form large numbers of like parts, and to set them on a suitable carrier element.

The product of the machine, therefore, need not be fasteners at all, the units need not be fastener units, and

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the carrier need not be a tape, but may be any suitable carrier element.

Looking, then, at Brainard's wire-working machine, Patent No. 292,467, dated January 29, 1884, we have a suitable strip automatically fed into a punch press, from which the barbs, each with two jaws, are formed and cut out successively. The carrier element, a strand of wire, is automatically fed into the machine from a spool, and passes under the barbs between the jaws, and a punch presses the barb down on the strand and into the concave sides of a channel, so that the jaws are made to clasp the strand tightly. The strand is automatically fed along step by step, so that a barb is fastened at each step with regulated spacing.

The Stover United States Patent No. 240,477, dated April 19, 1881, is practically the same as the Brainard patent, except that the carrier element is a flat metal tape, instead of a round wire. There is also a necessary variation of the mechanism for compressing the jaws on the metal tape.

Speaking generally, therefore, there was nothing new in devising a machine to form automatically and cheaply large numbers of like metal units and to set them on a suitable carrier element with regulated spacing.

The problem remaining to be solved was the devising of a means by which, when the particular fastener units here in question were successively cut and formed from the metal strip, they would be automatically carried on and placed with the jaws astride the corded edge of the tape, to be there compressed on the tape, as disclosed in the Aronson patent, thus avoiding the tedious and expensive manual operation necessary in the Aronson process for placing the jaws of the units astride the edge of the tape.

Sundback solved this problem as shown in respondent's patent by constituting the metal strip the means for carrying the units to the desired position. This object is attained by first punching out in the punch press from the metal strip automatically fed into the machine the piece of metal from which the unit is to be formed, and replacing the piece so cut out automatically back into the space from which it was cut out, and carrying it on, as the metal strip is fed along, for the next operation, where it is firmly held in position by compressing the edges of the metal strip, while

a punch and die form the unit. Then this unit, still held in position in the metal strip, is carried by that strip, as it is stepped on, to a position where the jaws of the unit are placed astride of the corded edge of the tape, and is there compressed on the tape by plungers, which compress the edges of the metal strip, and thus compress the jaws of the unit on the tape, as shown in the Aronson patent.

The specification of respondent's patent dwells on the novelty whereby the punching for the jaw member is completely severed from the blank metal strip and then immediately replaced therein, so that it can be further fed for the subsequent forming and cutting operations while at the same time being protected from tool marks. By this means, it is claimed, it is possible to apply pressure to the punching through the blank so as to hold the punching firmly during the shaping operation, and then, by a further side punching operation through the blank, to compress the jaws firmly on the carrier element or tape without leaving any tool marks upon the jaw members themselves. This avoidance of tool marks is claimed to be a great advantage, since it cheapens subsequent finishing operations.

The appellants' method of forming and severing the completed units from the flat strip of metal and then carrying these completed units in succession to a position where the jaws are placed astride the corded edge of the tape, is entirely different from the method employed as disclosed in respondent's patent just described. The appellants in their machine do not first punch from the metal strip a piece subsequently to be formed into a completed unit; but first, by punch and die, form the projection and socket of the unit in the metal strip, and then, by a subsequent punching operation, complete the making of the unit by cutting it out of, and thus severing it from, the metal strip. They do not constitute the metal strip a means of carrying the units successively to the position where the jaws are placed astride of the corded edge of the tape. They do not, by plunger, compress the edges of the metal strip and thus compress the jaws of the unit on the tape, and so prevent tool marks on the unit.

The method in the appellants' machine, in my view, is radically different. The unit is formed in the metal sheet and during the process of formation does not require to

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be held firmly by the pressure on the edges of the strip as specially provided for in respondent's patent. When completely formed by being cut from the metal strip by the second operation, the completed units are placed successively by the action of the cutting-out punch on a plane or table, where they are at once successively pushed by another operating part of the machine to a position where the jaws are placed astride of the corded edge of the tape. This method, and the form and operation of the machine by which the result is brought about, seem to me to be entirely different from the respondent's method, and from the form and operation of respondent's machine.

The method adopted in appellants' machine resembles less the methods adopted in respondent's machine than the methods disclosed in various other patents, such as the Brainard and Stover patents already referred to, and the Major United States Patent No. 525,914, dated September 11, 1894. The latter patent has reference to a machine for automatically making hooks and eyes and attaching them in spaced relation in groups, with gaps between groups, to a cardboard strip or tape by U shaped staples. The staples are formed and cut from a wire fed into the machine step by step, and are automatically brought to the proper position in relation to the hook or eye for fastening the latter to the cardboard strip or tape. The hook and eye are also made on the machine, and automatically brought to the proper position on the cardboard strip or tape, to be fastened there by the staples. The staple and hook or eye having thus been brought to the proper position, the staple is pushed through the loops of the eyes and cardboard, and clinched by contact of the staple ends at the other side of the cardboard in the ordinary method of stapling, so well known as not to require description, the patent states. The cardboard strip is fed along step by step until the desired number of hooks and eyes are attached, with regular spacing, and then is fed by a long step, so as to commence a new group.

It will thus be seen that the practice of forming and cutting units from a metal wire or strip fed step by step into the machine, and in the same machine automatically carrying the units successively as formed to a position where they are successively clamped or clinched to a tape or other carrying element in spaced relation in groups of pre-

determined length, was not new at the date of the respondent's patent, and that the most that can be covered by respondent's patent is the particular method and the particular mechanism by which the result is achieved, and cannot cover all methods and all mechanisms by which that result is brought about. *Tweedale* v. *Ashworth* (1); *Miller* v. *Clyde Bridge Steel Co.* (2).

It is argued for respondent that there is some novelty in respondent's method of clamping the units to the tape by feeding the tape step by step to attach a desired number of units with equal spacing and then, by a long step, to divide the units into groups, with a blank space on the tape between groups. Aronson attained this precise result, not by means of the tape being advanced by the long step, but by leaving blanks in his magazine—that is, spaces without units.

The Shipley United States patent, No. 85,249, dated December 22, 1868, relates to a feed-motion for machines for cutting the teeth of metal combs, and discloses a means of feeding a metal strip into a machine, step by step, so that the desired number of teeth are cut with equal spacing. Then the metal strip is advanced by a long step, so as to form groups of teeth of the desired number, with gaps between the groups. This is secured by means of the co-operation of two ratchet wheels and one pawl.

Major secured the same result by co-operation of a single ratchet wheel and two pawls. In respondent's machine the Major device is used, and in appellants' machine the Shipley device of two ratchets and one pawl is adhered to. Both machines use the Shipley method of feeding the metal strip into the machine step by step, but in that part of the operation no long step is required.

Many years before respondent's patent, Prentice made and used extensively a machine for fastening on tape the "Securo" fastener, in regularly spaced groups with gaps between groups, using a single ratchet wheel.

There seems, therefore, to be nothing new in respondent's ratchet feed of the tape step by step with long gaps at required intervals to form separated groups. Neither is there anything novel in obtaining tension on the tape by wrapping same on a knurled roller, as this was a well

(1) (1892) 9 R.P.C. 121, at 128. (2) (1892) 9 R.P.C., 470, at 479.

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known method of obtaining a grip on fabric without pinching the fabric so tightly between rollers as to cause injury. The use of roughened rollers to get a better grip on the tape is disclosed in the Olm patent, No. 1,114,177.

There is nothing new in respondent's use of plungers to compress the edges of the metal strip and, through them, the jaws. Aronson used plungers for this purpose, applied directly to the jaws. In any case, the appellants do not use plungers at all for this purpose, but adhere to a common practice disclosed in the patents already referred to, of pressing the jaws between or against inclined planes. These planes, in appellants' latest design, are pivoted at one end in such a way that, when the unit is pressed between them, they swing on the pivots and close at the point of contact with the unit, thus lessening friction. They constitute no infringement of respondent's plunger device, which in itself was not new.

Respondent, at the trial, relied on Claims 1, 2, 3, 7, 8, 10 and 19.

Claim 1 has reference to any machine for making fasteners, regardless of the method by which the machine produces them, which has means of feeding fastener members into position to be compressed on to the tape and means for compressing the fastener members thereon. This makes no claim to any particular mode of making the fasteners in the machine, but purports to cover any and all means in such a machine of feeding the tape step by step, feeding fastener members into position, and compressing these on the tape. Fastening Aronson's machine to any ordinary punch press arranged to form fastener units would infringe this claim. The claim, as already stated, is too wide, and must be limited to the particular means disclosed.

Claim 2 would cover all the machines previously used for making fasteners, unless it is confined to the particular means used for cutting out the material to be used for the unit and replacing it in the place from which it was cut, and then forming it into the unit. This means is not used by appellants, and is not infringed.

Claim 3 also must be confined to the particular means described, and is not infringed by appellants, who use an entirely different means.

Claims 7 and 8, as already stated, cover nothing that was new.

Claim 10 covers an ordinary old-time punch press operation, without novelty.

Claim 19 is exactly covered by the Aronson patent.

There is no new invention in respondent's machine, except the particular mode of carrying the units, after being formed, automatically to the position where the jaws are set astride the corded edge of the tape. Various mechanisms for doing this very thing with metal units are disclosed in the other patents of prior date referred to. The general idea of a machine for making and cutting metal units and automatically placing those in succession where they were attached to a suitable carrying member with regular spacing, in separated groups, was old at the date of the respondent's patent, and the only invention disclosed by respondent's patent is, as already stated, the particular method of carrying the units, after being formed, so as to place the jaws astride the tape; and this method, and the mechanism by which it is accomplished, are not infringed by appellants' machine.

The appeal should be allowed, with costs; and the action dismissed, with costs.

Appeal allowed with costs.

Solicitors for the appellants: *McCarthy & McCarthy.*
Solicitor for the respondent: *Harold G. Fox.*

LIGHTNING FASTENER COMPANY, LIMITED (PLAINTIFF) ..... APPELLANT;

AND

COLONIAL FASTENER COMPANY, LIMITED, AND G. E. PRENTICE MANUFACTURING COMPANY (DEFENDANTS) ..... RESPONDENTS.

1932
*Dec. 15, 16.
1933
*April 25.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA
(Suit No. 13298)

Patent—Validity—New combination of old elements—Usefulness—Advantages not produced before—Requirement of inventive step.

A new combination of old elements is not a patentable invention simply because it is useful and possesses advantages not produced before.

*PRESENT:—Rinfret, Lamont, Smith and Crocket JJ.,, and Latchford C.J. (Supreme Court of Ontario) *ad hoc.*

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The patent in question was held invalid because the improvement for which it was granted did not, having regard to the prior state of knowledge, require such exercise of the inventive faculty as would justify the granting of a monopoly.

APPEAL by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada, dismissing its action for alleged infringement of patent, on the ground that the device described in the patent did not call for sufficient skill or ingenuity to constitute a patentable invention. The appeal to this Court was dismissed with costs.

O. M. Biggar, K.C., R. S. Smart, K.C., and *H. G. Fox* for the appellant.

D. L. McCarthy, K.C., A. Geoffrion, K.C., and *S. A. Hayden* for the respondents.

The judgment of the Court was delivered by

RINFRET, J.—The appellant brought this action for infringement of Canadian letters patent No. 246727 applied for in the month of May, 1924, and granted on the 10th February, 1925. The action was dismissed by the Exchequer Court of Canada on the ground that the device therein described did not call for sufficient skill or ingenuity to constitute a patentable invention.

The invention relates to a particular type of slider for the now well known separable slide fasteners.

The earliest slide fasteners were of what was called the " tear " type. In these, the slider had a pull only at one end. It was adapted solely to close the fastener, which was opened by pulling apart the stringers on which the fastening elements were mounted, that is: " by tearing the two sides apart like you tear a piece of paper." Fasteners of that type were open to a great many objections, of which the chief was that they were not adapted for use on articles where the aperture is permanently closed at each end, such as a purse, a tobacco pouch or any kind of a bag. There was no practical way of operating them on the class of articles which call for such openings and which are probably more numerous than the class of articles where the opening is permanently fixed only at one end. There were " other deficiencies, such as weakness in holding the wings against spreading."

These difficulties were met, in 1916, by the use of a slider with a stiffening yoke running from one end to the other of

the slider and to which a travelling pull or tab was attached, so that when the slider was being opened the pull would operate from one end of the yoke, while to close it the same pull would operate from the other end. A patent disclosing that type of slider was applied for in the United States on June 20th, 1917, and issued on May 6th, 1919, while a corresponding Canadian patent issued March 18, 1919. This slider was on the market from the year 1916 to the year 1923. Mr. Sundback, the inventor, stated that, while it made a very considerable improvement, it did not permit of complete commercial success, because of the undue cost of its construction and its undue fragility. However, according to the evidence, that was the type of slider used in almost all fasteners until 1923, when it gradually went out of production. It was replaced by the slider covered by the patent in suit.

The specification describes the new slider as an improvement upon previous patents "wherein are shown sliders having the actuating means attached on an end thereof." The specification goes on to say that

> According to this invention, a rigid pull is pivoted at about the centre of the slider, and preferably transversely pivoted to the specially formed head of the rivet which holds the wings together.
>
> Such a construction is adapted to provide a smooth travel for the slider along the stringers; the actuating force applied at about the centre and above the plane of the stringers has an upward component thereof effective to raise the slider instead of raising only one end thereof, as is the case when the pull is attached at the end. This enables the slider to move more easily and smoothly when the actuating force is applied at a central point between the divergent channels. Another advantage accruing from the location of the pull in the centre is the provision of surfaces on either side of the pull, lengthwise of the slider, against which the operator's fingers may be pressed to steady the movement of the slider and lessen chatter when the pull is held between the fingers, or more precisely the thumb and forefinger. This invention also comprises a rigid construction of few parts.

The specification then describes the several parts of the slider by reference to the drawings. It sets forth that the slider is formed from a metal blank having wing portions connected by a neck. The wing portions have inturned edges adapted to provide diverging channels through which the locking members pass. The rivet clamps the wing portions and prevents them from spreading. Before insertion of the rivet, the spacer portions are bent down and inserted between the wings to hold them a fixed distance apart when clamped by the rivet. The lower ends of each

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spacer are bent inwardly to form inner walls for the diverging channels. The rivet has a head on one side and a portion, on the opposite side, adapted to be bent down in clamping the wings. Within the rivet are guide grooves forming a wedge at the vertex of the diverging channel; and the grooves are rounded to provide the necessary clearance for the locking members and to serve as guides to the latter. The rivet head, as already mentioned, is preferably formed so that a rigid pull is pivoted to it at about the centre of the slider; but the head may be more elongated to permit of a travelling pull which applies the moving force at either end of the slider, according to the direction of the pull.

Admittedly the respondent's slider resembles very closely the slider covered by the patent in suit. The rivet and the spacer walls are substantially the same. The only difference is that the rivet in the appellant's slider has been bevelled off so as to make a sharp cutting edge for the dividing of the units and the walls or inturned edges are on one wing only in the respondent's article, while they are on both wings of the appellant's article. It was not seriously disputed that the respondent's slider must be held to be an infringement of the slider covered by the patent, and that the appellant's action must succeed unless the patent be adjudged invalid.

Further it may not be denied that the appellant's slider was not to be found in the prior art in precisely the form in which it is described in the patent. To a certain extent, it was a new combination and the evidence establishes that it was useful. The learned trial judge found that it was lighter, smaller and neater and possibly more rigid than the earlier sliders, to which may be added that it was capable of being manufactured and sold cheaply. But the learned judge did not "think that these changes are sufficient to constitute subject-matter for a patent, whatever were the reasons for such structural changes." The result of the appeal, therefore, turns upon the question whether the extent of the advance made over the previous patents showed an inventive step or disclosed an invention in the pertinent sense.

In order to ascertain the advantages of the invention, it would seem to us that we will be completely fair to the appellant if we allow the specification to speak for itself:

Among the advantages of this invention may be enumerated its simplicity and rigidity of construction whereby the slider body and wings are stamped from a single sheet which also contains the spacer portions. The rivet clamps the wings against the spacers and also prevents spreading of the wings. The rivet is located between the spacers referred to and enables the pull device to be secured in substantially the central part of the slider. This invention provides a rigid slider of minimum overall thicknesses, wherein the pull will naturally lie flat below the top of the rivet. This permits the slider on washable articles to pass readily through a wringer without damage, and also does not provide objectionable projections on articles equipped with this slider. Securing the pull in about the centre of the slider permits a diagonal actuating force to have a component tending to lift the body of the slider instead of only an end thereof to produce smoother travel of the slider. Another feature contributing to smoother travel and resulting from the location of the pull device intermediate the end portions of the slider is the provision of the supporting surfaces on each side of the pull longitudinally of the slider whereby the thumb and finger of the operator may rest against these supporting surfaces to steady the travel of the slider and lessen the tendency to jerks and chatter in its movement. The elongated rivet head provides a very rigid construction for the slider and pull attachment and permits limited travel of the pull relatively to the centre of the slider, which will be desirable in large sliders for heavy work.

It will thus be seen that the slider of this invention comprises only three parts, the wings, neck, spacer and inturned edges being formed integral, the rivet holding these parts in fixed position and near the centre of the slider whereby any tendency of the diverging channels to spread is reduced to a minimum and the attachment of the pull device to the rivet head completes the slider.

This slider is especially adapted for fasteners attached to purses, bags, tobacco pouches, garments, and others, and is in short applicable to any fastener where it is convenient to hold the pull in such manner that the slider is supported by the fingers to retain its position parallel with the interlocking plane of the fastener. The transverse pivotal attachment of the pull facilitates travel of the slider around corner.

The advantages emphasized in the description just quoted are: the slider body (wings, neck and spacers) stamped from a single sheet, the rivet acting as a clamping piece and an anti-spreader, and the attachment of the pull device to the rivet head. Some insistence is made upon "securing the pull in about the centre of the slider"; but this is not given as a characteristic of the invention, since the specification alternatively refers to an "elongated rivet head" providing for a travelling pull. In fact, claim num-

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ber 6 selected by the appellant as succinctly stating the combination is in the following terms:

> A slider comprising wings having inturned edges forming diverging channels, a clamping rivet passing through said wings between the channels, and a pull device pivoted to said rivet.

Now, all the features claimed herein were old. Sliders comprising wings having inturned edges forming diverging channels, pull devices on various parts of the front of the slider including the centre, and rivets connecting wings were all disclosed in the prior art. In fact, the patent in suit is practically a combination of Sundback's earlier United States patents Nos. 1219881 and 1302606 with a variation in the location of the rivet in the former and the addition of the rivet head as a hitching post for the pull piece.

No doubt in almost every patent for mechanical combination the elements are old. But merely putting two things together is not a combination patentable in law. The resulting article may be new in a sense and it may be useful, but the combination is not an invention simply because it possesses advantages not produced before (See dictum of Lord Halsbury in *Morgan* v. *Windover & Co.* (1); and *Harwood* v. *Great Northern Ry. Co.* (2); *Riekmann* v. *Thierry* (3)).

We do not say that there was no merit in the new combination, but we do not think it was a combination to support a patent, because there was no real step by way of invention within the meaning of the patent law (*Wood* v. *Raphael* (4)).

Having regard to the state of knowledge at the time of the application, we agree with the learned President of the Exchequer Court that the improvement did not require such exercise of the inventive faculty as would justify the granting of a monopoly. (*Durable Electric Appliance Co. Ltd.* v. *Renfrew Electric Products Ltd.* (5); *Atlantic Works* v. *Brady* (6)). With the sliders already known to the art lying before them, Sundback and Prentice working independently, as the evidence shows, each produced the new article almost at the same time. In both cases, the result

(1) (1890) 7 R.P.C. 131 at 134.
(2) (1865) 11 H.L.C. 654.
(3) (1896) 14 R.P.C. 105.
(4) (1896) 13 R.P.C. 730, at 735.
(5) [1928] Can. S.C.R. 8.
(6) (1882) 107 U.S. Reports, S.C., 192, at 199 & 200.

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was brought about by the exercise of mechanical skill. It is not the object of the *Patent Act* to dignify by the name of invention every slight advance in the domain of mechanism.

The judgment of the Exchequer Court ought to be confirmed and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Harold G. Fox.*

Solicitors for the respondents: *McCarthy & McCarthy.*

LIGHTNING FASTENER COMPANY, LIMITED (PLAINTIFF) ..... APPELLANT;

AND

COLONIAL FASTENER COMPANY, LIMITED, AND G. E. PRENTICE MANUFACTURING COMPANY (DEFENDANTS) ..... RESPONDENTS.

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*Feb. 14.
*April 25.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA (suit No. 13674)

Patent—Validity—Prior disclosure

The judgment of the Exchequer Court, [1932] Ex. C.R. 127, dismissing the plaintiff's action for damages for alleged infringement of a patent relating to a locking device for separable slide fasteners, was affirmed, on the ground that the plaintiff's patent was invalid, all its essential points having been already brought out in a disclosure patented in France more than two years prior to the application in Canada for the patent in question.

APPEAL by the plaintiff from the judgment of the Exchequer Court of Canada (1) dismissing its action, which was brought for a declaration that the defendants had infringed certain letters patent and that the said letters patent were good, valid and subsisting letters patent, an injunction, damages, etc. The material facts of the case, for the purposes of the present judgment, are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

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*PRESENT:—Duff C.J. and Rinfret, Smith, Cannon and Crocket JJ.

(1) [1932] Ex. C.R. 127.

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O. M. Biggar, K.C., R. S. Smart, K.C., and *H. G. Fox* for the appellant.

D. L. McCarthy, K.C. and *S. A. Hayden* for the respondents.

The judgment of the court was delivered by

RINFRET, J.—This action was brought by the appellant against the respondents for a declaration that a certain patent (No. 288925) granted to the appellant was good, valid and subsisting and that the respondents had infringed the patent. The Exchequer Court of Canada dismissed the action (1) and this is an appeal from the judgment of that court.

The patent relates to a locking device for separable slide fasteners, that is to say: fasteners consisting of two rows of co-operating elements (locking members) which are caused to engage with one another by the passage of a slider along the rows and are disengaged by the movement of the slider in the opposite direction.

The appellant's invention is described as follows in the specification of the patent:

> According to this invention, a slider pull is provided adjacent its pivot with one or more fingers or lugs shaped to extend through a recess in the slider wing for direct engagement between locking members on one stringer or the lug may indirectly co-operate with said members through the aid of some other part of the slider. Preferably these lugs are spaced longitudinally and laterally to be engaged between locking members on each stringer.

It is claimed that the finger or lug automatically moves by gravity into position, through the recess, between two of the co-operating fastener elements and thus provides locking means whereby the slider is retained against movement in either direction on the stringer. A feature is that by means of this device the movement of the slider may be prevented at any point along the stringer.

The patent was applied for on the 26th of January, 1928, and was granted on the 16th of April, 1929.

The infringing article is also a locking device for separable slide fasteners; and, in the judgment appealed from, it is described as follows:

> * * * the pull or tab has two small lugs on its upper edge, bent at right angles to the face of the pull, one of which is longer than the other,

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the longer one being intended to go between the units, the other being intended simply as a support. The pull is not pivoted on the front wing of the slider but travels on a longitudinal slide the full length of the slider, and falls below the slider where the longer lug enters between the units, thus preventing any sliding of the fasteners. There is no hole extending through any portion of the wing of the slider. There are two slight recesses, not holes, at the bottom of the slider, on either side of the longitudinal slide, against which the lugs or fingers rest when in a locking position; it is really at the end of the front wing of the slider that the lug enters between the units.

We agree with the appellant that, for the purposes of the case, no distinction ought to be made between a travelling and a fixed pull. The invention relates to a mode of locking a slider, not to a mode of attaching the pull; and whether the pull has a fixed or travelling pivot is irrelevant, since it operates in the same way and the substitution of the one for the other has no effect upon the operation of the lock.

It is also immaterial whether the finger or lug reaches the fastener elements through a hole or through a recess; both recess and hole fulfill exactly identical functions. At best, one would be the mechanical equivalent for the other. The appellant's patent shows various embodiments of the invention. The specification uses the word "recess"; but the claims may be construed to cover indifferently a hole or a recess.

The respondent Prentice commenced to manufacture his slider lock and put it on the market in the United States in the Fall of 1925. It was shown through Canada early in 1926; but the first definite order for the article in this country was in October, 1926.

The respondents pleaded, amongst other things, that the appellant's patent was invalid because the invention was patented or described in printed publications more than two years before the application for the patent; and, at the trial, reference was made to the fastener of M. Gabriel Fontaine, a patent for which was applied for in France, on the 14th of November, 1923, and granted on the 5th of March, 1924. A copy of the patent was produced, as also an enlarged model of the slider used in connection with that fastener. As described in the patent, in the Fontaine device, the pull of the slider is provided with two spaced lugs adjacent its pivot. When the stringers are drawn up through the channels of the slider, as soon as the pull is

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released, it comes down by force of gravity and the lugs are pressed against the fastener elements, immediately above the conical edges of the slider, where the fasteners are in engagement, thus offsetting the fasteners, retaining them against movement and preventing the slider from working in any direction.

The Fontaine fastener was primarily intended for use on footwear. But we can conceive of no reason why it could not equally be used on any number of other articles where fasteners are employed; and the point is that, in the Fontaine patent, the locking device disclosed is substantially similar, is designed for exactly the same purpose and the disclosure gives the same knowledge as the appellant's patent. Fontaine, in his patent, begins by describing the invention, first in a general way, and then by way of reference to each of the drawings. On the drawings, the slider is marked as number 7, comprising the coupling member 8 and the pull or tab 9. The fastener elements are indicated by No. 6 and the lugs on the pull by Nos. 10 and 11. Other numbers are used to indicate other parts of the device; but we think that if the above numbers are borne in mind, it will be easy to understand the following quotation from the patent:

Le rapprochement des bandes en vue de leur emboîtement est obtenu par une pièce 7 formant coulisse. Cette pièce particulière comporte deux parties 8, 9 dont l'une peut pivoter autour de l'autre. La partie 8 qui est creuse, aplatie et cylindro-conique coiffe les extrémités opposées des lamelles 6 qui font légèrement saillie à cet effet de sorte que lorsqu'on tire la pièce 7 dans un sens d'une façon quelconque les lamelles passant successivement par la partie conique sont rapprochées lorsqu'elles arrivent dans la partie cylindrique et s'emboîtent. La partie 9 porte deux ergots 10, 11 et vient se rabattre, après fermeture de la chaussure, sur la pièce 8, sa fenêtre 12 recevant la saillie 13 de la pièce 8. Les ergots 10, 11 viennent alors obturer les sorties 14, 15 de la partie conique de la pièce 8 en coinçant les lamelles 6 s'y trouvant à ce moment et empêchant ainsi le décrochage des bandes, tant que la pièce 9 reste appliquée sur la pièce 8.

Pour défaire la chaussure il suffit de relever la pièce 9, de tirer les extrémités des bandes en les écartant et le décrochage a lieu, la pièce 8 coulissant le long des bandes dans le sens inverse de l'accrochage.

Il reste d'ailleurs entendu que l'invention n'est pas strictement limitée aux dispositions décrites qui peuvent varier de forme, de dimensions, de matière constitutive, etc.

" Résumé.

Fermeture pour chaussures remplaçant le lacet et autres caractérisée en ce que les bords du soulier à réunir portent des bandes composées de lamelles métalliques distinctes dont l'extrémité libre forme saillie d'un

côté et un creux de l'autre pour permettre leur emboîtement lorsque les bords du soulier sont rapprochés.

Ce rapprochement est obtenu par une pièce constituée en deux parties dont l'une creuse, plate et cylindro-conique coiffe les saillies opposées des lamelles et dont l'autre qui porte deux ergots vient se rabattre sur la première pour coincer les lamelles et empêcher le mouvement des bandes.

It will thus be seen that all the essential points in the appellant's patent were already brought out in Fontaine's disclosure. This would be made still clearer by reference to the drawings accompanying the patent.

The lugs described by Fontaine have complete identity of function with those claimed by the appellant; and they perform that function substantially in the same way. Nor does it matter whether the appellant's article is a modification of the Fontaine device, which it is not necessary to discuss. (*Panyard Machine & Mfg. Co.* v. *Bowman* (1); *MacLaughlin* v. *Lake Erie & Detroit River Ry. Co.* (2)). In Fontaine's, as well as in the appellant's and the respondent's devices, the idea is the same and there is substantial identity in the means of carrying it out. In our view, the difference is a mere variation of details. In Fontaine's, the lugs engage the fastener elements immediately above the conical sides of the slider. In the appellant's, the lugs reach the elements through a recess or a hole in the central part of the slider; in Prentice's, they reach the elements immediately below the slider. The appellant alleged and brought evidence to show that Prentice's was an infringement of its patent. We may assume that the contention is right. But what amounts to infringement, if posterior, should, as a general rule, amount to anticipation, if anterior. Fontaine's disclosure having been patented in France on the 5th of March, 1924, or more than two years prior to the application of the appellant in Canada, this affords sufficient ground for displacing the appellant's patent (*Patent Act*, sec. 7), which must therefore be declared invalid.

Without discussing the other matters involved herein, it follows that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Harold G. Fox.*

Solicitors for the respondents: *McCarthy & McCarthy.*

(1) [1926] Ex. C.R. 158. (2) (1902) 3 Ont. L.R. 706.

1933
Mar. 7.
* Apr. 25.

THE HOME FIRE & MARINE INSURANCE COMPANY v. BAPTIST

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

Sale—Automobile—Theft—Insurance company claiming from subsequent buyer—Identification of car—Enactments of the civil code as to stolen goods modified by the Motor Vehicles Act, R.S.Q. 1925, c. 35, as to automobiles—Arts. 1204, 1486 & seq. C.C.

The provisions of the *Motor Vehicles Act, R.S.Q.*, 1925, c. 35, have had the effect and were enacted for the very purpose of modifying, with regard to stolen automobiles, the general law concerning the sale and the revendication of stolen goods as enacted in the Civil Code (Arts. 1486 and seq. C.C.)—*Imperial Assurance Company* v. *Lortie* (Q.R. 50 K.B. 145) followed.

APPEAL by the plaintiff from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court, de Lorimier J., and dismissing the plaintiff's action.

The appellant is the assignee of an automobile, formerly the property of one Otto Seiss from whom it was stolen, and whom the appellant had insured against the loss of the automobile by theft. After the theft, the automobile was located by the appellant in Quebec in the hands of one Tremblay who had purchased the same, in good faith, from a dealer in similar articles, namely, the respondent, Baptist, for $2,400. The appellant revendicated the car from Tremblay upon payment to him of the sum of $2,400 under the provisions of the fourth paragraph of article 2268 of the Civil Code. Appellant then sought to exercise its recourse against the respondent Baptist, and his surety, The Toronto Casualty Marine and Fire Insurance Company, the other respondent, in virtue of section 21 of chapter 35 of the Revised Statutes of Quebec, 1925. The appellant claimed from the respondents jointly and severally $2,400, and made a further demand against the respondent Baptist only, for $400 in reimbursement of expenses alleged to have been necessarily incurred by it in revendicating the said automobile. The respondents made a common defence on two principal grounds, firstly that the automobile which the appellant acquired from Tremblay was not that which was stolen from Seiss, and secondly that, even if it was, the appellant

* PRESENT:—Duff, Rinfret, Smith, Cannon and Crockett JJ.

had no right of action against them, inasmuch as the car had been bought by the respondent Baptist in good faith in the regular course of business from a regular dealer in automobiles, and, that, under the circumstances of the case as alleged by them, the *Motor Vehicles Act* did not apply.

The trial judge upheld the respondents' plea mainly on the second ground, although in his judgment the evidence did not establish sufficiently the identification of the stolen automobile.

The formal judgment of the majority of the Court of King's Bench, Tellier C.J. and Howard and St. Germain JJ., dismissed appellant's appeal on the ground that " there is no error in the judgment appealed from ", but Howard and St. Germain JJ. in their written opinions stated that they arrived at that conclusion exclusively on the ground that the evidence as to the identification of the car was not sufficient. The dissenting judges, Bond and Galipeault JJ., would have allowed the appeal and maintained the appellant's action on the ground that the stolen car had been sufficiently identified, holding further that there was error in the decision of the trial judge that the *Motor Vehicles Act* did not have the effect of modifying the general law contained in the Civil Code as to the sale of stolen goods, and adding that such a decision was directly conflicting with the judgment of the Court of King's Bench in the case of *Imperial Assurance Co.* v. *Lortie* (1).

On the appeal to this Court, after hearing argument of counsel, the Court reserved judgment and on a subsequent day, delivered judgment allowing the appeal with costs and maintaining the appellant's action for $2,400, as, under the provisions of article 21 of the *Motor Vehicles Act,* the appellant was entitled only to be reimbursed the amount paid to Tremblay. This Court held that the appellant's evidence was the best available under the circumstances of the case and was sufficient to justify the maintenance of the action. On the question whether the provisions of the *Motor Vehicles Act* had the effect of modifying the enactments of the Civil Code as to stolen goods, the Court, concurring with the judgment of the appellate court, held that there was error in the decision of the trial judge. On this point, Rinfret J., with whom the full Court concurred, in his written reasons said:

(1) (1930) Q.R. 50 K.B. 145.

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Le juge de première instance a été d'avis que l'appelante était "obligée" d'établir les défauts de la "possession ou du titre de possession du défendeur" (Baptist). Or, a-t-il ajouté, "en supposant que l'automobile était celle dont on réclame le prix, le défendeur a prouvé qu'elle a été vendue aux enchères, à un encan public, au nommé Falcon, et de lui est passée au défendeur par l'entremise de Reid". Baptist "est devenu propriétaire et possesseur dans le cours ordinaire de ses affaires". Baptist, "qui est présumé de bonne foi, jure qu'il ignorait que cette automobile avait été volée; il est un homme de bonne renommée et doit être cru; de plus, sa possession de la voiture à titre de propriétaire fait présumer juste titre; (il) a donc établi l'exception prévue par l'article 1489 du code civil et c'était à la demanderesse, à son tour, de prouver les vices de la possession et du titre (de Baptist), ce qu'elle n'a pas fait; elle n'a pas établi que Falcon ou Reid s'étaient entendus avec la maison U.H. Dandurand Limitée (les encanteurs) pour faire de cette vente par encan, une vente dolosive et fictive".

* * *

"La loi concernant les véhiclules automobiles ne modifie et n'affecte pas le code civil quant aux articles (1487, 1488, 1489, 2202, 2268 et 412) qui s'appliquent dans l'espèce."

Bien que le jugement formel de la Cour du Banc du Roi déclare qu'il n'y a pas d'erreur dans le jugement porté en appel, il est à remarquer que ceux des juges de cette cour formant la majorité qui ont donné des notes s'appuient exclusivement sur le fait que la preuve d'identification de l'automobile est insuffisante ou incomplète. Les deux juges de la minorité signalent que la décision de la Cour Supérieure est directement opposée à l'arrêt de la Cour du Banc du Roi dans la cause de *Imperial Assurance Company* v. *Lortie* (1).

Sur ce point, nous pouvons croire que la Cour du Banc du Roi était unanime; et nous pensons comme elle qu'il y a erreur dans le jugement de la Cour Supérieure.

En référant aux articles du code civil concernant les "choses qui peuvent être vendues" (Arts. 1486 et suiv. C.C.). il est facile de comprendre le but du législateur lorsqu'il a inséré l'article 21 dans la loi des véhicules automobiles. Jusque là, la vente de la chose qui n'appartenait pas au vendeur était nulle (Art. 1487 C.C.). Elle était valide s'il

s'agissait d'une affaire commerciale ou si le vendeur devenait ensuite propriétaire de la chose (art. 1488 C.C.). Elle était encore valide si la chose perdue ou volée avait été vendue sous l'autorité de la loi. Dans ce cas, elle ne pouvait être revendiquée (art. 1490 C.C.). Enfin, elle était valide si la chose perdue ou volée avait été achetée de bonne foi, dans une foire, un marché, ou à une vente publique, ou d'un commerçant trafiquant en semblables matières. Dans ce cas, le propriétaire pouvait la revendiquer; mais il était tenu, pour rentrer en possession, de rembourser à l'acheteur le prix qu'il en avait payé (art. 1489 C.C.).

Ce que l'article 21 du statut spécial (S.R.Q. 1925, c. 35) a ajouté au code civil est ceci:

Une vente d'un véhicule automobile faite par une personne qui n'est pas licenciée sous l'autorité de cet article "n'est pas censée avoir été faite par un commerçant trafiquant en véhicules automobiles"; ou pour employer l'expression du code civil, par un "commerçant trafiquant en semblables matières". Le but évident est d'empêcher l'application de l'article 1489 du code, et, en pareil cas, d'éliminer l'obligation du propriétaire, en revendiquant la machine qui lui a été volée, de "rembourser à l'acheteur le prix qu'il en a payé" Donc celui qui achète une automobile d'une personne qui n'est pas licenciée perd la protection de l'article 1489 du code civil. D'autre part, si l'acheteur de l'automobile l'a acquise d'une personne licenciée, "dans ce cas", dit l'article 21, "le propriétaire (du véhicule automobile volé) "a le droit de réclamer en son nom, du commerçant et de sa caution, le prix qu'il a payé à l'acheteur".

Dès lors la personne licenciée ou le commerçant et sa caution doivent effectuer "le remboursement du prix que le propriétaire a payé à tout acheteur de ce véhicule automobile pour en recouvrer la possession sur revendication comme chose volée"; et ce remboursement doit être fait dans tous les cas où se rencontrent les conditions que mentionne l'article 21, sans tenir compte de la bonne foi du vendeur licencié, ni des circonstances prévues aux articles 1487 et suivants du code civil. Dans les cas spéciaux que cette législation prévoit, on a voulu précisément éviter l'application des articles du code. C'est ce que fait très bien voir la Cour du Banc du Roi *re Imperial Assurance* v.

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Lortie (1). Les notes des juges y sont claires, complètes et convaincantes. Nous ne désirons rien y ajouter. Mais il s'ensuit que les intimés ne pouvaient invoquer l'exception prévue par l'article 1489 du code civil, que l'appelante n'avait pas à prouver les vices de la possession et du titre de Baptist, et que le jugement de la Cour Supérieure qui a décidé le contraire ne pouvait être maintenu, au moins sur ce point.

Nous pouvons maintenant en venir au premier moyen invoqué dans le plaidoyer des intimés, c'est-à-dire le défaut d'identification de l'automobile en litige. Ce moyen est resté dans l'ombre dans le jugement de la Cour Supérieure, qui y fait seulement une rapide allusion ("La preuve à cette fin n'est pas catégorique, certaine, convaincante et suffisante; elle est contradictoire; de plus, la demanderesse était obligée d'établir les défauts de la possession ou du titre de possession du défendeur," etc.) pour passer immédiatement, comme on peut le voir, à la discussion de la question de droit qui est devenue la véritable *ratio decidendi* du jugement. Pour cette raison spéciale, nous croyons pouvoir intervenir dans la décision de cette question d'identité, de même que l'a fait la Cour du Banc du Roi, d'autant plus que le savant juge de première instance ne s'est pas prononcé sur la crédibilité des témoins, et qu'il a naturellement pesé les faits du point de vue de l'opinion qu'il émettait sur la question de droit.

La méthode d'enregistrement adoptée à l'usine de fabrication des voitures Cadillac a été expliquée à l'enquête:

Each car has a separate combination part number. When the car is assembled there is a record made which is called the assembly record, and it appertains to a particular motor number, and the serial number of the car when it is sold.

Q. And each car has a different assembly record ?

A. Yes, each car has a different assembly record.

Q. In your long experience you must have acquired some knowledge as to the manner in which numbers are stamped on different parts of cars?

A. Yes.

Q. When numbers are stamped by the factory, how are those numbers applied? What I mean is, are they applied regularly or irregularly?

A. They are regularly applied, all the figures being the same height and the same width.

Q. Are they on the same line?

A. On the same line.

(1) [1930] Q.R. 50 K.B. 145.

La voiture volée à Seiss et revendiquée de Tremblay était une automobile de la marque Cadillac. Elle avait donc son "assembly record" (enregistrement). Ce "record" a été établi par Seiss et par le témoin Horan. Nous admettons que la preuve qui en a été offerte n'était pas la meilleure dont le cas était susceptible (art. 1204 C.C.). On aurait pu faire venir comme témoin celui qui est préposé à la garde des enregistrements à la compagnie Cadillac et lui demander d'apporter le "record" de l'automobile vendue à Seiss; mais Horan avait vu le "record" et il avait vérifié personnellement les numéros attribués à chaque pièce de l'automobile de Seiss. Il a fait cette preuve devant la cour sans objection. La légalité de cette preuve ne pouvait plus être contestée devant les tribunaux d'appel (*Schwerzenski* v. *Vineberg* (1); *Gervais* v. *McCarthy* (2). D'ailleurs, à l'audition, le procureur des intimés n'a pas attaqué la légalité de cette preuve, mais il s'est borné à en discuter la valeur probante.

* * *

(Here the judgment deals with the facts of the case, and then concludes as follows.)

La majorité de la Cour du Banc du Roi semble avoir procédé de l'idée qu'il fallait que l'identité de la voiture fût établie jusqu'à la démonstration. Nous croyons respectueusement qu'on ne pouvait en exiger autant de la demande, que la preuve qu'elle a offerte était la plus satisfaisante dont le cas était susceptible et qu'elle était suffisante pour le maintien de l'action. En envisageant l'ensemble de la preuve, nous ne pouvons en venir à une autre conclusion.

Nous sommes donc d'avis que l'appel devrait être maintenu; mais le montant dont l'appelante peut demander le remboursement en vertu de l'article 21 de la loi des véhicules automobiles est seulement le prix qu'elle a payé à Tremblay. Elle devra donc avoir jugement pour la somme de $2,400 avec intérêts et les dépens dans toutes les cours.

Appeal allowed with costs.

F. Philippe Brais K.C. for the appellant.

C. A. Seguin K.C. and *E. Lanctôt* for the respondent.

(1) (1891) 19 Can. S.C.R. 243. (2) (1904) 35 Can. S.C.R. 14.

1933
*Mar. 1.
*May 8.

PEJEPSCOT PAPER COMPANY AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

EDWARD A. FARREN (PLAINTIFF).. RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Title to lands—Wilderness land—Documentary title—Evidence—Burden of proof—Pedigree evidence—Rule as to such evidence.

The matter in controversy in the respondent's action involved the title to and ownership of 200 acres of wilderness or wood-land. The respondent claimed title to the property through a conveyance dated May 3, 1920, from John and James Fitzgerald, the sons and heirs of one David Fitzgerald, deceased, who, in turn, was alleged to have been the only child of one Elizabeth Fitzgerald, the original grantee from the Crown. The appellant company claimed a documentary title to the property through a series of five conveyances from the first deed in 1897 to the last in 1909, and also claimed a title by continuous, exclusive and adverse possession in itself and its predecessors in possession for a period of over twenty years. The trial judge, after having admitted as evidence, subject to objection by appellant's counsel, the declarations made to witnesses by the two brothers, John and James Fitzgerald, concerning their own pedigree, excluded them in his judgment and dismissed respondent's action, finding that the appellant company had established its title to the property. The Appeal Division reversed the judgment.

Held, reversing the decision of the Appeal Division (5 M.P.R. 261), that the trial judge was justified in excluding the declarations of the deceased grantors in the deed to the respondent, John and James Fitzgerald, as evidence that they were grandsons of Elizabeth Fitzgerald, the original grantee from the Crown and that he was also justified in reaching the conclusion that the respondent had failed to establish his title. Crocket J. dissenting.

Held, also, Crocket J. dissenting, that the statements made by James and John Fitzgerald to the respondent, when the sale was being negotiated and they were trying to establish their title, would appear to be inadmissible, as having been made in favour of interest and at a time when, in the circumstances of the case, the title itself and the question of relationship had already become matters in controversy within the principle of the rule stated below. At all events, the interest of James and John Fitzgerald was so obvious and of such a character as to entitle the Court to regard their declarations as destitute of evidentiary weight. Declarations as to pedigree made by deceased persons are receivable to establish the particular issue, provided they were made *ante litem motam* (i.e., "before the commencement of any controversy, actual or legal, upon the same point"), and provided the deceased are proved *aliunde* to be members of the family by extrinsic evidence. The declarant's relationship must be

*PRESENT:—Duff, Rinfret, Lamont, Smith and Crocket JJ.

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proved independently and cannot be established by his own statement. The rule must be understood in this sense, that the party on whom the onus lies to establish the affirmative of the issue and who, for the purposes of the issues, must show that A was in family relation with B (as, for example, in such cases as the present where the party seeks to establish a right to property through inheritance from B) must adduce some evidence that the declarant was "*de jure* by blood or marriage" a member of the family of B.

Per Crocket J. (dissenting).—The trial judge has erred in excluding the declarations of John and James Fitzgerald as evidence that they were grandsons of the original grantee from the Crown; and, when the whole record of the trial, including these declarations, is considered, the decision of the Appeal Division in favour of the respondent should be affirmed. The rule as to pedigree evidence, applicable to this case, is that any declaration made by a deceased person touching his own pedigree is *prima facie* admissible as proceeding from one who is presumed to possess competent knowledge of the matter of which he speaks, and that no interest, which falls short of constituting a *lis mota* or actual or legal controversy upon the precise question which is the subject-matter of such a declaration, will render it inadmissible. If it appears, either from the declaration itself or from any other evidence which may be tendered, that there was, before or at the time the declaration was made, such a controversy upon the particular fact of which the declaration speaks and which it is sought to prove by it, the declaration will not be received.

APPEAL from the decision of the Appeal Division of the Supreme Court of New Brunswick (1), reversing the judgment of Mr. Justice Grimmer sitting in Chancery and maintaining the respondents' action for a declaration that he was the owner of 200 acres of wilderness or wood-land situated in King's County.

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

A. N. Carter for the appellant.

C. F. Inches K.C. for the respondent.

The judgment of the majority of the Court (Duff, Rinfret, Lamont and Smith JJ.) was delivered by

RINFRET, J.—This is an appeal from a judgment of the Supreme Court of New Brunswick, Appeal Division (1), reversing Grimmer J. sitting without a jury, who dismissed with costs an action for a declaration that the respondent is the owner of lot number 40 containing 200 acres in the

(1) (1932) 5 M.P.R. 261.

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Rinfret J.

parish of Upham, King's County, in the province of New Brunswick, for an injunction to restrain the appellants from entering on the lot and for damages for trespass and conversion of wood cut on the lot by the appellants.

The respondent claimed to be the owner of the land, which is wilderness land, by virtue of a deed given to himself and one Alexander Crawford, on the 3rd of May, 1920, by John and James Fitzgerald who pretended to have inherited the land from Elizabeth Fitzgerald, the original grantee;—Crawford having later sold his rights to the respondent.

The contention was that Elizabeth Fitzgerald died intestate leaving a son, David Fitzgerald, who in turn died intestate leaving his sons and heirs, the above named John and James Fitzgerald.

The burthen was on the respondent to establish that contention. The respondent claimed a declaration and decree that he was the owner in fee. He produced a deed purporting to come from the alleged heirs of the original grantee. The relationship of the vendors having been challenged, the onus was on the respondent to prove it, not upon the appellants to show that it did not exist. Of course, the deed itself recited the supposed lineal descent, but that was nothing more than the vendor's own declaration made, at the time of the sale, in order to establish their interest in the land. Recitals of that character do not amount to evidence of title.

James and John Fitzgerald died before the trial and, in fact, some time before the action was brought. As evidence of their relationship with Elizabeth Fitzgerald, the respondent attempted to prove the statements they made pending the negotiations leading to the sale. He also called as a witness one John Meyers, to prove declarations alleged to have been made concerning their genealogy by deceased members of the Fitzgerald family.

Declarations as to pedigree made by deceased persons are receivable to establish the particular issue, provided they were made *ante litem motam* (i.e. "before the commencement of any controversy, actual or legal, upon the same point"), and provided the deceased are proved *aliunde* to be members of the family by extrinsic evidence. The de-

clarant's relationship must be proved independently and cannot be established by his own statement.

The rule, we think, must be understood in this sense, that the party on whom the onus lies to establish the affirmative of the issue and who, for the purposes of the issues, must show that A was in family relation with B (as, for example, in such cases as the present where the party seeks to establish a right to property through inheritance from B) must adduce some evidence that the declarant was "*de jure* by blood or marriage" a member of the family of B.

It was said by Lord Brougham, apparently, in *Monkton* v. *Attorney General* (1) that it would be sufficient to show that the declarant was a member of the family of A; and this view of Lord Brougham has been acted upon in other cases and has been very vigorously supported by a well known and very able American writer on the law of evidence, Professor Wigmore.

The weight of authority, however, is decisively in favour of the rule as stated. In the *Berkeley Peerage* case (2), Lord Eldon expressed himself thus:

> Accordingly, in the *Banbury* case (3), as the depositions under the bill to perpetuate testimony contained many statements with regard to pedigree, a question was put to the Judges, whether if they could not be received as depositions, they could be received as declarations. The Judges thought that at all events the depositions could not be received as declarations, unless the individuals whose declarations were supposed to be incorporated in the depositions were *aliunde* proved to be relations, and that there was no such evidence.

In *Plant* v. *Taylor* (4), Baron Channel, speaking, in 1861, for the Court of Exchequer, which included at that time Baron Bramwell and Sir James P. Wilde, used this language, at p. 237,

> As we have stated more than once, the sole question of fact in dispute at the trial was the legitimacy of the defendant Taylor and the female defendants. This depended on the validity of the marriage of the persons who were de facto their father and mother. The fact of the marriage of the father, Thomas Taylor, with Anne Wickstead before his marriage with the mother of the defendant Taylor, and that Anne Wickstead was at that time living, was proved.
>
> The defendant, Taylor, was called as a witness to prove declarations by his father respecting his first marriage. Before a declaration can be admitted in evidence the relationship of the declarant *de jure, by blood*

(1) (1831) 2 Russ. & M. 147, at 156, 157.
(2) (1811) 4 Camp. 409, at 419, 420.
(3) (1811) 1 Sim. 8 St. 153.
(4) (1861) 7 H. & N. 211.

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or marriage, must be established by some proof, independent of the declaration itself. See the cases cited in Taylor on Evidence, vol. 1, p. 526, note 4.

Slight evidence, no doubt, would be sufficient. Here there was no proof of any relationship *de jure* between the declarant and the defendant. The proof was the contrary.

The cases collected in the note in Taylor on Evidence, to which Channell B. refers include, *inter alia,* the *Banbury Peerage* case (1) and the *Berkeley Peerage* case (2).

In *Hitchins* v. *Eardley* (3) Lord Penzance who, as above mentioned, was a member of the court which pronounced judgment in *Plant* v. *Taylor* (4), said:

> The rule of law on the subject is perfectly plain. It is that when a witness is called to give evidence of the declarations of a person whose connection with the family is in question, the judge is to decide whether this connection is established. It is obvious the application of this rule must lead to some practical difficulties, where the person whose declarations are tendered and objected to is also the person whose legitimacy is the question in the suit, and the Court must do its best to meet these difficulties in a practical way.

In *Aalholm* v. *People* (5), the Court of Appeals of New York, after a very careful review of the authorities, American as well as English, followed the judgment in *Plant* v. *Taylor* (4).

The phrase *ante litem motam* in itself might be capable of misconstruction. It contemplates a time anterior to the commencement of any actual controversy upon the point at issue.

The statements made by James and John Fitzgerald to Farren and Crawford, when the sale was being negotiated and they were trying to establish their title, would appear to be inadmissible, as having been made in favour of interest and at a time when, in the circumstances of the case, the title itself and the question of relationship had already become, it may fairly be held, matters in controversy within the principle of the rule. At all events, the interest of James and John Fitzgerald was so obvious and of such a character as to entitle us to regard their declarations as destitute of evidentiary weight.

In *Plant* v. *Taylor* (4), the Court of Exchequer thought the declaration of Thomas Taylor, the father, though made before any dispute as regards the property had actually

(1) (1811) 1 Sim. & St. 153.
(2) (1811) 4 Camp. 409.
(3) (1871) L.R. 2 P. & D. 248.
(4) (1861) 7 H. & N. 211.
(5) (1914) 105 N.E. 647.

arisen, might, perhaps, be inadmissible as a declaration by a person whose mind could not be free from bias; it was manifestly in many ways directly for his interest to make a declaration having a tendency to show that his first marriage was an illegal marriage and the second, consequently, valid.

No case has been cited (said Channell B.) in which the declaration of a deceased person obviously interested has ever been received.

This is reported in 1903 by Joyce J. in *Brocklebank* v. *Thompson* (1).

In the premises, the interest of James and John Fitzgerald was so obvious, at the time and in the circumstances the declarations were made, that their statement on the very point in question ought not to be held receivable.

The only other evidence was that of John Meyers who, the trial judge said, "claimed to be a nephew of the Fitzgeralds." In truth, there is in the record nothing to identify him as a member of the family, outside of his own self declarations to that effect. Myers, if his story proved to be correct, was interested in the result of the litigation and would have the same rights as John and James Fitzgerald. On his own admission, he came down to the trial, from Boston, because he had an interest in the outcome.

Moreover, his evidence comes far short of establishing, in such a way as to satisfy a judicial mind, the all important fact of the connecting link between Elizabeth Fitzgerald and David, the father of the respondent's vendors. Throughout his testimony, he failed to commit himself to any relevant statement. On the vital issue, the concrete facts are all to be found in the questions put to him by counsel, and his answers are vague and indefinite. In addition, they contain inaccuracies and contradictions pointed to by the trial judge, who found him unreliable and was even disposed to disregard his evidence altogether on the ground of lack of credibility.

We think, for these reasons, the trial judge was justified in reaching the conclusion that the plaintiff respondent had failed to establish his title. The evidence is not of such a character that the courts may judicially act upon it and declare John and James Fitzgerald the lineal descendants

(1) (1903) 72 L.J. Ch., 626 at 632.

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of the original grantee and, as a consequence, adjudge to the respondent the ownership of the lot in suit.

Perhaps one other point ought to be mentioned. Admittedly, the name of the original grantee's husband was Ezekiel Fitzgerald. A certified copy of the registration of death of David Fitzgerald was produced. Under the law of New Brunswick, these certificates or " extracts " are " *prima facie* evidence in any court of the facts therein stated " (*The Health Act,* R.S.N.B., 1927, c. 59, s. 36-5). In the certificate, the name of David's father is given as William Fitzgerald. It does not, therefore, correspond with the name of the husband of the original grantee. We are unable to find in the record any ground upon which to repel the evidentiary value of the certificate, which stands with its full force and effect.

There are several other circumstances in the evidence pointing to the same result; but we do not deem it necessary to dwell upon them.

In our view, the learned trial judge was right in deciding that the declaration and decree as to ownership prayed for by the respondent could not be granted by the court. That is sufficient to dispose of the appeal.

The appeal must be allowed and the judgment of the trial judge must be restored with costs here and in the Appeal Division.

CROCKET J. (dissenting)—With all deference, I am of opinion that the learned trial judge was not justified in excluding the declarations of the deceased grantors in the Farren-Crawford deed, James and John Fitzgerald, as evidence that they were grandsons of Elizabeth Fitzgerald, the original grantee from the Crown.

Two grounds of objection to the admissibility of these declarations were put forward on the argument, viz: first, that there was no evidence *de-hors* the declarations shewing any relationship by blood or marriage between the declarants and the original grantee; and, second, that the declarations were not made *ante litem motam.*

As to the first ground, the law is clear that if a declaration of a deceased person is tendered to prove a matter touching the pedigree of another, it must be proved *aliunde* that the declarant is related by blood or marriage to the person whose pedigree is in question, but among the num-

erous cases I have examined on the rule relied upon, I can find none which decide that where the declaration of a deceased person is made concerning his own lineage, such a declaration is not admissible until his lineage is independently proved by other testimony. When one considers the fundamental reason for the relaxation, in matters of pedigree as well as in matters of public and general interest, of the rule rejecting hearsay and reputation, one can well appreciate why it has been consistently held that some proof should be adduced of the relationship of a declarant, who is dead, to the person of whose pedigree his declaration speaks, but for my part I can discover no reason for applying such a rule to the declaration of a deceased person concerning his own pedigree. The very ground upon which such declarations are let in on matters of pedigree is the impossibility of proving by living witnesses the relationships of past generations, and the presumption that, when these declarations are made by relatives of the person whose pedigree is involved, they are made by those who have the greatest interest in seeking, and the best opportunity of knowing the truth on the subject.

Similarly hearsay and reputation in the form of declarations of deceased persons are admitted upon matters of public and general interest. Taylor's treatise on the Law of Evidence points out that on matters of public interest, which concern every member of the state, reputation from anyone is receivable, and that the want of proof of a declarant's connection with the subject in question affects the value only and not the admissibility of the evidence, all the King's subjects being presumed to have some knowledge of rights, which are essentially public, while in matters which are not strictly public, but of *general* interest—being confined to a lesser, though still a considerable portion of the community—some particular evidence of knowledge of the subject matter involved is generally required to render a declaration of a deceased person admissible. In treating of this distinction that well known work states in paragraph 612, 12th ed., 1931:—

> If the quality of the hearsay itself raises a natural inference that it was derived from persons acquainted with the subject, the Court will not require independent proof of that fact.

It seems to me that the rule requiring independent proof of relationship of the deceased declarant in cases of pedi-

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gree with the person, regarding whose pedigree his declaration is made, is based on the same consideration as the rule requiring independent proof in cases of general, as distinguished from public rights, viz:—that the declaration proceed from a source which the law presumes possesses that competent knowledge which is an essential prerequisite of its admission.

Phipson's Evidence, 7th ed., 1930, states the relationship rule as follows:—

> The declarations are only receivable from persons legitimately connected by blood *with the person or family whose pedigree is in question,* or from the husbands or wives of persons so connected.

Here the declarations objected to are the declarations of two brothers, James and John Fitzgerald, concerning their own pedigree, viz.; that they were grandsons of Elizabeth Fitzgerald, the original grantee. It was the pedigree of the declarants themselves which was in question, and as to this there could assuredly be no more competent knowledge than their own. In the words of Lord Chancellor Cranworth in the *Shrewsbury Peerage Case* (1),

> the declarations are made by (one of the) persons supposed to be perfectly cognizant of

the subject matter of which they speak. To require as a prerequisite to the admission of such a declaration other and independent proof of the very fact which the declarations are tendered to establish, viz: that the declarants were grandsons of Elizabeth Fitzgerald, would, it seems to me, not only involve the same superfluous absurdity, which Lord Brougham points out, in *Monkton* v. *Attorney-General* (2), and Taylor's Law of Evidence, referring to the latter case, in paragraph 640, but "would" at the same time—to quote the words of that distinguished Lord Chancellor in the same case upon the submission that the declarations must be shewn to be contemporaneous with the events to which they relate—"defeat the purpose for which hearsay in pedigree is let in."

Surely the presumption of the law must be that a man knows the names of his own grandparents as well as others, who are more remote relatives and who must therefore go further afield to connect themselves with the deceased person whose pedigree is in question and who is long since dead.

(1) (1858) 7 H. of L. Cases, 1 at 22.

(2) (1831) 2 Russ. & M. 147, at 157.

Is it reasonable to suppose that once relationship is established, no matter in what degree, with the person whose pedigree is in question, the courts will presume that any relative possesses sufficient knowledge of the pedigree of that person to render his declaration admissible, and yet will not presume that the person himself possesses the requisite knowledge for that purpose? As to whether the fact that the declarants themselves had an interest which might cast suspicion upon the genuineness of their declarations is another question, which I shall discuss when treating of the second ground of objection, remarking only in the meantime that, in my opinion, unless there be a *lis mota* existent before the declaration which is tendered, interest goes only to the weight and not to the admissibility of the evidence. Apart from the doctrine of *lis mota* presumed knowledge is the ground of admissibility, not lack of interest.

It therefore seems to me that it is only by assuming that when the rule in question speaks of the necessity of proving the relationship *aliunde* it refers to a relationship of the declarant with the person or family of the ancestor, through whom a property is claimed, and not of relationship with the person whose lineage is really involved, that that rule can have any applicability to the case at bar. For such an assumption, as I have already intimated, I have been unable to find any decisive authority and no warrant in the principles upon which hearsay evidence is admitted in pedigree cases. If the rule is to be thus interpreted it "would," as Taylor on Evidence puts it,

> to use a homely illustration, render inadmissible the statement of a deceased person as to the maiden name of his own grandmother.

unless the person relying upon such statement were able first to prove by other testimony the very fact which the deceased declarant's statement is tendered to establish. There would indeed be few cases in which descent from persons of long past generations could be proved at all. No greater encouragement could be given to those disposed to squat on long vacant wooded lands than by the adoption of such an interpretation of the rule as is here contended for.

I concede that it was an essential requisite of the plaintiff's case that he prove that James and John Fitzgerald, from whom he derived his title to the land, were heirs of

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Elizabeth Fitzgerald, the original grantee, but this fact does not, of course, deprive him of the benefit of the rules of evidence, which, for the very purpose of making possible what otherwise would be impossible, have so relaxed the doctrine against hearsay, as to render admissible for what they are worth all declarations of deceased persons, in matters of pedigree, of which the law may fairly presume the deceased declarants were fully cognizant. The fact that the reputed grandmother was the original grantee of the land in dispute, does not make her the person with whom relationship must be established. The relationship meant is, in my opinion, relationship with the person whose lineage is in question. In the case at bar James and John Fitzgerald were the persons whose pedigree was in reality, as it seems to me, involved. Had they been living and themselves been the plaintiffs in this action I cannot conceive of any valid objection which could have been made on the trial to any question put to either of them as to the names of his grandparents, unless his cross-examination clearly disclosed that he did not in fact know, either by personal knowledge or by family repute or tradition, in which event the presumption the law makes of competent knowledge in such a matter would, of course, be effectually rebutted.

Plant v. *Taylor* (1), which is chiefly relied on, and upon which the learned trial judge apparently based his decision as to proof of relationship, by no means makes it clear in my judgment that, in such a case as we are now dealing with, any proof *aliunde* is required to establish relationship with the ancestor from whom the title to the land in dispute is derived. In that case the plaintiffs' title to the land in question under a power of appointment was conditioned on default of lawful issue of the reputed father of the defendants. Proof of the absence of lawful issue of the defendants' father was therefore essential to the plaintiffs' case, and, as stated in the reasons for judgment, the sole question of fact in dispute at the trial was the legitimacy of the defendants. The plaintiffs accordingly proved that at the time the defendants' father married the mother of the defendants, he was married to another woman. One of the defendants, a son by the second marriage, was called

(1) (1861) 7 H. & N. 211.

as a witness to prove declarations by his deceased father respecting his first marriage. This evidence was rejected by the trial judge, and the Court of Exchequer sustained that ruling. It is true that in the reasons for judgment the Court states that before a declaration can be admitted in evidence relationship of the declarant *de jure,* by blood or marriage, must be established by some proof, independent of the declaration itself. This passage itself throws no light upon the identity of the persons between whom such relationship must be shewn to exist, but the Court after stating that " slight evidence, no doubt, would be sufficient " of such relationship, proceeds: " Here there was no proof of any relationship *de jure* between the declarant (the father) and the defendant (the reputed son). The proof was the contrary," and this, I take to be the real ground of the decision. While it was the legitimacy of the reputed son and his sisters which was in issue, and this depended on the validity of the marriage of the persons who were *de facto* their father and mother, the Court held, that the plaintiffs having already proved that the reputed marriage with the defendant's mother took place while the declarant's wife by the former marriage was still living, a declaration of the deceased father ought not to be received for the purpose of establishing that his own former marriage was invalid and the later one as a consequence valid, and that the defendants were therefore his lawful children, without some proof, independent of the declaration itself, that the defendants were *de jure* the children of the declarant. I can find no analogy between that case and the case at bar. The law manifestly would not presume that the declarant was cognizant of the invalidity of his own marriage. Moreover, while the declaration tendered in *Plant* v. *Taylor* (1) was the declaration of the ancestor himself, to whom, as it happened, the plaintiffs' title to the land in dispute had to be traced, the decision, as I apprehend it, cannot in any view be regarded as in any way indicating that a declaration of a deceased person respecting pedigree must be shewn, independently of the declaration itself, to be the declaration of one who is related *de jure* to the ancestor from whom the title to the land in dispute is inherited. If

(1) (1861) 7 H. & N. 211.

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it decides anything with respect to the identity of the persons between whom the required relationship must be established it is that a relationship must be shewn to exist between the declarant and the person, whose legitimacy was in question, and in that aspect confirms, rather than controverts, the view I have ventured to express upon this point. Neither do I think that the excerpt from Lord Eldon's reasons, quoted by my brother Rinfret from the *Berkeley Peerage* case (1), decides that the relationship which the rule contemplates, is a relationship of the declarant with the ancestor from whom title to the land in dispute must be derived.

As to the second ground of objection upon the question of *lis mota* and interest, there is no doubt that if at the time the declarations relied on were made there was any actual or legal controversy with reference to the point as to which the declarations were made, viz: the fact of the declarants being grandsons of Elizabeth Fitzgerald, the original grantee, they would not be admissible, but that controversy must relate to the precise point to which the declarations are sought to be applied. See *Freeman* v. *Phillips* (2); also the judgments of Sir C. Cresswell, Wightman, J. and Williams, J., in *Shedden* v. *Attorney-General* (3), and particularly the following dictum of Williams, J.:—

> I apprehend the true view is this: that the controversy which is to make the evidence of declarations of the members of the family inadmissible must be a controversy which has arisen in respect of the very point in dispute to which the proposed evidence is relevant.

In my opinion there is no evidence that there was, at the time the declarations here excluded were made or at any time, anything in the nature of a *lis mota* upon that question. The fact of the declarants being the heirs of the original grantee of the land in question was never challenged by the appellant or its predecessors in title otherwise than by the registration of deeds comprising, with many other lots, the lot of land claimed by the plaintiff—deeds which did not pretend to be derived from the original grantee or any of her heirs, devisees or grantees, but which themselves disclose were founded on a conveyance from one W. H. Rourke and five other grantors of the same

(1) (1811) 4 Camp. 409, at 419, 420.

(2) (1816) 4 M. & S. 486.

(3) (1860) 30 L.J. P.M. & A. 217 at 235 and 236.

family name, and their wives, dated 13th December, 1897, without indicating any connection with any prior conveyance of any description from any earlier grantor, leaving a hiatus of over 55 years between the date of the original grant to Elizabeth Fitzgerald, which was dated August 4, 1842. These conveyances were no doubt sufficient to pass any possessory title which the Rourkes had established to the lot. While they may be said in that sense to controvert the title of the heirs of the original grantee, they cannot in my opinion be properly held to raise a controversy upon the point which it was sought by the declarations to establish on the trial of this action, viz: that James and John Fitzgerald were heirs of the original grantee. It was at most the possession of the land against the heirs, whoever they were, that the registration of the Rourke deeds disputed—not the identity of the heirs. It is true that the plaintiff in order to maintain his action had to prove that John and James Fitzgerald, through whom he claimed his title, were heirs of the original grantee, and that this fact thus became an issue on the trial of the plaintiff's action, but, as I understand the doctrine of *lis mota,* the admissibility of the declarations relied on for the required proof of heirship, is unchallengeable in the absence of evidence that the particular fact which these declarations sought to establish had become a subject of controversy before the declarations were made.

I can find no authority for the proposition that the mere fact that the declaration of a deceased person as to his lineage may have or does have the effect of supporting his title to land to which a claim of adverse possession is being made affords of itself any valid ground for rendering that declaration inadmissible, while on the other hand there are cases which distinctly hold that, in questions of pedigree, declarations tending to support the title of the declarant to land are admissible in behalf of a plaintiff claiming under the declarant if made *ante litem motam.* See *Tilman* v. *Tarver* (1), where Abbott, Lord C.J., said:—

> I think them (declarations tending to support the title of the declarant) admissible notwithstanding, having been made *ante litem motam.* I remember a case of title to a peerage before the House of Lords in which the widow was allowed to prove the declarations of her deceased husband in support of her son's title, though the husband, if living, would

(1) (1824) Ry. & M. 141.

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have had the right which the declarations went to establish; and this has been followed up since. If no controversy existed at the time, the principle acted on is, that such declarations are admissible, though subject to observation.

In *Jenkins* v. *Davies* (1), Lord Denman, C.J., delivering the judgment of the court, used the following words, which appear to me very specially to apply to the present case:—

> The last disputed piece of evidence was a deed to which Elizabeth Stevens, then Davies, was a party, under the description of daughter and heiress of John Davies; and one Evan John, an undoubted relation, was also a party. Evan John was the tenant for life of the property in question; and she joined with him in conveying it to those under whom the defendants claimed to hold. Here was the declaration, therefore, both of Elizabeth Davies and of Evan John. It was objected to on account of the interest they had in making out things to be as there represented; and at least this intention of disposing of the property was said to be equivalent to a *lis mota*. But we think that this objection also fails. No dispute existed: but the parties did what they had a right to do, if members of the family. Almost every declaration of relationship is accompanied with some feeling of interest, which will often cast suspicion on the declarations, but has never been held to render them inadmissible.

It is true that in *Whitelock* v. *Baker* (2), Lord Eldon laid it down that the admissibility of declarations of deceased persons on questions of pedigree was founded upon the presumption that the words given in evidence are the natural effusion of the party upon an occasion when his mind stands even without bias to exceed the truth or to fall short of it, and that this has been recognized generally as a qualification of the principle upon which such declarations are to be received, but this dictum does not, I think, mean that it is to be presumed from the mere fact that a declaration of a deceased person upon a question of pedigree would tend to support the declarant's title to land or other property that there is such a bias as to render the declaration inadmissible.

In *Monkton* v. *Attorney-General* (3), Lord Brougham, L.C., commenting upon Lord Eldon's statement, said:

> I entirely agree that the words must be the natural effusion of the party and that, generally speaking, he must have no bias upon his mind. But even here there must be a limit. It will be no valid objection to such evidence that the party may have stood, or thought he stood (for that would equally bias) in *pari casu* with the party tendering the declaration, and relying upon it for the purpose of his own contention; for it has been decided, that although the party deceased, whose declaration

(1) (1847) 10 Q.B. 314, at 325. (2) (1807) 13 Ves. 511.
(3) (1831) 2 R. & Myl. 147 at 159.

you are giving in evidence, was in *pari casu,* and, if he had been living might have stood in the shoes of the party who tenders his declaration in evidence, that is not sufficient to exclude it.

And again at page 161:—

It was then asked as an argument for the further restriction of the rule, if a man may sit down to frame a pedigree how can you receive that pedigree in evidence like an ordinary declaration, when *non constat,* he may not have been in the act of making evidence for himself by preparing a document which should afterwards profit him or those in whom he is interested? To that I answer "Show me that the pedigree in question was prepared with that view. Bring it within the rule either of *Whitelock* v. *Baker* (1), or of the *Berkeley Peerage* case (2); prove that it was made *post litem motam,* not meaning thereby a suit actually pending, but a controversy existing, and that the person making or concocting the declaration took part in the controversy; show me even that there was a contemplation of legal proceedings with a view to which the pedigree was manufactured, and I shall then hold that it comes within the rule which rejects evidence fabricated for a purpose by a man who has an interest of his own to serve." The question then always will be (and so far I agree with the argument of the Crown) was the evidence in the particular circumstances manufactured or was it spontaneous and natural? If I thought that this came within the description of manufactured evidence, manufactured for a purpose connected with the present controversy, I should of course at once have rejected it, but upon looking at it and examining it, I cannot upon the whole bring my mind to see that it was fabricated in such circumstances or with such a view as should bring it within the principle adverted to.

That the principles thus enunciated in *Tilman* v. *Tarver* (3); *Monkton* v. *Attorney-General* (4); *Jenkins* v. *Davies* (5), and *Shedden* v. *Attorney-General* (6) regarding the admissibility of declarations of deceased relatives upon questions of pedigree and the bearing of the doctrine of *lis mota* therein have never been authoritatively challenged and are still recognized as the settled law of England is clearly shewn by Taylor's treatise on the Law of Evidence already referred to, where all these cases and many others of the same effect are treated as laying down the law as it now stands upon these important subjects. For instance at page 402 of this work it is stated regarding the legal meaning of *lis mota* in English law as a controversy:—

The commencement of the controversy was at one time further defined by Alderson, B., to be "the arising of that state of facts on which the claim is founded" without anything more; but this dictum, though afterwards upheld by Lord Cottenham, has since been overruled (*Shedden* v. *Attorney-General* (6) and *it is now decided* that there must be,

(1) (1807) 13 Ves. 511.
(2) (1811) 4 Caulp. 409.
(3) (1824) Ry. & M. 141.
(4) (1831) 2 Russ. & M. 147.
(5) (1847) 10 Q.B. 314.
(6) (1860) 30 L.J.; P.M. & A. 217.

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not *merely facts which may lead to a dispute,* but a *lis mota,* or suit, or controversy preparatory to a suit, actually commenced, or dispute arisen, and upon the very same pedigree or subject matter which constitutes the question in litigation.

And again at page 403:—

It follows from the above explanation of *lis mota* that declarations * * * are admissible if no dispute has arisen, *though made in direct support of the title* of the declarant and * * * that the mere fact of the declarant having stood or having believed that he stood *in pari jure* with the party relying on the declaration will not render his statement inadmissible (*Monkton* v. *Attorney-General* (1)).

And, again on the same page, referring particularly to a peerage case (Zouch Peer 1807) Parl. Min., 207, which seemed to throw some doubt upon the admissibility of a declaration made in direct support of the title of the declarant:—

But even if the peerage case just referred to be not susceptible of this explanation, a single isolated decision can scarcely controvert a rule of law which has been sanctioned and acted upon by numerous Judges and is so founded on reason that a contrary doctrine would go far towards excluding all evidence of reputation.

For the reasons already appearing, I am of opinion that any declarations made by a deceased person touching his own pedigree is *prima facie* admissible as proceeding from one who is presumed to possess competent knowledge of the matter of which he speaks, and that no interest, which falls short of constituting a *lis mota* or actual or legal controversy upon the precise question which is the subject-matter of such a declaration, will render it inadmissible. If it appears, either from the declaration itself or from any other evidence which may be tendered, that there was, before or at the time of the declaration was made, such a controversy upon the particular fact of which the declaration speaks and which it is sought to prove by it, the declaration will not be received.

Plant v. *Taylor* (2), already referred to, and a passage from the judgment of Joyce, J., on the trial of the action of *Brocklebank* v. *Thompson* (3), are particularly relied upon in support of the proposition that the declaration of a deceased person upon a matter of pedigree is inadmissible if the declarant is obviously interested or the declaration is one which is obviously made for his own interest.

(1) (1831) 2 Russ. & M. 147. (2) (1861) 7 H. & N. 211.
(3) [1903] 2 Ch. 344.

I have already pointed out in discussing the first objection the dissimilarity between the facts in *Plant* v. *Taylor* (1) and those in the case at bar, and what was the real ground of the decision in the former. At best the statements relied upon in that judgment were mere dicta, and obviously contingent ones, as appears from the words by which they are introduced:

> Perhaps the learned trial judge was right in excluding the evidence on the ground that any declaration * * * though not made *post litem motam* * * * would be a declaration by a person whose mind could not be free from bias.

Had the decision been based upon the ground of obvious interest, which the court seems to have been careful to avoid, no criticism could well have been made of the statement that a declaration tending to shew that the declarant's first marriage was void and his second consequently valid, the negation of which would have stamped him as a bigamist, was a declaration which "it was manifestly in many ways directly for his interest to make," but that would not have made it an authoritative decision to support the proposition that the mere fact that a declaration tended to support a title to a small lot of vacant woodland, was a declaration that was so obviously made in the declarant's own interest as to warrant its exclusion in view of the long line of authoritative decisions to the contrary.

The statement of Joyce J., in *Brooklebank* v. *Thompson* (2) is a repetition of the dictum relied on in *Plant* v. *Taylor* (1) and in a case which likewise has no application whatever to the case now under discussion. The declaration there in question, which was a written memorandum made in the year 1762 by the plaintiffs' predecessor in title, related to the existence of a churchway through the demesne of a manor and was tendered as a declaration of reputation concerning a question of alleged public or quasi public right for the purpose of proving that the way was limited to a certain class of tenants of the manor. The learned trial judge held that it was not such a declaration, "but, if anything, at the very utmost only a statement by the person most interested denying or disputing the existence of a right in any but the 'tenants above wall,' (whatever may be the meaning of that expression) to a church-

(1) (1861) 7 H. & N. 211. (2) [1903] 2 Ch. 344.

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way through the demesne" of the particular manor, and that it was a private statement, and then quoted the dictum from *Plant* v. *Taylor* (1). No question of pedigree was in any way involved in *Brocklebank* v. *Thompson* (2) and presumably Joyce J. held that the declaration in question did not concern any public or quasi public right. In my judgment it in no manner touches the matter now in question. I can find no reference in Taylor's Law of Evidence to this case. Phipson on Evidence cites it at p. 232 among other cases as authority for the proposition that declarations by predecessors in title are not evidence for their successors "unless receivable on other grounds," and at p. 286, coupled with *Plant* v. *Taylor* (1), as authority for the further proposition that declarations made in direct support of a claim contemplated to be brought by the declarant or otherwise obviously to subserve his own interest, will be rejected, but immediately adds "but if no dispute has arisen or claim been contemplated the fact that the declarations tend to support his own title or that the declarant stood or believed he stood *in pari jure* with the party relying on them affects their weight only and not their admissibility," citing *Jenkins* v. *Davies* (3), from which I have already quoted Lord Denman's decisive observations.

The learned trial judge having erred in excluding the declarations referred to, as with the utmost respect I think, for the reasons above stated, he did, his judgment on the question of title or descent clearly cannot stand, notwithstanding His Lordship's very strong comments upon the unreliability of the testimony of the witness, David Myers, whose evidence in my opinion as to his being the grandson of David Fitzgerald and the nephew of James and John Fitzgerald, was corroborated by the testimony of three or four independent witnesses. When the whole record of the trial as it came before the Appeal Division, and as it is now before us is considered, including the declarations which the learned trial judge subsequently to the trial decided should be excluded, and which he did exclude from his consideration of the cause, I am bound to say that it has produced upon my mind the same conviction which it did upon the mind of the Appeal Division.

(1) (1861) 7 H. & N. 211. (2) [1903] 2 Ch. 344.
(3) (1847) 10 Q.B. 314.

It is only necessary to mention the fact that the certified copy of the grant to Elizabeth Fitzgerald and the memorandum attached thereto as an official government document shewed that the grant was made to her as the widow of Ezekiel Fitzgerald, to whom it had been allotted on account of military service, and that he, Ezekiel Fitzgerald was a sergeant in the 34th Regiment, a well known regiment then quartered in New Brunswick; that David Myers, the nephew of James and John Fitzgerald, who had lived with them and with their father and his grandfather, David Fitzgerald, as a boy had heard them all speak of his great-grandfather being a lieutenant or sergeant in the army; and the further declaration of James and John Fitzgerald, as testified by the plaintiff in reply to a question by the learned trial judge that when he (plaintiff) asked them where the original grant of this property was, they told him it was burned in a trunk when they were burned out in a fire at 98 Winter Street, Saint John, with the statement of the plaintiff that he had personal knowledge of the fire to which the declarants had referred. Farren also swore that when he asked them if they had ever been into the property, James told him he had been in with his father as a boy. Other witnesses swore that they had heard James and John Fitzgerald at different times speak of owning woodland in Saint Martins, where this land was situated. These declarations, it seems to me, were declarations which bore upon the question of their descent from the original grantee, and were admissible with evidence of all other facts bearing thereupon for the purpose of establishing a series of facts from which the affirmative of that issue might be inferred as a reasonable probability, within the meaning of the dicta of Lord Chancellor Loreburn in *Evans* v. *Astley* (1), and Lord MacMillan in *Jones* v. *G. W. Ry.* (2).

I also agree with the Appeal Division that there was no evidence upon which a finding of open, continuous, adverse possession for the statutory period could properly be made under the authorities.

(1) [1911] A.C. 678.

(2) (1930) 47 T.L.R. 39.

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PEJEPSCOT PAPER CO. v. FARREN.

Crocket J.

The appeal in my opinion should be dismissed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Lewin & Carter.*

Solicitor for the respondent: *George H. V. Belyea.*

1933

*June 8.
*June 16.

IN RE THE INCOME WAR TAX ACT

DAVID JUNE WATEROUS.....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Income War Tax Act, R.S.C., 1927, c. 97—Dividend of company paid in Dominion of Canada bonds issued exempt from Dominion income tax—Assessment of shareholder for income tax upon dividend so paid—Exemption provision in bond.

A company declared a dividend payable in Dominion of Canada war loan bonds held by it, at the par value thereof. The bonds each provided that "the obligation represented by this bond and the annexed interest coupons and all payments in discharge thereof are and shall be exempt from taxes—including any income tax—imposed in pursuance of any legislation enacted by the Parliament of Canada." Appellant, a shareholder in the company, received a dividend in bonds as aforesaid, and was assessed upon the amount thereof under the *Income War Tax Act*, R.S.C., 1927, c. 97.

Held: The assessment was valid. The taxation was not on "the obligation represented by the bond," but upon appellant's income, which was in part measured by the amount of the bonds which he received as dividend, and which constituted income.

Judgment of the Exchequer Court (Audette J.), [1931] Ex. C.R. 108, affirmed.

Lamont J. dissented.

APPEAL from the judgment of Audette J., of the Exchequer Court of Canada (1), dismissing the present appellant's appeal from the decision of the Minister of National Revenue affirming the assessment of appellant for income tax for the year 1928. The material facts of the case and the question in dispute are sufficiently stated in the judgment now reported, and are indicated in the above

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*PRESENT:—Rinfret, Lamont, Smith, Crocket and Hughes JJ.

(1) [1931] Ex. C.R. 108.

head-note. The appeal was dismissed with costs (Lamont J. dissenting).

W. T. Henderson K.C. and *A. M. Latchford* for the appellant.

C. F. Elliott K.C. and *W. S. Fisher* for the respondent.

The judgment of the majority of the court (Rinfret, Smith, Crocket and Hughes JJ.) was delivered by

SMITH J.—On April 27, 1929, the appellant made a return of his income for the year ending December 31, 1928, which return contained the following entry under Clause 6:

Income from Dividends

* * *

Received from Waterous Limited, Brantford, Ontario, Dominion of Canada Victory Loan Bonds, maturing November 1st, 1933, as dividend declared payable in bonds; these bonds being tax free as to principal and interest. Face value, $30,500.

The appellant was a shareholder in the company mentioned. At a meeting of the directors of Waterous Limited, held on June 28, 1928, the following resolution was passed:

It was moved by C. A. Waterous and seconded by L. M. Waterous that a dividend of thirty per cent be declared, payable in Dominion of Canada War Loan Bonds now held by the Company at the par value thereof and that bonds be distributed to the shareholders in accordance herewith. Carried.

In pursuance of this resolution, the appellant received from the company the bonds in question, as shown in the receipt quoted above.

The appellant was assessed under the *Income War Tax Act*, R.S.C., 1927, ch. 97, upon this sum as part of his income, and took an appeal to the Minister of National Revenue, which was dismissed. He then appealed to the Exchequer Court of Canada, from the decision of the Minister, and this appeal was dismissed by Mr. Justice Audette on the 4th April, 1931 (1); and from that judgment the present appeal is taken.

Section 4 of the Act reads as follows:

4. The following incomes shall not be liable to taxation hereunder:

* * *

(*j*) The income derived from any bonds or other securities of the Dominion of Canada issued exempt from any income tax imposed in pursuance of any legislation enacted by the Parliament of Canada;

(1) [1931] Ex. C.R. 108.

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WATEROUS v. THE MINISTER OF NATIONAL REVENUE.

Smith J.

The appellant contends that he was not liable to taxation for income on the amount of these bonds, and relies upon the following provision, set out in the bond itself, as follows:

> The obligation represented by this bond and the annexed interest coupons and all payments in discharge thereof are and shall be exempt from taxes—including any income tax—imposed in pursuance of any legislation enacted by the Parliament of Canada.

It is argued on behalf of the appellant that the taxation levied on the amount of this bond is taxation on "the obligation represented by the bond," which obligation is non-taxable under the provisions of the bond itself, issued in pursuance of statutory authority.

The respondent contends that the amount of the bond in question is income of the appellant, as defined by sec. 3 of the *Income War Tax Act*, R.S.C., 1927, ch. 97, and that the taxation is not upon the bond itself, or upon the obligation represented by the bond, but upon the appellant personally, on his income, part of which is merely represented by the amount of the bond.

I am entirely in agreement with the reasons of Mr. Justice Audette in the court below, containing the following statement:

> The dividend paid and distributed from the gains and profits of the company remains a gain and profit in the hands of the shareholder, whether that dividend is paid in kind, specie or in bond; because it is all through a dividend from, and of, profit and gain; it remains of such nature in the hands of both the company and the shareholder.

I think it is clear that this is not a taxation on the obligation represented by the bond or upon payments in discharge thereof, but merely taxation upon the appellant's income, which is in part measured by the amount of the bond which he received as dividend, and which constitutes income.

In the case of *In re McLeod* v. *The Minister of Customs and Excise* (1), Mr. Justice Mignault has the following remark:

> All this is in accord with the general policy of the Act which imposes the income tax on the person and not on the property. In other words, it is the person who is assessed in respect of his income.

We are also referred to the case of *Hitner* v. *Lederer* (2). This case, though not binding here, seems to be precisely

(1) [1926] Can. S.C.R. 457, at 464.

(2) (1926) 14 Federal Reporter, 2nd Series, 991.

in point, and the reasoning is in accord with what has been said above. The United States issued Liberty Bonds. One of the provisions of the Act authorizing these bonds was that the bonds were exempt, both as to principal and interest, from all taxes. An employee received one of these bonds in payment of salary, and the question there, as here, was whether or not the amount of the bond should be regarded as income, for the purposes of taxation; and it was held that it was income, subject to income tax.

It is pointed out in the reasons that it was not a tax because of the ownership of the bonds, which would have been a tax upon the principal; it was solely and exclusively income in payment of salary for compensation of services, and had nothing whatever in this sense to do with Liberty Bonds.

Again, it is said at p. 993:

> The bonds are by the express provision of the Act of 1917 not a medium of exchange recognized by law. This means that what was taxed was not "bonds," but "income."

The appeal should be dismissed, with costs.

LAMONT J. dissented, but did not deliver written reasons.

Appeal dismissed with costs.

Solicitors for the appellant: *Henderson & Boddy.*

Solicitor for the respondent: *W. S. Fisher.*

M. D. DONALD LIMITED.....APPELLANT;

AND

CHARLES R. BROWN, PROVINCIAL ASSESSOR .....RESPONDENT.

1933
*April 25.
*April 26.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Assessment and taxation—Income—Company assessed for income tax in respect of profit on sale of land—Whether profit was a profit of the company—Whether sale was made by or on behalf of the company—Facts and circumstances in connection with transaction—Agreement of sale by individuals to whom company had made voluntary and unregistered conveyance—Resulting trust—Land Registry Act, R.S.B.C., 1924, c. 127, s. 34.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Crocket JJ.

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The question in dispute was whether or not the profit on sale of certain land was a profit of the appellant company and therefore income of the company upon which it was liable for income tax under the *Taxation Act*, R.S.B.C., 1924, c. 254, ss. 2, 4. The land had been purchased by or on behalf of three individuals (who, with their solicitor, were the company's only shareholders) who paid the purchase price. The land was transferred to the company (which made no payment therefor), one lot by a conveyance (direct from the original vendor) in February, 1928, and the other lot by a conveyance in May, 1928. The land (upon which were rented buildings) was managed by one of the individuals, the same as if the company did not exist. In 1929 the said three individuals entered into an agreement to sell the land to a purchaser at a profit (the profit in question), which agreement was registered on February 5, 1929. On the face of the agreement, it was a sale by the three individuals; the money was payable to them, and the proceeds of the sale were paid to them. In June, 1928, the company had executed a conveyance of the land to the three individuals, for a nominal consideration, which conveyance was not registered until February 5, 1929, a few minutes after the registration of said agreement of sale.

Held: Upon all the facts and circumstances in evidence, the sale on which said profit was made was not a sale by the company or on its behalf, the profit was not a profit of the company, and it was not liable for income tax thereon.

It was contended that the said conveyance from the company to the individuals was a voluntary deed, and that, consequently, it passed nothing but the legal estate, and that there arose a resulting trust in favour of the grantor, the company. *Held:* Although it may be a disputed question whether or not a voluntary deed, without more, gives rise to a resulting trust in favour of the grantor, yet the law is clear that all the circumstances are to be looked at, and if the conclusion is that, in view of all the circumstances, no resulting trust was intended, then no resulting trust arises. In the facts and circumstances of the present case, no resulting trust was intended. The intention was to vest the full beneficial, as well as the full legal, title in the grantees.

The individuals were in a position to enter into the agreement of sale, notwithstanding that the conveyance from the company to them had not been registered; and the mere fact that, at the times of the making and registering of the agreement of sale, the conveyance from the company to them had not been registered, did not militate at all against the conclusion that the sale was their sale and that the purchase price was theirs. (The effect of s. 34 of the *Land Registry Act*, R.S.B.C., 1924, c. 127, discussed).

Upon the facts in evidence, the individuals, in managing the property and in receiving the conveyance of June, 1928, from the company, were not acting as agents or trustees for the company; the company was intended to be merely the depositary of the title, while all responsibilities in relation to the land were to be borne by, and all benefits to be enjoyed by, the individuals. Certain assessment returns made by the company, while entitled to their proper weight as evidence against the company, could not, under the circumstances in which they were made and in light of all the facts, affect the above conclusion.

In re Hastings Street Properties Ltd., 43 B.C. Rep. 209, discussed and distinguished.

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APPEAL by the company, M. D. Donald Ltd., from the judgment of the Court of Appeal for British Columbia, dismissing (Macdonald, C.J.B.C., and Galliher, J.A., dissenting) its appeal from the judgment of the Judge of the Court of Revision and Appeal, Vancouver Assessment District, dismissing its appeal against an assessment for income tax with respect to a certain profit made on a sale of land. The material facts of the case are sufficiently stated in the judgment now reported, and are indicated in the above head-note. The appeal to this Court was allowed with costs.

J. W. de B. Farris K.C. for the appellant.

Eric Pepler for the respondent.

After hearing argument of counsel, the Court reserved judgment, and on the following day delivered judgment orally.

The Chief Justice, delivering the judgment of the Court, said:

This appeal arises out of a controversy concerning the assessment of the appellants to income tax in respect of a sum of $77,000 which, the Crown alleges, was a profit "of" the appellants from the sale of real estate in Vancouver in the year 1929. The material sections of the Act (the *Taxation Act* of British Columbia, R.S.B.C., 1924, c. 254) are sections 2 and 4. Section 2 defines "income" as including

* * * all * * * profits arising * * * from real and personal property, or from money * * * invested, * * or from any venture, business, * * * of any kind whatsoever.

Section 4, which is the section creating the liability, imposes taxes upon

all * * * income of every person resident in the Province, * * * and income earned within the Province of persons not resident in the Province.

There is no question raised here whether this sum of $77,000, in respect of which the dispute arises, was in the nature of income, and upon that point it is quite unnecessary to express any opinion.

The question of substance is whether it was income "of" the appellant; and the answer to that depends upon the

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determination of the point whether or not the sale, in the execution of which this sum was paid, was a sale by the company or on behalf of the company. If it was such a sale, so that the proceeds belonged to the company beneficially, then the form of the transaction is of no importance whatever, and, admittedly, the appeal must fail, because the assessment was a right assessment.

The property consisted of two lots, which were throughout the argument referred to as lots 9 and 10, and that will be a sufficient description for our purposes. In 1929, Mrs. Meltzer, Mr. William Meltzer and Mrs. Schwartz entered into an agreement to sell this property to a purchaser for $210,000. That agreement was subsequently registered on the 5th of February, 1929. On the face of it, it is a sale by these three individuals; the money is payable to them, and, in point of fact, the proceeds of the sale were actually paid to them, and so far as appears enjoyed by them. The Meltzers, at the time of the execution of the agreement, were not the registered owners of the property. There had (on 12th June, 1928) been a conveyance to them of these lots, executed by the company, for the expressed consideration of one dollar and "other good and valuable consideration"; the resolution, however, by which the sale had been authorized by the Board of Directors having fixed the consideration at the nominal consideration of one dollar. This deed was not registered until the 5th February, 1929. On that same day, and a few minutes before the registration of the deed, the agreement of sale was registered.

Here, there are two points with regard to which some observations ought to be made. First, it is said that this deed from the company to the Meltzers was a voluntary deed, and that, consequently, it passed nothing but the legal estate, and that there arose a resulting trust in favour of the grantor, the company. Now, the question whether or not, to-day, a voluntary deed gives rise to a resulting trust in favour of the grantor, is a question about which there is a good deal of dispute. I refer to paragraph 108 in the 28th volume of Lord Halsbury's collection, upon the subject of Trusts and Trustees, which is in these words,

> It would seem that a voluntary conveyance of real property is deemed, in the absence of evidence to the contrary, to pass the beneficial interest in the property conveyed.

That statement is based mainly upon the observations of Lord Hardwicke in *Young* v. *Peachy* (1), and of Lord Justice James in *Fowkes* v. *Pascoe* (2). In the note, however, it is observed that a contrary view is expressed in Lewin on Trusts and concurred in by the eminent property lawyer, Mr. Joshua Williams, in his Law of Real Property, as well as by others.

The question as to the effect of a voluntary deed, without more, is, beyond doubt, a question upon which there is difference of opinion among real property lawyers. But there is no dispute about this: all the circumstances are to be looked at, and if the conclusion is that, in view of all the circumstances, no resulting trust was intended, then no resulting trust arises.

I think the proper conclusion from the facts I shall presently mention is that, in the circumstances of this case, it is quite out of the question to conclude that these parties intended there should be a resulting trust; quite impossible to reach any other conclusion than that the intention was to vest the full benefical as well as the full legal title in the grantees under that deed.

Another point is raised which it is perhaps desirable to consider, and that is based upon section 34 of the *Land Registry Act* of British Columbia. It is said that, by force of that section, this document which was executed on the 12th June, 1928, but which was not registered until the following February, conveyed, before registration, no interest of any description whatever to the grantees, so that, at the time the agreement of sale was made and registered, the land was the property of the company. Now, it is to be observed that the section, while it declares that an unregistered deed conveys no interest in the land, limits its operation in this way: "except as against the person making the same." As between the parties, the instrument has its full operation according to its terms. As between the parties, the interest in the property which is the subject of the instrument, the interest of the grantor, is deemed to pass to the grantee. Moreover, the section expressly declares that the grantee, in any case, acquires the right to apply to be registered. It is quite plain that where

(1) (1742) 2 Atk. 254, at 256.

(2) (1875) 10 Ch. App. 343, at 348.

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a registered owner, having a title to real estate as registered owner, and having the right to convey, executes a conveyance, the duty of the Registrar is, upon application, to register the transfer and to take all the steps necessary to lead to the issue of a certificate of title in favour of the grantee. The effect of the deed, therefore, is to vest in the grantee at least a right, enforceable by mandamus, to require the registrar to register him as the owner of the property. Moreover, the express terms of section 34 leave no doubt that this right is a right which passes by alienation *inter vivos,* by inheritance, by will; and the possessor of the right is in a position to make a sale of the property. From the economic point of view, there can probably be little difference between the position of an unregistered grantee from an honest grantor, who has not registered his grant, and the position of a person who has registered his grant and has received a registered title. Accordingly, assuming the deed to be operative to pass the beneficial as well as the legal interest, as it would be on the face of it, to the grantee upon registration, the grantees are in a position to enter into an agreement for sale of the property; and the mere fact that the document had not been registered would not militate in the slightest degree against the conclusion that the sale was their sale, that the benefits of the sale secured on the face of the instrument to the vendor were their benefits; in other words, that the purchase price was theirs.

Now, as against this, there could, in the present case, be only one possible effective answer; and that is, that these three persons who received this grant from the appellant company, received it in the capacity of agents or trustees for the company. And that is a question which must be determined by a consideration of the facts as a whole, and it is, therefore, necessary to review the history of the company's title and of the company's conduct and the conduct of the Meltzers in relation to these properties.

The company was incorporated in December, 1926. The nominal capital was $10,000. Four people signed the memorandum of association,—Mrs. Meltzer, Mr. Meltzer, Mrs. Schwartz (their daughter) (the persons who were the grantees under the deed from the company and the vendors under the deed to the Vested Estates Ltd., to which I have

just referred), and Mr. Grossman, their solicitor. Four shares were allotted, one to each of these persons. These shares were paid in full and the sum of $400 received for these shares by the company was deposited to the credit of the company; and that appears to have been the only bank account the company ever had, and that sum of $400 appears to have been the only sum that was ever credited to the company in the bank account.

The company had, as assets, these two lots, and two mortgages,—one for $75,000 and the other for $9,500, held by Mrs. Schwartz as mortgagee, and assigned to the company. They were transferred to the company shortly after its incorporation, for a nominal consideration, apparently. There is no suggestion that the consideration was anything but nominal.

Lot 9 was purchased in December, 1926, prior to the incorporation of the company, by Mrs. Schwartz, for the sum of $53,000, $15,000 of which was paid in cash. A final payment was made on the 6th of February, 1928, and was, as Mrs. Meltzer says, paid by the Meltzers. The other part of the consideration consisted of the assumption of a mortgage and of the obligations of a purchaser under an agreement of sale, and clearly before the execution of the conveyance to the company these encumbrances must have been discharged, because in the conveyance which was registered 20th February, 1928, there is no reference to any encumbrance of any description. There is no suggestion that the company entered into any obligation to repay any of these moneys; or that one cent of the money paid by the Meltzers was repaid. Mrs. Meltzer's evidence is directly to the contrary. But, for the moment, I dwell upon the fact that, apart from the evidence of Mrs. Meltzer, there is no suggestion that there was any obligation on the part of the company to reimburse, or that there was any reimbursement to Mrs. Schwartz, or to any of the Meltzers, in respect of these payments.

Lot 10 was purchased, apparently, in December, 1927, for $70,000. Thirty thousand dollars was paid in cash. The other part of the consideration was by way of the assumption of a mortgage for the balance of the purchase money. The property was transferred by a conveyance on the 5th May, 1928, to the company. Here again, there is

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no suggestion that there was any obligation entered into to repay this sum of $30,000 or that there was any repayment of a single cent of that money. I ought to have remarked, with respect to lot 9, that the conveyance is taken direct from the vendor to the company, that, in other words, the purchase was a purchase in the name of the company.

These are the facts of the situation as they appear from the documents, and altogether apart from the evidence of Mrs. Meltzer.

It is stated by Mrs. Meltzer, and not contradicted (if there were any dispute, there could have been contradiction), and I understand Mr. Pepler did not dispute, that these two properties, upon which there were buildings and which were rented, were managed by Mrs. Meltzer for the family. Indeed, the learned judge of the Court of Revision finds that she managed these properties precisely as she would have done if there had been no incorporation of the company, and did that because she was accustomed to doing business in that way.

I mentioned the bank account of the company. Mrs. Meltzer had her own personal account in the Bank of Montreal, and it must be taken, I think, as established that all rentals received from this property were paid to her, that all the outgoings were paid by her. She paid the insurance, the taxes, and for the repairs. There were virtually no meetings of the company. The company, as a company, did not intervene in any respect in the management of these properties. I repeat, the properties were dealt with, were managed, precisely as they would have been, if there had been no company in existence. The company received no money, had no money, and paid no money.

There is, in addition to what has been said, the circumstance already mentioned that the conveyance of lot 9 was taken directly in the name of the company, the purchase money having been paid by the Meltzers. That being so, there was, of course, a resulting trust in favour of the Meltzers. The company, I think, clearly held that property in trust for the Meltzers.

It may be noted that the total of the rentals received was less than $15,000; the specific payments by the Meltzers mentioned in the evidence amount to $51,000. The payments by them must have been much more. Mrs. Melt-

zer's testimony is, as already stated, that all payments were made by her. On the face of all these facts, the proper conclusion seems to be that the company was intended to be merely the depositary of the title, while all responsibilities in relation to the property were to be borne by, and all benefits to be enjoyed by, the Meltzers as individuals. That being so, the proposition upon which the position of the Crown is necessarily founded, viz., that in managing these properties, and in receiving the deed of June 12, 1928, the Meltzers were acting as agents or trustees of the company necessarily falls to the ground.

This conclusion does not necessarily rest upon the strict legal presumption. Looking at the whole situation,—the way in which the parties acted in relation to the property, the disregard of the company in the actual transactions in connection with the property, the fact that in both cases the property was purchased by the Meltzers, that the purchase money was paid by the Meltzers,—apart altogether from strict legal presumption, there is sufficient support for a highly probable conclusion that the parties had no thought of any such intention as a resulting trust in favour of the company when the transfer took place in June, 1928.

As against all this, the Crown puts forward, and very properly, certain assessment returns made in the name of the company. And let me say here that I see no ground for criticizing the action of the Assessment Department. On the face of the transaction, there was undoubtedly something to be investigated, and one can hardly be surprised that the assessor reached the conclusion he did. I do not understand Mr. Farris to cast any reflection on the Department or upon anyone connected with it. But here we are concerned, not with the appearance of things, but with the proper result when the real facts are, as they are now, known.

As to these assessment returns, Mrs. Meltzer, who had management of the estate, says she never saw them. They appear to be signed by Mrs. Schwartz who, apparently, did not know anything about the business. They were compiled by Mr. Clyne on instructions from Mrs. Meltzer, no doubt, with perfect bona fides. The datum from which he started, I think, plainly was this, that in his view the

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company was the owner of the properties; and that being so, he concluded that the rents would be a part of the income of the company. It is perfectly plain, I think, from the evidence, that he had no sufficient knowledge of the actual facts to direct his attention to the distinction between the company and the Meltzers individually, and from the point of view of the parties themselves it was not a matter of consequence whether, as regards rentals, the parties as individuals or the company should be assessed to income tax in respect of them.

Mrs. Meltzer says she didn't know whether in the municipal assessment roll the property was assessed to the company or to the individuals. In all probability, as the registered title was in the company, the company was assessed in respect of them. Now that the facts are known, I cannot regard these returns as in any way affecting the inferences to be drawn from the facts I have mentioned.

Now, a word as to the judgments. The Judge of the Court of Revision has given his reasons, and from those I think we can see pretty clearly the considerations by which he was influenced in reaching the conclusion he did. He does find as a fact that the business which was carried on by Mrs. Meltzer was the company's business. He finds also as a fact that the company did carry on the business of dealing in real estate, within its powers, and that the company did make the profit alleged from such dealings.

I think it is necessary to consider here his remark that the company in order to succeed has to get away from its own returns as made to the Assessor. I am not sure that the learned Judge of the Court of Revision has not misdirected himself just at that point.

The returns by the company were undoubtedly evidence against the company. They should receive their proper weight as evidence. But, in truth, the real question which the learned judge had to decide was whether or not the sale which was made in December, 1928, was a sale made by the Meltzers entitling them to the purchase money or whether it was a sale by the company entitling the company to the purchase money, and, as I have already said, there could be only one basis for a conclusion that it was a sale made by the company, and that would be that the Meltzers were acting either as agents or as trustees of the

company. Now, I repeat, in considering that question, these returns were some evidence undoubtedly, in favour of the Assessor's view; but the returns were compiled by a man who really did so without taking into consideration, and without really knowing, the real facts, and the conclusion, if he had come to the conclusion, that the business was the business of the company would have been a conclusion involving, to some extent at all events, conclusions of law the validity of which he was entirely incompetent to determine. The learned judge has, I think, quite failed at that point to realize what the real question was that he had to decide. Then, he emphasizes the fact that it is not denied that Mr. Clyne's figures are correct. I do not think there is any dispute as to that and I do not think that the correctness of the figures really enters into the controversy at all. The learned primary Judge does, I think, indicate very clearly what is influencing his mind by his allusion to the *Hastings Street Properties Ltd.* case (1). That is a case to which I think some reference ought to be made, because it really illustrates the point before us.

That was a case in which some people incorporated a company with an authorized capital of $50,000, five shares being issued of $1 each. The shareholders were minded to enter into a speculation and proposed to do so by using the company as an instrument and, in order to effectuate their design, loaned the company $40,000. The company bought property and sold it at a profit of $30,000. The terms on which the loan was made were that any profit on the transaction was to be distributed among them. I should have thought there could be only one question in that case, —whether the company was entitled to deduct from the moneys received the sums which it paid under the obligation to the lenders for the purpose of determining the amount of its taxable income. If it was not so entitled, the case was an obvious one. The purchase was the company's, the sale was the company's, the profit (for the purposes of the *Taxation Act*) was the company's.

There is no kind of analogy to the present situation where the sale was not made by the company; where the proceeds of the sale never, even momentarily, belonged to the company.

(1) 43 B.C. Rep. 209; [1930] 3 W.W.R. 561; [1931] 1 D.L.R. 604.

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Again, the learned Judge referred to section 34, which I have already discussed, in a manner which I think shows his view to be that, as the title to the property remained, except as between the parties, vested in the company until after the sale was made, the benefit of the sale necessarily enured to the company, and that consequently the profit was the company's profit.

For these reasons, I think the learned Judge's so-called findings of fact cannot be regarded as conclusive.

Coming to the Court of Appeal, the judgments in favour of the Crown are very brief and they seem to proceed upon the view that, as there was some sort of design to "evade" the *Taxation Act,* the appellants are liable. Of course, the word "evade" is, in this connection, a rather ambiguous one. It may mean that the intention was to engage in a transaction not touched by the *Taxation Act;* if so, nobody has any ground of complaint. It may be, on the other hand, that you are imputing an intention to put a transaction, which is in substance within the taxing provisions, into a form which, on the face of it, takes it out of the taxing provisions; and such a scheme as that must fail. I think, on the whole, that the view expressed by the Chief Justice in his dissenting judgment, concurred in by Mr. Justice Galliher, is the correct one.

For these reasons, I think the appeal should be allowed; and the order will be that the assessment will be amended by striking out this sum of $77,000. The appellants will be entitled to their costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Grossman, Holland & Co*

Solicitors for the respondent: *Harper & Sargent.*

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*Feb. 13.
*June 8.

IN THE MATTER OF THE MARITIME FREIGHT RATES ACT, 1927 (17 GEO. V, CH. 44); AND IN THE MATTER OF THE MARITIME FREIGHT RATES ACT (R.S.C., 1927, CH. 79).

REFERENCE BY THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Board of Railway Commissioners for Canada—Jurisdiction—Maritime Freight Rates Act, R.S.C., 1927, c. 79 (original Act, 17 Geo. V, c. 44), ss. 3, 7, 8, 9—Approval by Board from time to time of tariffs filed by "other companies" (s. 9) specifying tolls lower than those specified in tariffs originally filed and approved under s. 9—Board certifying from time to time normal tolls differing from those originally certified at time of approving of tariffs originally filed and approved under s. 9—Reimbursement to company of difference between lower tolls and modified normal tolls.

It is within the jurisdiction of the Board of Railway Commissioners for Canada (*a*) to approve from time to time, under s. 9 of the *Maritime Freight Rates Act* (R.S.C., 1927, c. 79), tariffs filed by "other companies" therein referred to (companies other than the Canadian National Railways), specifying tolls lower than those specified in the tariffs originally filed and approved (which provided for reductions in rates of approximately 20%) under s. 9; (Cannon J., dissenting, held that any special or competitive tariffs filed by "other companies" of their own motion, specifying tolls lower than those specified in the tariffs originally filed and approved under s. 9, are not to be taken as filed under said Act, but under the *Railway Act,* and there can be no approval thereof under said s. 9); (*b*) to certify from time to time (as distinct from the provision in s. 9 (4) for certifying in every third year, etc., as to revision of the normal tolls and subsequent use of revised normal tolls) normal tolls in respect of particular freight movements differing from those originally certified at the time of approving the tariffs originally filed and approved under said s. 9; (Cannon J., dissenting, *contra*); and (*c*) to certify as the amount of reimbursement to the company the difference between the lower tolls referred to in (*a*) *supra* and the modified normal tolls referred to in (*b*) *supra;* (Cannon J., dissenting, *contra*).

The Board's ruling of September 23, 1932, to the effect that, where a railway company, under said s. 9, has made an approximate 20% reduction in its rates, and subsequently publishes a tariff making a further reduction in rates, to meet water or truck competition, or for other reasons, such tariff containing the further reduced rates should be published under the general provisions of the *Railway Act,* and the company is not entitled to any reimbursement under said s. 9 with respect to such rates, and there should be no reference on such tariff to the *Maritime Freight Rates Act,* was not a correct one. (Cannon J., dissenting, *contra*).

Subs. 2 of s. 3 of the *Maritime Freight Rates Act,* as contained in R.S.C., 1927, c. 79, applies to "other companies" referred to in s. 9 of said Act (notwithstanding the rearrangement in R.S.C., c. 79, of the sub-

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secs. of sec. 3 as contained in the original Act, and s. 9 (2) in each Act making applicable "the provisions of subs. 2 of s. 3 * * * of this Act").

Having regard to the general scope and terms of the *Maritime Freight Rates Act,* tariffs filed by "other companies" referred to in s. 9 are lawful tariffs until disallowed, notwithstanding that subs. 3 of s. 3 (being the same as subs. 2 of s. 3 of the original Act) is not now expressly referred to in s. 9. (Cannon J. held that "competitive tariffs filed by other companies are lawful tariffs until disallowed under the express terms of secs. 331 and 332 of the *Railway Act;* and to reach this conclusion, it is not necessary to have regard to the general scope and terms of the *Maritime Freight Rates Act* or to subs. 3 of s. 3 thereof").

The intent and scheme of the *Maritime Freight Rates Act* as to above matters, discussed, with particular regard to ss. 3, 7, 8 and 9 thereof.

REFERENCE by the Board of Railway Commissioners for Canada, upon a case stated, under s. 43 of the *Railway Act* (R.S.C., 1927, c. 170), for the opinion of the Supreme Court of Canada on certain questions of law arising under the *Maritime Freight Rates Act* (R.S.C., 1927, c. 79; and the original Act, 17 Geo. V, c. 44).

The stated case and the questions for decision are set out in the judgment of Duff, C.J., now reported.

A. G. Blair, K.C., for the Board of Railway Commissioners for Canada.

W. N. Tilley, K.C., and *E. P. Flintoft, K.C.,* for the Canadian Pacific Ry. Co. and the Dominion Atlantic Ry. Co.

C. B. Smith, K.C., for the Provinces of Nova Scotia, New Brunswick and Prince Edward Island.

H. P. Duchemin, K.C., for the Sydney & Louisburg Ry. Co. Ltd. and others.

J. L. Ilsley, K.C., for the Nova Scotia Shippers' Association and others.

The judgment of the majority of the court (Duff C.J., and Rinfret, Smith and Crocket JJ.) was delivered by

DUFF C.J.—This appeal concerns the interpretation of the *Maritime Freight Rates Act,* which, as originally enacted, contained a recital to the effect (*inter alia*) that it was expedient to put into practical operation the recommendations of the Royal Commission on Maritime Claims respecting Transportation and Freight Rates, for the purpose of removing the burden imposed upon the trade and

commerce of the Maritime Provinces since 1912, in so far as it might be reasonably possible to do so, without disturbing unduly the rate structure in Canada. The statute required the Canadian National Railways, and permitted other companies, to lower their tolls in the Maritime Provinces by approximately 20%, and the deficits in respect of the Maritime section of the C.N.R. were to be paid by the Government, and other companies adopting the lower standard were to be reimbursed the difference between normal tolls and the lower tolls.

For a complete understanding of the bearing and significance of the questions with which we have to deal, it is convenient to transcribe the statement of facts and the questions now put before us by the Order of the Board of Railway Commissioners in the case stated for the opinion of this Court under the authority of section 43 of the *Railway Act*.

"1. The Maritime Freight Rates Act, 17 Geo. V, chapter 44 (Appendix A hereto), assented to on 14th April, 1927, entitled 'An Act Respecting The Canadian National Railways and the Tariffs of Tolls to be charged on certain Eastern Lines,' directed that from and after 1st July, 1927, a reduction of approximately 20% be made in the tariffs of tolls to be charged in respect of movements called 'Preferred Movements' of freight traffic upon or over the 'Eastern Lines,' as defined, of the Canadian National Railways. Revenues and expenses of the Eastern Lines were to be kept separate from other accounts in connection with the Canadian National Railways and the deficits of the Eastern Lines were to be included in the estimates annually submitted to Parliament.

"2. The Act also provided by section 9 that with respect to freight movements similar to the 'Preferred Movements,' other companies operating in the 'Select Territory' as defined might file tariffs of tolls 'meeting the statutory rates'. The Board of Railway Commissioners was by the Act to approve these tariffs and certify the normal tolls which but for the Act would have been effective and ascertain and certify to the Minister of Railways and Canals the amount of the difference between the tariff tolls and the 'normal tolls' on traffic moved by the company each year under the tariffs so approved.

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"3. The Act is now chapter 79 of the Revised Statutes of 1927 (Appendix B). As originally passed it contained a preamble reciting that the Act was passed to carry out the recommendations contained in the Report of a Royal Commission on Maritime claims.

"4. The Board of Railway Commissioners by section 11 of the Act was authorized to hear and determine all questions arising under the Act, subject, however, to appeal as provided in the Railway Act. The Board, acting under this section and in response to application of other companies referred to in section 9, made rulings set out in its Circular No. 213, dated 18th June, 1927 (Appendix C), as to the interpretation to be given the following expressions found in section 9 of the Act: (*a*) 'Select Territory'; (*b*) 'Freight movements similar to the preferred movements'; and (*c*) 'meeting the statutory rates.' Subsequently certain companies, including the Canadian Pacific Railway, the Dominion Atlantic Railway and others, elected to meet the statutory rates, and then filed tariffs pursuant to section 9 of the Act.

"5. Prior to 1st July, 1927, it was the practice in the territory covered by the Act, as in other parts of Canada, for railway companies to make adjustments in rates from time to time to meet changing industrial or traffic conditions, including competition with other transportation agencies, and since the Act came into effect, the Canadian National Railways and also the companies referred to in section 9 of the Act have found it necessary to adjust and vary the tolls originally filed under the Act, from time to time, as new industrial and traffic conditions arose.

"6. In the autumn of 1927, the question was raised as to whether the companies referred to in section 9 were entitled to reduce the rates that had been published in compliance with the Act and still continue to be reimbursed for the difference between the normal rate and the rate originally published in compliance with the Act. There are attached (Appendix D) copies of letters dated 25th November, 1927, and 10th January, 1928, from E. P. Flintoft, Assistant General Solicitor, Canadian Pacific Railway, to the Secretary of the Board and letters dated 16th January, and 1st February, 1928, from the Secretary of the Board to Mr. Flintoft, containing the decision made by the Board with respect to the questions raised.

"7. In continuance of the practice referred to in section 5 hereof and under authority of the decision of the Board as set out in section 6 hereof the companies referred to in section 9 of the Act have from time to time filed with and had approved by the Board tariffs containing reductions in various tolls below those originally filed and approved under the said section 9.

"8. (*a*) All tariffs subsequently filed were approved by Orders in the form set out in Appendix E (1) in which the Board also certified what purported to be the normal rates which, but for the Act, would have been effective.

"(*b*) In some cases the normal rates specified in the Order were arrived at strictly in conformity with the decision referred to in section 6 hereof by adding to the new reduced rates specified in the tariff the same differentials as existed between the original normal rates and the reduced rates originally filed under the Act.

"Example: Board's Order No. 47304, dated 2nd September, 1931, as amended by Order No. 47339, dated 10th September, 1931, *re* rates on apples from Dominion Atlantic stations to Halifax for export. (Appendix E (2)).

"(*c*) In a large proportion of the cases, however, the Board adopted the practice of certifying in such order as normal such rates as it considered would have been adopted by the companies to meet the new industrial and traffic conditions, had the Act not been passed.

"Example: Board's Order No. 40130, dated 7th January, 1928, *re* rates on fruits and vegetables, canned, and apples, evaporated, from Port Williams and Sheffield Mills, N.S., via Dominion Atlantic and connecting lines to destinations in the Canadian Northwest. (Appendix E (3)).

"9. At a meeting of the Board on 23rd September, 1932, its ruling of 30th January, 1928, as contained in the Secretary's letter of 1st February, 1928, to Mr. Flintoft, was rescinded and the decision embodied in the letter from the Secretary of the Board, dated 12th October, 1932, was adopted. (Appendix F.)

"10. Rate adjustments of the character referred to in sections 5 and 7 hereof may be illustrated under the following four general headings under each of which are set out examples of particular conditions met and reference to the tariffs filed and the Board's Orders approving the same:—

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"(1) Rates published on a basis lower than the rates originally approved under the Act to meet the needs of an industry established at a point where no similar industry previously existed, or to place it in proper relationship with similar industries at other points on the same railway which enjoyed the benefits of commodity rates as reduced under the Act:—

"(*a*) Effective 12th December, 1927, rates on fruits and vegetables, canned, and apples, evaporated, from Port Williams and Sheffield Mills, N.S., via Dominion Atlantic and connecting lines to points in the Canadian Northwest, were reduced under the Act to the same basis as applied from other canning points on the Dominion Atlantic in Nova Scotia, such as Aylesford, Berwick, Bridgetown, Kingston, Lakeville and Waterville, to place the two canneries at Port Williams and Sheffield Mills on a competitive basis with those other canning plants. The rates previously in effect were the class rates as reduced under the Act. The tariff giving effect to the further reductions was Supplement No. 3 to C.P. Tariff No. E-4530, C.R.C. No. E-4318, Item No. 80-A, approved under the Act by the Board's Order No. 40130, dated 7th January, 1928.

"Copies of the Board's Order and of the relevant portions of the said Supplement are attached hereto as Appendix G (1).

"(*b*) Effective 19th April, 1929, rates on potatoes, carloads, for manufacturing into starch, from points on the Canadian Pacific Railway in New Brunswick to Hartland, N.B., were reduced below the basis originally approved under the Act, in order to enable the new industry at Hartland to obtain the raw material it required for manufacture. The tariff giving effect to these further reductions was Supplement No. 14 to C.P. Tariff No. E-4524, C.R.C. No. E-4312, Item No. 532, approved under the Act by the Board's Order No. 42665, dated 20th May, 1929.

"Copies of the Board's Order and of the relevant portions of the said Supplement are attached hereto as Appendix G (2).

"(2) Rates published on a basis lower than the rates originally approved under the Act to place an industry on the originating line on a competitive basis with similar industries located on the Canadian National Railways:—

"(a) Effective 3rd February, 1931, rates on pit props and pit timber, Glennie to Minto, N.B., via Fredericton and Grand Lake Coal and Railway, were reduced to the same basis as in effect between certain points on the Canadian National. The rates previously in effect were on the mileage scale as originally reduced under the Act. The Tariff providing for the further reductions was Supplement No. 26 to F. & G.L. Tariff No. 108, C.R.C. No. 157, Item No. 205, approved under the Act by the Board's Order No. 46267, dated 12th February, 1931.

"Copies of the Board's Order and of the relevant portions of the said Supplement are attached hereto as Appendix H (1).

"(b) Effective 15th December, 1931, rates on potato starch and potato flour, carloads, from Hartland, N.B., via Canadian Pacific to destinations in the Provinces of Ontario and Quebec, were reduced under the Act to the same level as the rates on the same commoditeis via the Canadian National from Charlottetown and Hunter River, P.E.I., to Ontario and Quebec destinations. The only rates in effect previously from Hartland were the class rates as reduced under the Act, and the further reductions were made to enable the mill at that point to compete with the mills established at the points on the Canadian National. The tariff giving effect to such further reductions was Supplement No. 43, to C.P. Tariff No. E-1360, C.R.C. No. E-4312, Item No. 534, approved under the Act by the Board's Order No. 47896, dated 22nd December, 1931.

"Copies of the Board's Order and of the relevant portions of the said Supplement are attached hereto as Appendix H (2).

"(3) Rates published on a basis lower than the rates originally approved under the Act to enable industries to reach additional markets or to compete at destination with products from other sources of supply:—

"(a) Effective 9th November, 1927, rates on wood-pulp, carloads, from Saint John, West Saint John, Saint George, Fairville and Edmundston, N.B., to Gatineau, Quebec, via Canadian Pacific, were reduced under the Act to the same basis as in effect from the same shipping points to Ottawa, in order to enable shipments to be made to the new paper mill established at Gatineau. The rate previously applic-

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able to this movement was the class rate as reduced under the Act. The tariff giving effect to such further reductions was Supplement No. 1, to C.P.R. Tariff No. E-4516, C.R.C. No. E-4304, approved under the Act by the Board's Order No. 40134, dated 7th January, 1928.

" Copies of the Board's Order and of the relevant portions of the said Supplement are attached hereto as Appendix I (1).

" (*b*) Effective 29th August, 1931, rate on peat moss, carloads, from Saint Stephen, N.B., via Canadian Pacific to Montreal, was reduced to enable the shippers at Saint Stephen to compete in the Montreal market with imported moss. The only rate previously in effect was the class rate as reduced under the Act. The tariff giving effect to the further reduction was Supplement No. 40 to C.P. Tariff No. E-1360, C.R.C. No. E-4312, Item No. 482, approved under the Act by the Board's Orders No. 47491, dated 7th October, 1931, and No. 47638, dated 10th November, 1931.

" Copies of the Board's Orders and of the relevant portions of the said Supplement are attached hereto as Appendix I (2).

" (4) Reductions forced upon the railway company in order to hold the traffic against some other competitive transportation agency, either water or highway, such reductions being in some cases seasonal, that is, effective only during the season of navigation or during that part of the year when the highway competition is more acute:—

" (*a*) Effective 3rd August, 1931, the rate on lumber from Falmouth, N.S., via Dominion Atlantic to Halifax, was reduced under the Act to meet motor truck competition. This was lower than the basis originally approved under the Act and expired 31st December, 1931. The tariff giving effect to the further reduction was Supplement No. 33, Item No. 60, to D.A.R. Tariff No. CT-388, C.R.C. No. 817, section 3, approved under the Act by the Board's Order No. 47406, dated 24th September, 1931.

" Copies of the Board's Order and of the relevant portions of the said Supplement are attached hereto as Appendix J (1).

" (*b*) Effective 28th August, 1931, rates on apples, carloads, from Berwick, N.S., and other points, via Dominion Atlantic to Halifax for export, were reduced below the

level originally approved under the Act, to meet competition by motor truck and water via Kingsport and Port Williams. The tariff giving effect to the further reduction was D.A.R. Tariff No. CT-418, C.R.C. No. 863, approved under the Act by the Board's Orders, No. 47304, dated 2nd September, 1931, and No. 47339, dated 10th September, 1931.

"Copies of the Board's Orders and of the relevant portions of the said tariff are attached hereto as Appendix J (2).

"(*c*) Effective 15th April, 1932, rates on pulpwood from Annapolis Royal, N.S., via Dominion Atlantic, to Middletown, N.S., for furtherance, were reduced below the basis originally approved under the Act to meet water competition. The tariff giving effect to such further reductions was Supplement No. 44 to D.A.R. Tariff No. CT-388, C.R.C. No. 817, Item No. 156, approved under the Act by the Board's Order, No. 48423, dated 13th April, 1932.

"Copies of the Board's Order and of the relevant portions of the said Supplement are attached hereto as Appendix J (3).

"The foregoing examples are typical of many similar reductions of the several classes referred to that have been made since the coming into force of the Act.

"*The questions for decision are:*—

"1. Whether, having regard to the facts above set out and to the relevant provisions of the Maritime Freight Rates Act and of the Railway Act, it is within the Board's jurisdiction:—

"(*a*) To approve, from time to time, under section 9 of the Maritime Freight Rates Act, tariffs filed by other companies referred to in the said section specifying tolls lower than those specified in the tariffs originally filed and approved under the said section, the tariffs last referred to having provided for reductions in rates of approximately 20%.

"(*b*) To certify, from time to time, as distinct from every third year as provided in subsection 4 of the said section, normal tolls in respect of particular freight movements differing from those originally certified at the time of approving the tariffs originally filed and approved under the said section;

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"(*c*) To certify to the Minister of Railways and Canals as the amount of reimbursement to the company, the difference between the lower tolls, referred to in clause (*a*), and the modified normal tolls referred to in clause (*b*).

"2. Whether the Board's ruling dated 23rd September, 1932, set out in Appendix "F" is correct.

"3. Whether subsection (2) of section 3 of the Maritime Freight Rates Act, as contained in the Revised Statutes of Canada, 1927, applies to "other companies", referred to in section 9 of the said Act.

"4. Whether, having regard to the general scope and terms of the said Act, tariffs filed by other companies referred to in section 9 are lawful tariffs until disallowed, notwithstanding that subsection (3) of section 3 is not now expressly referred to in section 9."

The Maritime Act, by the general declaration of policy in its preamble, left little room for doubt as to the governing purpose of it. There is, besides, a specific declaration in section 8 that the purpose of the Act is to give certain statutory advantages in rates in the "Select Territory", and that these "statutory rates" are not based upon a principle of fair return to the railways for the carriage service.

The general reduction of 20% primarily affects rates for what are called "preferred movements", which are, broadly speaking, movements upon the "Eastern Lines" of the Canadian National Railways, that is to say, lines in the Maritime Provinces and in a limited area in Eastern Quebec. Since the declared policy of the statute is to give certain advantages to persons and industries in the region described as the "Select Territory", it was not within the purview of that policy to confine such advantages to shippers on the Canadian National Railways. Accordingly, by section 9, provision is made enabling other companies operating within the areas affected, to frame and file tariffs "meeting" the "statutory" tariffs. It is not disputed that both before and since the passing of the Act adjustments of freight rates have constantly been necessary in the Select Territory, as in other parts of Canada, to meet changing industrial and traffic conditions. With the establishment of a new industry at a point where no similar industry existed, it is often expedient, to encourage its

development, to reduce the rates applicable to the movement inwards of its raw material and outwards of its finished product; again, in order to insure continuance of traffic on its line, a railway company finds it desirable to establish a basis of rates for industries thereon comparable to that enjoyed by competing industries on another line; furthermore, in order to enable shippers, particularly of low priced commodities, to reach more distant markets or to compete with shippers at other sources of supply, it often becomes necessary to accord special rates for such shippers. Another example of adjustments that must take place is furnished by those necessitated by the competition of other transportation agencies, particularly by highway and water.

The general rules governing the practice in fixing freight rates are laid down in the *Railway Act* (R.S.C., c. 170), under the heading "Traffic, Tolls and Tariffs"—sections 312 to 359 (inclusive). By ss. 328 to 332 (inclusive), tariffs may be issued under three heads, viz., standard, special and competitive. Sections 336 to 341 (inclusive) provide for the issue of joint tariffs where traffic is to pass over two or more lines of railway.

These enactments are so designed as to enable railway companies to adjust and vary their tolls to meet the exigencies arising from alterations in industrial and traffic conditions, and to enable them to compete with other agencies of transport.

It must, of course, be assumed that the *Maritime Freight Rates Act* was passed in contemplation of the practice founded upon this state of the law which was well known. The C.P.R. Co. and the Dominion Atlantic Co. elected to act under section 9 of the Act, which is in these terms:

9. (1) Other companies owning or operating lines of railway in or extending into the select territory may file with the Board tariffs of tolls respecting freight movements similar to the preferred movements, meeting the statutory rates referred to in section seven of this Act. The Board, subject to all the provisions of the Railway Act respecting tariff of tolls, not inconsistent with this Act, shall approve the tariffs of tolls filed under this section.

(2) The provisions of subsection two of section three and of sections seven and eight of this Act shall apply to the tariffs of tolls filed under this section.

(3) The Board on approving any tariff under this section shall certify the normal tolls which but for this Act would have been effective and shall, in the case of each company, at the end of each calendar year promptly ascertain and certify to the Minister of Railways and Canals the amount of the difference between the tariff tolls and the normal

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tolls above referred to on all traffic moved by the company during such year under the tariff so approved. The company shall be entitled to payment of the amount of the difference so certified, and the Minister of Railways and Canals shall submit such amount to Parliament if then in session, (or if not, then at the first session following the end of such calendar year) as an item of the estimates of the Department of Railways and Canals.

Subsection 2 of section 3, designated in section 9 (2), is as follows:

2. The Board of Railway Commissioners, hereinafter called the Board, is authorized and directed to

(*a*) approve such cancellations, and, subject to the provisions of the Railway Act, respecting tariffs of tolls for the carriage of freight, where not inconsistent with this Act, to approve all tariffs of tolls so substituted;

(*b*) maintain or cause to be maintained such substituted tariffs, subject to all provisions of the Railway Act respecting tariffs of tolls not inconsistent with this Act, on the general rate of level approximately twenty per cent. below the tolls or rates existing on the first day of July, one thousand nine hundred and twenty-seven, while the cost of railway operation in Canada remains approximately the same as at the said date, but the Board may allow the increase or reduction of such tolls or tariffs from time to time to meet increases or reductions, as the case may be, in such cost of operations;

(*c*) adjust or vary such substituted tolls or rates from time to time as new industrial or traffic conditions arise, but always in conformity with the intent of this Act as expressed in sections seven and eight and other relative sections hereof.

The form of order which the Board adopted and has employed in approving tolls under section 9 is this:

1. THE BOARD ORDERS that the tolls published in (particulars of tariff), filed by the Company under Section 9 of the Maritime Freight Rates Act be and they are hereby approved subject to the provisions of subsection 2 of section 3 of the said Act.

2. AND THE BOARD HEREBY CERTIFIES that the normal tolls which but for the said Act would have been effective in lieu of tolls published in the said (same particulars of tariff) approved herein, are as follows:—

(Sgd.) Chief Commissioner, B.R.C.

There is not the least dispute that, in practice, during a period of years, it was considered that both the C.N.R. and the other railways must vary their tariffs from time to time and that the Maritime Act was applicable to the tariffs so varied; and upon this view the Board acted in ascertaining and certifying "normal rates".

In response to an application of the companies affected for a ruling as to the interpretation to be put upon certain expressions in s. 9, the Board made certain rulings or decisions, set out in its Circular No. 213 (Appendix C), interpreting section 9 of the Act. The general effect of

these rulings was to authorize the application, in respect of rate reduction, of the same principles to the Canadian National Railways and to other companies within the "Select Territory".

Relying on this ruling, it is stated that the Canadian Pacific Railway Company and the Dominion Atlantic Railway Company, as well as other companies, and as to this there is, in point of fact, not the slightest controversy, elected to bring their rates into conformity, in principle, with the "statutory rates" and framed their tariffs accordingly. Later, a question was raised whether the companies to which section 9 is applicable were entitled to reduce rates that had been published under that section, and still retain their right to reimbursement under the terms of its provisions. The Board decided this question in the affirmative.

Relying, again, it is said, on the decision of the Board (and, again, there is no dispute about the fact), these companies, from time to time, filed with the Board, in supposed compliance with section 9, new tariffs effecting reductions in various tolls, as originally filed and approved, and these reduced tolls were approved by the Board.

The Board's power under section 9 (1) to approve the reduced tolls was not exhausted, it is contended, upon approval of the tariffs setting forth the reductions first made upon the Act becoming effective. The practical working of the scheme of the Act required, in view of considerations already explained, an interpretation of the Board's powers, under that section, as being continuing powers exercisable from time to time, whenever changed industrial or traffic conditions, in its judgment, might demand or render expedient further adjustments or variations of tolls. Otherwise, it is said, the Act, instead of endowing the shippers of the Maritime Provinces with the benefits it was designed to bestow, must prove an actual hindrance to the industrial and commercial development of the areas within the "Select Territory". This appears to have been the view accepted by the Board in approving the reductions already alluded to.

It should, perhaps, be observed that apart from the standard rates, which constitute the maxima of rates that may in any case be charged, the only rates available be-

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tween many points are the so-called class rates payable in respect of the various classes of commodities specified in the Canadian Freight Classification. Now, when a new industry is established at a point where no such industry previously existed, and there are flourishing similar industries at other places, with which the new establishment has to compete and which are in the enjoyment of lower rates than the class rates, the rates for the new establishment must, as a condition of its existence, be put upon a basis below the class rates, comparable to that of the rates enjoyed by the competing establishments. This is but one example of the numerous types of cases in which rate reductions become necessary and are constantly taking place.

In June, 1927, when the initial reduction of 20% went into operation, the only rates (other than standard rates) then in effect in a large proportion of cases were these so-called class rates, while in other cases "commodity rates" were in effect, calculated, for various reasons, upon a lower basis. These rates were reduced approximately 20%. Almost immediately new conditions arose which called for further reductions, and the Board had to then deal with the question above indicated, which was decided, as already observed, in the manner contended for by the railways.

A brief commentary upon the examples given in paragraph ten of the case will be useful:

Heading 1 (*a*). This is the case of a new plant brought into competition with plants at other points. Successful operation would have been, it appears, commercially impossible if the "class" rates, even as originally reduced under the Act, had been payable; a further reduction was sanctioned as necessary.

(*b*) The starch manufacturer, it is explained, could not afford to pay on his raw material the ordinary rates paid on potatoes for domestic consumption, even as reduced under the Maritime Act, and a further reduction was required.

Heading 2. These are cases of what, it appears, is sometimes called "market competition." That is to say, the railway finds it necessary to reduce its rates in order to put shippers on its line in a position to compete with shippers on another line (in this case the Canadian National Railways) in common markets. This expansion of business

would not have been possible if the further reductions had not been made.

Heading 3 (*a*). In this case a prospective purchaser developed after the first reduction had been put into effect. The commodity was of a low grade, and the traffic could not, it is explained, bear the class rate, even as reduced under the Act, so a further reduction was necessary to enable the shippers to reach this additional market.

(*b*) This is another case of market competition, though the rival shipper was overseas. It also illustrates the necessity of a further reduction to enable the shipper of this relatively low grade commodity to reach an additional market.

Heading 4. These examples are said to illustrate one of the commonest conditions with which the railway companies are faced to-day, viz., the necessity of reducing their rates to preserve their traffic against other competitive agencies of transportation. In the examples given are the cases of highway competition, water competition and combined water and highway competition. These competitive conditions change almost from day to day and demand frequent readjustments of rates.

From these illustrations it is argued that any construction of the Act which would prevent the railway companies affected by section 9 from moulding their tariffs to meet these constantly changing conditions, and while leaving the Canadian National Railways free to reduce its tariffs, would constitute discrimination between persons and industries served by the different systems; a result obviously not within the scheme of the Act as designed. The intent of the statute which aims at relief for shippers in the whole of the "Select Territory" would be largely frustrated by permitting such discrimination.

The Board has until recent months given full operation to this interpretation of the section. Cases in which further reductions were made were approved by orders of the Board specially issued in the individual case, and in each of these orders the Board certified the normal rates that would be applicable to such case.

We have come to the conclusion that the practice followed by these companies with the approval of the Board, as indicated in the examples given, is in accord with the

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proper construction of section 9. In view of the conditions with which the Act deals, the better construction of the section would appear to be that the Board's power to certify normal tolls was not exhausted with the first certification. (*Boon* v. *Howard* (1); *Reg.* v. *Clarence* (2); *The Duke of Buccleugh* (3).)

The practice which has been followed is not, we think, inconsistent with the provisions of subsection 4 of section 9, which contemplates a general revision of rates, brought about by changes in wages or other costs of operation in the territory at large. The practice now under review deals with individual rates which, as already stated, must be subject from time to time to adjustment to enable individual shippers served by the railways concerned to hold their own as against shippers served by other lines or other transport agencies. We are satisfied that regional discrimination could not have been contemplated.

It will be convenient now to summarize the grounds we have indicated in this rather lengthy discussion, upon which we think the interpretation of the Maritime Act advanced by the appellants ought to be accepted.

The key to that interpretation seems to be given by sections 7 and 8. By force of section 7, the tariffs of tolls "provided for" in the Act are "to be deemed statutory rates" and are "to be deemed" to be rates not "based on any principle of fair return to the railway for services rendered in the carriage of traffic". Accordingly, these rates must not be taken into account in determining the "reasonableness" of "other rates". By section 8, the "purpose of this Act" is explicitly declared to be the purpose of "giving certain statutory advantages" in respect of charges for railway transport to the "persons and industries" in the select territory; and the Board is expressly prohibited from approving or allowing any tariffs which may "destroy or prejudicially affect" such advantages "in favour of persons or industries located elsewhere than in such select territory".

Shippers, in Nova Scotia, of apples, for example, destined for Montreal, are to enjoy the reduced rates which are to go into effect immediately on the passing of the statute

(1) (1874) L.R. 9 C.P. 277, at 308. (2) (1888) 22 Q.B.D. 23, at 65.
(3) (1889) 15 P.D. 86, at 96.

(rates 20% below the existing rates); and to the extent of this reduction the Board is required to maintain a "discrimination between" (*Railway Act*, s. 314) the select territory and other localities where apples are produced and shipped—the apple districts of Ontario, for example, and British Columbia.

There can, we conceive, be no question as to the scope of sections 7 and 8. They apply to all rates "specified in the tariffs of tolls in this Act provided for". They apply to the substituted tariffs which are to be "prepared and submitted to the Board" immediately upon the passing of the Act. They apply also, and this it is important to emphasize, to these tariffs, as varied and adjusted (under subs. 2 (*c*) of s. 3) "as new industrial or traffic conditions arise". By the explicit terms of s. 9 (2) they apply to the tariff tolls to be approved under that section. In performing the duty of the effecting or sanctioning of such variations and adjustments, the Board is required to act "always in conformity with the intent of the Act as expressed in sections 7 and 8". The "intent of the Act as expressed" in these sections, which is to govern the Board in effecting or sanctioning such variations and adjustments, is that persons and industries in the select territory, as to the "preferred movements" are to enjoy a statutory preference of 20% in respect of railway rates over persons and industries "located" elsewhere. As already observed, we think the phrase "the rates specified in the tariffs of tolls in this Act provided for" must be read as including the variations and adjustments brought into force under section 3 (2*c*); and that the effect of the words of this last mentioned enactment "always in conformity with the intent of this Act as expressed in sections 7 and 8 and other relative sections hereof" ("other relative sections hereof" would appear to contemplate the principal enactment of section 3 requiring the reduction of existing rates by 20%) is to provide for the maintenance in the tariffs, as adjusted and varied, of the difference of 20% between the rate brought into force when "new industrial or traffic conditions arise" and the rate which would have prevailed if the Act had not been passed.

This seems to be the necessary deduction from the declaration (in s. 7) that "fair return to the railway for

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services rendered" is not to be the principle determining the variations or adjustments under section 3 (2*c*) and the declaration in section 8 that the favoured persons and industries are always to enjoy the advantage of the discrimination established in their favour as against other localities.

Broadly speaking, the principles have been observed in the execution by the Board of its general powers in relation to tolls, that "the object of the legislation is plainly declared", viz.,

> the fixing of just and reasonable freight and passenger rates, having proper regard, not only to the question of the reasonableness and fairness of the rate itself, but also to the principle of equality as between different districts and shippers,

that this principle would be infringed by

> giving special rights to any particular district of the country, or creating rates, which by change of circumstances and conditions could not be described as just or reasonable;

and that

> an unremunerative rate applicable in one district involves a discrimination as against other districts where traffic and operating conditions are similar, and directly infringes on the provisions of the Act requiring uniformity of rates.

These passages from the judgment of the Chief Commissioner (Sir Henry Drayton) delivered in December, 1917, in the case known as the *Increase in Rate Case* (1), sufficiently explain the broad principles by which the Board has been governed in applying the enactments of the *Railway Act*.

The Board's duty in applying the enactments of section 3 (as well as of section 9) is to give form and substance to the intent of the Act, as expressed in sections 7 and 8, which, we repeat, exclude in explicit language the two principles expounded by the Chief Commissioner, that of the reasonableness of the rate in itself, and that of "uniformity" of rates as affecting different localities.

Since the Board, in proceeding under section 3 (2*c*), is not to follow the fundamental principles of rate making governing tariffs compiled under the general *Railway Act* expounded by the Chief Commissioner, it follows that, unless we adopt the view above set forth that the rule of the Maritime Act, the maintenance of a difference of 20% between the rate in force and the rate that would have

(1) 22 Can. Ry. Cas. 49, at 59, 68.

been in force if the Act had not been passed, is a condition governing the Board in effecting or sanctioning variations under section 3 (2*c*), we are driven to the conclusion that, in proceeding under this last named enactment, the Board is left without the guidance of any canon of any description. We cannot accept that conclusion.

Moreover, it seems a reasonable view that the procedure indicated, and the rule laid down in subsection 3 of section 3 were intended to apply to proceedings under subsection 2*c* of that section. We have already said that in our view the phrase "rates specified in the tariffs of tolls in this Act provided for" includes the variations and adjustments of such rates under section 3 (2*c*). We likewise think that "substituted tariffs" in subsection 3 embraces "substituted tariffs" as varied and adjusted under subsection 2*c*.

We do not doubt that the Act does not contemplate that the Board, in proceeding under subsection 2*c*, is to act exclusively *ex mero motu suo*. An application from some quarter is contemplated as the normal mode of initiating the proceeding. Where the Board proceeds without an application the variation or adjustment does or may take effect at once. But the Board may proceed upon an application by the Company or by a third party,—a shipper, for example. If the variation or adjustment proposed is one required by "new industrial or traffic conditions," then, under s. 3 (2*c*) it is the duty of the Board to bring it into operation as soon as the change in circumstances arises, or as soon as it becomes aware of them. The Company or the other applicant having established the facts, in other words, having shewn that circumstances have arisen requiring action of the Board under s. 3 (2*c*), it would not be an unreasonable recognition of the spirit of the statute, as manifested by sections 7 and 8, to treat the new rate as in force from the moment the facts had been put before the Board, that is to say, from the moment of application.

Again, where the application is made by the Company it would seem to be a convenient procedure to treat the "submission" of the altered tariff by the Company as the initiation of the application. As already indicated, this appears to be the procedure contemplated by s. 3 (3).

That this is the procedure which in fact has been followed by the Board is shewn by the various orders, copies

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of which are appended to the case, approving of variations proposed by the companies. It is said in the factum filed by the Board that no application has been made by the companies for variation or adjustment of rates under s. 3 (2*c*) or s. 9 (2). But the orders referred to are obviously not made under the *Railway Act*. They sanction in express terms rates 20% below the rates that, under the conditions prevailing at the time, upon the principles of rate making which prevail under the *Railway Act*, and under the practice of the Board, could not properly have been, and would not have been sanctioned by the Board, if the Act had not passed. The practice of the Board in respect of these orders is set forth in paragraph 8 of the Case in these words:

> 8. (*a*) All tariffs subsequently filed were approved by Orders in the form set out in Appendix E (1) in which the Board also certified what purported to be the normal rates which, but for the Act, would have been effective.
>
> (*b*) In some cases the normal rates specified in the Order were arrived at strictly in conformity with the decision referred to in Section 6 hereof by adding to the new reduced rates specified in the tariff the same differentials as existed between the original normal rates and the reduced rates originally filed under the Act.
>
> Example: Board's Order No. 47304 dated 2nd September, 1931, as amended by Order No. 47339 dated 10th September, 1931, *re* rates on apples from Dominion Atlantic stations to Halifax for export. (Appendix E (2).)
>
> (*c*) In a large proportion of the cases, however, the Board adopted the practice of certifying in such order as normal such rates as it considered would have been adopted by the companies to meet the new industrial and traffic conditions, had the Act not been passed.
>
> Example: Board's Order No. 40130 dated 7th January, 1928, *re* rates on fruits and vegetables, canned, and apples, evaporated, from Port Williams and Sheffield Mills, N.S., via Dominion Atlantic and connecting lines to destinations in the Canadian Northwest. (Appendix E (3).)

Obviously, the Board, in all these cases, was professing to exercise its powers under the Maritime Act. Down to the time when the statute as it appears in the Revised Statutes came into force (1st February, 1928), the Board probably assumed that a grant of the same power as that expressly conferred by s. 3 (1*e*), (as s. 3 (2*c*) then was), in relation to the rates of the C.N.R., was necessarily implied, as respects the companies affected by s. 9, in the authority given to these last mentioned companies to file tariffs "meeting" the "statutory rates referred to in s. 7" which literally (and it would seem also by necessary intendment) would include the rates as varied or adjusted under s. 3

(1e). The Board may also have taken the view that a construction by which the authority to "vary and adjust" should embrace only the rates of the C.N.R. would reduce the statute to obvious absurdity, as imposing upon it the duty to discriminate, in the matter of tolls, against "persons and industries" located on the lines affected by s. 9, in favour of those "located" on the C.N.R.

We think the form in which the proposed changes were submitted to the Board is of no importance. We have no doubt that the Board had jurisdiction to approve the rates submitted, and to certify the normal tolls which would have prevailed if the Act had not passed, under s. 9 and s. 3 (1e) or under s. 9 (2) and s. 3 (2c).

At this point, it is convenient to comment upon Question 2, which is in this form:

Whether the Board's ruling dated 23rd September, 1932, set out in Appendix F, is correct?

The ruling is in these words:

WHEREAS the following ruling was made by the Board at a meeting held on the 30th January, 1928, in connection with question submitted by Mr. Flintoft of the Canadian Pacific Railway Company, is hereby rescinded:—

"Is a carrier which is subject to Section 9 of the Act entitled to reduce a rate that has been published in compliance with the Act and still continue to be reimbursed for the difference between the normal rate and the rate originally published in compliance with the Act?

Ans.: The answer to this question is in the affirmative, but that such further reduction of the rate will be subject to all the limitations contained in the Railway Act."

That upon reconsideration of the above ruling, the decision of the Board is that where a railway company, under the authority of Section 9 of the said Act, has made an approximate 20% reduction in its rates, and subsequently publishes a tariff schedule making a further reduction in rates published under the authority of the Act, to meet water or truck competition, or for other reasons, such tariff schedule containing the further reduced rates should be published under the general provisions of the Railway Act and the railway company is not entitled to any reimbursement under Section 9 of the Maritime Freight Rates Act with respect to such rates and there should be no reference to the Act last named shown on such tariff schedules. In other words, where normal tolls, which would not have been reduced but for the provisions of the Maritime Freight Rates Act, were, under the authority of that Act, reduced approximately 20%, the railway company was entitled to reimbursement under the terms of Section 9, but where a railway company makes a further voluntary reduction in such rates it is not doing so under the provisions of the Maritime Freight Rates Act, but under the general provisions of the Railway Act, and the Maritime Freight Rates Act has no application with respect to such tariffs.

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The last sentence seems to give the ratio of the ruling; and, apparently, this ratio would apply to the Canadian National Railways as well as the railways affected by section 9. We cannot think that the powers or the duties of the Railway Commission are not the same under section 3 (2*c*) or section 9 (2) whether these powers are exercised by it *ex mero motu suo* or after having been invoked by a railway company or by a shipper. In all cases where the "new industrial or traffic conditions" bringing those enactments into play have arisen, it is not only within the power, but it is the duty, of the Board to act. If a given variation or adjustment ought to be directed on the application of a shipper, then it ought to be approved on the application of the railway company. The fact that the railway company assents to the change or requests the change is immaterial. Such changes, if made, are made under the *Maritime Freight Rates Act* and not under the *Railway Act*.

We now turn to section 9. There is, we think, no admissible reason for disregarding subsection 2 of that section as it appears in the Revised Statutes of 1927. It must be assumed, we think, that the change was made deliberately, and in order more clearly to express the purpose of the statute; to give, perhaps, more explicit sanction to the rulings of the Board. The clue to the construction of section 9 is given by subsection 3 which requires the Board "on approving any tariff under this section" to certify "the normal tolls which, but for this Act, would have been effective". The difference between the "normal tolls" in this sense and the "tariff tolls" is to be the measure of the reimbursement. The "tariff tolls" are to be framed for the purpose of "meeting" the "statutory tolls" under section 7. "Tariff tolls" are statutory tolls in the sense that they are tolls which for the reasons already outlined could not take effect, as indeed subsection 3 of section 9 impliedly declares, otherwise than by force of the Maritime Act.

Variations and adjustments pursuant to subsection 2 are plainly "tariff tolls" within the meaning of subsection 3; for the obvious reason that they are "rates specified in tariffs of tolls in this Act provided for" within the meaning of section 7, which is made applicable to them by the

express terms of section 3 (2c). Moreover, we see no reason to think that what we have said as to section 3 (2c) and section 3 (3) does not equally apply to variations and adjustments under section 9 (2) which makes section 3 (2c) applicable to tariffs of tolls filed under section 9.

The answers to the questions submitted are, in principle, dictated by what has been said. The answers to the sub-questions of Question 1 are in the affirmative; the answer to Question 2 in the negative; to Question 3 in the affirmative, and to Question 4 in the affirmative.

CANNON, J. (dissenting in part).—In *Canadian National Railway Company* v. *Province of Nova Scotia* (1), the present Chief Justice of Canada, speaking for this Court concerning the *Maritime Freight Rates Act* now under consideration, said:

In explaining the provisions of the Act, the phrase "Eastern lines" will frequently be used, and it is convenient at this place to quote textually section 2 of the Act which gives the meaning of that expression:

"For the purposes of this Act the *lines of railway now operated** as a part of the Canadian National Railways and situated within the provinces of New Brunswick, Nova Scotia and Prince Edward Island, and the lines of railway, similarly operated, in the province of Quebec extending from the southern provincial boundary near Matapedia and near Courchesne to Diamond Junction and Levis are collectively designated as the 'Eastern Lines.'"

For a similar reason, section 8 should also be mentioned, which defines the phrase "select territory," as including Nova Scotia, New Brunswick and Prince Edward Island in addition to the localities on "the lines in the province of Quebec mentioned in section 2."

The Act, by section 3, requires the cancellation of tolls in force at its date (which we shall speak of as normal tolls), in respect of the "movements of freight traffic" described as "preferred movements," and the substitution therefor of tariffs of reduced tolls (which we shall refer to as the statutory tolls). The "preferred movements" comprise three classes, first, of local traffic between points on the "Eastern lines," second, of export traffic destined overseas between points on the "Eastern Lines" and ocean ports on the "Eastern Lines," and third, of westbound traffic originating on the "Eastern Lines," and extending westward beyond those lines.

As respects the first and second of these classes of "preferred movements," the statutory tolls are ascertained by making a deduction from the normal tolls of approximately twenty per cent. As respects the third class of such movements, the statutory rate is ascertained by making a deduction, also of twenty per cent, but, in this case, the deduction takes effect only upon that part of the "through rate" which the statute in section 4 describes as the "Eastern Lines proportion of" that rate. The statute also provides for the non-compulsory reduction of

(1) [1928] Can. S.C.R. 106, at 111-114, 120-122.

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rates by companies, other than those concerned with the "Eastern Lines," which own or operate railways "in or extending into the select territory." Such companies, by section 9, are permitted, in order to "meet" the compulsory statutory rates, to file tariffs of reduced rates "respecting freight movements similar to the preferred movements."

It is part of the scheme of the Act that these non-compulsory reductions, sanctioned by section 9, shall not be ultimately borne by the companies whose tolls are affected by them; and by that section provision is made for the transfer of that burden to the Dominion Government, the Minister of Railways and Canals being required, at the end of each year, to pay to the companies availing themselves of the privileges of the section the difference, as certified by the Board of Railway Commissioners, between the amount which would have been payable in normal tolls, but for the tariffs filed under it, and the sums actually "received under those tariffs."

* * *

As appears from recitals and declarations in the preamble and in the body of the Act, the statutory rates, whether compulsory under sections 3 and 4, or non-compulsory under section 9, are envisaged by the statute not as providing a fair return for railway services, but as arbitrary rates, established with the design of affording special "statutory advantages to persons and industries" in the "select territory"; it was therefore considered just to transfer from the railway companies to the Dominion Treasury the burden of reductions authorized by section 9, which in the legal sense are non-compulsory, but, which it was recognized, might be exacted from the companies concerned, by the force of competition. It should also be observed, that the only enactment of the Act which confers a right of compensation upon railway companies (other than those concerned in the operation of the "Eastern Lines") in respect of reductions sanctioned by the Act is the provision in section 9 already mentioned and *that provision relates only to non-compulsory reductions authorized by the section.** Indemnity to companies in respect of loss of revenue arising from a compulsory reduction is not provided for and not contemplated by the Act.

* * *

* * * The function of this court is to give effect to the intention of the legislature, as disclosed by the language selected for the expression of that intention. *Whatever views may have inspired the policy of a statute, it is no part of the function of a court of law to enlarge, by reference to such views, even if they could be known with certainty, the scope of the operative parts of the enactment in which the legislature has set forth the particular means by which its policy is to be carried into effect**. If the language employed is fairly open to a given construction, then the policy of the Act, as disclosed by the statute itself, read in the light of the known circumstances, in which it was passed, may legitimately be called in aid. * * *

The preamble professes to be for the most part a summary of the relevant portions of the report of a Royal Commission of September, 1926, through which, as it recites, Parliament has been advised that the Intercolonial Railway was designed, *inter alia,* to afford to Maritime merchants, traders and manufacturers the larger market of the whole Cana-

*The italicizing is made by the present judgment of Cannon J.

dian people; but that in "determining" the construction of the railway, commercial considerations were subordinated to considerations of a national, Imperial, and strategic character, which dictated a longer route than would otherwise have been necessary, and that, to this extent,

"the cost of the railway should be borne by the Dominion and not by the traffic which might pass over the line."

The preamble proceeds:—

"And whereas the Commission has, in such report, made certain recommendations respecting transportation and freight rates, for the purpose of removing a burden imposed upon the trade and commerce of such provinces since 1912, which, the Commission finds, in view of the pronouncements and obligations undertaken at Confederation, it was never intended such commerce should bear; and whereas it is expedient that effect should be given to such recommendations, in so far as it is reasonably possible so to do without disturbing unduly the general rate structure in Canada."

To the recitals in the preamble there should be added the declaration contained in s. 8:—

"The purpose of this Act is to give certain statutory advantages in rates to persons and industries in the Maritime provinces."

It will be observed that the recitals in so far as they are pertinent, may be summed up in the proposition that, by reason of the circumstances attending the institution of the Intercolonial Railway system, "the cost of the Railway" should be borne by the Dominion, and not by the traffic on the line, *in so far as that cost is due to national, Imperial and strategic considerations, as contradistinguished from commercial considerations,** and that certain recommendations founded upon this view in the report of the Royal Commission ought to receive effect.

* * *

* * * The purpose of the Act is declared to be to give "certain statutory advantages in rates."

Now, then, are the tariffs of rates under discussion in this case, "statutory rates given by the Special Act" or are they special rates that might have been given by the companies, for purely commercial considerations, prior to 1927, under the provisions of the *Railway Act?*

Under sections 331 and 332 of the *Railway Act,* railway companies were authorized to issue special freight and competitive tariffs for the carriage of goods and were only required to file these tariffs with the Board of Railway Commissioners and specify the date of the issue thereof and the date on which it was intended to take effect. If the provisions of subsection 2 of section 3 of the *Maritime Freight Rates Act,* as they are found in chapter 79 of the Revised Statutes of Canada of 1927, are to be read into section 9 thereof, "other companies owning or operating lines of railway in or extending into the select territory may file with the Board tariffs of tolls respecting freight

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movements similar to the preferred movements, *meeting the statutory rates referred* to in section seven of this Act." These statutory rates are not based upon any principle of fair return to the railway for services rendered in the carriage of freight. This applies only to tolls filed under section 3 (1) (*b*) as statutory substitutes to the tariffs cancelled and showing a reduction of approximately 20% to meet the increased cost due to national, strategic or Imperial considerations.

Again, even assuming that subsection 2 (*c*) of section 3 applies to the other companies, the Board is only authorized and directed to *adjust* and *vary* such substituted tolls or rates from time to time as new industrial or traffic conditions arise, also in conformity with the intent of the Act which is to give compulsorily certain statutory advantages and rates to persons and industries in the "select territory." The Board has never been called upon by either the C.N.R. or the "other companies" to adjust or vary substituted tariffs. From time to time tariffs have been filed by both companies of their own motion, varying the substituted tariffs, and the Board has approved of these tariffs. This approval was not necessary, as no order or direction of the Board is required to enable a company to file a tariff lower than the substituted tariff for the purpose of meeting competition. The filing of such tariffs and the approving same in no way involve the exercise by the Board of its power to adjust or vary tariffs.

Does this clause add anything to the right which the companies already had of filing special and competitive freight rates to meet special and industrial or traffic conditions?

I do not think so. They could and always had under the *Railway Act* the faculty of reducing their rates by simply filing the new rates with the Board. The latter's approval was not required and I see nothing in the Acts which calls upon the Board to approve these special tariffs. The adjustment and variation of tolls from time to time by the Board contemplated in the Special Act is not the approval of competitive rates such as those submitted and filed by the companies. The rights of other companies to file tariffs and obtain reimbursement from the government in respect of reduced rates must be found in section 9,

which, according to me, shows clearly that reimbursement is provided for only in the case of original substituted tariffs.

The Board is given power to " approve the tariffs of tolls *filed under this section.*" The only tariffs of tolls authorized to be filed under section 9 are " tariffs of tolls respecting freight movements similar to the preferred movements, meeting the statutory rates referred to in section seven of this Act."

Section 7 says that " the rates specified in the tariffs of tolls, in this Act provided for, in respect of preferred movements, shall be deemed to be statutory rates."

The tariffs of tolls referred to in section 7 are the tariffs filed by the C.N.R. under section 3 (1) (*b*), namely: tariffs " showing a reduction * * * of approximately twenty per cent." from those in force before July 1, 1927.

Hence it follows that the only tariffs of tolls which can be filed and approved by the Board under section 9 are tariffs *meeting* the tariffs filed by the C.N.R. under section 3 (1) (*b*).

By section 9 (3) the Board " on approving any tariff *under this section* shall certify the normal tolls which but for this Act would have been effective."

The Board must then certify and the company is entitled to receive " the difference between the tariff tolls and the normal tolls above referred to," not on all traffic, but " on all traffic moved by the company * * * under the *tariff so approved.*"

It is also to be noted that the Board has no authority to change the " normal " tolls except under the provisions of subsection 4.

Nowhere in the Act is authority given to " other companies " to file tariffs in substitution for those filed to meet " the statutory rates," and nowhere in the Act is authority given to the Board to approve any other tariffs.

The language of section 9 is only appropriate and can only be applied in the case of reimbursement under the original substituted tariffs.

To illustrate this: The rate before the Act came into force for a certain commodity was $1. A tariff is filed under section 9 reducing the toll to 80 cents. The Board certifies $1 as the normal toll, and the difference between the normal

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toll, $1, and the tariff toll, 80 cents, is the amount the carrier is entitled to receive from the Government. Later on, owing to competition, it becomes necessary for the company to reduce the toll to 60 cents. The company files a new tariff purporting to be under the *Maritime Freight Rates Act* and claims reimbursement. If entitled to reimbursement, how is the amount of such reimbursement to be ascertained?

Section 9 (3) says: "The Board on approving any tariff under this section shall certify the normal tolls which but for this Act would have been effective."

Now the normal toll in this case has not been changed. It still remains $1. The Board, if it assumes to approve the tariff, must certify $1 as the normal toll, and under the terms of the Act the carrier would be entitled to receive the difference between the tariff toll, 60 cents, and the normal toll, $1, namely, 40 cents.

This, of course, leads to an absurdity, and the railways themselves do not make this claim. What they say is that they are still entitled to the 20 cents, and this no matter how many tariffs are filed nor how great the reduction in the tariff toll may be.

To give an actual case: There was a rate of 28 cents on apples on June 30, 1927. A new tariff was filed under the provisions of section 9 in which the toll was reduced by 20% to 22½ cents, making the reimbursement to the company 5½ cents. To meet competition the rate was reduced to 10 cents. The company claims that it is entitled to receive the same reimbursement from the Government, namely, 5½ cents.

The difficulty is that "the normal toll which but for this Act would have been effective" is still 28 cents. If the company is entitled to reimbursement at all, it must be for the difference between 28 cents, the normal toll, and 10 cents, the tariff toll under which the apples move.

How can it be said that 15½ cents, or any other figure lower than 28 cents is "the normal toll which but for this Act would have been effective"? The railway was confronted with competition by other transportation agencies which compelled the establishment of a ten-cent rate, and, Act or no Act, this is the competitive rate it had to establish to secure the traffic.

The actual words of section 9, together with the impossibility of making its language applicable for the purpose of reimbursement in the case of the filing of tariffs other than those authorized by section 9 (1), show clearly that it was only in respect of the original substituted tariffs "meeting the statutory rates" that reimbursement was intended.

With hesitation, in view of my great respect for the opinion of the majority of my brethren, who seem to hold the contrary view, I believe that Parliament intended to reimburse the Canadian National Railways and the other companies for the losses which the 20% reduction in the rates existing in 1927 would occasion. The Dominion at large was to pay in order to give lower statutory rates to the "select territory", i.e., the three maritime provinces and part of Eastern Quebec, so as to bring them back to the position enjoyed along the I.C.R. prior to 1912. This has been done and presumably the 1927 cut in rates was sufficient to achieve that object of the Act; further action under this special legislation is expressly limited in scope. The reimbursement was provided to recoup the railways for the reduction of their legitimate earnings but nowhere does this legislation add to the already existing power of the railways to grant voluntarily special competitive rates. No indemnity was ever necessary to reach that result; railways are not supposed to do of their own free will what is not economically profitable to themselves. The very fact that no compulsion was required before or since the passing of the 1927 Maritime Freight Rate legislation would, to my mind, indicate that Parliament could not think it necessary to provide for compensation to the railways for such voluntary reductions. The fact that a different and illegal practice has crept in is not a good reason to continue it after the Board decide that such an unwarranted drain on the public purse must be stopped and refuse to lend themselves any further to a wrong application of the Act.

My answers to the questions would be as follows:

1. (*a*) After the Board of Railway Commissioners have approved the cancellation of the existing freight rates and approved the substituted tariffs and tolls, they may adjust or vary such substituted tolls or rates from time to time as new industrial or traffic conditions arise; they may also

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allow the increase or reduction of such tolls and tariffs from time to time to meet increases or reductions, as the case may be, in the cost of operations of the railways; but they are not called upon to approve these special competitive rates, which could, before and since the passing of the special Act, be filed without leave and freely by the railway companies under the general provisions of the *Railway Act.*

(*b*) Answering 1 (*b*). My answer is in the negative.

As a consequence, my answer to paragraph (*c*) of the first question is in the negative.

My answer to Question 2 is that, in my opinion, the Board's ruling of the 23rd September, 1932, is correct.

My answer to Question 3 is in the affirmative.

In answer to Question 4, I say:

Competitive tariffs filed by other companies are lawful tariffs until disallowed, under the express terms of sections 331 and 332 of the *Railway Act;* and to reach this conclusion, it is not necessary to have regard to the general scope and terms of the *Maritime Freight Rates Act* or to subsection (3) of section 3 thereof.

The sub-questions of Question 1 answered in the affirmative; Question 2 answered in the negative; Questions 3 and 4 answered in the affirmative.

BLAIS *v.* PARADIS

1933

*May 15, 16.

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

Contract—Alterations to store—Building materials—Work for a fixed price or by the day—Oral evidence.

APPEAL by the defendant from the decision of the Court of King's Bench, appeal side, province of Quebec (1), dismissing the defendant's appeal from the judgment of the Superior Court, Gelly J., in favour of the plaintiff.

The plaintiff's action was for $3,719.98, being a balance claimed for building materials furnished and work alleged to have been done by the day in fulfilment of a

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Cannon JJ.

(1) (1932) Q.R. 54 K.B. 495.

contract for alterations to a store. The appellant Blais admitted he owed $3,208.71, of which $2,000 were paid during the course of the work and alleged he offered $1,208.71 before the action, as the balance due; he contended that these sums were due in virtue of a contract for a fixed price of $2,241, with certain extra work done during the execution of the contract, but that for each item of this extra work, prices were agreed and accepted by the parties. The Superior Court held and maintained the action for the total amount, less 5 per cent for negligence and default in supervising the work, which judgment was affirmed by the appellate court.

On the appeal to this Court, after hearing argument of counsel, oral judgment was delivered dismissing the appeal with costs.

Appeal dismissed with costs.

Gérard Lacroix for the appellant.

Roger Létourneau for the respondent.

THE NEW REGINA TRADING COMPANY LIMITED (PLAINTIFF)..... } APPELLANT;

AND

THE CANADIAN CREDIT MEN'S TRUST ASSOCIATION, LIMITED, THE TRUSTEE OF THE PROPERTY OF REGINA TRADING COMPANY LIMITED, AUTHORIZED ASSIGNOR, AND THE CANADIAN CREDIT MEN'S TRUST ASSOCIATION, LIMITED (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Appeal—Jurisdiction—Bankruptcy—Leave, under Bankruptcy Act (R.S.C., 1927, c. 11), s. 24, to commence action in King's Bench Court, Sask.—Appeal from Court of Appeal to Supreme Court of Canada, without special leave obtained under Bankruptcy Act, s. 174.

The plaintiff's tenant made an assignment under the *Bankruptcy Act*, R.S.C., 1927, c. 11, and defendant was appointed trustee. Plaintiff claimed the amount of three months' rent ($5,250) under s. 126 of said Act and ss. 41 to 48 of the *Landlord and Tenant Act*, R.S.S., 1930,

*PRESENT:—Duff, C.J. and Rinfret, Lamont, Smith and Cannon JJ.

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c. 199, and obtained leave, under s. 24 of the *Bankruptcy Act*, to commence an action in the King's Bench Court, Sask. Plaintiff recovered judgment at trial, which was reversed by the Court of Appeal, which dismissed its action. Plaintiff appealed to the Supreme Court of Canada. Defendant moved to quash the appeal for want of jurisdiction, on the ground that the judgment appealed from was in a proceeding under the *Bankruptcy Act* and no special leave to appeal had been obtained under s. 174 thereof.

Held: The motion to quash should be dismissed; said s. 174 had no application, the action not falling within the description therein, "proceedings under this Act."

MOTION to quash the appeal for want of jurisdiction.

The appeal was by the plaintiff from the judgment of the Court of Appeal for Saskatchewan (1).

The plaintiff's tenant made an assignment under the *Bankruptcy Act*, R.S.C., 1927, c. 11, and the defendant was appointed trustee. Leave was given by Macdonald J., in Chambers, under the provisions of s. 24 of the *Bankruptcy Act*, to commence action against the defendant. The plaintiff claimed the sum of $5,250, being the amount equivalent to three months' rent of the premises, and interest thereon, the claim being made under the provisions of s. 126 of the *Bankruptcy Act* and ss. 41 to 48, inclusive, of the *Landlord and Tenant Act*, R.S.S., 1930, c. 199. There was also an alternative claim for the said sum against the defendant personally, because of its failure to give effect to the alleged preferential claim of the plaintiff upon the assets of the trust estate, and a claim (not in issue in the present appeal) for damages alleged to have been suffered by reason of wrongful acts of defendant in subletting the premises.

The trial judge, Taylor J. (2), awarded the plaintiff the sum of $5,250 for three months' rent, out of the tenant's assets, in the hands of the defendant, in priority to the claims of all other creditors. He dismissed the plaintiff's other claims in the action. The defendant, as trustee, appealed, and the Court of Appeal (1) allowed its appeal, set aside the judgment below, and dismissed the plaintiff-tiff's action (dismissing also the plaintiff's cross-appeal in respect of its other claims).

(1) [1933] 1 W.W.R. 492; 14 C.B.R. 275.

(2) [1932] 2 W.W.R. 692; 14 C.B.R. 95.

The plaintiff appealed to the Supreme Court of Canada.

The plaintiff applied before Martin J.A., under s. 70 of the *Supreme Court Act,* R.S.C., 1927, c. 35, for the approval of a bond as security for the effectual prosecution of an appeal to the Supreme Court of Canada and for the payment of such costs, etc., as might be allowed against it. On that application the defendant's counsel objected to the approval of the bond, contending that the action was a "proceeding" in bankruptcy, and that, under the provisions of s. 174 of the *Bankruptcy Act,* no appeal lay from the Court of Appeal to the Supreme Court of Canada, unless special leave to appeal had been obtained from a judge of the Supreme Court. Martin J.A. (1) held that such contention was not well founded; that the action was an ordinary action, commenced in the Court of King's Bench, and the fact, that leave was obtained from the judge in bankruptcy to commence the action, under the provisions of s. 24 of the *Bankruptcy Act,* did not make the action, which was commenced pursuant to the leave, a "proceeding" in bankruptcy; that when leave is given to commence the action, it is brought in the appropriate court, and proceeds in that court, subject to the procedure therein and to any right of appeal which exists in that court or with respect to decisions rendered in that court; that the right of appeal in this action existed, not by reason of the *Bankruptcy Act,* but by virtue of the provisions of the *Supreme Court Act,* and the appeal was an exercise of the ordinary right of appeal which is given by the *Supreme Court Act* from a final judgment of the court of last resort in the province (*Supreme Court Act,* R.S.C., 1927, c. 35, s. 36). He approved of the bond as security.

The defendant (respondent in this Court) now moved to quash the appeal for want of jurisdiction, on the ground taken by defendant before Martin J.A. on the said application for approval of bond.

G. F. Henderson K.C. for the motion.

O. M. Biggar K.C. contra.

(1) [1933] 2 W.W.R. 154; 14 C.B.R. 377.

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The judgment of the court was delivered by

DUFF C.J.—We think this application should be dismissed.

We agree entirely with the view expressed by Mr. Justice Martin in the court below (1) that the action does not fall within the description "proceedings under this Act" in section 174 of the *Bankruptcy Act* and, consequently, the provisions of that section have no application.

The application is dismissed with costs.

Application dismissed with costs.

Solicitors for the appellant: *Barr, Stewart & Cumming.*

Solicitors for the respondent: *Mackenzie, Thom, Bastedo & Jackson.*

1932
*Oct. 24.

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*May 8.

MONTREAL TRAMWAYS COMPANY (DEFENDANT) ..... APPELLANT;

AND

PAUL LÉVEILLÉ (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Tramway—Pregnant mother—Fall from car—Company's fault admitted—Infant born with club feet—Right of infant to sue for damages after birth—Jury trial—Evidence—Reasonable inference—Whether deformity of the child's feet resulted from accident to mother.

The respondent's wife, being seven months pregnant, was descending from a tram car belonging to the appellant company when, by reason of the negligence of the motorman, she fell, or was thrown, from the car and was injured. Two months later she gave birth to a female child who was born with club feet. The respondent, as tutor to his child, brought an action against the appellant company, claiming that the deformity of the child was the direct consequence of the negligence of the appellant company by which the mother was injured. The action was tried with a jury who found in favour of the respondent and judgment for $5,500 was rendered accordingly, which was affirmed by a majority of the appellate court.

Held, Smith J. dissenting, that the judgment appealed from should be affirmed and the appeal dismissed.

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*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

(1) [1933] 2 W.W.R. 154; 14 C.B.R. 377.

Held, also, Smith J. dissenting, that there was sufficient evidence adduced at the trial to produce in the jury's minds a conviction that it was reasonably probable that the deformity of the child resulted as a consequence of the mother's injury, and, consequently, their verdict should not be disturbed. The fact that the appellant's fault caused the deformity of the child cannot, from the nature of things, be established by direct evidence. It may, however, be established by a presumption or inference drawn from facts proved to the satisfaction of the jury. These facts must be consistent one with the other and must furnish data from which the presumption can be reasonably drawn. It is not sufficient that the evidence affords material for a conjecture that the child's deformity may have been due to the consequences of the mother's accident. It must go further and be sufficient to justify a reasonable man in concluding, not as a mere guess or conjecture, but as a deduction from the evidence, that there is a reasonable probability that the deformity was due to such accident.

Per Smith J. (dissenting).—The evidence of the medical experts called on behalf of the respondent establishes that medical science has not yet discovered the cause of club feet and such evidence has merely put forward more or less plausible theories on that subject. Therefore, having regard to the scientific problem involved, there was no evidence sufficiently positive and definite upon which the jury could reasonably find as a fact that the child's club feet resulted from the injury to the mother.

Held, further, Smith J. dissenting, that under the civil law, a child, who suffers injury while in its mother's womb as the result of a wrongful act or default of another has the right after birth to maintain an action for damages for the injury received by it in its pre-natal state.

Per Rinfret, Lamont and Crocket JJ.—The answer to the appellant's contention that an unborn child being merely a part of its mother had no separate existence and, therefore, could not maintain an action under article 1053 C.C., is that, although the child was not actually born at the time the appellant by its fault created the conditions which brought about the deformity to its feet, yet, under the civil law, it is deemed to be so if for its advantage. Therefore when it was subsequently born alive and viable it was clothed with all the rights of action which it would have had if actually in existence at the date of the accident. The wrongful act of the appellant produced its damage on the birth of the child and the right of action was then complete.

Per Cannon J.—The action in damages, and consequently the possibility of exercising it, has its existence from the date the injured person has suffered prejudice. In this case, the right of the infant child to claim damages was not entire before its birth. The child, while in its mother's womb, was not suffering any prejudice nor inconvenience and no complete right of action then existed. Right to damages was born at the same time as the child when the deformity was revealed and therefore the respondent's action was well founded in law.

Per Rinfret, Lamont, Smith and Crocket JJ.—The great weight of judicial opinion in the common law courts denies the right of a child when born to maintain an action for pre-natal injuries; *per* Rinfret,

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Lamont and Crocket JJ., although it has been held that the doctrine, which regards an unborn child as born if for its benefit, had been adopted in England by the Ecclesiastical and Admiralty courts, and to some extent by the Court of Chancery.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Duclos J., sitting with a jury, and maintaining the respondent's action in damages.

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

Arthur Vallée K.C. for the appellant.

H. N. Chauvin K.C. and *J. Hélal* for the respondent.

The judgments of Rinfret, Lamont and Crocket JJ. were delivered by

LAMONT J.—On March 25, 1929, the respondent's wife, then seven months pregnant, was descending from a tram car belonging to the appellant (hereinafter called the Company) when, by reason of the negligence of the Company's motorman, she fell, or was thrown from the car to the street and was injured. Two months later she gave birth to a female child—now called Jeannine—who was born with club feet. The respondent had himself appointed tutor to the child and brought this action ès-qualité against the Company, claiming that the deformity of the child was the direct consequence of the negligence of the Company by which its mother was injured. The action was tried with a jury who found for the respondent and awarded damages in the sum of $5,500, for which amount judgment was entered. This judgment was affirmed by the Court of King's Bench (appeal side), Dorion and Hall JJ. dissenting. From the judgment of the Court of King's Bench the Company appeals to this court.

The appeal presents three questions for determination:

1. Has a child, who suffers injury while in its mother's womb as the result of a wrongful act or default of another, the right after birth to maintain an action for damages for the injury received by it in its pre-natal state?

2. Was there evidence on which the jury could reasonably find that the deformity of the child's feet was the result of the accident to its mother?

3. Was the charge of the trial judge to the jury sufficient in law?

These questions fall to be determined by the civil law of the province of Quebec. The action is brought under article 1053 of the civil code, which reads:—

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

For the Company it was contended that the first question should be answered in the negative, because—

1. A child *en ventre sa mère* is not an existing person—*in rerum naturâ*—but only a part of its mother and, therefore, does not come within the meaning of the term "another" in article 1053 C.C., and

2. The Company's liability was founded in contract, express or implied, and there had been no contract with the child.

In support of its contention the Company cited the case of *Walker* v. *G.T.N. Rly. Co. of Ireland* (1). In that case the plaintiff's mother, while a passenger on the defendant's railway, was injured by the defendant's negligence, and the plaintiff, who was then *en ventre,* was subsequently born deformed. After the child was born it brought an action for damages for the deformity which it alleged was caused by the company's negligence. On demurrer, the court, which consisted of four judges, held that the child could not maintain the action. The decision was based largely on the ground that the company had only contracted to carry the mother to whom alone it owed a duty not to be negligent. The broader ground, namely, the legal right of an unborn child to personal security, was discussed at some length, but the views of the judges on that point were against the recognition of the right; the Chief Justice, however, expressly stated that he would leave the question open, and based his judgment on the single ground that there were no facts set out in the statement of claim which fixed the defendants with liability for breach of duty as carriers of passengers.

During the argument in that case it was pointed out that under English law a conceived but unborn child, for the purposes of succession to property on an intestacy and for

(1) (1891) 28 L.R. (Ir.) 69.

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many purposes in connection with wills and their construction, was deemed to be born at a particular time if it was for the child's benefit that it be so held, and that in *The George and Richard* (1), it was held that a child *en ventre sa mère* at the date of its father's death was capable, when born, of maintaining an action under Lord Campbell's Act. Reference was also made to the language of Mr. Justice Buller in *Thellusson* v. *Woodford* (2), who, when replying to an allegation that a child *en ventre sa mère* was a non-entity, at page 322, said:—

> Let us see what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.

The court, however, took the view that the doctrine which regards an unborn child as born, if for its benefit, was a fiction of the civil law which had been adopted in England by the Ecclesiastical and Admiralty courts, and to some extent by the Court of Chancery; but that the common law courts had never recognized the fiction as applying so as to permit a child to obtain damages for pre-natal injuries.

That pre-natal injury affords no foundation for an action for damages on the part of a child was held in the following American cases: *Allaire* v. *St. Luke's Hospital* (3); *Gorman* v. *Budlong* (4); *Nugent* v. *Brooklyn Heights Rly. Co.* (5); *Drobner* v. *Peters* (6); *Stanford* v. *St. Louis-San Francisco Rly.* (7). The only case to the contrary cited to us was *Kine* v. *Zukerman* (8). These were all cases under the common law and it must be admitted that the great weight of judicial opinion in the common law courts denies the right of a child when born to maintain an action for pre-natal injuries.

The rights of an unborn child under the civil law are based on two passages found in the Digest of Justinian, lib. 1, tit. 5, ss. 7 and 26, as follows:—

(1) (1871) L.R. 3 Adm. 466.
(2) (1798) 4 Ves. 227, at 335.
(3) (1898) 76 Ill. App. 441, affirmed 184 Ill. App. 359.
(4) (1901) 49 Atl. 704.
(5) (1913) 154 App. Div. (N.Y.), 667.
(6) (1921) 232 N.Y., 220.
(7) (1926) 108 S.O. 566.
(8) 4 Pa. Dist. & Co. Reports, 227.

7. Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partas quaeritur.

(An unborn child is taken care of just as much as if it were in existence in any case in which the child's own advantage comes in question.)

26. Qui in utero sunt in toto paene jure civili intelliguntur in rerum naturâ esse.

(Unborn children are in almost every branch of the civil law regarded as already existing.)

The Civil Code of Quebec makes provision for the appointment of a curator to the person or to the property of children conceived but not yet born. Arts. 337 and 338 C.C.

Art. 345 reads as follows:—

The curator to a child conceived but not yet born, is bound to act for such child whenever its interests require it; he has until its birth the administration of the property which is to belong to it, and afterwards he is bound to render an account of such administration.

This article practically embodies the Roman Law rule first above quoted.

Art. 608 C.C. reads as follows:—

608. In order to inherit it is necessary to be civilly in existence at the moment when the succession devolves; thus, the following are incapable of inheriting:—

1. Persons who are not yet conceived;

2. Infants who are not viable when born;

Under this article the right to inherit is made to depend upon civil existence. A conceived but unborn child, therefore, is deemed to have civil existence if subsequently born viable.

Articles 771 and 838 C.C. deal with gifts *inter vivos* and by will. The former article reads:—

771. The capacity to give or to receive *inter vivos* is to be considered relatively to the time of the gift. It must exist at each period, with the donor and with the donee, when the gift and the acceptance are effected by different acts.

It suffices that the donee be conceived at the time of the gift or when it takes effect in his favour, provided he be afterwards born viable.

Article 838 C.C. contains a similar provision in respect of a conceived but unborn child taking a benefit under a will.

It was contended by the Company that as the civil code by express provision had declared that the conceived but unborn child should possess the rights and capacities of a born child in respect of the matters mentioned in articles 608, 771 and 838 C.C., it limited by implication the cases in which a child *en ventre* would be deemed to be born to those expressly mentioned. On the other hand the respondent contended that the matters referred to in these articles,

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though specially dealt with in the civil code, are merely illustrative instances of the rule that an unborn child shall be deemed to be born whenever its interests require it, but that they in no way limit the meaning of article 345 C.C., which is general in its terms.

The Code Napoléon of France contains articles similar to articles 608 and 771 of the Quebec civil code. The French authorities may, therefore, be helpful in determining whether or not, under the civil law, the rule is of general application.

In Baudry-Lacantinerie et Houques-Fourcadé's *Droit Civil Français,* 3rd ed., tome 1, at page 270, the learned authors say:—

289. L'homme constitue une personne dès le moment même de sa naissance. Jusque-là il n'est pas une personne distincte, il n'est encore que *pars viscerum matris.* Pourtant, en droit romain, on considérait, par une fiction de droit, l'enfant simplement conçu comme déjà né, lorsque son intérêt l'exigeait. Ce principe, admis aussi dans notre ancien droit, a été en ces termes: *infans conceptus pro nato habetur, quoties de commodis ejus agitur.* Le code civil en consacre lui-même plusieurs applications, qui prouvent qu'il a été maintenu dans toute sa généralité.

In Aubry et Rau, Droit Civil Français, 4th ed., tome 1, par. 53, page 262, the author says:—

Dans le sein de sa mère, l'enfant n'a point encore d'existence qui lui soit propre, ni par conséquent, à vrai dire, de personnalité. Mais, par une fiction des lois civiles, il est considéré comme étant déjà né, en tant du moins que son intérêt l'exige. En vertu de cette fiction, l'enfant simplement conçu jouit d'une capacité juridique provisoire, subordonnée, quant à ses effets définitifs, à sa naissance en vie et avec viabilité.

And in Mignault's *Droit Civil Canadien,* we find the following:—

Une vieille maxime dit que l'enfant conçu est déjà réputé né toutes les fois qu'il s'agit de ses intérêts.

Then, after referring to the nomination of the curator under article 345 C.C., the learned author continues:—

Il n'est pas nécessaire de citer les cas qui nécessitent cette nomination. Elle se fait *dans tous les cas* où l'intérêt de l'enfant l'exige.

In determining the generality of the application of the fiction reference may also be made to the opinions expressed by certain English judges familiar with that law.

In *Burnet* v. *Mann* (1), Lord Chancellor Hardwicke said:—

The general rule is that they (unborn children) are considered *in esse* for their benefit not for their prejudice.

(1) (1748) 1 Ves. Sen. 156.

and in *Wallis* v. *Hudson* (1), the same judge, at page 116, stated that a child *en ventre sa mère* " was a person *in rerum naturâ.*" Then, after referring to the Statute of Distributions which he said was to be construed by the civil law, he proceeded as follows:—

> As to the civil law, nothing is more clear, than that this law considered a child in the mother's womb absolutely born, to all intents and purposes, for the child's benefit.

This statement as to the civil law was referred to with approval by Lord Atkinson in *Villar* v. *Gilby* (2). See also *Schofield* v. *Orrel Colber* (3).

In *Doe* v. *Clark* (4), Butler J. used this language:—

> It seems indeed now settled that an infant *en ventre sa mère* shall be considered, generally speaking, as born for all purposes for its own benefit.

In many of the English cases in which effect was given to the rule of the civil law it was applied simply as a rule of construction by which the term " child " or " children " was held to include a child *en ventre sa mère.* But in *Doe* v. *Lancashire* (5), the question was not one of construction but of the revocation of a will by the birth of a child, and Gross J., at page 63, said:—

> I know of no argument, founded on law and natural justice, in favour of the child who is born during his father's life, that does not equally extend to a posthumous child.

These learned judges undoubtedly considered the fiction to be of general application.

To the Company's contention that an unborn child being merely a part of its mother had no separate existence and, therefore, could not maintain an action under article 1053 C.C., the answer, in my opinion, is that, although the child was not actually born at the time the Company by its fault created the conditions which brought about the deformity of its feet, yet, under the civil law, it is deemed to be so if for its advantage. Therefore when it was subsequently born alive and viable it was clothed with all the rights of action which it would have had if actually in existence at the date of the accident. The wrongful act of the Company produced its damage on the birth of the child and the right of action was then complete. The separate existence of an unborn child is recognized even at common law,

(1) (1740) 2 Atk. 115.
(2) (1907) A.C. 139.
(3) [1909] 1 K.B. 177.
(4) (1795) 2 H. Bl., 399 at 401.
(5) (1792) 5 T.R. 49.

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for it is well established that if a person wrongfully causes injury to a child before its birth which results in death after it has been born alive, such person will be guilty of a criminal offence although the wrongful act was directed solely against the mother. *Rex* v. *Senior* (1); Russell on Crimes, 8th ed., vol. 1, page 622. It was, however, urged that there is no true analogy between crime and tort, as the punishment of crime is for the public benefit, while the remedy in tort is for private redress. While in some cases there may be no analigy yet there are, in my opinion, many cases in which crime and tort are merely different aspects of the same set of facts and in which there is so close an analogy that something more than the bare denial of it is necessary to carry conviction. The wrongful act which constitutes the crime may constitute also a tort, and, if the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it is difficult to see why it should not also recognize its separate existence for the purpose of redressing the tort.

If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.

The argument that the Company's liability is founded in contract cannot, in my opinion, be maintained. This is not the case of a person not a party to the contract suing for a breach of it. The respondent does not seek to recover from the Company on the ground that it failed to perform its contract with the mother, but on the ground that it committed an independent tort against the child. The

(1) (1832) 1 Moody's C.C. 346.

fault which constitutes a wrong to the child may also constitute a breach by the Company of its contract with the mother, but, under article 1053 C.C. the existence or non-existence of the mother's contract is entirely irrelevant in tort.

There were two other matters to which our attention was called; the first was that cases similar to the present one must have arisen many times in the past, but that no decided case (or at most only one) has been found in which the child's right of action for pre-natal injuries has been maintained. The paucity of decided cases is far from conclusive, and may be largely accounted for by the inevitable difficulty or impossibility of establishing the existence of a causal relation between the fault complained of and the injury to the child. With the advance in medical science, however, that which may have been an insuperable difficulty in the past may now be found susceptible of legal proof.

The other matter to which we were asked to give serious consideration was the practical inconvenience and possible injustice to which the Company might be exposed if it were held that this right of action could be maintained. It was urged that to so hold would open wide the door to extravagance of testimony and lead, in all probability, to perjury and fraud. I am not apprehensive on this point for, although in certain cases special care will be required on the part of the judge in instructing the jury, I feel quite confident that the rules of evidence are adequate to require satisfactory proof of responsibility and that the determination of the relation of cause and effect will not involve the court in any greater difficulty than now exists in many of our cases.

For these reasons I am of opinion that the fiction of the civil law must be held to be of general application. The child will, therefore, be deemed to have been born at the time of the accident to the mother. Being an existing person in the eyes of the law it comes within the meaning of "another" in article 1053 C.C. and is, therefore, entitled through its tutor to maintain the action.

Support for this view is, I think, furnished by the fact that none of the judges below cast any doubt upon the right of the respondent to sue. The point, it is true, does

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not appear to have been raised in either court but I cannot think a point so important and outstanding would have been passed without comment had not the judges below been satisfied as to the existence of the right.

The next question is, whether there was evidence on which the jury could reasonably find the existence of a causal relation between the accident to the mother and the deformity of the child's feet.

The general principle in accordance with which in cases like the present the sufficiency of the evidence is to be determined was stated by Lord Chancellor Loreburn in *Richard Evans & Co., Limited* v. *Astley* (1), as follows:—

> It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise but courts, like individuals, habitually act upon a balance of probabilities.

There was undoubtedly evidence to go to the jury that the mother's accident was caused by the fault of the Company, and the jury's finding on that point cannot be disturbed. That such fault caused the deformity of the child cannot, from the nature of things, be established by direct evidence. It may, however, be established by a presumption or inference drawn from facts proved to the satisfaction of the jury. These facts must be consistent one with the other and must furnish data from which the presumption can be reasonably drawn. It is not sufficient that the evidence affords material for a conjecture that the child's deformity may have been due to the consequences of the mother's accident. It must go further and be sufficient to justify a reasonable man in concluding, not as a mere guess or conjecture, but as a deduction from the evidence, that there is a reasonable probability that the deformity was due to such accident.

The distinction, I think, is well brought out by a comparison between two cases of the province of Quebec: *Boilard* v. *Cité de Montréal* (2), and *Montreal Tramways Company* v. *Mulhern* (3).

(1) [1911] A.C. 678. (2) (1914) 21 R.L.n.s. 58.
(3) (1917) Q.R. 26 K.B. 456.

In the *Boilard* case (1), the young child of the plaintiff had been compulsorily vaccinated in compliance with a city by-law. Shortly after the vaccination, the child's arm became paralysed and permanently useless. Contending that the condition of the arm had been brought about as a result of the vaccination, the plaintiff, as tutrix, sued the city in damages on behalf of the child. At the trial, three different theories were advanced by the medical experts. One was that it was a clear case of infantile paralysis in no possible way to be attributed to the vaccination. Another theory ascribed the cause either to infected vaccine or to infantile paralysis. The third theory was that the use of infected vaccine was the sole possible explanation of the condition of the arm. There was, however, no positive evidence of the fact that the vaccine was actually infected. The jury held the city responsible on the ground that the vaccine used was infected. The Court of King's Bench set aside the verdict. Sir Horace Archambault, then Chief Justice of the province of Quebec, delivering the judgment of the court, said:—

Une chose est claire, au milieu de cette obscurité, c'est qu'il s'agit ici d'une question d'opinion, et non d'une question de fait constant, positif. Aucun témoin n'est venu jurer positivement que le vaccin était infecté. Tout ce que certains d'entre eux ont pu dire, c'est que le résultat produit tendrait à établir, ou ferait présumer, que le vaccin était infecté. Les jurés n'ont donc pu que décider entre les diverses opinions émises, et émettre eux-mêmes une opinion. Ce n'est pas là la décision d'un fait; et les jurés n'ont pas d'autre juridiction que de décider les questions de fait.

* * *

Sans doute, il faut s'en rapporter à l'opinion de médecins, d'experts, pour connaître les effets, les conséquences d'un accident. Ainsi, une maladie nerveuse se déclare à la suite d'un accident; les médecins seront admis à prouver que cette maladie a été produite par l'accident. De même, on entendra des médecins pour savoir si la maladie est permanante ou temporaire. Mais, dans ces cas, l'accident lui-même doit d'abord être prouvé, ainsi que la faute de la partie que l'on veut tenir responsable des dommages qui ont résulté de l'accident. En d'autre termes, le fait générateur de la responsabilité doit être établi par témoins, qui en attestent l'existence. Les conséquences de ce fait peuvent ensuite être établies par des experts.

In the *Mulhern* case (2), the question was whether the respondent had established that the death of her husband was due to the bodily injuries sustained by him in a collision several months previous to his death and which, at first, did not appear to be serious. The autopsy had shewn that the death was due to " thrombosis of the coronary

(1) (1914) 21 R.L.n.s. 58. (2) (1917) Q.R. 26 K.B. 456.

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artery." The question was whether the thrombosis had been caused by the accident. Three doctors testified that, in their opinion, the accident had either caused or aggravated the condition of the deceased. Other doctors, while admitting that possibility, said that it was not the cause in the particular circumstances. Yet another one declared that it was a scientific impossibility for the thrombosis to have been the result of the accident. The jury found in favour of the plaintiff. The case came before the Court of King's Bench, in Quebec, which included four of the five judges who had sat in the *Boilard* case (1). The court held that the finding of the jury should not be interfered with. It distinguished *Boilard* v. *City of Montreal* (1), as appears by the head-note:—

In a jury trial where damages are claimed for (an accident), a verdict cannot be founded only on medical controverted opinions, but the case is different where the medical evidence is supported by a proof of non contested facts. The jurors may then render their verdict by appreciating the facts and opinion of medical men, which they have before them.

An affirmative verdict can be rendered upon facts and probabilities only if they establish presumptions; and if these presumptions are strong enough to bring about a reasonable conviction in the mind of a jury, the Court should not interfere.

Mr. Justice Carroll delivered the judgment of the court, and, referring to the *Boilard* case (1) (page 459) (2), he said:

Dans cette dernière cause, il s'agissait d'un enfant qui avait été vacciné et qui, à la suite de l'opération, avait perdu l'usage du bras vacciné. Le jury avait déclaré que le vaccin était infecté, mais cette réponse ne résultait pas des faits prouvés, elle résultait seulement d'opinions théoriques controversées entre les médecins entendus comme témoins.

Ici (meaning in the *Mulhern* case), nous avons bien des théories contradictoires, mais nous avons aussi des faits non contestés. Le défunt, avant cet accident, jouissait d'une bonne santé et n'avait manifesté aucun symptôme de la maladie dont il est mort. Il s'est plaint immédiatement après l'accident de douleurs dans la région du coeur. Les témoins que l'ont connu nous disent qu'il n'était plus le même homme d'affaires averti, consciencieux et travailleur, l'accident en a fait une ruine physique.

Les jurés pouvaient-ils, eu égard à ces faits prouvés devant eux, conclure que l'accident avait ou déterminé ou accéléré la mort? Sans doute que l'autopsie a révélé des lésions au coeur, plus anciennes que celles qu'auraient causées l'accident, mais si l'accident a fait évoluer plus rapidement la maladie et abrégé la vie de Holman, la compagnie est responsable.

Les faits qui ont été établis devant les jurés produisent des probabilités, et cette cause ne peut être décidé que sur des présomptions basées sur ces probabilités. Si les présomptions ainsi créées sont assez fortes pour produire une conviction raisonnable chez douze jurés, est-ce qu'une cour doit intervenir? Je ne le crois pas.

(1) (1914) 21 R.L.n.s. 58. (2) (1917) Q.R. 26 K.B. 456.

The judgment was affirmed by this court (1).

In *Jones* v. *G.W. Rly. Co.* (2), the House of Lords had to consider whether there was evidence on which a jury could properly find negligence on the part of the defendant's servants which caused or contributed to the death of the husband of the first plaintiff. In stating the principles which should govern in such a case, Lord MacMillan, at page 45, said:

> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogeny of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved.

An instance of a case where this court "bridged the hiatus" is that of *Shawinigan Engineering Co.* v. *Naud* (3). It is sufficient to refer to the judgment of the court (Duff, Mignault, Newcombe, Rinfret and Smith JJ.), more particularly to the passage from the foot of page 344 to the end of page 345, to realize how strikingly similar the problem of the relation of cause and effect happened to be both in that case and in the present case.

By article 1242 C.C. presumptions not established by law are left to the discretion and judgment of the court. The corresponding article in the Code Napoléon (art. 1353) is to the same effect but with the limitation that the court will admit only such presumptions as are "*graves, précises et concordantes,*" by which is meant presumptions in which the connection between the facts established in evidence and the fact to be proved is such that the existence of the known facts establishes by inference or deduction the fact in dispute.

Article 1242 of the Quebec Civil Code does not contain the limitation of the Code Napoléon but as a presumption to be admitted as legal proof is necessarily a deduction from proven facts, there is, perhaps, but little if any differ-

(1) (1917) 55 Can. S.C.R. 621. (2) (1930) 47 T.L.R. 39.
(3) [1929] Can. S.C.R. 341.

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ence between the meaning to be ascribed to the two articles. See the *Montreal Rolling Mills* v. *Corcoran* (1).

In the present case there was evidence from which the jury could find that the mother fell on her stomach and that the fall produced ecchymosis on the right side thereof; that, after the accident, she suffered abnormal pains in her abdomen which continued until after her confinement, and for the first time she had a leakage of fluid from the uterus which, though slight and intermittent, continued until the birth of the child. These leakages Dr. Benoit, the family physician, explained as coming from the amniotic fluid. The doctor's view was that the three membranes of the sac had been slightly fissured, sufficiently to permit the fluid to slowly filter through, but not sufficiently to bring about a premature confinement.

The jury had also before them the further testimony of Dr. Benoit, who was present at the confinement, and who stated that in delivering the mother he had to break the sac—that the water therein had partly escaped and "*l'accouchement a été presque à sec.*" He examined the child immediately after its birth and found that each foot was bent inwards. Witnesses also testified that the child was born with a black mark on its heel. There was also evidence that no members on either side of the family had ever had club feet; that Madame Léveillé's first child had been perfect in health and form; that her carriage of Jeanine had been normal and that up to the 25th of March, 1929, she had not suffered any accident or fright. This evidence was uncontradicted. It was, therefore, for the jury to determine, in the light of that evidence and the medical testimony, whether a causal relation existed between Madame Léveillé's fall and the child's club feet.

Nine medical witnesses were examined at the trial, three testifying for the respondent and six for the appellant.

For the respondent Dr. Langevin, a gynaecologist and obstetrician professor at the University of Montreal, testified that in its mother's womb the child's members were in a flexed position and their malformation would be promoted by the absence of liquid in the uterine cavity which would cause the walls thereof to contract and the flexing to increase. He further said that in the last months of

(1) (1896) 26 Can. S.C.R. 595.

pregnancy, particularly from the seventh to the ninth month, the calcification of a child's bones greatly increases; that during this period it requires twenty-two times more lime than during the first months, and that with the extra pressure caused by the contraction of the uterine cavity the chances of the bones calcifying in their flexed position become greater. He also said that when the pressure is found in the uterine cavity the probability is that a deformity will result. Dr. Langevin's conclusion was that while club feet may result from various causes, the only satisfactory explanation, in the circumstances of this case, was that the deformity resulted as a consequence of the mother's fall. In fact he said that scientifically there was no other explanation.

Dr. Letondal, professor of children's clinic of the faculty of medicine, and specialist in children's diseases, testified to the same effect as Dr. Langevin. He admitted that his conclusion was simply a theory incapable of scientific demonstration but he expressed the opinion that it was the most probable theory and there was no other that he could suggest.

Dr. Benoit also testified as follows:—

Q. Docteur, à quoi attribuez-vous cette condition de pieds bots dont l'enfant souffre aujourd-hui?—R. Enfin, d'après les auteurs,.....

Q. Docteur, dans le cas présent, qui nous occupe?—R. Dans le cas présent ici, je l'attribue par la pression utérine sur la position des membres, pression qui a duré deux mois, au cours desquels il y a calcification des membres et cette malformation a été causée par la position des membres qui a été exagérée et je crois que le pied bot qui est ni plus, ni moins qu'une exagération d'une position normale au moment où il y avait calcification. Et je pourrais dire que le pied a été calcifié dans cet état-là.

* * *

Q. Maintenant, voulez-vous me dire s'il y a relation entre l'état que vous avez constaté et l'infirmité que vous avez vu chez cet enfant?—R. Pour moi, c'est l'état de contractibilité des membranes de l'utérus, et c'est dû au traumatisme qu'elle a eu lors de sa chute.

On the other hand the medical witnesses called on behalf of the appellant stated that the cause of club feet in children is not known to the medical profession. They did not agree with the conclusion reached by the respondent's witnesses, some because they thought that if there had been a rupture of the uterine cavity sufficient to permit leakage from the amiotic sac it would have produced a premature confinement. Others thought the fall of the

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mother would not cause club feet in the child she was carrying at the time, and one added: that at seven months the feet of a child have become so ossified that a fall which would injure them would be likely to break the bones. The testimony given by these witnesses was largely of a negative character and they could not suggest any reasonable hypothesis to account for the deformity.

Does the evidence in this case take us beyond the region of pure conjecture and into the domain of reasonable inference? It was contended on behalf of the Company that, even if the accident to the mother was the result of the Company's fault, there was no evidence whatever to connect the deformity of the child's feet with the mother's accident; that it was just as reasonable to attribute the club feet to an unknown cause as to attribute it to the consequences of the mother's fall. I do not think this is so. Ascribing the club feet to an unknown cause does not eliminate uterine contraction as a probable cause. The Company's medical witnesses by saying that they do not know the cause of club feet do not negative the testimony of those who find uterine contraction a very probable cause. In this case the cause which produced club feet cannot be demonstrated to a certainty and the law does not require that it should be. It is simply a question of drawing an inference. Three medical witnesses for the respondent gave it as their opinion that the contraction caused by the escape of amiotic fluid was not only sufficient to account for the deformity in this case but that they could see no other probable cause. The jury were entitled to accept the conclusion of these witnesses and to infer from the whole evidence the existence of a causal relation.

The argument advanced on behalf of the Company in this case was advanced in the case of *Craig* v. *Glasgow Corporation* (1). In that case a farmer was found lying beside the track of a tramway company with his head so badly injured that he had no recollection of what had taken place. He remembered that he had been driving two cows along the track, but had no recollection of having seen the tram car. The questions were whether he had been struck by the car and, if so, could it reasonably be inferred that the accident was due to the negligence of the company's

(1) (1919) S.C. (H.L.) 1.

driver? The driver testified that he would have been proceeding more slowly if he had seen the man and the cows. He did not see the man at all, nor did he see the cows until he was within three feet of them. The Lord Ordinary found that the man had been knocked down by the car as a consequence of the driver's failure to keep a proper lookout. This judgment was reversed on appeal but was restored by the House of Lords. In his judgment in the House of Lords Lord Findley, at page 9, said:—

> It is of course within the bounds of possibility that the pursuer had a fit and fell and injured his head upon the rail. It is within the bounds of possibility, as was suggested as a hypothesis—not, I think, that it was put as a very likely hypothesis—that he was knocked down by one of these cows. But what is the reasonable inference? That is what we have to deal with.

The data furnished by the evidence which the jury accepted and from which they deduced a presumption of causal relation, were, in my opinion, more convincing in the case before us than those found in the following cases in which the inferences drawn by the jury were upheld. *McArthur* v. *Dominion Cartridge Company* (1); *Jones* v. *G.W. Rly. Co.* (2); *Grand Trunk Rly. Co.* v. *Griffith* (3).

I am, therefore, of opinion that the evidence here does take us beyond the realm of conjecture and into the domain of reasonable inference, in which case it was for the jury to say if the evidence produced in their minds a conviction that it was reasonably probable that the deformity of the child resulted as a consequence of its mother's injury. They, having said it was, their verdict should not be disturbed.

The only other question is as to the sufficiency of the charge of the trial judge. Several objections were taken to the charge but the only one requiring consideration is that the judge misdirected the jury in respect of the law applicable to presumptions. The chief objection was that he failed to instruct the jury that a presumption was admissible as legal proof only when it was "*grave, précise et concordante*" or "weighty and serious"; that instead he instructed them that they were entitled to accept presumptions that rendered only simply probable or likely the existence of a causal relation between the deformity of the child and the accident to the mother. As required in the

(1) [1909] A.C. 72. (2) (1930) 47 T.L.R. 39.
(3) (1911) 45 Can. S.C.R. 380.

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case of mixed juries the judge charged them in both the French and English languages. The following passages were referred to as embodying errors in law:

Quand on examine les faits dans cette cause, ceux qui rendent même simplement probable le résultat, c'est que l'accident rend probable que les pieds bots soit la conséquence de la chute.

It is left to your discretion to find out and decide whether from all the circumstances there is sufficient for you to presume to create in your minds a likely presumption that the injury was caused as a direct result of the accident.

In this case you could not have direct proof. You must go by inference or presumption. More often the contested point is not demonstrated, but is simply rendered possible, *vraisemblable* to a more or less degree.

In this latter passage I take it the learned judge having used the word "possible," immediately substituted therefor, the word "*vraisemblable,*" for he has not elsewhere instructed the jury that the mere possibility of a causal relation was sufficient.

In support of his instructions the trial judge quoted to the jury the following passages dealing with presumptions of fact from well known French authors.

Planiol—9th ed., no. 36:

la preuve proprement dite, directe et absolue n'existe presque jamais; le plus souvent il n'y a que des présomptions qui pourront non pas démontrer mais simplement rendre la chose probable à un degré plus ou moins fort.

Marcadé—vol. 5, art. 1353 C. N.:

Cette disposition de la loi est de la plus haute importance; elle est l'une de celles qu'il faut se graver profondément dans l'exprit, pour ne les jamais perdre de vue.

Sa portée est, en effet, immense puisqu'elle érige en preuves légales pour tous les cas où le témoignage est admissible, les simples conjectures du magistrat, les simples probabilités que les dépositions des témoins ou les diverses circonstances de la cause peuvent faire naître dans son esprit.

Does the law as stated by these authorities differ from that laid down in the above mentioned cases? In my opinion there is practically no difference for, under either the French or English jurisprudence, the presumptions or inferences to be receivable as proof must be a deduction from established facts which produces a reasonable conviction in the mind that the allegation of which proof is required is probably true. That conviction may vary in degree between "practical certainty" and "reasonable probability" or, as Planiol puts it, may render "la chose probable à un degré plus ou moins fort."

In the *Jones* case (1) Lord MacMillan points out that a conjecture is of no legal value " for its essence is that of a guess," while Marcadé would accept as proof " *les simples conjectures du magistrat.*" In my opinion these are not inconsistent views for as I read Marcadé he was not using the word " conjecture " in the sense of " guess."

In Littré—*Dictionnaire de la Langue Française,* the first meaning given for " conjecture " is " *opinion établie sur des probabilités* "; and in *Larousse pour tous,* the meaning given is: " *présomption, supposition, opinion fondée sur des probabilités.*" This appears to me to be the sense in which Marcadé used the word " conjecture." It, therefore, is simply a conviction founded on probabilities. For all practical purposes I see no reason why the principle stated by Lord MacMillan in the *Jones* case (1) is not just as applicable to Quebec law as to English law. The objection, therefore, that the trial judge misdirected the jury in the observations referred to cannot be maintained.

The question, however, is whether he instructed the jury sufficiently? In a case such as this it is, in my opinion, essential that the judge should instruct the jury that the presumption which they are entitled to admit as proof must not be a mere guess on their part, but must be a reasonable deduction from such facts as they shall find to be established by the evidence. The learned trial judge did not in so many words give the jury this instruction but I think, in effect, he conveyed it to their minds. He called their attention to the uncontradicted evidence of the respondent's witnesses—to the reasoning and conclusions drawn from that evidence by Dr. Langevin, and then he said:—

> Si vous croyez, si vous en venez à la conclusion que les faits dont les témoins ont parlé constituent dans votre esprit une présomption raisonnable, et si vous adoptez le témoignage de M. Langevin qui est le seul qui nous donne une opinion un peu formulée, si vous adoptez son opinion, vous répondrez à cette question: oui.

Dr. Langevin had stated the inferences which he drew and the reasons why he drew them. In leaving it to the jury to say if they drew the same inferences the trial judge was practically instructing them that the presumption to be admitted as proof must be a deduction and not a guess.

(1) (1930) 47 T.L.R. 39.

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After considering the charge as a whole I agree with the majority of the court below that there was nothing in the charge to mislead the jury.

I would dismiss the appeal with costs.

CANNON J.—Le demandeur, en sa qualité de tuteur à sa fille Jeannine, née le 25 mai 1929, réclame les dommages soufferts par cette enfant, venue au monde avec des pieds bots, et poursuit la défenderesse parce que la négligence d'un de ses préposés, en causant la chute, le 25 mars 1929, de la mère de l'enfant, alors enceinte de sept mois, serait la cause de cette infirmité dont l'enfant souffre préjudice depuis sa naissance. La faute de la compagnie a été affirmée par le jury et n'a pas été mise en doute devant nous.

Trois points seulement sont soulevés, dont le premier n'a pas été invoqué devant les autres juridictions:

1. L'on nie que cette enfant puisse recouvrer des dommages qu'elle aurait soufferts comme conséquence d'un accident causé à sa mère avant sa naissance et dont elle aurait, par ricochet, elle-même souffert;

2. Les présomptions sur lesquelles le jury s'est fondé pour établir la relation de causalité entre cet accident à la mère et l'infirmité de l'enfant ne sont pas suffisantes en droit pour justifier le verdict du jury;

3. La charge du juge n'a pas suffisamment éclairé le jury sur cette question de droit.

I.

Il est à remarquer que devant la Cour Supérieure et devant la Cour du Banc du Roi l'on n'a pas soulevé le point qui nous a été soumis quant à l'existence du droit d'action dans les circonstances révélées en détail dans les notes de mon collègue, l'honorable juge Lamont.

Après avoir examiné avec soin les raisons que l'on a fait valoir de part et d'autre, il me semble qu'il n'est pas nécessaire en l'espèce de discuter les droits de l'enfant dans le sein de sa mère, entre sa conception et sa naissance. L'action en responsabilité, et partant la possibilité de l'exercer devant la juridiction compétente, naît, en principe, du jour où la victime a subi le dommage; et une faute ne suffit pas pour agir. Le préjudice est l'un des trois éléments essentiels de la responsabilité. Sans lui, pas d'action en responsabilité possible. Quelle réparation pourrait réclamer

un demandeur s'il n'avait subi encore aucun dommage? Si, en principe, le demandeur ne peut agir dès l'instant où la faute a été commise mais seulement à l'instant où cette faute lui a causé un dommage, il me semble que le droit à réparation de Jeannine Léveillé n'a commencé à exister qu'après sa naissance, lorsque l'infirmité corporelle dont elle souffre s'est révélée. Avant cette date, aussi longtemps qu'elle était dans le sein de sa mère, il est évident qu'elle ne souffrait aucun dommage, aucun inconvénient et aucun préjudice. Aucune action en responsabilité n'était ouverte. Ce n'est que lorsque le préjudice certain a été souffert que ses droits ont été lésés, qu'elle est devenue une victime ayant des droits à réparation. C'est de ce moment, après sa naissance, que son droit a commencé. On peut dire que son droit est né en même temps qu'elle. Elle pouvait donc, assistée de son tuteur, intenter la présente action pour essayer de démontrer que le préjudice dont elle souffre a été causé antérieurement à sa naissance par la faute de la défenderesse et de son employé.

Il n'est pas nécessaire de discuter la maxime: *"Infans conceptus pro nato habetur quoties de commodis ejus agitur,"* ni l'application des articles 345, 608, 771, 838 et 945 du Code civil. Il ne s'agit pas d'un droit que l'enfant avait dès sa conception, mais d'un droit à réparation qui a commencé à sa naissance.

II

Le demandeur ès-qualité avait à établir en fait que la chute de la mère, deux mois avant la naissance de l'enfant, a causé l'infirmité de cette dernière, c'est-à-dire établir un lien de causalité entre la faute et le préjudice. Si le préjudice est la conséquence de l'acte illicite, l'auteur du quasi-délit doit réparer, même si cette conséquence était imprévisible au moment de la faute.

La Cour de cassation, en France, pose en principe que l'appréciation du rapport de causalité est une question de fait; mais nous pourrions intervenir et mettre de côté la décision du fait par le jury si nous en arrivions à la conclusion qu'elle est déraisonnable. Dans l'espèce, la faute n'aurait atteint la victime qui se plaint devant nous que par ricochet. Sans doute, peut-on dire que l'analyse du lien de causalité ne nécessite pas une distinction entre les

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causes prochaines et les causes lointaines; toutes sont équivalentes au point de vue de la responsabilité. Mais devons-nous dire que les principes de la causalité conduisent à ordonner la réparation de dommages indirects? Je ne le crois pas; car dans la série des préjudices, il y a un moment où nul ne peut plus affirmer avec certitude que sans la faute le dommage ne se serait pas produit. A partir de ce moment, l'existence du lien de causalité n'est plus établie; la faute initiale ne peut donc plus être tenue comme cause du préjudice.

Comme le disent MM. Henri et Léon Mazeaud, dans leur *Traité de Responsabilité Civile,* 1931, no. 1673,

* * * l'auteur de la faute initiale ne répond dans la chaîne des préjudices que de ceux qui sont la conséquence certaine, nécessaire de son acte. L'expression de "dommage nécessaire", ou de "suite nécessaire", qu'employait déjà Pothier, est préférable à celle de "dommage direct" ou de "suite immédiate"; elle marque plus exactement la nature du lien de causalité qui est exigé et le point où s'arrête le responsabilité du défendeur. Elle ne laisse pas en effet supposer que seul le premier préjudice doit être réparé: le deuxième, le troisième, le quatrième, etc., sont susceptibles d'engager la responsabilité de l'auteur de la faute initiale: il en est ainsi chaque fois qu'ils ont un lien *certain* de causalité avec cette faute; mais, plus ils s'éloignent dans la chaîne des conséquences, plus la certitude diminue.

Ces mêmes auteurs soulignent le fait que la jurisprudence en France, avec raison, ne voit dans la nécessité d'un préjudice direct que l'application du principe d'après lequel la relation de cause à effet doit exister avec certitude entre la faute et le dommage.

Dès que cette relation existe, le préjudice doit être réparé, si lointain soit-il; et cela montre assez que les expressions "dommage indirect" et "suite immédiate" exprimaient fort mal l'idée générale qu'elles recouvrent. Il n'est pas question de proximité dans le temps ou dans d'espace, mais seulement de l'existence d'un lien de causalité.

Dans la cause actuelle, avons-nous réunis les trois éléments de la responsabilité: préjudice, faute, rapport de causalité, de façon a établir un lien de droit entre la victime du préjudice et l'auteur de la faute?

Ici, l'on a dû nécessairement, pour établir ce rapport de causalité, avoir recours aux présomptions découlant des circonstances prouvées: chute de la mère, symptômes anormaux avant et pendant la naissance, qui ne s'étaient pas produits chez elle auparavant; marques de l'enfant; constations du médecin traitant et témoignages médicaux. Les présomptions que le jury a tirées des faits légalement établis devant lui sont, en principe, suffisantes dans le procès en

responsabilité. Le juge du fait est souverain quant à leur appréciation (arts 474-475 C.P.C.); mais il a le devoir de conscience de n'admettre que des présomptions graves, précises et concordantes. Il faut donc, dans chaque espèce, scruter les faits invoqués par le demandeur en responsabilité pour établir la faute, le dommage et le lien de cause à effet; et une fois que le juge de première instance, assisté d'un jury, a constaté les faits, a établi cette relation comme certaine et non problématique, un tribunal d'appel ne peut, en vertu du code de procédure civile, intervenir que si le verdict est contraire au poids de la preuve; et l'article 501 C.C. nous dit que le

> verdict n'est pas considéré comme étant contraire à la preuve, à moins qu'il ne soit de telle nature que le jury, en examinant toute la preuve, n'aurait pu raisonnablement le rendre.

ou, suivant l'article 508 C.C., un jugement différent peut être rendu

> lorsque les faits, tels que constatés par le jury, exigent que le jugement soit en faveur de l'appelant.

La Cour du Banc du Roi a refusé d'en venir à cette conclusion; et je ne vois aucune raison valable pour mettre de côté cette décision. Les conclusions des docteurs Langevin et Letondal à l'effet que les circonstances de cette cause indiquaient comme seule explication satisfaisante, que la chute de la mère et ses conséquences avaient amené la difformité de son enfant, ont été acceptées par le jury. Est-ce un verdict déraisonnable? Il n'aurait peut-être pas été celui d'un jury de médecins ou de spécialistes; mais il a reçu l'approbation du tribunal choisi et désigné par le loi pour décider souverainement du fait suivant sa conscience; et rien au dossier ne démontre que ce tribunal a erré. Le verdict du jury ne règlera pas la controverse médicale engagée devant lui. Mais la loi ne peut attendre que les médecins soient unanimes pour décider la question de fait soulevée en cette cause. L'on n'a pas établi que l'infirmité de l'enfant provenait d'une autre cause que l'accident causé à sa mère pendant la période de gestation par la faute maintenant admise du préposé de la défenderesse. Je ne crois pas qu'en présence d'un verdict du jury, approuvé par le juge de première instance et par le tribunal d'appel, nous puissions, sur une question de fait, mettre de côté ces jugements concordants, à moins que l'on puisse nous in-

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diquer une erreur manifeste qu'il serait de notre devoir de corriger. On ne l'a pas fait.

Comme dans *Shawinigan Engineering Co.* v. *Naud* (1), le fait que les médecins de la compagnie, tout en soutenant que l'infirmité de l'intimée n'est pas le résultat de la chute de la mère, se déclarent incapables d'en découvrir une autre cause, affaiblit la valeur probante de leur opinion, et l'affirmation contraire me paraît mieux s'accorder avec l'enchaînement logique des circonstances et la succession des symptômes qui se sont manifestés. Ces circonstances et ces symptômes sont suffisamment graves, précis et concordants pour nous permettre de décider que l'intimée a fait la preuve qui lui incombait, de la relation entre l'infirmité dont elle souffre et l'accident que sa mère a subi par suite de la négligence de l'appelante.

III

Quant au troisième point, je crois, comme mon collègue, l'honorable juge Lamont, et pour les mêmes raisons, que le juge avait suffisamment indiqué au jury les règles à suivre pour tirer des déductions des faits établis devant lui.

Je crois donc que l'appel devrait être renvoyé avec dépens.

SMITH J. (dissenting).—The respondent sues on behalf of his infant child for injuries alleged to have been sustained by the child by reason of the mother having fallen in alighting from the appellant's car at a time when she was seven months pregnant of the child. The child was born two months later, with club feet. The allegation is that the club feet were the result of the fall, which the jury has found was caused by the appellant's negligence.

The first question to be determined upon the appeal is whether or not any action lies on behalf of the child.

My brother Lamont has reviewed authorities on this point at length, and concludes that the great weight of judicial opinion in the common law courts denies the right of a child, when born, to maintain an action for prenatal injuries, but that such right of action exists under the Civil Code of Quebec.

(1) [1929] S.C.R. 341, at 345.

In my view, the provisions of the Civil Code in reference to appointment of curators to unborn children or as to the right of such children to inherit or take, by gift or will, do not help to distinguish the law under this code from the common law, as all these rights exist also under the common law, and are entirely different in character from the right of action in tort set up in this case.

It seems to me that in the various citations made by my brother Lamont as to the civil law, the reference is to rights concerning property, and not to rights such as here claimed. Neither under the common law nor under the Civil Code of Quebec does the law on this point seem to have been definitely settled by authority; but, while admitting that the point is a doubtful one, my view is that the action does not lie.

I am further of opinion that, having regard to the scientific problem involved, there was not evidence upon which the jury could reasonably find as a fact that the child's club feet resulted from the injury to the mother.

The medical evidence offered by the respondent to shew that the deformity of the child's feet resulted from the accident is that of Doctors Langevin, Letondal and Benoit.

The two latter do not pretend to have formed any independent opinion of their own. Dr. Letondal says:

* * * évidemment que ce témoignage du docteur Langevin m'a excessivement impressionné. Mais il s'agit simplement d'une hypothèse et pas d'une chose qu'on peut démontrer scientifiquement.

Mais dans le cas particulier c'est vraiment l'hypothèse la plus probable, et il n'y en a pas d'autre que je puisse assigner, dans ce cas particulier, je n'en vois pas d'autres.

Dr. Benoit attended the mother from the time of the accident until after the birth of the child, two months later, and says:

on n'aurait pas pu en faire la preuve mais j'ai entendu le témoignage cet après-midi, du docteur Langevin, des causes qui amènent le pied bot, et je crois que c'est l'hypothèse la plus plausible. Il y a de certains cas où l'on ne peut pas affirmer. Cependant, je n'ai jamais fait d'études spéciales parce que je ne suis pas un spécialiste.

It may be noted here that he learned of no causes from Dr. Langevin except the one, as that witness mentioned no others. These two doctors therefore add nothing to the testimony of Dr. Langevin, but merely accept what he says, but both, on the strength of what Dr. Langevin has said, proceed to confirm his opinion.

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Dr. Langevin is a "*gynécologiste,*" and "*médecin en chef de la Maternité,*" professor at the University of Montreal, and has charge of the obstetrical course. He is asked if there is a relation between the accident and the club feet of the child, and answers:—

C'est une possibilité. D'ailleurs, dans l'analyse du processus psychologique, ce qu'il faut se rappeler, c'est que naturellement l'enfant a les membres fléchis dans la cavité utérine. Deux causes peuvent favoriser surtout la difformation des membres normalement, l'absence de liquide dans la cavité de l'utérus venant contracter l'enfant, le fléchissement s'accentue.

Then the following question is asked:—

Q. Docteur, au cas où vous auriez un enfant, et la preuve démontre ceci que la femme était parfaitement bien jusqu'au moment où elle est tombée sur le ventre alors qu'elle portait depuis sept mois, qu'elle est arrivée chez elle immédiatement après être tombée presque sans connaissance, et qu'elle s'est sentie immédiatement des douleurs dans l'abdomen, qu'en arrivant chez elle sa mère a constaté que ses habits étaient souillés, qu'il y avait des marques rouges; que depuis elle a continué de perdre un peu et de tacher son linge jusqu'au moment de l'accouchement et que ces pertes qui arrivaient chez elle c'était des eaux et que à part de cela elle était parfaitement bien; et maintenant j'ajouterai, par la preuve que nous allons faire, que l'accouchement s'est fait comme l'on dit, à peu près à sec; et que l'enfant, à sa naissance, portait des marques noires, comme des contusions à l'endroit ou ce traumatisme ce serait produit à l'extérieur; ces faits étant donnés, dites-moi donc, docteur, si vous trouvez qu'il y a relation entre l'accident et puis l'état de l'enfant à sa naissance. —R. Je le crois.

Asked if there might be any other cause, he answers:—

Il peut y avoir un nombre de causes, mais du moment qu'il y aurait eu pression dans la cavité utérine il est probable qu'il y a eu difformation. Il peut y avoir d'autres causes que cet accident, mais cet accident, dans le moment, qui s'est produit, par suite du traumatisme, peut expliquer le cas.

The doctor is not a specialist on club feet, and does not pretend to have made any special study on their cause. He says there may be many causes, but tells us nothing of what these other causes are, or of what medical science has discovered about the causes that lead to club feet.

Dr. Letondal, one of the respondent's witnesses, says that it is not exactly known in medicine what leads to club feet and, so far as he is concerned, it is not determined what is the cause of club feet.

According to the last answer of Dr. Langevin, quoted, if the mother was well before the accident, and not well after it, it is a satisfactory conclusion to say that any defect in the child when born is the result of the accident.

One of the basic facts submitted in the question is that the child, at its birth, carried black marks like contusions at the place where this "*traumatisme*" would be produced at the exterior. The only evidence of any marks on the exterior of the woman's body after the accident is that given by her mother, Justine Therrien. She is asked:—

Q. Et puis, après cela, avez-vous constaté qu'elle avait des marques rouges.—R. Un petit peu sur le ventre.

The injured woman gave evidence, and makes no mention of any marks; and Dr. Benoit, who was called in to see her the next day, and presumably examined her, although he does not say so, makes no mention of any such marks.

When the child was born, Madame Beaulieu, a sister of the injured woman and an attendant at childbirth, discovered that the child had club feet, and called the doctor's attention to it; and then the mother and the doctor examined the child; and all three gave evidence as to what they saw. Madame Beaulieu says:—

* * * j'ai constaté que l'enfant était infirme, et alors qu'il avait des taches sur les pieds.

* * * Quel genre de taches?

Des bleus, des ecchymoses * * *.

The mother of the child says:—

* * * j'ai regardé les marques.

Q. Des marques?—R. Bien. Je sais qu'il avait des taches noires en arrière, des marques que j'ai vues.

Dr. Benoit examined the child, and found that it had club feet but says not a word about marks, either black or blue, on the back or on the feet. I have quoted every word of evidence that there is in reference to marks on the mother and on the child, and, as will be seen, there is nothing connecting these blue marks on the feet, or these black marks *en arrière* (perhaps meaning on the back of the feet—that is, on the heels—with the *petit peu* red marks on the body of the mother referred to in the evidence of Justine Therrien quoted, either as to position or otherwise. The marks mentioned in the question are black marks, and the only black marks mentioned in the evidence are those *en arrière*.

One of these facts, therefore, upon which Dr. Langevin's theory is built, is not established by evidence.

Another of the basic facts, submitted in the question, is that on arriving home, the mother of the injured woman

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discovered that her clothes were soiled, that from that time she continued to lose a little, and to stain her linen, up to the moment of the birth; and that this loss, which happened with her, was of water; that is, fluid. In addition to what is stated in the question, Dr. Langevin states, that he has heard the evidence giving the description of the symptoms which were present in consequence of the accident. The description, as given in the evidence, is entirely different from what is stated in the question.

As to the loss of fluid, the mother of the child says she had no loss up to the time of the accident, and, being asked if she had any such loss immediately after, answers that she cannot tell, as she was too nervous, and that they might ask Dr. Benoit. Two months passed from the date of the accident until the birth, during which time these alleged losses continued, saturating the woman's clothes; but she says not a word about it.

There is the evidence of Justine Therrien, mother of the child's mother, who undressed her on her arrival home after the accident, and who says she discovered that the patient was wetted, that she was very nervous, and had a headache. Asked if these losses of fluid lasted a long time, she answers: "Non, monsieur, pas trop longtemps." Then asked if she remarked, following this, losses of fluid, she answers, "Plusieurs jours." To the question, "Elle égouttait?" she responded, "Oui, monsieur."

Next we have the evidence of Madame Beaulieu, already mentioned. She saw her sister the second day after the accident. She saw fluid on her sister's clothes and her linen soiled, and this condition continued; and at the birth there was no fluid at all. She is asked if, before the birth, her sister "était avec un gros ventre?" to which she replied, "Pas du tout." She is asked if this was due to the loss of fluid, and answers that, before the accident her sister was very big, but after, this diminished. She was so big before the accident as not to be able to button her coat, and after the accident "ca tout diminué." At the birth, she says, there was no fluid at all, that it was "un accouchement à sec, dans le sang."

Dr. Benoit, who was called in to see the patient the day after the accident, and who attended her regularly, as he says, for the following two months, is asked if he dis-

covered that she lost fluid, and answers, "I did not discover it myself." Asked if the patient spoke to him on the subject, he says, "Frankly, I do not remember that." He says not a word about the bigness of the patient having diminished; and this sister of the child's mother, who went to see her every day, and who must have come in contact with the doctor very frequently, never mentioned either the loss of fluid that she was observing nor the diminution of bigness to the doctor; and the doctor himself never heard of these conditions until some time after the birth, never was told of them by anybody; but he does say that he observed at the time of the birth that there was very little fluid.

He builds up, however, in his own mind a theory and says the fluid flowed away gradually by an opening very slight, and even, he believes, that it was some membranes of the sac which were torn. There are three of them, and he believes that one of the membranes had an opening lengthwise in one tissue and probably there was also an opening a little further away; and the fluid would run like that between the membranes, but the sac was not much open. Then he says that this is an anomaly, on which he would not rely if there had been no accident.

It will be noticed that all this is not founded on anything that he observed. He never knew, until the birth, that there was any loss of fluid; he then discovered, he says, that there was very little fluid, which did not even draw from him a remark about its loss at the time, nor a little later, when he discovered the club feet. If he had thought at the time that the small quantity of fluid had anything to do with the club feet, surely he would not have left all this theory about small openings in different plies of the walls of the sac to conjecture afterwards; but would have examined the sac there and then, when it was before him, to ascertain if there was any rupture at all. This was the sure method of determining the fact, but, instead of adopting this very obvious method, he waits until he gets into the witness box, and then propounds a conjecture about it, which has no basis whatever in fact, and which is entirely improbable. If a blow from the outside tore these membranes, why should it tear only one ply at one place, and another ply at some distance off? The

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doctor was not accepting the evidence of this sister of the patient, because, on his theory, there could have been no diminution of the bigness from the time of the accident. If such a thing occurred, it could only occur gradually, in accordance with the gradual loss that the doctor speaks of, and would be most significant at the time of the birth; and at that time the doctor noticed nothing of the kind.

What, then, under all these circumstances, was the state of fact upon which Dr. Langevin's answer is based? He heard the evidence of the three women; then he heard what was stated in the question. We have it in evidence by Drs. Gray and Dubé, called for the defence, that if there had been a loss of fluid as described, causing the pressure assumed, there would have been a miscarriage, and matters could not have gone on for two months, to the completion of the birth in the natural way in the natural time. The conditions spoken of did not hasten the birth by a day, the child was born without any complications, and in perfect health. Did Dr. Langevin, in his answer, assume that there was such a great loss of fluid that the largeness disappeared almost immediately after the accident, and brought about the pressure that he speaks of from that time? If he did, he is not basing his answer upon what is stated in the question, as he was bound to do. If he did not accept that as the condition, but accepted the statement in the question as indicating a gradual loss of fluid, then when does he think the pressure that he relies on commenced? It must have been, on that view of the case, a very considerable time, probably at least a month, before pressure, to any practical extent, would commence. The doctor's theory, of course, is utterly denied by a number of doctors as prominent as himself, called by the defence; but if the doctor's opinion, under the circumstances mentioned, is sufficient evidence to sustain a verdict, it is useless to place the contrary opinion of other doctors against his, because it is the province of the jury to decide as to the weight to be attached to a number of conflicting opinions; and, in order to discard Dr. Langevin's evidence, and the verdict founded on it, one must go further.

As already stated, Dr. Langevin is not a specialist in the matter of club feet. His specialty in obstetrics has no more to do with club feet than it has to do with insanity.

If this child had been born an idiot, Dr. Langevin could just as well have said that he believed it was caused by pressure on the skull, and, knowing no other reason, he would consider that one sufficient. He does not pretend to have formed his opinion on anything of the kind that he had observed in his own experience, does not pretend that he had made any special study as to the causes of club feet, or that he formed his opinion on anything that he learned from medical science. He does not say that he ever heard of such a case.

Dr. Benoit and Dr. Letondal, witnesses for the respondent, say that the cause of club feet is not known to medical science, and the same statement is made by Dr. Gray, Dr. Ferron, Dr. Nutter and Dr. De Martigny, and this is not denied by Dr. Langevin. All he says is that there are a number of causes, without naming a single one of them except the one that he propounds in this case.

What force or probability, then, is there in Dr. Langevin's opinion? As already stated, it is not based on anything that he has observed, on any study of the matter that he has made, or on anything that has been discovered by medical science. Such an opinion, to be worth anything, must be based on a definite state of facts of which there is evidence, and here it is impossible to tell what particular state of facts he had in mind as the basis of his opinion. Did he, from the statement in the question, conclude that the black marks mentioned indicated that the feet, perfectly formed, were subjected to violence at the time of the fall, that twisted or distorted them, and that they were subsequently held in that position by pressure?

Perhaps he discarded all statements about marks, and relied only on the pressure. The greatest pressure would be suggested by the evidence of the sister, who discovered the mother's bigness practically gone when she saw her, a little after the accident, and which was never recovered. Did Dr. Langevin take his theory of pressure from this testimony, which he says he heard? If so, his answer is not based on the statements in the question, and he must have rejected Dr. Benoit's theory of gradual leakage between the plies of tissue of the walls of the sac.

Again, did the doctor disregard the evidence of Dame Beaulieu about great loss of fluid, causing at once the loss

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of bigness, which he had heard, and which Dr. Benoit also heard and evidently disbelieved? If so, with the gradual leakage that otherwise took place, such as described by Dr. Benoit, when did pressure begin sufficient to twist the bones of the feet already formed at seven months? The pressure necessarily would come gradually, following the gradual loss of fluid that extended over the whole two months. On this supposition there would be for some time the rapid calcification of the bones of the feet that the doctor dwells upon as going on so rapidly during the last two months, before the pressure could become sufficiently great to have effect. I wonder at what time the doctor settled in his mind as the basis of his theory that pressure sufficient to twist the bones of the feet commenced? He was at liberty to choose in his mind any one of many different conditions as the basis of his theory, and no one can tell what the basic conditions on which he built were.

Then there is the evidence of the two doctors called for the respondent, and the other doctors already referred to and not controverted by Dr. Langevin's evidence, that medical science has not discovered the cause of club feet, and has merely put forward more or less plausible theories, of which Dr. Langevin's does not seem to be one.

For the reasons indicated, I think that there was no evidence sufficiently positive and definite to warrant the jury in finding that the club feet resulted from the accident. Dr. Langevin's theory is a mere guess.

In coming to this conclusion, it is a satisfaction to me to feel that I am doing no injustice to this unfortunate child, because on the evidence, including that of Dr. Langevin, I am fully convinced that there is not the slightest probability that his theory is correct.

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

Appeal dismissed with costs.

Solicitors for the appellant: *Vallée, Vien, Beaudry, Fortier & Mathieu.*

Solicitor for the respondent: *Joseph Hélal.*

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CARMELO G. GRIMALDI (DEFENDANT) ..... } APPELLANT; *May 17, 18. *June 8.

AND

VICTORIO V. RESTALDI (PLAINTIFF) RESPONDENT.

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

Negligence—Automobile—Placed by owner at disposal of a friend—Accident—Patron momentané—Evidence—Declarations by the owner admitting his liability—Proof by the injured person.

The respondent, who was vice-consul for Italy, and also a physician and surgeon, carrying on the practice of his profession in the city of Montreal, had amongst his patients the appellant. On the 17th December, 1928, the appellant required by telephone the services of the respondent during the course of the afternoon, but the respondent had some professional calls to make before he was free to call upon the appellant. The latter accordingly—as he had done on former occasions—placed at the disposal of the respondent his automobile, together with his chauffeur, in order that the respondent might make his other professional visits and then call at the appellant's residence. Between the hours of six and seven o'clock in the afternoon, the chauffeur of the appellant, in approaching from the south the subway under the Canadian Pacific Railway tracks over St. Denis street, drove the automobile against one of the steel uprights dividing the lane for vehicles of this nature from the lanes provided for the tramway lines, and as a result of the impact the respondent sustained serious injuries, for which he claimed damages from his friend and patient, the appellant. Before the trial, the appellant's counsel proceeded to the examination of the respondent on discovery (art. 286 C.C.P.); and the latter swore that the appellant admitted to him, in the presence of other witnesses, that the accident "was the chauffeur's fault" and that "he (the appellant) was liable * * * for the accident and its consequences." At the trial, the respondent merely proved the amount of damages and produced no further evidence as to the chauffeur's fault. The appellant's grounds of appeal were, first, that the record did not show any evidence that the accident was due to the fault of his chauffeur and, secondly, that the respondent, at the time of the accident, was the *patron momentané* of the chauffeur, and as such had no claim against the appellant.

Held, affirming the judgment appealed from, (Q.R. 54 K.B. 197), that the respondent's examination on discovery established sufficiently the existence of facts which explained the acknowledgment by the appellant of his liability, as sworn to by the respondent and which also fully justified the judgment appealed from in favour of the respondent. Such examination taken under the provisions of art. 286 C.C.P. forms part of the record under art. 288 C.C.P., it contains evidence of "aveux extra-judiciaires" by the appellant in which he admits his liability and his chauffeur's fault. These "aveux" were expressly

*PRESENT:—Duff C.J. and Rinfret, Smith, Cannon and Crocket JJ.

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alleged by the respondent in his statement of claim, and, as this is a case where parol evidence is admissible, they could be proved by the respondent under his oath.

Held, also, that the respondent was not, at the time of the accident the *patron momentané* of the appellant's chauffeur. The appellant had retained for himself the power and the right to give instructions to his chauffeur; and the respondent, being merely the appellant's guest in his car, had no control over the acts of the chauffeur. Under the circumstances of the case, there has been no transfer to the respondent of the appellant's control over the chauffeur's acts and of his power to give orders to the driver of the car.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Joseph Demers J. and maintaining the respondent's action in damages for $5,073.07.

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

W. A. Merrill K.C. and *G. D. McKay* for the appellant.

J. L. Ralston K.C. and *J. D. Kearney K.C.* for the respondent.

The judgment of the Court was delivered by

RINFRET, J.—L'intimé est médecin et exerce sa profession à Montréal. L'appelant, se sentant malade, le pria par téléphone de venir le voir. A ce moment-là, l'intimé avait des courses à faire et devait, entre autres choses, aller avec sa femme à une réception offerte par le consul général de Serbie, puis faire des visites à quelques-uns de ses patients. L'appelant lui dit qu'il lui enverrait son automobile pour lui permettre de vaquer d'abord à ses occupations et l'amener ensuite à la résidence de l'appelant, où il pourrait lui donner ses soins. Cela fut convenu. Le bureau de l'intimé étant situé dans l'est de la ville, il fut entendu que le chauffeur de l'appelant, conduisant la voiture de ce dernier, passerait d'abord à la résidence de l'intimé pour chercher Madame Restaldi et la conduirait à l'hôtel Mont Royal, où l'intimé viendrait l'attendre; qu'il irait de là à la réception du consul de Serbie; puis que l'intimé ferait ses visites à ses patients et qu'il se rendrait ensuite chez l'appelant.

(1) (1933) Q.R. 54 K.B. 197.

Ce programme fut suivi. Après la réception, l'intimé alla reconduire sa femme chez lui. Il ramena avec elle une des amies de cette dernière, que, en route, ils déposèrent chez elle; puis, il fit ses visites médicales; et, au moment où il se rendait chez l'un de ses patients, comme la voiture passait par le tunnel sous la voie du chemin de fer, au nord de la rue Saint-Denis, elle donna sur l'un des montants en acier qui soutiennent le tablier de la voie ferrée et qui séparent le passage destiné aux voitures de celui qui est destiné aux tramways. L'intimé, qui était assis à l'arrière de l'automobile, fut violemment projeté sur le siège d'en avant et fut gravement blessé. Il poursuivit l'appelant et réclama des dommages-intérêts. La Cour Supérieure et la Cour du Banc Roi en appel ont maintenu son action. L'appelant se pourvoit devant cette cour et demande que ces jugements soient infirmés pour deux motifs: Il prétend que le dossier ne dévoile aucune preuve de faute de la part de son chauffeur; et que, d'ailleurs, ce chauffeur, au moment de l'accident, était devenu le préposé de l'intimé.

Il vaut mieux examiner d'abord ce second moyen. Il soulève sans doute une question mixte de droit et de fait, mais sa solution dépend essentiellement de l'appréciation des circonstances particulières du cas qui nous est soumis.

L'appelant a téléphoné pour requérir les services de l'intimé. Il aurait préféré le voir immédiatement; mais l'intimé avait ses engagements à remplir ("important cases"). C'est alors que l'appelant lui offrit de lui envoyer sa voiture et son chauffeur, ce qui lui permettrait d'accomplir plus facilement ses diverses obligations ("It was easier for me to go and see these people before") et d'arrêter chez l'appelant en retournant chez lui.

C'est l'appelant qui suggéra de mettre sa voiture et son chauffeur à la disposition de l'intimé pour toutes ces fins. Au cours du téléphone échangé entre les parties, il ne fut naturellement question d'aucun arrangement par lequel le chauffeur deviendrait le préposé de l'intimé. Aucune convention n'ayant été faite à ce sujet, il faut déduire des faits que nous connaissons la nature des relations qui se sont trouvées créées entre l'intimé et le chauffeur. Bien entendu, l'appelant est resté le patron habituel du chauffeur; mais il prétend que, lors de l'accident, l'intimé en était devenu le patron momentané, de façon à engager sa responsabilité.

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Nous sommes d'accord avec les jugements rendus pour arriver à la conclusion que telles ne sont pas les conséquences des faits qui se sont passés. En pareil cas, la règle nous paraît bien posée dans le "Recueil Périodique des Assurances", publié par M. Sainctelette (année 1930), page 519:

* * * la responsabilité de l'acte du préposé mis par le commettant à la disposition d'un tiers se déplace pour incomber à ce dernier, ou continue au contraire à peser sur le commettant, suivant qu'en fait le préposé est ou n'est pas passé sous la direction et l'autorité du tiers.

Le critérium, d'ailleurs, nous est fourni par les jugements de la Cour Suprême et du Conseil Privé dans la cause de *Bain* v. *Central Vermont Ry.* (1). Il faut se demander qui avait le contrôle de l'employé au moment du fait qui a causé l'accident; et, à son tour, ce contrôle dépend du droit de donner des instructions et des ordres, du "droit de surveillance et de direction" (Dalloz, 1909-1-135).

En l'espèce, il ne nous paraît pas douteux que l'appelant avait conservé l'autorité et le droit de donner des instructions. L'intimé n'avait pas acquis ce droit et l'on ne saurait dire qu'il existât un rapport de subordination entre le chauffeur et lui. Il n'avait sûrement pas agréé le chauffeur comme son préposé occasionnel ou comme un homme attaché à son service (*Bloch* v. *Ordoquy*) (2). L'intimé était tout simplement l'invité de l'appelant dans sa voiture. Il ne contrôlait pas les agissements du chauffeur. La situation n'était pas différente de celle où l'appelant aurait envoyé chercher l'intimé dans sa voiture pour le conduire directement à la résidence de l'appelant. En effet, les courses faites avant de se rendre chez l'appelant avaient été convenues avec ce dernier, et le chauffeur conduisait l'intimé chez ses divers clients en vertu des instructions que lui avaient données l'appelant. L'intimé avait donné les adresses au chauffeur, et le chauffeur y dirigea successivement la voiture conformément aux ordres qu'il avait reçus de son maître habituel. Il est donc resté soumis à l'autorité de Grimaldi pour la façon de conduire et d'éviter les accidents. (Dalloz, *Répertoire Pratique,* vol. 10, vbo. *Responsabilité,* n° 769). Le chauffeur avait été chargé par son maître de conduire le médecin à la réception et chez ses patients. En conséquence, il fallait que Restaldi fournît

(1) (1919) 58 Can. S.C.R. 433; [1921-2] A.C. 412.

(2) Gazette du Palais, 1924-1-744.

au chauffeur les indications nécessaires pour qu'il pût le mener aux endroits prévus; mais Restaldi n'avait pas le pouvoir de donner des ordres au chauffeur. Il n'a pas pris charge de la voiture ou du chauffeur. Le parcours de l'auto à travers la ville devait s'accomplir dans les limites qui avaient été tracées par l'appelant lui-même. L'intimé s'est laissé conduire suivant l'invitation de l'appelant et, sous tous rapports, il s'en est rapporté à la prudence, à l'habileté et à l'expérience de l'employé de ce dernier. Dans les circonstances, il n'y a pas eu substitution de pouvoir de contrôle et de surveillance; et l'appelant est demeuré responsable des actions de son chauffeur, qui, d'ailleurs, faisait son affaire au moment de l'acte dommageable (Tessier, *Responsabilité de la puissance publique,* p. 196). Il n'y a pas eu déplacement de responsabilité (*Legros* v. *Mercadier* (1).

Nous pouvons maintenant passer au premier moyen de l'appelant. La question se présente de la façon suivante: Avant le procès, l'appelant a fait interroger l'intimé au préalable en vertu de l'article 286 du code de procédure civile. Lors de l'enquête, l'intimé, étant sans doute d'avis que les faits dévoilés dans cet examen préalable établissaient suffisamment la responsabilité de l'appelant, se contenta de prouver les dommages qu'il avait soufferts et n'offrit aucune preuve des faits tendant à démontrer la faute du chauffeur. De consentement, cependant, deux photographies furent produites comme exhibits; et l'une d'elles fait voir le tunnel où l'accident est arrivé. Sur cette photographie, on marqua d'une croix le montant en acier avec lequel la voiture vint en contact. Cette indication fut faite par accord entre les deux parties. Le juge de première instance a décidé que l'accident dont le demandeur a été victime résulte "du fait, de la faute, de l'imprudence, négligence ou inhabileté du chauffeur du défendeur". Il a ajouté que, de plus, l'appelant n'avait "pas repoussé la présomption établie contre lui par la loi dans l'espèce".

Les juges de la Cour du Banc du Roi furent unanimes à écarter le moyen résultant de la prétendue présomption légale. Nous sommes d'accord avec eux sur ce point, conformément, d'ailleurs, à l'arrêt de cette cour dans la cause de *Pérusse* v. *Stafford* (2).

(1) Gazette du Palais, 1926-2-291. (2) [1928] S.C.R. 416.

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Mais la Cour du Banc du Roi a été de l'avis du premier juge quant au résultat du procès. Il est vrai qu'elle semble avoir appuyé son jugement sur la théorie de "*res ipsa loquitur*". Sur ce principe, et surtout sur son application aux circonstances du présent litige, nous entendons réserver notre opinion.

Mais il n'est pas nécessaire, suivant nous, d'entrer sur ce terrain pour la solution de cette cause, car l'examen préalable est suffisant pour conduire à la conclusion concordante des jugements qui nous sont soumis.

La déposition prise en vertu de l'article 286 C.P.C. doit "former partie du dossier" dans la cause (Art. 288 C.P.C.). Or, cette déposition contient la preuve d'aveux extrajudiciaires de l'appelant dans lesquels il a admis sa responsabilité et la faute du chauffeur. Ces aveux étaient expressément allégués dans la déclaration; et comme il s'agit d'une cause où la preuve par témoins est admissible, ils pouvaient donc être prouvés par le serment de l'intimé (Art. 1244 C.C.). Ce dernier jure que l'appelant lui a admis, en présence de témoins, que l'accident "was the chauffeur's fault", et que "he was liable * * * for the accident and its consequences".

Nous n'avons pas à nous demander si l'appelant était lié par ces aveux au point de ne pouvoir les révoquer lors de l'enquête, car le fait demeure qu'il n'a pas rendu témoignage et qu'il n'a pas contredit la version de l'intimé. La preuve des aveux est restée au dossier avec sa pleine force et son plein effet.

D'ailleurs, nous croyons que la seule déposition préalable a dévoilé suffisamment de faits pour expliquer les aveux de l'appelant et pour justifier pleinement les jugements qui ont été rendus, quoiqu'ils n'aient pas indiqué un élément de faute particulier.

L'accident est arrivé le 17 décembre. Il était environ six heures et demie du soir. Il faisait noir. Le tunnel et ses approches étaient dans l'obscurité ("In the subway, I noticed that it was dark"). Or, le chauffeur n'avait pas allumé les gros phares de la voiture ("He had no big lights on * * * He had his small ones"). C'est une présomption raisonnable, dans les circonstances, que, sans les projecteurs, le chauffeur ne pouvait voir les obstacles au-devant desquels il allait au moment où il s'est engagé

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dans le tunnel obscur, après six heures du soir, en décembre. Il ne nous paraît pas discutable que c'était là, de la part du chauffeur, une omission qui dépendait exclusivement de lui et qui constituait une imprudence ayant un rapport direct avec l'accident qui est arrivé. Il est juste de signaler que, dans sa déclaration, l'intimé en avait fait une allégation spéciale de négligence.

Pour ces raisons, nous sommes d'avis que l'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Merrill, Stalker & McKay.*

Solicitors for the respondent: *Mitchell, Ralston, Kearney & Duquet.*

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*May 17.
*May 30.

PHILIPPE MÉTIVIER (PLAINTIFF).....APPELLANT;

AND

PIERRE-AURELIUS PARENT AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

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

Will—Clauses—Interpretation—Rules as to contract applicable—Intention of the testator—Literal meaning of the words—Art. 1013 et seq. C.C.

The general provisions of the Civil Code (Arts. 1013 et seq.) enacting certain rules of interpretation as to contracts are applicable, by analogy, to arrive at the true meaning of the clauses of a will, taking into account however the difference existing between a contract and a will. Therefore, in a will as in a contract, the real intention of the testator must first be looked for and such intention will be found by giving a fair and literal meaning to the actual language of the will; and it is only when the intention is really doubtful that it is permissible to go outside the literal meaning of the words.

This must be the rule even if the result is that the clause in the will might thereby become inoperative. Art. 1014 C.C. applies only when the meaning of a clause is doubtful.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, D'Auteuil J., and dismissing the appellant's action.

*PRESENT:—Duff C.J. and Rinfret, Smith, Cannon and Crocket JJ.

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The appellant brought an action against the respondent in order to obtain from the courts an interpretation of a certain clause of a will and there is no dispute between the parties as to the facts of the case. Marie-Louise Métivier, widow of Narcisse Rioux, made her will in authentic form before Joseph Sirois, N.P., the 24th September, 1921. After having remembered a large number of her relatives by particular legacies in an amount exceeding $180,000, she bequeathed in equal shares the residue of her property to her niece, Marie Hélène Larrivée, wife of P. A. Parent, one of the respondents, and her two nephews, Philippe Métivier, the appellant, and Alphonse Larrivée the other respondent. The testatrix died December 1, 1921, and the three legatees survived her and accepted the bequest. Mrs. Parent subsequently died on December 1, 1930. Before her death she had already received from the executors a total sum of $36,430. In the antenuptial marriage contract entered into between Mrs. Parent and her husband, according to the laws of Quebec, it was provided that the surviving consort would be the universal heir of the other. The respondent Parent therefore took possession of his wife's estate including the sum of $36,430 or whatever might be left of it. The sole question at issue between the parties was whether or not Mrs. Parent took under her aunt's will as institute or grevé de substitution. Appellant contended that she did and the respondents claimed there was no substitution created by the will and that none could be implied.

A. Chase-Casgrain K.C. and *Chs. Frémont K.C.* for the appellant.

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

The judgment of the court was delivered by

RINFRET J.—Dans cette cause, les parties ont déclaré qu'elles n'avaient

pas de preuve à faire, ni d'un côté ni de l'autre, et (qu'elles) s'en remettaient à la cour sur l'interprétation de l'acte, les faits étant admis.

L'interprétation dont il s'agit a trait à la clause XXIII du testament de Marie-Louise Métivier, de la cité de Québec, veuve de M. Narcisse Rioux. Ce testament a été reçu devant Joseph Sirois et Ernest Labrèque, notaires, le 24 septembre 1921.

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Voici le texte de cette clause:

XXIII. Je lègue le résidu de tous mes biens sans exception à ma nièce, Marie-Hélène Larrivée, épouse de P.-A. Parent, de St-Ulric, à mon neveu, Philippe Métivier, d'Algoma Mills, et à mon neveu, Alphonse Larrivée, de Beauport, que j'institue mes légataires universels résiduaires, par parts égales entre eux. Si l'un de mes légataires résiduaires universels venait à mourir avant moi, laissant des descendants légitimes, ceux-ci recevront sa part en son lieu et place, suivant les règles de la représentation, mais la part de celui qui serait décédé sans laisser de descendants appartiendra avec les réserves ci-après aux autres légataires résiduaires, à titre d'accroissement. Nonobstant la disposition ci-dessus, je veux qu'au cas où Madame Parent décèderait sans descendants légitimes son mari prenne et reçoive en pleine propriété la moitié de la part de Madame Parent dans le legs universel présentement fait, l'autre moitié seulement accroissant aux autres légataires résiduaires. Au cas où il décèderait sans enfant, et nonobstant encore la disposition ci-dessus, j'autorise mon neveu, Philippe Métivier, à disposer par testament de sa part en faveur de son épouse, lorsqu'il se mariera, et jusqu'à concurrence de dix mille piastres, et de la balance en faveur de ses frères et soeurs et neveux et nièces. Ce n'est qu'au cas où mon dit neveu n'aurait pas ainsi disposé par testament de sa part du legs universel qu'il y aura accroissement en faveur de mes autres légataires résiduaires.

Je veux de plus, que mon autre neveu, Alphonse Larrivée, puisse disposer par testament en faveur de sa femme d'une somme de dix mille piastres pour les cas où il décèderait sans enfant, seul le surplus accroissant à mes autres légataires résiduaires.

Je recommande à ma nièce, Madame P.-A. Parent, de continuer les bonnes oeuvres que je fais actuellement, et qu'elle connaît.

En vertu de cette clause, Marie-Hélène Larrivée, Philippe Métivier et Alphonse Larrivée sont institués légataires universels résiduaires par parts égales entre eux. Tous trois étaient vivants lors du décès de la testatrice. Mais, subséquemment, Marie-Hélène Larrivée est décédée sans laisser de descendants, et la question qui se pose est de savoir à qui, dans les circonstances, sa part du legs universel résiduaire doit être attribuée.

L'appelant a prétendu que, dans ce cas, cette part appartenait pour moitié au mari de Marie-Hélène Larrivée et que l'autre moitié appartenait par parts égales aux deux autres légataires résiduaires. Au contraire, le mari a prétendu que, Marie-Hélène Larrivée ayant survécu à la testatrice, elle est devenue, au décès de cette dernière, propriétaire absolue de sa part du legs universel résiduaire et, par suite, libre d'en disposer à son gré. Les exécuteurs testamentaires intimés ont adopté ce point de vue. L'appelant est l'un des deux colégataires de Marie-Hélène Larrivée, et il a institué la présente action dans le but de faire décider la question ci-dessus.

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La Cour Supérieure et la majorité de la Cour du Banc du Roi ont jugé dans le sens des prétentions du mari et des exécuteurs testamentaires. L'appelant nous soumet que ces jugements sont erronés et nous demande de les infirmer.

Le code civil édicte certaines règles d'interprétation des contrats (art. 1013 et suiv.). Les règles générales posées dans ces articles s'appliquent, par analogie, à l'interprétation des testaments, sauf à tenir compte de la différence qui sépare le contrat du testament (Référer sur ce point à la jurisprudence et à la doctrine citées dans Fuzier Herman, *Répertoire du Droit Français,* vbo " Testament," no 1616).

Dans tout testament, comme dans tout contrat, on doit d'abord rechercher l'intention des parties. Cette intention doit se déduire du sens des " termes " du contrat ou du testament (art. 1013 C.C. *Carter* v. *Montreal Trust Co. & Goldstein* (1)). Ce n'est que si l'intention est douteuse que l'on doit s'écarter du sens littéral des mots. Pothier, dans son Traité des Donations Testamentaires, au chapitre VII, " De l'interprétation des legs", pose la règle suivante

> 357. Règle II. Il ne faut pas néanmoins s'écarter de la signification propre des termes du testament, s'il n'y a de justes raisons de croire que le testateur les a entendus dans un autre sens que leur sens naturel; *non aliter à significatione verborum recedi opportet, quàm cùm manifestum est aliud sersisse testatorem.*

C'est, en somme, ce que le Conseil Privé a répété *re Auger* v. *Beaudry* (2):

> The only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will.

Appliquant ces principes à la clause XXIII, voici la signification qui en résulte:

Le résidu de tous les biens, sans exception, est légué par la testatrice, par parts égales entre eux, à Marie-Hélène Larrivée, Philippe Métivier et Alphonse Larrivée.

Si tous trois sont vivants lors du décès de la testatrice, chacun d'eux recueille sa part et en devient propriétaire définitif. C'est là la disposition principale. Tout ce qui suit est subsidiaire et ne prend effet que si l'un ou l'autre des légataires universels ne recueille pas sa part par suite de son décès antérieur à celui de la testatrice.

Si l'un de ces légataires vient à mourir avant la testatrice, laissant des descendants légitimes, ceux-ci reçoivent la part

(1) 63 Can. S.C.R. 207, at 216. (2) [1920] A.C. 1010, at 1014.

du légataire décédé en son lieu et place et suivant les règles de la représentation.

Si l'un de ces légataires vient à mourir avant la testatrice sans laisser de descendants, "la part de celui qui serait décédé" appartiendra aux autres légataires résiduaires "à titre d'accroissement," mais "avec les réserves ci-après":

Si c'est Madame Parent (Marie-Hélène Larrivée) qui est ainsi décédée sans descendants, son mari reçoit en pleine propriété la moitié de la part de Madame Parent dans le legs universel; "l'autre moitié seulement accroissant aux autres légataires résiduaires."

Si c'est Philippe Métivier qui est décédé, une partie de sa part "jusqu'à concurrence de dix mille piastres" ira à son épouse, et la balance à ses frères et soeurs, et neveux et nièces, pourvu qu'il en ait disposé de cette façon par testament. S'il n'en a pas ainsi disposé par testament, "il y aura accroissement en faveur (des) autres légataires résiduaires."

Si c'est Alphonse Larrivée qui est décédé sans enfant, une partie de sa part ira à sa femme (jusqu'à dix mille piastres), pourvu qu'il en ait ainsi disposé par testament en faveur de cette dernière; "seul le surplus accroissant (aux) autres légataires résiduaires."

C'est là, suivant nous, le seul sens que la clause XXIII peut avoir, si l'on donne un emploi à tous les mots qui s'y trouvent et si l'on donne à ces mots leur sens usuel et littéral. Dans ces conditions, les prétentions des intimés sont exactes et les jugements de la Cour Supérieure et de la Cour du Banc du Roi doivent être maintenus.

La clause est formée d'une disposition principale: le legs universel à trois légataires nommés; et d'une disposition subsidiaire avec "réserves" ou restrictions spécifiées qui pourvoit aux conditions dans lesquelles s'opèrera le droit d'accroissement.

Pour donner raison à l'appelant, il faudrait que l'on interprétât les trois "réserves" ou restrictions comme étant des dispositions distinctes et indépendantes de la disposition subsidiaire. Or, ces restrictions ne sont pas indépendantes et distinctes de la disposition subsidiaire. Elles sont reliées à cette dernière et elles y sont incorporées par les mots "avec les réserves ci-après" qui s'y trouvent, par le mot "nonobstant" qui est répété dans chacune des "ré-

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serves" relatives à Madame Parent et à Philippe Métivier, et par les mots "de plus" dans la "réserve" relative à Alphonse Larrivée. Traiter ces restrictions comme distinctes de la disposition d'accroissement, ainsi que le veut l'appelant, aurait pour effet d'éliminer complètement tous ces mots et de lire la clause entière comme s'ils ne s'y trouvaient pas. Ce serait aller formellement à l'encontre des règles que nous venons de voir concernant l'interprétation des contrats et des legs.

Ce serait, en plus, imposer à la clause XXIII une intention que, évidemment, elle n'a pas. En effet, il serait inexact de dire que les deux colégataires de Marie-Hélène Larrivée recevront sa part dans tous les cas où elle décèderait sans descendants légitimes. La seule partie de la clause qui attribue cette part aux deux autres légataires résiduaires est celle où il est dit:

> Mais la part de celui qui serait décédé sans laisser de descendants appartiendra avec les réserves ci-après, aux autres légataires résiduaires à titre d'accroissement.

Et cette disposition ne prend effet que moyennant trois conditions expresses:

(1) Que Marie-Hélène Larrivée meure avant la testatrice ("avant moi");

(2) Que ce soit "à titre d'accroissement";

(3) Que cet "accroissement" se produise seulement "avec les réserves ci-après".

Il n'y a donc pas droit d'accroissement absolu. C'est un droit d'accroissement "avec les réserves ci-après".

Les "réserves ci-après" sont des conditions imposées à l'existence même du droit d'accroissement. Ce sont des restrictions au droit d'accroissement; ce ne sont pas des restrictions au legs initial. Ces mots: "avec les réserves ci-après" ont pour effet d'insérer dans la disposition subsidiaire, à titre d'exception, chacune des restrictions subséquentes, lesquelles, par le fait même, sont incorporées dans cette disposition subsidiaire. Ces exceptions sont donc nécessairement subordonnées à la condition essentielle qui est que l'un des colégataires universels résiduaires (ou, dans l'espèce, Marie-Hélène Larrivée) "décéderait" avant la testatrice et sans laisser de descendants. Ce n'est que dans ce cas que l'accroissement prend effet en faveur des autres colégataires et ce n'est donc également que dans ce cas qu'il peut y avoir lieu de tenir compte des exceptions. Dès que chaque légataire universel, ou, pour le cas actuel, dès

que Marie-Hélène Larrivée a survécu à la testatrice, elle a *ipso facto* eu la saisine de son legs universel; il n'y avait plus lieu à accroissement; et les cas particuliers de réserves ou d'exceptions ne pouvaient plus se présenter. En d'autres termes: L'évènement supposé dans la disposition subsidiaire, à savoir: le décès de l'un des légataires universels avant la testatrice, n'ayant pas eu lieu, cette disposition est devenue inopérante; et, comme conséquence, les "réserves" ou restrictions sont tombées avec elle.

L'appelant a prétendu qui si l'on interprète ainsi la clause XXIII, il en résultera que l'autorisation donnée à Philippe Métivier et à Alphonse Larrivée de disposer par testament d'une partie de leur part serait contraire à l'article 1061 du code civil qui défend de faire une

stipulation sur * * * une succession non ouverte * * * excepté par contrat de mariage.

Pour le moment, nous n'avons pas à nous prononcer sur la légalité de ces "réserves" ou restrictions. Il ne serait pas juste d'exprimer une opinion sur ce point, au sujet duquel le litige ne s'est pas engagé et où les parties intéressées n'ont pas été entendues. Nous nous contentons de dire ceci—car c'est tout ce qui est nécessaire pour décider la cause actuelle: Il faut interpréter la volonté de la testatrice conformément aux termes qu'elle a employés dans son testament, dût cette interprétation entraîner l'annulation des stipulations ou "réserves" spéciales qui concernent Philippe Métivier et Alphonse Larrivée (Cass. D. 67-1-30). Il en résulterait simplement que ces conditions particulières du testament seraient considérées comme non écrites (art. 760 C.C.).

L'appelant nous a référé à l'article 1014 du code civil et a fait observer qu'on doit plutôt entendre une disposition dans le sens

avec lequel elle peut avoir quelque effet que dans le sens avec lequel elle ne pourrait en avoir aucun.

Nous répétons que nous ne nous prononçons pas sur la question de savoir si l'autorisation de tester accordée à Philippe Métivier et à Alphonse Larrivée peut être considérée comme valide. Il suffit de dire que la règle posée à l'article 1014 C.C., et que l'appelant invoque, s'applique seulement "lorsqu'une clause est susceptible de deux sens". Elle ne s'applique donc pas ici. La volonté de la testatrice a été exprimée d'une façon qui n'est pas douteuse. S'il en résulte qu'une partie des stipulations qu'elle a volontaire-

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Rinfret J.

ment insérées dans son testament ne peut recevoir son exécution, parce que la loi le défend, cela n'est pas une raison, dans l'espèce, pour modifier l'interprétation de l'intention qu'elle a exprimée. En ce qui concerne le cas de Madame Parent, qui fait l'objet du présent litige, la disposition n'est pas susceptible de deux sens; et, en plus, elle peut avoir tout son effet sans se heurter à aucun article du code. (Voir les décisions de la Cour de Révision dans les causes de: *Montreal Canada Fire Insurance Company* v. *Richmond & al.* (1), *et Lemarier & al* v. *Corporation de Ste-Angèle* (2):

Quand un texte est précis, ne prête à aucune équivoque, il ne faut pas en éluder la lettre sous prétexte d'en pénétrer l'esprit.

Le raisonnement qui précède acquiert encore plus de force par suite de l'emploi, dans la disposition subsidiaire et dans chacune des "réserves", du mot "accroissement". C'est un mot dont le sens est précis dans le code et dont la portée est bien connue dans le droit civil. En l'espèce, il est employé dans un document authentique reçu devant des notaires qui en connaissaient exactement la signification et qui, nous en sommes certains, appréciaient toutes les conséquences du terme qu'ils ont choisi. Le droit d'accroissement est celui en vertu duquel des cohéritiers ou des colégataires recueillent comme venant se réunir aux leurs les parts de ceux de leurs colégataires qui ne peuvent les recueillir ou qui y renoncent. En ce qui concerne Marie-Hélène Larrivée, l'accroissement ne pouvait exister que dans le cas où elle n'aurait pas recueilli sa part par suite du fait qu'elle serait décédée avant la testatrice. Elle a survécu à la testatrice; et, en vertu des termes du testament et de la loi, elle a eu la saisine de sa part. A partir de ce moment, le mot "accroissement", tel qu'il est employé au code et dans le sens bien connu qu'il a dans le droit civil, n'était plus un terme approprié pour indiquer une disposition telle que la suggère l'appelant. Au contraire, il est un terme éminemment propre à exprimer la disposition telle que nous l'interprétons, à laquelle il s'adapte parfaitement.

Pour ces raisons, l'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Guay & Frémont.*

Solicitors for the respondents: *St. Laurent, Gagné, Devlin & Taschereau.*

(1) (1909) 14 R.L.n.s. 349.

(2) (1920) 26 R. de J. 317.

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*May 10, 11.
*June 16.

FERDINAND D'AMOURS (PLAINTIFF).... APPELLANT;

AND

HENRI DARVEAU (OPPOSANT)..... RESPONDENT.

AND

LÉON D'AMOURS & FILS LTÉE.
(MISE-EN-CAUSE).

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

Sale—Entire stock in trade—Purchaser to pay liabilities—Purchase price—Not paid in money, but by delivery of capital stock of purchasing company—Whether arts. 1569 (a) to (d) C.C. (Bulk Sales) apply—Bulk sale without affidavit (art. 1569 (b)) not void de plano, but voidable only.

By notarial deed, L.D. sold to L.D. & F. Ltée. his manufacturing plant as a going concern, comprising certain lands, stock in trade, goods on hand, accounts due and bills receivable, his good will and certain specified patent rights; it was also provided by the deed that the purchaser would pay all the liabilities of the vendor. The consideration or purchase price did not consist in money, but in the above undertaking and in the issue to the vendor of virtually the whole of the capital stock of the purchasing company which had been incorporated precisely to carry on the business of the vendor.

Held that the provisions of the civil code as to bulk sales (arts. 1569 (*a*) to (*d*) do not apply to such a transaction. *Mathieu* v. *Martin* (29 R.L.n.s. 111) foll.

Per Smith and Cannon JJ. and Rivard J. *ad hoc.*—A bulk sale, which is not accompanied with an affidavit as required by art. 1569 (*b*) is not void *de plano* but voidable only. *Mathieu* v. *Martin, supra,* foll.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Fortier J., and dismissing the appellant's contestation.

The appellant, Ferdinand D'Amours, having obtained judgment against Léon D'Amours personally, seized in execution all the goods belonging to the company mise-en-cause, to which Léon D'Amours had previously sold and transferred his manufacturing plant as a going concern, on condition that it would pay his debts. But, previous to that seizure, the company had borrowed moneys by issuing debentures and had hypothecated in a trust deed all its

*PRESENT:—Duff C.J. and Smith, Cannon and Crocket JJ. and Rivard J. *ad hoc.*

(1) (1932) Q.R. 54 K.B. 481.

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goods as warranty. The respondent Darveau, as trustee of the debenture holders, filed an opposition to annul the appellant's seizure and claimed possession of the goods seized. The appellant contested the opposition on the ground that the sale of the stock in trade by Léon D'Amours to the company, being a bulk sale, was null for the reason that the formalities required by arts. 1569 (*a*) and seq. C.C. had not been complied with.

Alex. Michaud K.C. for the appellant.

R. Taschereau K.C. and *P. Rousseau* for the respondent.

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

DUFF C.J.—The ground upon which in my opinion this appeal should be dismissed can be stated very shortly.

The cardinal question appears to be whether chapter 9 (*a*) (arts. 1569 (*a*) to (*d*) C.C.) applies to a transaction such as that impeached in this litigation. By that transaction Léon D'Amours sold to Léon D'Amours et Fils, Ltée.,

(1) Certain lands described;
(2) Tout le roulant du fonds de commerce et toutes les marchandises en mains, contrats en cours, comptes et billets recevables;
(3) His goodwill; and
(4) Certain specified patent rights.

It is provided by the deed that the purchaser shall pay the liabilities of Léon D'Amours. The consideration consists in this undertaking and the issue to Léon D'Amours of virtually the whole of the capital stock of the purchasing company.

This is not, it seems to me, a transaction of the character contemplated by chapter 9 (*a*). The language of arts. 1569 (*a*) and (*b*) point to the conclusion that the transactions in view are only those of a very simple character,—those, probably, in which there is a " purchase price " in the strict sense, that is, a price in money. The provisions of the succeeding articles tend strongly to confirm this view of the scope of the chapter. It would be extremely difficult indeed to apply art. 1569 (*d*) in any other case than a case of sale for money. This would be particularly difficult in a

transaction such as that before us where the whole of the consideration consists in the issue of shares to the seller and an undertaking to pay the liabilities of the seller. Such a case is, I think, outside the scope of the chapter.

In truth, where the contract of transfer imposes upon the purchaser the obligation to pay the debts of the seller, it, in itself, virtually arms the creditors of the seller with the chief practical redress given by the statute. In other words, such a transaction does not appear to fall within the mischief the chapter aims to correct.

This is the view expressed by Mr. Justice Rinfret in his judgment in *Mathieu* v. *Martin* (1), with which I entirely agree.

The appeal should be dismissed with costs.

The judgment of Smith and Cannon JJ. and Rivard J. *ad hoc* was delivered by

RIVARD J. *ad hoc*.—(Saisie mobilière et immobilière de la part de Ferdinand D'Amours, en exécution d'un jugement prononcé contre Léon D'Amours.—Opposition afin d'annuler par Henri Darveau en qualité de fiduciaire pour les porteurs des obligations émises par la compagnie Léon D'Amours et fils limitée.—Contestation par le demandeur saisissant, maintenue par la Cour supérieure de la province de Québec, rejetée par la Cour du Banc du Roi.—Appel à la Cour suprême du Canada, interjeté par le demandeur-contestant.)

Le 28 novembre 1928, par acte notarié, Léon D'Amours, un négociant, avait vendu à la compagnie Léon D'Amours et fils limitée, présente mise-en-cause, divers immeubles lui appartenant, y compris les constructions, usines, machines, machineries et accessoires qui s'y trouvaient, de même que ses droits dans certains brevets énumérés, et "tout le *roulant* de son fonds de commerce et toutes les marchandises *en mains*, contrats en cours, comptes et billets recevables", avec "l'achalandage dudit fonds de commerce"; cette vente avait été faite pour le prix de $99,000, payé par la livraison de 990 actions acquittées de la compagnie, dont quittance, et "à la charge par l'acquéreur de payer et acquitter, pour et à l'acquit du vendeur, tous les comptes et billets payables dus par ledit sieur Léon D'Amours * * *"

(1) (1922) 29 R.L.n.s. 111.

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La compagnie Léon D'Amours et fils limitée, constituée en corporation par lettres-patentes du 1er août 1928, avait précisément été établie pour acquérir les biens de Léon D'Amours et continuer son commerce. En effet, la vente du 28 novembre 1928 comprenait tout l'actif de Léon D'Amours, fonds de commerce, immeubles, droits et créances; et, d'autre part, la compagnie se chargeait de tout le passif du vendeur, y compris la créance, dont le recouvrement est poursuivi par le présent appelant, Ferdinand D'Amours, et qui est antérieure à la vente du 28 novembre 1928.

Cependant, la compagnie Léon D'Amours et fils limitée avait émis des obligations, garanties en la manière ordinaire par un acte de fiducie sur ses biens, y compris ceux qu'elle avait acquis de Léon D'Amours; et la compagnie ayant fait défaut de rencontrer ses paiements, s'étant même déclarée insolvable, l'intimé Darveau avait, en sa qualité de fiduciaire, pris possession, le 20 juillet 1930, de tout l'actif mobilier et immobilier de la compagnie. Et, quand le demandeur-appelant, Ferdinand D'Amours, eut fait saisir les biens en exécution de son jugement contre Léon D'Amours, l'intimé Darveau, invoquant l'acte de fiducie et ses droits de fiduciaire, fit à la saisie une opposition afin d'annuler, dont la contestation par l'appelant, maintenue en première instance et rejetée en appel, est maintenant soumise au jugement de la Cour suprême.

La Cour supérieure avait maintenue la contestation, pour la raison que la vente par Léon D'Amours à la compagnie constituait une vente en bloc aux termes des articles 1569A et suivants du code civil et que, n'étant pas accompagnée de l'affidavit requis, cette vente était nulle.

La même contestation a été rejetée, en appel, par le motif que les articles 1569A et suivants du code civil ne s'appliquent pas à la vente en bloc d'un fonds de commerce dont l'acheteur se charge de payer les dettes, et que les dispositions de ces articles ne s'adaptent pas au cas d'une vente de l'actif à charge du passif.

Deux des juges de la Cour du Banc du Roi étaient d'opinion que la vente du 28 novembre 1928 devrait être traitée comme une vente en bloc au sens des articles 1569A et suivants du code civil quant à ce qui constituait, dans les biens vendus, le fonds de commerce et les marchandises; ils

n'auraient apparemment déclaré l'opposition fondée que pour le reste; il semble donc que le jugement, qui rejette la contestation en son entier, ne soit pas une décision unanime de tous les juges d'appel. Cependant, aucune dissidence n'a été enregistrée, et le motif ci-dessus rapporté est le seul qui se trouve au jugement formel. C'est aussi le seul auquel s'attaque l'appelant.

Les articles 1569A et suivants s'appliquent-ils à la vente en bloc, quand l'acheteur s'est chargé du passif? C'est là le seul point à décider dans cette cause, dit-il. Il n'y en a pas d'autre.

Il y en a d'autres, mais celui-là suffit, en effet.

Le chapitre de *la vente en bloc,* ajouté au code civil par la loi I Geo. V, c. 39, et qui se compose des articles 1569A à 1569E, a pour objet d'ouvrir en faveur des créanciers un recours de la nature de l'action paulienne, mais qui n'est pas assujetti aux conditions des articles 1033 et suivants C.C.

L'art. 1569A C.C. dit d'abord ce qu'il entendre par *vente en bloc,* en vue des dispositions qui suivent: c'est toute vente ou tout transport de fonds de commerce ou de marchandises, en dehors du cours ordinaire des opérations commerciales du vendeur.

Suivent les règles applicables à cette sorte de vente:

1569B: L'acheteur doit, avant de payer le prix, en partie ou en totalité, obtenir du vendeur une déclaration assermentée des créanciers du vendeur et de la somme due à chacun d'eux, ainsi que de la nature des créances.

1569C: Si une partie quelconque du prix d'achat est payé, sans que cet affidavit ait été obtenu, la vente est

réputée frauduleuse et, à l'égard des créanciers du vendeur, nulle et de nul effet, à moins que tous les créanciers du vendeur ne soient payés en entier à même le produit de cette vente.

1569D: Si l'affidavit a été obtenu, deux alternatives sont prévues: *a*) ou bien l'acquéreur se conforme aux indications que comporte cette déclaration: alors, il doit payer à chacun des créanciers indiqués la somme qui lui est due, si le prix de vente est assez élevé pour les désintéresser tous, et sinon, une proportion déterminée par le rapport de chaque créance à la totalité du prix d'achat; *b*) ou bien l'acquéreur ne se conforme pas à cette règle: il est alors personnellement responsable, envers les créanciers indiqués, des sommes portées en regard de leurs noms respectifs.

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Il est indéniable que la vente en bloc, non accompagnée de l'affidavit requis par l'art. 1569B C.C., n'est pas nulle de plein droit, est annulable seulement, et que son annulation doit être déclarée par l'autorité judiciaire (cf. *Mathieu* vs *Martin* (1); *Ramsay* vs *Turcotte* (2); *Montreal Abattoirs* vs *Picotte* (3); *Benoit* vs *Dieulefet* (4).). Pareille vente doit-elle être déclarée frauduleuse, quand elle ne comporte aucune fraude dont le créancier puisse souffrir, lorsqu'elle a pour conséquence exactement le résultat que la loi a voulu lui faire produire, et qu'elle évite précisément ce que le législateur a voulu prévenir? Telle est, en effet, la position créée par la vente du 28 novembre 1928.

L'opération s'est faite ouvertement, sans rien qui révèle la moindre intention frauduleuse, et simplement dans le dessein avoué de transporter les droits et les obligations de Léon D'Amours à une compagnie destinée à continuer son commerce.

La présomption de fraude voulue par l'art. 1569B C.C., en l'absence d'affidavit, ne peut s'élever; le législateur a établi cette présomption pour la protection des créanciers qui, par suite d'une vente en bloc des biens de leur débiteur, verraient l'actif de ce dernier, leur gage commun, évanoui, et leur recours pratiquement anéanti. En ce cas, la loi veut que leur droit d'être payés à même cet actif soit sauvegardé, soit qu'à défaut d'affidavit la vente puisse être annulée et que l'actif retombe dans le patrimoine du débiteur, soit que l'acquéreur les paye sur le prix de son achat ou qu'à défaut il devienne personnellement tenu d'acquitter les dettes du vendeur.

Cette dernière alternative est, pour les créanciers, la plus favorable de toutes: ils gardent leur recours contre le débiteur originaire, ils en acquièrent un nouveau; ils peuvent exercer leurs droits sur les biens vendus et de plus sur les autres propriétés de l'acquéreur. C'est précisément la situation où se trouvent les créanciers de Léon D'Amours, après la vente du 28 novembre 1928, par laquelle, sans novation, la compagnie Léon D'Amours et fils limitée a pris à sa charge les dettes de Léon D'Amours.

Dans ces conditions, les articles 1569A C.C., et suivants ne s'appliquent point, sauf, pourrait-on dire, que la responsa-

(1) (1922) 29 R.L. n.s. 112.
(2) 14 Q.L.R. 123.
(3) Q.R. 52 S.C. 373.
(4) Q.R. 57 S.C. 354.

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bilité statutaire du dernier paragraphe de l'art. 1569D se trouve en quelque sorte suppléée par la responsabilité contractuelle. Même si les art. 1569 A C.C. et suivants étaient applicables, et même si un affidavit avait accompagné la vente, les créanciers n'auraient pas eu de droits plus étendus, ni l'acheteur plus d'obligations.

En somme, il n'y a pas lieu d'appliquer les art. 1569A C.C. et suivants, et les créanciers n'ont pas d'intérêt à se prévaloir de ces dispositions, dans le cas de la vente d'une entreprise en exploitation, comprenant l'actif et le passif, à une compagnie formée pour continuer le commerce du vendeur.

L'appel doit être rejeté.

Appeal dismissed with costs.

Solicitor for the appellant: *Alex. Michaud.*

Solicitors for the respondent: *Rousseau, Rousseau & Paré.*

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*May 8.
*May 22.

DONAT THIFFAULT .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Statements made by accused in the presence of several police officers, who were not produced as witnesses—Admissibility in evidence of such statements—Inquiry by trial judge as to voluntary character of—Not a mere matter of discretion for trial judge—Declaration by accused as to previous arrest.

The Court, reversing the judgment of the Court of King's Bench, appeal side, quashed a conviction for murder and granted a new trial, on the ground that a statement in writing alleged to have been made by the appellant to certain police officers has been improperly received in evidence upon his trial. *Sankey* v. *The King* ([1927] S.C.R. 436) foll. and *Rex* v. *Seabrooke* (58 C.C.C. 323) ref.

Determination of any question raised as to the voluntary character of a statement by an accused elicited by interrogatories administered by police officers is not a mere matter of discretion for the trial judge. Where such a statement is elicited in the presence of several officers, the statement ought, as a rule, not to be admitted unless (in the absence of some adequate explanation of their absence) those who were present are produced by the Crown as witnesses, at least for cross-examination on behalf of the accused; and, where the statement professes to give the substance of a report of oral answers given by the

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accused to interrogatories, without reproducing the questions, then the written report ought not to be admitted in evidence unless the person who is responsible for its compilation is (here again in the absence of some adequate explanation of his absence) called as a witness.

Upon the evidence, although the document was read over to the appellant before he signed it, it was not, in one most important particular, a correct statement of what the accused appellant said and intended to say. Moreover the statement made by the accused in this case contained a declaration that he had been once arrested "for a fight * * * and I had paid the costs." The fact that the accused had been arrested for a criminal offence and had paid "the costs" could not be competent evidence—not only on the ground that the fact itself would be in law wholly irrelevant, but on account of the unfair prejudice to the accused which would be the likely effect of the reception of evidence of it; and a document professing to embody admissions obtained as the admissions of the accused were in this case, which included a record of an admission of a fact that would be inadmissible against him, and which was calculated to prejudice him, could not properly be received in evidence. It might in a proper case be used by a witness to refresh his memory; but the use of the document itself as evidence could not be justified.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, upon leave to appeal granted by this Court (1), sustaining the conviction of the appellant, on his trial before Laliberté J. and a jury, on a charge of murder. The grounds of appeal, and the material facts of the case bearing on the points dealt with by this Court, are sufficiently stated in the judgment now reported. The appeal was allowed; the conviction was quashed, and a new trial ordered.

Lucien Gendron K.C. and *Leopold Pinsonnault* for the appellant.

V. Bienvenue K.C. and *P. Biguë K.C.* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—This appeal raises a question as to the admissibility in evidence, upon the appellant's trial for murder, of a statement in writing alleged to have been made by him to certain officers of the provincial police of Quebec.

The indictment charged

Que le ou vers le 4 mars 1932, en la paroisse de Ste.-Thècle, district des Trois-Rivières, Donat Thiffault, de la dite paroisse de Ste-Thècle, dit district, s'est rendu coupable de l'acte criminel qualifié meurtre, en mettant et faisant mettre volontairement le feu à sa maison d'habitation,

(1) [1933] S.C.R. 242.

dans la dite paroisse de Ste-Thècle, laquelle maison fut incendiée, avec l'intention de causer la mort de Bertha Gervais, son épouse, et en causant par là effectivement la mort de la dite Bertha Gervais, sa dite épouse, qui mourut dans le dit incendie. Le tout sans justification ni excuse et contrairement au code criminel canadien et ses amendements.

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As we have come to the conclusion that there must be a new trial, our references to the facts will be limited to such as appear to be necessary to make clear the considerations affecting the points in dispute.

The appellant, at the time of the burning of his house on the night of the 3rd and 4th of March, 1932, was living alone in the house with his wife and one of his sons. His wife was sleeping upstairs. It was an important part of the case for the Crown that the fire which caused her death did not originate in the wood stove in the first story or in the furnace in the cellar. Witnesses were called who stated that the cellar was cold and that it was evident that the furnace had not been heated that night. There was a fire of no importance in the wood box beside the stove in the first storey, but that was easily and quickly extinguished. The fire in which Mrs. Thiffault lost her life in the second storey was, the Crown contended, and witnesses deposed, an independent fire which had originated in that storey where there was no stove or other heating apparatus.

The evidence adduced by the Crown consisted very largely of accounts of various instances of suspicious conduct and of incriminating statements of the accused himself. These, the Crown contended, pointed to a determination to burn the house in order to collect the insurance money and to get rid of his wife. A good deal was made of an incident in which his wife was said to have charged him with attempting to get her to drink ether. Much was also made of a conversation which was alleged to be, in effect, a proposal of marriage by the accused a few days before the fire accompanied by a prediction that he would soon be a widower.

In view of the nature of the case made by the Crown, the written statement received in evidence was plainly calculated to incriminate the appellant as shewing that he had given a false account of the origin of the fire, and as admitting that he entertained projects of marriage soon after his wife's death and that he was about to leave the province when he was detained by the police. The admis-

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sion that the house which he had insured for $1,500 was bought for $800 and that he had received $3,500 as the result of a fire two years before was also gravely compromising, in view of the evidence adduced by the Crown of conversations in which he had spoken of insurance as a very useful thing and had said that his brother had profited by insurance to the extent of $16,000.

The text of the document objected to is as follows:

Ma femme était couchée en haut, dans la nuit du 3 au 4 mars 1932, ainsi que mon fils Florent Thiffault. Je me suis aperçu du feu vers 1.00 hr. du matin. La boucane m'a réveillé, j'ai traversé de ma chambre à la cuisine et j'ai ouvert la porte pour crier: "Au feu". En partant pour monter en haut, mon garçon est tombé en bas dans l'escalier, je l'ai ramassé dans l'escalier et jeté dehors. Il avait une épaule démanchée et la tête fendue. Le Dr. Aubin en a pris soin. C'est le seul qui était couché en haut. Un nommé Magnan est arrivé avec un extincteur. Quand on a vu qu'on ne pouvait pas sauver en haut, nous avons sauvé le ménage en bas. J'ai acheté un gallon d'éther à Shawinigan mais je ne connais pas qui me l'a vendu. Mon épouse a fait analyser l'éther par le Dr. Aubin de Ste-Thècle. Le soir du feu, je suis allé chez Magnan (Charles). (Je veux parler de la soirée précédant le feu), je suis entré chez Anselme Baril et Philomène Béland, vers 6.30 ou 7 hrs. je suis parti vers 9 hrs. moins quart. Ensuite je suis allé chez Davidson, le barbier, j'ai veillé là jusqu'à 10.30 avec Alexandre Moisan. Là, je suis parti à la maison.

La cause du feu est un feu de fournaise, la fournaise chauffait au bois. Le feu était pris le long du tuyau en montant. La dimension de la maison en dehors 26 pieds carrés, en bas de la maison il y avait 4 appartements. En haut, 4 appartements et un passage.

J'ai retiré $1,500.00 d'assurances sur la maison et $1,700.00 sur le ménage. J'étais assuré pour le feu par M. A. I. Gravel, de Trois-Rivières. L'assurance a été prise par M. Arthur Guillemette, de Ste-Thècle. J'étais assuré depuis quatre ans. Ça fait un an que j'ai cette maison et j'ai continué à payer les assurances pour le feu. J'ai payé la maison $800.00 et elle était assurée pour $1,500.00 J'ai déjà passé au feu à Ste-Thècle il y a 2 ans; j'ai reçu $3,500.00 d'assurances. J'avais été assuré par M. M. Guillemette et Gravel. Je n'ai jamais été arrêté pour vol ni pour vente de boisson; j'ai été arrêté une fois pour bataille à Harvey Jonction et j'ai payé les frais. Je n'ai jamais proposé à une femme que nous pourrions nous marier prochainement alors que ma femme vivait. Personne n'a brisé de vitres ou enfoncé la porte pour entrer dans la maison lors du feu alors que j'étais dans la cuisine. Je devais rencontrer Mme Emile Comeau, le 21 juillet, pour question de mariage mais quand j'ai vu le détective à Ste-Thècle, j'ai vu qu'il se brassait quelque chose et je ne me suis pas rendu chez Mme Comeau et j'avais décidé de partir pour Hertz, Ontario, le 25 juillet; je n'ai pas mis mon projet à exécution parce que la police est venu me chercher. C'est moi qui ai fait du feu dans la fournaise le dernier et il était environ 10.30 p.m. j'ai fait un feu de bois et la fournaise était dans la cave. Un "drum" à gazoline servait de fournaise, et je ne suis pas descendu dans la cave entre minuit et une heure; je n'ai pas entendu crier ni plaindre ni ma femme ni mon fils, et j'ai signé.

The circumstances in which the document was procured are these: The coroner on the adjournment of the inquest on the 23rd of July directed Mitchell, a provincial constable, to arrest and detain the accused as a material witness. The accused was, accordingly, taken into custody at Ste. Thècle and was conducted by Tremblay, the deputy chief of detectives, accompanied by Mitchell, to Quebec. He was there detained at the quarters of the provincial police until the following morning, when, in the presence of Tremblay and Mitchell and one Chouinard, a clerk, he was interrogated by the chief of detectives Lemire. It is quite evident, from the record made, that Lemire's questions were directed, not only to ascertaining the connection of the accused with the fire in which his wife lost her life, but also to obtaining admissions of damaging facts in his past history. It was obviously on the face of it an interrogation for the purpose of procuring admissions which could be used in evidence against the accused. A record of what the accused said was drawn up by Chouinard as the examination proceeded, and this was afterwards read over to the accused, who signed it.

Although the summary compiled by Chouinard and signed by Thiffault is expressed in the first person, it is not a verbatim report of what occurred. The questions are not given and the summary could only be, at best, on the face of it, a statement of Chouinard's interpretation of the substance of the answers to the interrogatories administered.

There are two decisive objections to the admission of the document.

First, the evidence points to the conclusion that, although the document was read over to him before he signed it, it is not a correct statement of what the accused said and intended to say. Admittedly, there is one most serious error. It was part of the Crown's case against him that he had procured ether for the purpose of putting into effect some noxious design against his wife. Being interrogated as regards his possession of ether, his answer was that he had bought, as he thought, whisky, and had discovered afterwards that they had given him ether. The signed statement not only disregards the explanation, but converts the explanation into an admission that he had purchased ether

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—an admission most material to support the case for the Crown. In view of this admitted mis-statement of what the accused had said, it seems to us to be quite plain that the document containing it ought not to have been admitted, at all events in the absence of explanation by Chouinard, who had compiled it.

There is a cognate objection which, apart from everything else, seems to establish the inadmissibility of the document. It contains a declaration that the accused had been once arrested "pour bataille * * * et j'ai payé les frais." The fact that the accused had been arrested for a criminal offence and had paid "les frais" could, of course, not be competent evidence—not only on the ground that the fact itself would be in law wholly irrelevant, but on account of the unfair prejudice to the accused which would be the likely effect of the reception of evidence of it; and we think that a document professing to embody admissions obtained as the admissions of the accused were, which includes a record of an admission of a fact that would be inadmissible against him, and which was calculated to prejudice him, could not properly be received in evidence. It, no doubt, might in a proper case be used by a witness to refresh his memory; but the use of the document itself as evidence could not be justified.

The second objection is on the ground that the voluntary character of the statement signed by the accused has not been established. The law governing the decision on the point raised by this objection was stated in a judgment of this Court in *Sankey* v. *The King* (1), in the course of which it was said,

> We feel, however, that we should not part from this case without expressing our view that the proof of the voluntary character of the accused's statement to the police, which was put in evidence against him, is most unsatisfactory. That statement, put in writing by the police officer, was obtained only upon a fourth questioning to which the accused was subjected on the day following his arrest. Three previous attempts to lead him to "talk" had apparently proved abortive—why, we are left to surmise. The accused, a young Indian, could neither read nor write. No particulars are vouchsafed as to what transpired at any of the three previous "interviews"; and but meagre details are given of the process by which the written statement ultimately signed by the appellant was obtained. We think that the police officer who obtained that statement should have fully disclosed all that took place on each of the occasions when he "interviewed" the prisoner; and, if another policeman was pres-

(1) [1927] S.C.R. 436, at 440-1.

ent, as the defendant swore at the trial, his evidence should have been adduced before the statement was received in evidence. With all the facts before him, the learned judge should form his own opinion that the tendered statement was indeed free and voluntary as the basis for its admission, rather than accept the mere opinion of the police officer, who had obtained it, that it was made "voluntarily and freely."

It should always be borne in mind that while, on the one hand, questioning of the accused by the police, if properly conducted and after warning duly given, will not *per se* render his statement inadmissible, on the other hand, the burden of establishing to the satisfaction of the court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown. (*The King* v. *Bellos* (1); *Presko* v. *The King* (2). That burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer, who obtained it, that it was made freely and voluntarily.

This judgment was applied, and rightly applied we think, by the Court of Appeal for Ontario in *Rex* v. *Seabrooke* (3). It results from this statement of the law that the determination of any question raised as to the voluntary character of a statement by the accused elicited by interrogatories administered by the police is not a mere matter of discretion for the trial judge, as the court below appears to have thought. Where such a statement is elicited in the presence of several officers, the statement ought, as a rule, not to be admitted unless (in the absence of some adequate explanation of their absence) those who were present are produced by the Crown as witnesses, at least for cross-examination on behalf of the accused; and, where the statement professes to give the substance of a report of oral answers given by the accused to interrogatories, without reproducing the questions, then the written report ought not to be admitted in evidence unless the person who is responsible for its compilation is (here again in the absence of some adequate explanation of his absence) called as a witness.

In the present case there are exceptionally powerful reasons for applying these rules strictly. The Deputy Chief of Detectives Tremblay who accompanied the accused from Ste. Thècle with Mitchell and was present throughout the interrogatories was not produced. Mitchell was called but only after the document had been admitted. No explanation is proffered of the absence of Tremblay. As to

(1) [1927] S.C.R. 258. (2) (1922) 63 S.C.R. 226.
(3) (1932) 58 C.C.C. 323.

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the clerk Chouinard, it was especially important that his evidence should be before the court, because, first, as already observed, the statement written by him was in reality a summary of what he judged to be the substance of the answers given by the accused; and second, because of the proved inaccuracy of the statement in one most important particular.

We can entertain no doubt that, upon the principle elucidated in the judgment of this Court in *Sankey* v. *The King* (1), the admission of this document cannot be supported.

We were asked to dismiss the appeal upon the ground that, even if not strictly admissible, the document added nothing to the weight of the evidence supplied from other sources. We are not satisfied that no substantial wrong, within the meaning of sec. 1014 (2) of the Criminal Code, has occurred in virtue of the improper reception of this document. We are unable to reach the conclusion that, to use the language of the Judicial Committee in *Makin* v. *A.G. for N.S.W.* (2), that

> it is impossible to suppose that the evidence improperly admitted * * * can have had any influence on the verdict of the jury.

The conviction must be quashed and, in the circumstances, we think there should be a new trial.

Appeal allowed and new trial ordered.

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*May 19.
*June 16.

STUART A. GALT (PLAINTIFF).....APPELLANT;

AND

DAME MINNIE ROBERT (DEFENDANT)...RESPONDENT.

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

Municipal law—Action for municipal taxes before the Superior Court—Execution of judgment—Sale by the sheriff—Right of redemption by the owner—Arts. 600, 780, 708, 760 C.C.P.—Cities and Towns Act, R.S.Q., 1925, c. 102, ss. 564 and seq.

Section 564 of the *Cities and Towns' Act*, giving to the owner of an immoveable the right to redeem it within a year from the date of its sale for municipal taxes, does not apply in a case of a judicial sale by the sheriff in execution of a judgment rendered by the Superior

*PRESENT:—Duff C.J. and Rinfret, Smith, Cannon and Crocket JJ.

(1) [1927] S.C.R. 436. (2) [1894] A.C. 57.

Court in an action for municipal taxes brought and proceeded with in accordance with the provisions of the Code of Civil Procedure.
The Superior Court of Quebec has jurisdiction to entertain an action for municipal taxes when the amount claimed is $100 or more.
Judgment of the Court of King's Bench (Q.R. 54 K.B. 161) affirmed.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Walsh J., and dismissing the appellant's action.

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

H. Chauvin K.C. and *J. Martineau K.C.* for the appellant.

Chs. Laurendeau K.C. and *H. Gérin-Lajoie K.C.* for the respondent.

The judgment of the court was delivered by

RINFRET J.—L'action qui nous est soumise dans cet appel a pour but de faire déclarer qu'un certain immeuble, vendu par le shérif à la suite d'un jugement de la Cour Supérieure, est sujet au rachat prévu par les articles 564 et suivants de la *Loi des cités et villes* (1925, S.R.Q., c. 102), sous prétexte que la réclamation qui avait fait l'objet du jugement de la Cour Supérieure consistait en une demande de taxes municipales.

Il est exact que l'action originaire intentée par la ville d'Iberville contre la compagnie "Pyramid Realty Limited" avait pour but de réclamer des taxes municipales. Ces taxes s'élevaient à la somme de $352.10. La ville institua cette action comme une action pour dette ordinaire devant la Cour Supérieure; et il est indiscutable qu'elle avait le droit de poursuivre sa réclamation sous cette forme et que la Cour Supérieure avait juridiction pour entendre la cause et prononcer le jugement.

Sur ce point, malgré l'avis contraire exprimé par le juge de première instance, la Cour du Banc du Roi (1) a été unanime dans le sens que nous venons d'indiquer; et c'est la conclusion inévitable qui résulte à la fois du texte du code de procédure civile (art. 48 et suiv.) ainsi que du jugement du Conseil Privé dans la cause de *Montreal Light, Heat & Power Consolidated* v. *City of Outremont* (2).

(1) (1932) Q.R. 54 K.B. 161. (2) [1932] A.C. 423.

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Il est juste d'ajouter que, devant cette Cour, les deux parties étaient d'accord sur cette question.

La ville d'Iberville, ayant, conformément au code de procédure, obtenu son jugement d'une cour compétente sur une action ordinaire pour dette, procéda, toujours en vertu du même code, à mettre ce jugement à exécution au moyen d'un bref de saisie au nom du Souverain (Art. 600 C.P.C.). Les procédures de l'exécution forcée furent strictement suivies. Dans le cours ordinaire des choses, un immeuble situé dans la ville d'Iberville fut vendu par le shérif d'après les règles du code de procédure et fut adjugé à l'intimée.

Le bref de *fieri facias*, de même que les annonces de vente et les autres procédures accessoires, se contentaient de mentionner que la saisie avait été pratiquée et que la vente judiciaire serait effectuée en exécution d'un jugement, sans indiquer la nature de la réclamation pour laquelle le jugement avait été obtenu. Cela est d'ailleurs conforme à la pratique et à la loi. En sorte que le public, et en particulier l'adjudicataire, ne connaissaient rien de la dette qui avait fait l'objet de la demande originaire. Tout ce qu'ils savaient, et tout ce qu'ils étaient tenus de savoir, d'après la façon dont on a toujours procédé dans la province de Québec, c'était qu'il y avait eu un jugement de la Cour Supérieure suivi d'une saisie dont la vente judiciaire était la conclusion.

D'après le procès-verbal de vente dressé par le shérif, l'adjudication a transféré tous les droits inhérents à l'immeuble vendu et que le saisi pouvait exercer, ainsi que les servitudes actives qui y étaient attachées (c'est le texte même de l'article 780 du code de procédure civile). L'intimée, s'étant portée adjudicataire, paya le montant de son enchère (art. 758 C.P.C.) et reçut du shérif un contrat de vente (art. 760 C.P.C.) dont les termes étaient:

* * * autant que je puis le faire légalement, je cède, abandonne, vends et transporte au dit adjudicataire, ses hoirs et ayant cause, tout le dit immeuble (suit la description) et tous et chacun les droit, titre, intérêt, propriété, et demandes quelconques, de ma part en vertu du dit bref relativement au dit immeuble.

Pour avoir et tenir le dit immeuble sus-mentionné et décrit avec ses accessoires, par le dit adjudicataire, ses hoirs et ayant cause, pour leur propre usage et bénéfice *à toujours*.

Cette cession est aussi complète qu'elle peut l'être. Elle est d'ailleurs en la forme habituelle du contrat de vente judiciaire. S'il est une chose bien établie dans la province

de Québec, c'est que la vente du shérif, régulièrement faite, comporte une cession absolue et constitue le titre le plus sûr et le plus solide que l'on puisse posséder.

L'intimée étant devenue propriétaire en la forme et manière que nous venons d'exposer, vendit plus tard la propriété à un tiers. Mais il n'est pas nécessaire d'aller plus avant dans l'histoire de ce litige, vu que les procédures supplémentaires auxquelles cette affaire a donné lieu ont été définitivement réglées par la Cour du Banc du Roi et qu'il n'y a pas d'appel de cette partie du jugement.

L'appelant, créancier de "Pyramid Realty Limited," invoquant alors les articles 564, 565, 566 et 567 de la *Loi des cités et villes*, s'est adressé à l'intimée pour racheter ou retraire l'immeuble au nom et pour le profit de la compagnie qui en était propriétaire au temps de l'adjudication. L'intimée a refusé; et l'action a été intentée contre elle pour la contraindre à effectuer la rétrocession de l'immeuble. La sanction suggérée par l'appelant, si l'intimée persistait dans son refus, était que le jugement définitif tienne lieu d'acte de rétrocession et, au moyen de l'enregistrement, opère la radiation de tous les actes qui sont intervenus à la suite de l'adjudication. La Cour Supérieure a maintenu l'action, mais la majorité de la Cour du Banc du Roi (1) a infirmé cette décision.

Pour mieux comprendre la prétention soulevée par l'appelant, il vaut mieux reproduire d'abord l'article de la *Loi des cités et villes* sur lequel il s'appuie:

> 564. L'immeuble vendu pour taxes peut être racheté par le propriétaire ou ses représentants légaux, en tout temps durant l'année qui suit la date de l'adjudication, sur paiement à l'adjudicataire du prix de vente, y compris le coût du certificat d'adjudication, avec intérêt à raison de dix pour cent par an, une fraction de l'année étant comptée pour l'année entière.

Nous sommes d'avis que la Cour du Banc du Roi a eu raison de décider que cette disposition de la *Loi des cités et villes* ne s'appliquait pas à une vente judiciaire effectuée par le shérif en exécution d'un jugement de la Cour Supérieure.

La première considération qui nous amène à cette conclusion est que l'article 564 se trouve dans une loi spéciale et que, à moins que l'intention contraire n'y soit formellement exprimée ou ne découle nécessairement des termes

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employés, il ne doit pas être interprété comme devant s'appliquer à des cas autres que ceux auxquels pourvoit la loi spéciale. Ce principe a d'autant plus de force, en l'espèce, que la loi spéciale ici vient en conflit avec le code de procédure civile, qui est, dans la province de Québec, la loi fondamentale d'application générale. Or, l'adjudication à l'intimée n'a pas été faite en vertu de la *Loi des cités et villes*—loi spéciale où se trouve l'article 564—, mais elle a été faite en vertu du code de procédure civile, loi générale où aucune disposition de ce genre ne se rencontre. Sans doute, le texte de l'article 564 est plutôt large. Mais cela n'empêche pas le fait qu'il est contenu dans la *Loi des cités et villes,* sans aucune référence à la loi générale, et qu'il doit être entendu comme étant, dans l'intention du législateur, destiné à s'appliquer uniquement aux cas prévus par la loi dans laquelle il a été inséré. En l'absence d'indications précises à cet effet, l'on ne saurait traiter l'article 564 de la même manière que s'il faisait partie du code de procédure civile et, pour ainsi dire, comme s'il était incorporé à ce code.

Notre point de vue est bien exprimé dans Maxwell, On the interpretation of statutes, 7th ed., p. 71:

> General words and phrases, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act and as not altering the law beyond them.

L'auteur, au moment où il formule ce principe général, vient de faire observer que l'on ne saurait présumer que le parlement aurait eu l'intention, sans le dire expressément, de modifier la loi commune

> beyond the immediate scope and object of the statute. In all general matters outside those limits, the law remains undisturbed.

L'on ne doit pas perdre de vue que, dans une loi spéciale, l'esprit du législateur est dirigé uniquement sur l'objet de cette loi. Même lorsqu'il emploie les termes les plus généraux, il n'a quand même en vue que le sujet particulier dont la loi s'occupe; et il n'entre pas dans ses intentions de légifiérer sur d'autres matières. Il faut éviter, si le législateur ne l'a dit lui-même, d'interpréter une disposition contenue dans une loi spéciale de façon à lui donner une portée qui la ferait sortir du cadre de cette loi.

En plus de la première considération que nous venons d'exposer, il nous paraît y avoir plusieurs autres raisons pour arriver à la même conclusion.

On connaît bien le but de l'article 564. La méthode spéciale pourvue par les lois municipales de Québec pour permettre de percevoir les taxes comprend, d'abord, la saisie et la vente des biens meubles appartenant à ceux qui doivent des taxes et se trouvant dans la municipalité (*Loi des cités et villes*, art. 542 et suiv.; Code municipal, art. 718 et suiv.). A l'encontre de la procédure dans les cas ordinaires, telles saisie et vente sont faites en vertu de mandats signés par le maire ou par le préfet, suivant le cas, adressés à un huissier et exécutés par cet officier. Il s'agit là de tous les meubles saisissables appartenant au contribuable débiteur et qui se trouvent dans la municipalité.

Il y a, en plus, la vente et l'adjudication des immeubles, soit en vertu des articles 726 et suivants du code municipal, soit en vertu des articles 548 et suivants de la *Loi des cités et villes;* mais là il ne s'agit plus de la vente de tous les immeubles du contribuable. Cette procédure spéciale ne s'applique qu'aux "immeubles sur lesquels les taxes imposées n'ont pas été payées"; et c'est là une différence essentielle entre la vente pour taxes effectuée en vertu des lois municipales et la vente judiciaire en exécution d'un jugement. La première ne peut être effectuée que sur l'immeuble qui doit la taxe, tandis que, lorsqu'une municipalité a procédé à prendre jugement pour ses taxes comme sur une action de dette ordinaire, son jugement est exécutoire contre tous les biens meubles et immeubles du contribuable, sans tenir compte de la question de savoir si les immeubles saisis sont les mêmes que ceux sur lesquels les taxes étaient imposées et à raison desquels le jugement a été rendu. La vente municipale est limité à l'immeuble imposé, tandis que la vente judiciaire s'applique à tous les biens du contribuable.

Or, le code municipal et la *Loi des cités et villes,* dans des chapitres spéciaux, règlent minutieusement la procédure qui doit être suivie lorsque la corporation municipale décide de procéder à la vente des immeubles sur lesquels des taxes sont imposées. Ce ne sont pas les officiers de justice qui agissent dans ces procédures. Suivant le cas, c'est le secrétaire-trésorier du comté ou le greffier de la ville. C'est lui non seulement qui exécute toutes les procédures, mais c'est lui également qui dresse et signe le certificat d'adjudication d'abord, puis l'acte de vente après que la période de

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retrait est expirée. C'est une procédure très sommaire. Il n'y a pas de saisie. Il n'y a que la publication d'avis aux endroits spécifiés par la loi municipale. Dans le code municipal, l'adjudication est faite à celui qui offre de payer le montant des deniers à prélever, y compris les frais, pour la moindre partie de l'immeuble sur lequel il est dû des taxes (art. 732 code municipal). En vertu de la *Loi des cités et villes,* le greffier vend les immeubles au plus haut enchérisseur; mais il est spécifié qu'il ne s'agit que des "immeubles sur lesquels il est encore dû des taxes" (art. 552). Dans chacun des cas, l'adjudicataire doit payer immédiatement le prix de son adjudication; et, sur paiement, il reçoit seulement un certificat constatant les particularités de la vente, en vertu duquel il est dès lors saisi de la propriété de l'immeuble adjugé; et il peut en prendre possession, mais "sujet au retrait qui peut en être fait" dans l'année, pour les villes, et dans les deux années suivantes pour les corporations régies par le code municipal (C.M. art. 734-735 et 736; *Loi des cités et villes,* art. 553-554 et 555). Ce n'est que si l'immeuble adjugé n'a pas été racheté ou retrait dans le délai prévu que l'adjudicataire devient propriétaire absolu ou irrévocable (Code municipal, art. 740; *Loi des cités et villes,* art. 558). Au contraire, dans la vente judiciaire en vertu du code de procédure civile, dès que l'adjudicataire a payé son prix d'achat, le shérif, comme officier de la cour, lui consent un acte absolu et définitif.

On voit donc la différence essentielle entre les deux méthodes de procédure; et cela permet de comprendre le sens exact des mots employés dans l'article 564 de la *Loi des cités et villes.* Il nous paraît clair que, lorsque le législateur, dans cet article, s'est servi de l'expression "l'immeuble vendu pour taxes", il a voulu exprimer par là exclusivement l'immeuble vendu conformément aux dispositions des articles 548 et suivants de la *Loi des cités et villes,* parce que c'est uniquement à ce genre de vente que l'expression s'applique. Les mots "vente pour taxes" ont un sens bien spécial dans le langage municipal de la province, et ils sont compris couramment comme voulant dire: la vente effectuée suivant la méthode particulière qui est pourvue au code municipal ou dans la *Loi des cités et villes.* C'est le seul cas, en effet, où l'on puisse dire véritablement qu'un immeuble est "vendu pour taxes". Dans

les autres cas, sans doute la dette pour laquelle l'action a été intentée a pu être une taxe, mais cette taxe est transmuée dans le jugement qui intervient. Elle devient une dette judiciaire semblable à toutes les autres dettes judiciaires; et lorsque la saisie et la vente s'ensuivent, ce n'est plus une vente pour taxes, mais c'est une vente en exécution du jugement obtenu sur l'action. La distinction que nous faisons n'est pas arbitraire, puisque précisément elle est marquée par les mots employés par le législateur lui-même dans les expressions différentes qu'il a employées aux articles 564 et 546 de la *Loi des cités et villes.* A l'article 564, comme nous l'avons signalé, il parle de "l'immeuble vendu pour taxes", tandis qu'à l'article 546, lorsqu'il réfère à la vente du shérif ou d'un autre officier, à la suite d'une action intentée devant les tribunaux, il la définit comme "la vente * * * en exécution d'un jugement obtenu".

Par conséquent, en analysant le texte même de l'article 564 et en donnant aux mots de ce texte leur sens usuel et courant, on arrive encore à la conclusion adoptée par la Cour du Banc du Roi que "l'immeuble vendu pour taxes" se réfère à la vente particulière réglée par les lois municipales, et non pas à la vente judiciaire effectuée en exécution d'un jugement. Cela est confirmé encore par l'emploi dans l'article des mots "certificat d'adjudication", qui, évidemment, s'adressent au certificat donné par le greffier dans une vente municipale. Ce dernier point cependant est moins significatif, parce que l'on pourrait tout de même prétendre que, si l'on applique l'article à une vente judiciaire par le shérif, il faudrait alors l'entendre *mutatis mutandis,* et, dans ce cas, remplacer les mots "certificat d'adjudication" par les mots "contrat de vente". Ce serait sans doute, en l'espèce, une méthode d'interprétation défectueuse, puisque le contrat de vente du shérif est définitif, tandis que le certificat d'adjudication du greffier est un titre uniquement temporaire. Mais comme il est nécessaire de faire cette substitution de mots pour permettre l'opération du droit de retrait dans les ventes faites à la suite d'un jugement de la cour de magistrat, ou des cours de circuit, ou de la cour du recorder, en vertu de l'article 546, l'argument tiré de l'emploi des mots "certificat d'adjudication" dans l'article 564, pour écarter son application à une vente faite à la suite d'un jugement de la Cour Supérieure, perd

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nécessairement de la force que cet argument pourrait autrement avoir.

Il est cependant deux autres motifs d'approuver le jugement de la Cour du Banc du Roi, que nous tirons de l'article 546.

Cet article déroge au code de procédure civile. Il permet de réclamer, par une action intentée devant la cour de magistrat, ou la cour de circuit du comté ou du district, ou la cour du recorder, le paiement des taxes municipales, quel que soit le montant de l'action.

Précisons que la raison d'être de cet article dans la *Loi des cités et villes* est uniquement ce fait: que l'action peut être intentée, dans ce cas, quel que soit le montant des taxes réclamées. N'eût été cette raison, le premier paragraphe de l'article eût été inutile, car le code de procédure civile attribuait déjà aux cours qui y sont mentionnées le droit de connaître de ces actions dans la limite de leur juridiction ordinaire. En vertu du code de procédure civile, la corporation municipale avait droit d'instituer son action en réclamation de taxes jusqu'à concurrence des montants prévus, soit devant chacune de ces cours, soit devant la Cour Supérieure. Le but principal de l'article 546 a donc été de faire exception à la loi générale pour permettre aux corporations municipales de poursuivre le recouvrement des taxes devant les tribunaux inférieurs sans aucune limite quant au montant réclamé.

Une disposition de ce genre existait depuis longtemps dans la *Loi des cités et villes* (Voir les statuts refondus de 1909, art. 5755, et les statuts antérieurs). Mais, jusque-là, il demeurait bien clair que tout immeuble soumis à une vente en exécution d'un jugement—même si le jugement avait été rendu sur une action en réclamation de taxes municipales—n'était pas soumis au retrait qui, au contraire, était autorisé par la loi dans tous les cas de vente par le greffier de la municipalité. C'est en 1922, lors d'une refonte de la loi concernant les cités et villes, que l'on introduisit pour la première fois (S.R.Q. 13 Geo. V, c. 65, art. 535) la prescription que la vente d'un immeuble par le shérif, ou autre officier, en exécution d'un jugement obtenu devant les tribunaux inférieurs, serait sujette au droit de retrait, de la même manière et dans le même délai que les ventes faites par le greffier de la municipalité.

Le texte de l'article 535 de la loi de 1922 est le même que le texte de l'article 546 de la *Loi des cités et villes* actuelle; et l'on peut en tirer immédiatement deux déductions:

1° Jusqu'à cet amendement, les immeubles vendus en exécution d'un jugement, qu'il fût des tribunaux inférieurs ou de la Cour Supérieure, n'étaient pas susceptibles de retrait. La loi de 1922 a modifié la situation en disant expressément que le retrait s'appliquerait désormais aux jugements obtenus sur une action devant les tribunaux inférieurs. Elle a donc laissé subsister la loi antérieure quant aux jugements obtenus devant la Cour Supérieure, qui n'est pas mentionnée dans la nouvelle législation.

2° En plus, l'amendement de 1922 reproduit dans l'article 546 de la loi actuelle est à l'effet que la vente en exécution d'un jugement des tribunaux inférieurs

est sujet au droit de retrait de la même manière et dans le même délai que les ventes faites par le greffier de la municipalité.

Or, le seul article qui permet ce droit de retrait est l'article 564; et c'est donc cet article que le législateur a entendu désigner lorsqu'il parle du

droit de retrait de la même manière et dans le même délai que les ventes faites par le greffier de la municipalité.

Cela souligne bien que, dans son intention, le retrait dont il est question dans l'article 564 est celui qui opère dans "les ventes faites par le greffier de la municipalité". Cet article, par lui-même, ne s'applique qu'à ces ventes; et le retrait dont il parle s'applique également aux ventes en exécution d'un jugement des tribunaux inférieurs uniquement en vertu de la référence qui se trouve dans l'article 546 de la *Loi des cités et villes*. Comme l'on ne saurait trouver de référence analogue en ce qui concerne les ventes faites en vertu d'un jugement de la Cour Supérieure, il s'ensuit que le droit de retrait ne s'applique pas à ces ventes.

Nous dirions d'ailleurs, indépendamment du raisonnement qui précède, que le fait même de spécifier le droit de retrait dans le cas de vente à la suite de jugements des tribunaux inférieurs implique nécessairement l'exclusion de ce droit lorsqu'il s'agit de jugements de la Cour Supérieure.

Ajoutons, en plus, ceci:

L'article 10 du chapitre 7 de la loi de Québec 31 Vict. prescrit que

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nul acte ou nulle disposition de la législature en aucune manière aura force à l'encontre (d'un article du code de procédure civile), à moins que tel article n'ait été spécialement désigné dans tel acte.

Un arrêt de la province de Québec, *Giroux* v. *Quebec, Montreal & Southern Railway* (1), a décidé que cet article était encore en vigueur. Cette opinion a été approuvée par quelques-uns des juges de la Cour du Banc du Roi qui ont rendu jugement dans cette cause-ci; et elle a également été adoptée par l'appelant dans son factum et lors de l'audition devant cette cour, bien qu'il s'en soit servi pour appuyer un autre point de la cause. Si cela est exact, il semblerait qu'il en résulte que les dispositions du code de procédure civile quant à une vente judiciaire en exécution d'un jugement de la Cour Supérieure et tous les articles qui s'y rapportent, n'étant nulle part "spécialement désignés" dans la *Loi des cités et villes,* continuent d'avoir leur plein effet conformément au code de procédure civile, et ne sont nullement affectés par les prescriptions relatives au retrait contenues dans cette loi spéciale.

Il ne reste plus qu'à considérer deux objections soulevées par l'appelant.

Jusqu'à la loi de 1922, les articles des lois successives qui prescrivaient le rachat des immeubles vendus pour taxes contenaient l'expression: "Vendu par le greffier du conseil en vertu des dispositions précédentes", ou quelque expression équivalente; tandis qu'en 1922 on a retranché ces expressions.

Leur disparition peut certainement s'expliquer par le fait que c'est au même moment que la législation nouvelle a étendu le droit de retrait aux ventes faites en exécution des jugements des tribunaux inférieurs. Mais même si cette modification du texte ne s'expliquait pas de cette façon, nous n'y verrions pas, quand même, l'indication d'un changement dans l'intention du Parlement. La présomption qu'un changement d'intention résulte d'une modification du texte n'est jamais décisive; et l'on doit adopter sur ce point le principe posé par le Conseil Privé dans son arrêt *re Brown* v. *McLachlan* (2) que:

in dealing with a statute which professes merely to repeal a former statute of limited operation and to re-enact its provisions in an amended form, (we) are not necessarily to presume an intention to extend the operation of those provisions to classes of (matters) not previously subject to

(1) 19 R.P.Q. 357. (2) 4 A.C. 550.

them, unless the contrary intention is shewn; but (we) are to determine on a fair construction of the whole statute, considered with the surrounding circumstances, whether such an intention existed.

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L'appelant a attiré notre attention sur le fait que les articles 568 à 571 de la *Loi des cités et villes* sembleraient impliquer que l'article 564 doit recevoir une application générale.

Nous ne le croyons pas. Ces articles traitent de l'achat par la municipalité des immeubles vendus pour taxes. Ils permettent à la municipalité d'enchérir et d'acquérir ces immeubles lorsqu'ils sont mis en vente; la municipalité peut ainsi enchérir et acquérir ces immeubles à toute vente du shérif et à toute autre vente ayant l'effet d'une vente du shérif; puis ces articles prévoient la façon de procéder "si le droit de retrait est exercé" et stipulent que, s'il n'est pas exercé, "le greffier, le shérif, le protonotaire ou le syndic, suivant le cas, dresse et signe un acte de vente en faveur de la municipalité et le fait enregistrer". La mention de "toute autre vente ayant l'effet d'une vente du shérif" et celle du protonotaire ou syndic dans les articles 568 et 570, supposeraient, suivant l'appelant, que le législateur aurait prévu que le droit de retrait pourrait s'exercer dans d'autres cas que ceux d'une vente par le greffier ou d'une vente en exécution d'un jugement des tribunaux inférieurs. Nous ne croyons pas que cette conséquence résulte du texte de ces articles.

En vertu du code de procédure civile (art. 1146 et suiv.), même à la suite d'un jugement de la cour de circuit, le bref pour l'exécution d'un immeuble est rapportable à la Cour Supérieure du district où le jugement a été rendu; et toutes les procédures incidentes à la saisie ou à la vente des immeubles saisis sont du ressort de la Cour Supérieure, où le bref est rapportable, de la même façon que si le jugement y eût été originairement rendu. Il s'ensuit que, dans les cas prévus par l'article 546 de la *Loi des cités et villes,* et comme conséquence du jugement rendu par la cour de circuit, le shérif et le protonotaire sont les officiers qui doivent agir. En plus, lorsque le shérif est intéressé, c'est le protonotaire ou son député qui agit en ses lieu et place (art. 35 et 36 C.P.C.). L'emploi des mots "shérif" et "protonotaire" n'implique donc pas nécessairement une vente qui aurait été faite en exécution d'un jugement de la Cour Supérieure.

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Il y a l'emploi du mot "syndic" qui, nous l'avouons, n'est pas facile à expliquer. Les avocats de l'un ou de l'autre côté ont été incapables de nous signaler un cas où un syndic serait appelé à agir lorsqu'un immeuble situé dans une cité ou une ville est mis en vente pour taxes municipales. Le savant procureur de l'intimée a suggéré que l'article 568 prévoit également tous les cas d'immeubles mis en vente et sur lesquels seraient dues des taxes municipales. Il se peut que ce soit là l'intention du législateur; mais cette intention ne résulte pas clairement de la phraséologie qu'il a adoptée. Dans un cas où la question se présenterait carrément, les tribunaux seraient peut-être contraints de lui attribuer ce sens, s'il fallait réellement en venir à la conclusion que, en dépit du texte, il ne peut avoir d'autre sens, et que l'on soit incapable de trouver un cas où un immeuble serait mis en vente pour taxes municipales par un syndic.

Pour le moment, il suffit de dire que le seul emploi de ce mot dans l'article 570 n'a sûrement pas pour effet d'introduire la Cour Supérieure dans les clauses de la *Loi des cités et villes* qui concernent le droit de retrait. Un syndic n'a rien à voir avec une vente en exécution d'un jugement de la Cour Supérieure.

Et d'ailleurs, la loi n'indique pas de quel syndic il s'agit. Il n'est pas probable que ce soit le syndic de faillite. Cet officier existe en vertu d'une loi fédérale; et il semblerait que si c'est à lui qu'on a voulu faire allusion dans une loi provinciale, on l'aurait indiqué par une désignation plus claire. On lui aurait donné tout son nom de "syndic de faillite". Il est plus vraisemblable qu'il s'agisse des syndics scolaires, ou des syndics nommés en vertu des lois paroissiales. En effet, c'est à ces syndics que réfère un article de la même loi dans la sous-division précédente, à l'article 563.

De plus, l'on remarquera que l'article 568, qui parle de l'achat par la municipalité des immeubles vendus pour taxes, mentionne indistinctement les taxes municipales et les taxes scolaires. L'article 570, qui le suit, par l'emploi du mot "syndic", aurait donc eu pour but d'indiquer les syndics scolaires, en assumant qu'il pourrait se présenter des cas où ces syndics seraient appelés à agir et à dresser et signer un acte de vente en faveur de la municipalité en vertu de l'article 570.

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Quoi qu'il en soit de la portée exacte de cette prescription, nous sommes décidément d'avis qu'elle ne crée certainement pas une présomption suffisante pour prévaloir à l'encontre de toutes les raisons démontrant que le droit de retrait ne s'applique pas dans les cas d'immeubles vendus en exécution d'un jugement de la Cour Supérieure.

Nous croyons donc que la décision de la Cour du Banc du Roi doit être confirmée avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Chauvin, Walker, Stewart & Martineau.*

Solicitors for the respondent: *Lajoie, Lajoie, Gélinas & McNaughton.*

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*Feb. 21.
*May 8.

BENJAMIN KOEPPEL AND NETTIE KOEPPEL (PLAINTIFFS) ..... APPELLANTS;

AND

COLONIAL COACH LINES LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Contributory negligence—Ultimate negligence—The Negligence Act, 1930 (Ont.), c. 27—Collision between motor vehicles—Jury's findings—Whether findings reasonably warranted by the evidence—Setting aside of verdict.

A motor car driven by one of the plaintiffs, and in which the other plaintiff was riding, collided with the defendant's motor bus at a curve on a wet pavement. Plaintiffs claimed, and defendant counterclaimed, for damages. At the trial each party contended that the vehicle of the other had crossed the middle line of the road and caused the collision, and the evidence was largely directed to this issue. In answers to questions put to them, the jury found negligence in defendant's driver, causing the injuries to plaintiffs, in that "driver had been warned (this referring to a passenger's remark on seeing the motor car's approach) and might have applied brake sooner"; and also found negligence in plaintiff driver, causing the injuries to plaintiffs and damage to defendant, in that, "owing to the wet surface of road and worn condition of his front tires, he should have taken more precaution in making this curve"; and found the degrees of negligence: plaintiff driver 70%, defendant 30%; in accordance with which judgment was given at trial (*The Negligence Act, 1930,*

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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Ont., c. 27). This judgment was varied by the Court of Appeal, Ont., which dismissed the plaintiffs' action and sustained defendant's judgment against plaintiff driver. Plaintiffs appealed.

Held (Cannon and Crocket JJ. dissenting): Plaintiffs' appeal should be dismissed.

Per Rinfret, Lamont and Smith JJ.: The jury's finding of negligence against plaintiff driver was a finding that he did not exercise the care which a reasonable and prudent man would have exercised in the circumstances, and further, by implication, that the accident occurred on defendant's side of the road. By their answer as to defendant's negligence, the jury found in effect that, notwithstanding that through plaintiff's negligence his car crossed the middle line and went in front of the bus, the bus driver by applying his brakes more promptly could and should have avoided the accident. This was a finding of ultimate negligence, and, if supported by the evidence, left defendant responsible for the whole resulting damage. But the evidence did not reasonably warrant such a finding. (As to lack of time to act, *Swadling* v. *Cooper,* [1931] A.C. 1, at 10, referred to). The verdict against defendant could not be sustained and should be set aside (reference to *Can. Pac. Ry. Co.* v. *Fréchette,* [1915] A.C. 871, at 881).

Per Cannon J. (dissenting): The jury's findings were in effect that the negligent driving of both plaintiff and defendant's driver contributed (in the degrees mentioned) to cause the accident; and, upon the evidence, their verdict should not be set aside as unreasonable. (As to cases of contribution, *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129, at 144, cited). The judgment at trial should be restored.

Per Crocket J. (dissenting): The jury's finding against the defendant was a finding of ultimate negligence, and was reasonably warranted upon the evidence. But also the finding against the plaintiff driver was, on its face, a finding of ultimate negligence, and, but for the finding of ultimate negligence against defendant, a finding of either ultimate or contributory negligence against the plaintiff driver would have been reasonably supportable upon the evidence. The two findings (of the negligence in each which "caused" the injuries), upon the wording of the questions and answers, were contradictory, and both could not stand, either as findings of ultimate or of contributory negligence. (The law as to contributory negligence and ultimate negligence discussed). For above reason, and having regard to the direction, exclusive in certain respects, of the contest at the trial and of the judge's charge to the jury, there should be a new trial.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario allowing the defendant's appeal from the judgment of Kelly J. on the findings of a jury.

The action, which was for damages, arose out of a collision between a motor car, driven by one of the plaintiffs and in which the other plaintiff was riding, and a motor bus of the defendant. The jury found negligence (causing the injuries or damage) both in the driver of the defendant's bus and in the driver of the motor car, assessed

the damages of the plaintiff Benjamin Koeppel (driver of the car) at $629.50, of the plaintiff Nettie Koeppel at $6,500, and of the defendant (which had counterclaimed for damage to its bus) at $2,300, and found that the degrees of fault were: in the plaintiff driver 70%, and in the defendant 30%.

The judgment at trial was that the plaintiff driver recover against defendant $188.85 and costs; that the other plaintiff recover against defendant $6,500 and costs; that the defendant recover against the plaintiff driver $1,610 and costs; and that the defendant (which had claimed indemnity in accordance with the provisions of the Contributory Negligence Act of Ontario—*The Negligence Act, 1930,* c. 27) recover from the plaintiff driver 70% of the amount awarded to the plaintiff Nettie Koeppel for damages and costs, which the defendant might be compelled to pay pursuant to the judgment.

The judgment of the Court of Appeal directed that the action be dismissed with costs, and that the defendant recover on its counterclaim from the plaintiff driver the sum of $1,610 with costs.

The material facts of the case and the jury's findings are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The appeal to this Court was dismissed with costs, Cannon J. (who would restore the judgment at trial) and Crocket J. (who would order a new trial) dissenting.

W. F. Schroeder for the appellant.

T. N. Phelan, K.C., and *A. W. Beament* for the respondent.

The judgment of the majority of the Court (Rinfret, Lamont and Smith JJ.) was delivered by

LAMONT J.—This is an appeal from the judgment of the Court of Appeal for Ontario setting aside the judgment of Kelly J. in favour of the appellants entered in accordance with the verdict of the jury. The action was for damages for personal injuries received as the result of a collision between a light Falcon Knight coupé, owned and driven by Benjamin Koeppel, and an omnibus belonging to the respondent.

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On June 17, 1930, the appellants were proceeding easterly along the Provincial Highway No. 2, and, when about half a mile west of the town of Prescott, their car collided with the respondent's bus going west, whereby both vehicles were badly damaged and Nettie Koeppel was severely injured. The road at the point of impact had a good concrete surface, twenty-four feet wide, and had a black line marking its centre. It, however, curved sharply and, at the time of the collision, was wet. The appellants' car was six feet wide, while the bus was eight feet wide, thirty-three feet long, and weighed 14,000 pounds.

The pleadings shew a remarkable similarity in the allegations made. In their statement of claim the appellants allege that

the accident occurred solely in consequence of the negligence, imprudence and want of care of the defendant's driver in driving the defendant's bus at an excessive rate of speed, contrary to the rule of the road, in failing to keep a proper look-out and in failing to have the said bus under control having regard to all the circumstances.

The statement of defence, on the other hand, alleges that

the said collision was caused solely by the negligence, imprudence and want of care of the plaintiff Koeppel in driving his motor car at an excessive rate of speed contrary to the rule of the road and not having it under control under all the circumstances.

At the trial each party contended that the vehicle of the other had crossed over the centre line of the road, invaded his territory, and was responsible for the collision, and the evidence was largely directed to this issue.

The questions material to this appeal put to the jury, and the answers thereto given by them, were as follows:—

1. Q. Was there any negligence of the driver of defendant's bus (or coach) which caused the injuries to the plaintiffs?—A. Yes.

2. Q. If there was such negligence of defendant's said driver, state fully and clearly what was or were the act or acts, or omission or omissions, which constituted such negligence?—A. Driver had been warned and might have applied brake sooner.

3. Q. Was there any negligence of the plaintiff Benjamin Koeppel which caused the injuries to plaintiffs, and the damage to defendant?—A. Yes.

4. Q. If there was such negligence of the plaintiff Benjamin Koeppel, state fully and clearly what was or were his act or acts or omission or omissions which constituted his negligence?—A. Owing to the wet surface of road and worn condition of his front tires. He should have taken more precaution in making this curve.

* * *

8. Q. If you find that the driver of defendant's bus was negligent, and also that plaintiff Benjamin Koeppel was negligent, then state the degree

in which each of them was at fault or negligent?—A. Koeppel—70%, Colonial Coach Lines—30%.

In giving these answers the jury had before them the evidence of the Koeppels, that at the time of the collision their car was running twenty-two or twenty-three miles per hour; that previously it had been running from twenty-eight to thirty miles but had slowed down for the curve; that at all times their car had been on the south side of the centre line; that the respondent's bus was coming fast, and that instead of keeping to its own side of the road it cut the curve and crashed into their car. They said the left wheels of the bus were two or three feet over the centre line at the time.

The jury had also before them the evidence of W. G. McElroy, the driver of the bus; Edmund Smith, formerly a driver for the respondent but who, at the time of the accident, was a passenger in the bus; E. H. Billings, agent at Prescott for the Canadian Oil Company, who was driving a truck a short distance behind the respondent's bus, and Mrs. Sarney, a passenger in the bus. These witnesses testified that at all material times before the impact the bus was on its own side of the road; that the appellants' car was coming very fast—one witness putting it at thirty-five miles per hour—and that it was raining at the time. The first three of these witnesses stated that when Koeppel turned his front wheels to the right to take his course around the curve the momentum of the car was such that it did not take the curve but went straight ahead although the front wheels were properly set for the curve. They gave as a reason that the front tires would not grip the wet pavement. Smith refers to this straight ahead movement as "skidding" and says that when he saw the speed at which Koeppel's car was coming he remarked to McElroy that "something was likely to happen", as he knew Koeppel could not make the curve at that speed. On being asked how far the car was from the bus when he made that remark to McElroy, he gave this testimony:—

Q. At the time you made this remark to McElroy how far was the coupe away from you?—A. I do not know exactly how far it would be away.

Q. Approximately how far away would it be? I do not expect you to get out and measure it?—A. I could not give you any estimate.

Q. Would it be 20 feet away?—A. It was more than that.

Q. Was it 30 feet away?—A. Yes, and it would be more than that, but I do not know exactly how far.

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Q. Was it 50 feet away?—A. I could not say if it was 50 feet or not, or more.

Q. Give us your best estimate. I do not care whether you are right or wrong?—A. I do not know how far it was away.

Q. You do not remember how far it was away?—A. I do not know.

Q. What made you think there was going to be an accident?—A. When I saw the car coming around the curve I could see he was travelling quite fast and I know the nature of the roads there and I knew that at the speed he was travelling he could not make that curve.

* * *

Q. At the time you made that remark to McElroy the coupe was still well over to its south side of the centre line of the road?—A. He was still on his own side of the road, yes.

Q. And if you gave him the whole half of the road to pass there is no reason why he should not get across?—A. Yes, there was.

Q. What reason?—A. The reason I saw was that he was travelling too fast and the road was wet.

Smith also said that after the accident he examined the front tire left on the car and found it had no tread on it, that the tread had been worn off and the tire was in a very smooth condition.

McElroy testified that at no time did the speed of his bus exceed twenty miles an hour. He claimed that the accident was caused because the front tires of the Koeppel car failed to grip the wet pavement and follow the curve; that the car crossed the centre line and hit his bus which was well over to the right hand side; that when Koeppel turned his wheel to follow round the sharp part of the curve he was not more than twenty feet from him, and that Koeppel was then on the south side of the centre of the road. As to his ability to stop the bus, McElroy testified that, going at fifteen miles an hour, he could stop it, even on the wet pavement, in nine feet, and, going at twenty miles an hour he could stop in fifteen feet, but he added: "I do not know much about feet." He further said that he did not hear Smith say "Something is likely to happen," all he heard him say was "Look at this bird coming."

In view of this evidence what meaning is to be given to the answers of the jury? Dealing first with question 4—the negligence ascribed to the appellants—the finding is: "Owing to the wet surface of the road and the worn condition of his front tires he should have taken more precaution in making this curve". This is a finding that Koeppel did not exercise the care which a reasonable and prudent man would have exercised in the circumstances. In my opinion it is more: it is a finding by implication that the

accident occurred north of the centre line of the road; there would be no point otherwise in referring to the condition of Koeppel's tires. If Koeppel were on his own side of the road when the collision occurred the condition of his tires could not be a factor contributing to the accident.

Then referring to the answer given to question 2: "The driver had been warned and might have applied his brakes sooner."—By this answer, the jury, in my opinion, intended to find that if the brakes had been applied sooner the accident would have been avoided. It is a finding of ultimate negligence. The jury by these two answers were saying that, notwithstanding the fact that Koeppel crossed the centre line and drove in front of the bus, the driver of the bus, by the more prompt application of his brakes could and should have avoided the accident. If that finding is supported by the evidence, the driver of the bus, by not avoiding the consequences of Koeppel's negligence, when he had the present ability to do so, leaves the respondent responsible for the whole resulting damage.

Does the evidence support the finding?

Assuming that the remark made by Smith to McElroy amounts to a warning sufficient to fix the respondent with liability if unheeded (which to my mind is very doubtful), and assuming that when it was made the relative positions of the car and the bus were just what he says they were (and his is the only evidence on the point on which the appellants can rely), what does the evidence shew? It shews that when Smith gave his warning to McElroy the car and the bus were more than thirty feet apart, but it cannot be definitely fixed at fifty feet. But, giving the respondent the benefit of the doubtful distance of fifty feet between the car and the bus when Smith uttered his warning, it is, in my opinion, impossible to say that the accident could have been avoided. The combined speed of the vehicles was forty-two or forty-three miles per hour. The two cars at that speed would cover fifty feet in four-fifths of a second and, even if we allow more for the decreased speed of the bus after applying the brakes, there would be no more than one second of time which the driver of the bus would have to apply his brakes. One must add to that, as pointed to in the evidence, that brakes "do not *take* right instantly," that is, their effect is not felt imme-

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diately upon the wheels. It seems clear that we have here the class of case illustrated by the recent decision of the House of Lords in *Swadling* v. *Cooper* (1). Koeppel himself states that "he first realized there was danger" only when he was "about 20 feet away from the bus". The driver of the bus could not anticipate that the tires of the car "would not grip the pavement" and would let it "slide directly across into the path of the bus". Upon the only evidence in the record, between the moment when the bus driver "could have become aware" that Koeppel's car was cutting across to the north side and the moment of the impact, "there can have been no time for the (driver) to do anything to avoid the impact".

Even assuming the bus had stopped in fifteen feet, that would not have avoided the accident. Koeppel admits that he did not apply his brakes. His car would have kept on approaching the bus in any event and the only difference would have been that Koeppel's car would have struck the bus possibly a little more to the right than where it actually struck it.

It follows that the finding against the respondent is not reasonably warranted by the evidence and that, under the circumstances, that finding cannot stand.

Though reluctant to disturb the verdict of a jury, after careful examination of the evidence in this case, we have come to the conclusion that the verdict against the respondent cannot be sustained and there is no course open to us but to set it aside. (*Canadian Pacific Railway Company* v. *Fréchette* (2). We, therefore, agree with the Court of Appeal that the appellants' action fails.

The appeal should be dismissed with costs.

CANNON J. (dissenting).—I have read with great profit the opinions prepared by my brothers Lamont and Crocket. Is the evidence in this case of such a character that judgment cannot be possibly given in favour of plaintiffs? Or is the verdict of the jury so contradictory that a new trial must be ordered? With due respect, I think that the Court of Appeal went too far in dismissing the action completely and refusing to accept the finding of contributory negligence reported by the jury.

(1) [1931] A.C. 1, at 10. (2) [1915] A.C. 871 at 881.

Borrowing the words of Lord Birkenhead in his speech to the House of Lords in *Admiralty Commissioners* v. *S.S. Volute* (1),—

> I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame * * * , might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

In this case, we have the benefit of the jury's verdict, and there is evidence given on behalf of the defendant showing that McElroy was aware of the danger. The jury did not go so far as to say that he could have avoided the collision by appropriate measure but thought that he to a certain extent, 30%, contributed to the accident in the ordinary common sense, because there was not, in their opinion, a sufficient separation of time, place and circumstances between the negligent driving of the plaintiff and that of McElroy to make it right to treat the negligence of the plaintiff as the sole cause of the collision. If McElroy had put on his brake sooner, he may or may not have avoided the collision; there is no finding on this point and it was difficult to determine the distance between the vehicles when the danger of collision became apparent to Smith and other onlookers. I do not feel competent to decide from the record that it was not possible to stop the bus in good time within a distance which is not clearly established. I do not see my way clear to set aside the verdict of the jury as unreasonable; they have to the best of their ability applied their common sense to the evidence and, like the trial judge, I would give effect to their findings.

I, therefore, would allow the appeal and restore the judgment of the trial judge. The appellants will recover their costs here and in the Appellate Division from the respondent company.

CROCKET J. (dissenting).—This action was brought to recover compensation for personal injuries and loss severally sustained by the two plaintiffs before their marriage as a

(1) [1922] 1 A.C. 129, at 144.

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result of a collision between the plaintiff Benjamin Koeppel's automobile and one of the defendant's omnibuses.

The collision occurred on a sharp curve between a quarter and a half a mile west of the town of Prescott shortly before ten o'clock a.m., on June 17th, 1930, while the plaintiff was driving his automobile—a light Falcon-Knight coupe—with the female plaintiff (then Miss Nettie Bernstein) seated beside him—easterly along the Ontario provincial highway No. 2 on a holiday trip from Brooklyn, N.Y., to visit relatives at Hull, Quebec. The defendant's omnibus was proceeding west on its regular scheduled trip from Ottawa to Kingston. Koeppel was instantly thrown through the windshield of his car and sustained several bruises and other injuries, including the fracture of two teeth for which he claimed the payment of a New York dentist's bill for $150. Miss Bernstein sustained much more serious injuries, including a fracture of her right ankle and lacerations of the scalp, of the right leg below the knee and of her left ring finger, all of which have left deep permanent scars. The coupe itself was practically destroyed.

In their statement of claim for these injuries the plaintiffs alleged that the collision was caused solely by the negligence of the driver of the omnibus. This negligence is specifically stated in paragraph 3 to have consisted in approaching the curve at an excessive rate of speed and having the left wheels of the bus several feet south of the centre line of the highway. "The plaintiff Koeppel," the statement continues,

> turned his car to the south side of the highway as much as possible in order to avoid a collision with the defendant's bus, but when both vehicles were quite close to each other, the defendant's bus not only failed to turn to the right to enable the plaintiffs' automobile to pass in safety, but it was negligently turned sharply to the south, colliding violently with the plaintiffs' motor car * * *.

Paragraph 3-A alleges that the said accident occurred solely in consequence of the negligence, etc., of the defendant's driver in driving the bus

> at an excessive rate of speed, contrary to the rule of the road, in failing to keep a proper lookout and in failing to have the said bus under control having regard to all the circumstances.

The defendant by its defence denied all negligence on its part and alleged that the collision was caused solely by the negligence of the plaintiff, Koeppel, in driving his motor car

at an excessive rate of speed contrary to the rule of the road and not having it under control under all the circumstances,

and, alternatively, that Koeppel was guilty of contributory negligence. The defendant counter-claimed on these grounds for damages to the amount of $3,000, covering cost of repairing its bus, depreciation and loss of its use for thirty days at $50 a day. The defendant also claimed, in the event of the female plaintiff being found entitled to recover any amount against it, indemnification from the plaintiff, Koeppel, for his proportionate share thereof, under the provisions of the Contributory Negligence Act.

On the trial of the action at the Ottawa Assizes before Kelly, J., and a jury, the evidence on the part of the plaintiffs was directed principally towards proving that, immediately before and at the moment of the collision, the omnibus was cutting the curve with its left wheels on the south side of the painted line marking the centre of the paved roadway, and that it struck the coupe while the latter was well over on its own side of the road and while Koeppel, seeing the omnibus heading southwesterly towards him, was trying to avoid it by steering his car southeasterly towards the south shoulder of the road. The evidence on the part of the defendant was directed to disproving this claim and proving that the collision was caused by the coupe, in consequence of the excessive speed at which it was approaching the acute part of the curve, swerving from the south side of the road and running against the omnibus when the latter was wholly on and well over to its own, the north, side of the pavement. It was common ground that the pavement was wet with the rain and was more or less slippery.

The learned trial judge left eight questions to the jury. These questions and the jury's answers thereto were as follows:

1. Was there any negligence of the driver of defendant's bus (or coach) which caused the injuries to the plaintiffs?—A. Yes.

2. If there was such negligence of defendant's said driver, state fully and clearly what was or were the act or acts, or omission or omissions, which constituted such negligence?—A. Driver had been warned and might have applied brake sooner.

3. Was there any negligence of the plaintiff Benjamin Koeppel which caused the injuries to plaintiffs, and the damage to defendant?—A. Yes.

4. If there was such neglgence of the plaintiff Benjamin Koeppel, state fully and clearly what was or were his act or acts or omission or omissions which constituted his negligence?—A. Owing to the wet surface

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of road and worn condition of his front tires. He should have taken more precaution in making this curve.

5. At what amount do you assess the damages of plaintiff Benjamin Koeppel?—A. $629.50.

6. At what amount do you assess the damages of plaintiff Nettie Koeppel?—A. $6,500.

7. At what amount do you assess the damages of the defendant?—A. $2,300.

8. If you find that the driver of defendant's bus was negligent, and also that plaintiff Benjamin Koeppel was negligent, then state the degree in which each of them was at fault or negligent?—A. Koeppel, 70%; Colonial Coach Lines, 30%.

Upon these findings His Lordship directed a judgment for the plaintiff, Nettie Koeppel (an amendment having been allowed changing her maiden to her married name), against the defendant for $6,500 and costs; and, applying the provisions of the Contributory Negligence Act, a judgment for the plaintiff, Benjamin Koeppel, for $188.85—30% of the damages found by the jury to have been sustained by him —and costs; and a judgment for the defendant against the plaintiff, Benjamin Koeppel, for $1,610—70% of the damages found by the jury to have been sustained by it—with costs of its counter-claim. He also adjudged that the defendant should be indemnified under the provisions of sec. 3 of the Contributory Negligence Act (*The Negligence Act, 1930,* Ontario) to the extent of 70% of the amount it should be compelled to pay the plaintiff, Nettie Koeppel, upon her judgment against the defendant.

The defendant appealed to the Appellate Division against the judgments in favour of the two plaintiffs. That Court (Mulock, C.J.O., and Riddell and Grant, JJ.A.) allowed the appeal with costs, and dismissed the plaintiffs' action with costs, allowing the defendant's judgment against the plaintiff, Benjamin Koeppel, for $1,610 and costs to stand.

The plaintiffs now appeal to this Court against this decision, which, it is contended, involved the unwarranted setting aside of a valid finding of the jury that the collision was caused by the negligence of the omnibus driver in failing to apply his brakes sooner.

The learned Chief Justice and the late Mr. Justice Grant held that to succeed in the action it was necessary for the plaintiffs to establish that the omnibus crossed over to the southerly half of the highway and there caused the collision, and that the jury's answer to question 2 was not a finding to that effect. They held further, however, that

that answer was not a finding that the application of the brakes sooner would have prevented the accident nor a finding that the accident was caused by any negligence of the defendant.

It is only on the assumption that the plaintiffs must be strictly confined to the particulars alleged in their statement of claim and to the case as appearing by the evidence of their own witnesses on the trial that the jury's answer to question 2 can be disregarded. With all deference I am of opinion that such an assumption is not warranted in the circumstances of this case. The whole conduct of the defendant's driver in the operation of the bus while approaching the curve and in meeting the situation created by the approach of the Koeppel car from the opposite direction was exposed to the jury by the evidence of the bus driver and other of the defendant's own witnesses, who were travelling in the bus with him at the time. The first question which the learned trial judge left to the jury was: "Was there any negligence of the driver of defendant's bus, which caused the injuries to the plaintiffs?" with a direction in the event of the jury finding that there was, to state fully and clearly what was or were the act or acts or omission or omissions which constituted such negligence. There was no reservation or restriction to acts or omissions specifically alleged in the statement of claim.

Had the plaintiffs sought to introduce evidence to prove any negligence which was not within the allegations of their statement of claim, the defendant might well have objected to its admission on that ground. Such an objection would, doubtless, have resulted in an application to amend, which it would have been the duty of the trial judge to grant, unless the defendant made the affidavit of prejudice required by the *Judicature Act*. Here the failure of the driver of the bus to apply the brakes sooner than he did, which was the negligence the jury plainly meant to find, was disclosed by the defendant's own witnesses. No question of surprise, therefore, could arise on the production of the testimony. The evidence was all on the record and without objection. As a matter of fact, when the defendant's counsel, after the jury returned its findings, objected to the answer to question 2 on the ground that it was not within the negligence set up in the statement of

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claim, the trial judge, on application thereupon made by the plaintiffs' counsel, did allow an amendment to cover that answer.

In my opinion, it was not only the duty of the jury, under the direction which the learned trial judge gave them, to state any negligence of which they were satisfied on the whole evidence the driver of the bus was guilty, whether it was specifically alleged in the statement of claim or not, but it was also the duty of the trial judge to accept the jury's finding as to what that particular negligence was, provided it was intelligible and could reasonably be made on any evidence adduced before them and not withdrawn from their consideration, and to allow any amendment necessary to cover it, as His Lordship did.

I find myself also unable to adopt the view that the answer to question 2 was not a finding that the failure to apply the brakes sooner caused the collision, nor a finding that the collision was caused by any negligence of the defendant. It is true that it was not in terms an express, specific finding that "the application of the brakes sooner would have prevented the accident," but, reading it, as it must be read, with question 1 and the jury's answer thereto, it sufficiently indicates that the negligence of the bus driver, which they had already distinctly found caused the plaintiffs' injuries, consisted in his failure to apply the brakes sooner than he did. This in law plainly means that his failure to apply the brakes sooner was the real effective cause of the collision, i.e., its proximate, ultimate cause, which of course implies that the application of the brakes sooner would have prevented the collision. It may be, as Mr. Justice Riddell in his reasons for judgment holds, that the words of the answer: "Driver had been warned and might have applied brake sooner" negatives any negligence with regard to the application of the brakes by the bus driver *before* he was warned, but whether the language which the jury used was intended to so limit the negligence or not, it is none the less a finding of negligence on the part of the bus driver, and, coupled with question 1 and the jury's answer thereto, a finding of negligence "which caused the injuries to the plaintiffs."

The real difficulty in the case is that, while the jury have made this finding on questions 1 and 2, they have at the

same time in answer to questions 3 and 4 found that Koeppel was also guilty of negligence " which caused " the collision and the resulting injuries and damage, and that these two findings are manifestly contradictory unless one reads into questions 1 and 3 the words " or materially contributed to cause " and treats the negligence separately found against each driver, not as in itself causing the collision, but as operating with the negligence of the other to jointly cause it.

Although the answer to question 4 is less specific and definite than the answer to question 2, and in reality adds nothing to the jury's answer to question 3, viz: that Koeppel was guilty of negligence in approaching the curve in the circumstances, it is quite apparent from the reference to the wet surface of the road and the worn condition of his tires that what the jury meant was that he was approaching the curve at too great a speed. Whether the answer sufficiently indicates this or not, the answer to question 3 is a distinct finding that Koeppel was guilty of negligence, " which caused the injuries to plaintiffs and the damage to defendant." On its face this finding is a finding of ultimate negligence on the part of Koeppel, as the answers to questions 1 and 2 are also a finding of ultimate negligence on the part of McElroy. When the two findings and the answer to question 8 apportioning the fault are considered together there can, I think, be little question that the jury intended the two findings as findings of contributory negligence against both drivers, no doubt in the sense that the collision would not have occurred had it not been for the negligence of both. This, however, is not sufficient to make the negligence of either contributory in the legal sense of the word. A cause which is merely a *sine qua non* is not sufficient to constitute contributory negligence in the legal sense. This court decided in the case of *McLaughlin* v. *Long* (1), that the *Contributory Negligence Act* of the province of New Brunswick, which is similar in its relevant provisions to that of Ontario and the other provinces of Canada, effected no change in the law of contributory negligence so far as the meaning of that term is concerned and that damage or loss could properly be said to be "caused" by the fault of two or more persons within the meaning of

(1) [1927] Can. S.C.R. 303.

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sec. 2 of that Act " only when the fault of each of such persons is a proximate or efficient cause of such damage or loss, i.e., only when at common law each would properly have been held guilty of negligence which contributed to causing the injurious occurrence." Contributory negligence therefore implies, as it always did, negligent acts or omissions of two or more persons operating together to produce such an emergency or peril as to render it impossible for either or any of them, by the exercise of reasonable care, to avoid the consequences of the negligence of the other or others. There can be no such thing in the case of a collision between two vehicles as contributory negligence on the part of the one driver unless there is negligence on the part of the other which has also materially contributed to bring the collision about, that is to say, has efficiently operated with the negligence of the other to cause it. In that case, the combined negligence of the two drivers is in law the proximate cause of the collision. If, however, notwithstanding that both drivers may have been guilty of negligence, the situation resulting therefrom was such that either, by the exercise of reasonable care, could have avoided the collision, the failure to exercise such care and thus prevent the collision becomes the immediate and sole proximate cause thereof. The negligence of the other in that event cannot be said to have had any effective part in it. It is not a *causa efficiens*.

Here, the sole negligence found against McElroy was his failure to apply his brakes sooner. This finding obviously is based upon the fact that he was fully aware of the danger of Koeppel's not making the curve at the speed at which he was approaching it on a wet and slippery pavement and that he had the time and opportunity to avoid the threatened consequences by applying his brakes and stopping the bus before proceeding to the danger point at the peak of the curve. If he had the time and opportunity thus to avoid the threatened consequences of Koeppel's negligence, and negligently failed to do so, he was ultimately and wholly responsible for the collision. If he had not, and the earlier application of his brakes would have made no difference, he was not responsible at all, failing a finding of some other negligence on his part operating with that of Koeppel to create a peril which neither could avoid,

such as excessive speed, driving on the wrong side of the road or not keeping a proper lookout.

The finding against McElroy can therefore only be treated as a finding of ultimate negligence. Whether it is reasonably warranted as such by the evidence is another question which Mr. Justice Riddell, alone of the Appeal Judges, considered. With the utmost respect I find it impossible, upon my examination of the evidence of McElroy himself and of the witnesses, Smith and Billings, to agree with His Lordship that the finding is not reasonably warranted, whether it be construed as negativing all negligence on McElroy's part *before* he was warned or not.

The jurors had before them evidence of the dangerous character of the curve, especially in wet weather, and of McElroy's undoubted knowledge thereof. Also the statement of Smith, a licensed chauffeur, then in the employ of the defendant, who was seated in a passenger seat directly behind McElroy, that he saw the coupé coming around the curve and knew when he saw it that at the speed it was travelling it "could not make that curve" and called McElroy's attention to the danger. They had heard Smith, when asked how far the coupé was away at that time, answer that he did not know exactly, but later admit that possibly he could see 150 to 200 yards down the road (from where the bus was) at that time, and state also that at the time the coupé started to skid across the road it was possibly 100 or 125 feet away, and that he disagreed with McElroy's statement that the bus was but 20 feet away when the coupé started to skid. They also had Smith's evidence that when he called McElroy's attention to the coupé coming down the road the latter started slowing the coach down and "either shortly before or at the time of impact he immediately jammed his brakes on to stop the coach". Also the evidence of Billings, another licensed chauffeur, who was driving an oil truck behind the bus, that they were both entering this very treacherous curve, especially after a rainstorm, and that he could see a glimpse of the coupé coming around and that he realized if the smaller car took the curve at that speed it would be fatal. Also the statement of McElroy himself that when he first saw the coupé he was pretty close to the guard rail (on the north side of the highway) about the same distance back from the

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corner, and that the coupé had just come around another turn west on the road (at least 400 feet west of the first turn, according to the road plan in evidence), and that as he (McElroy) approached this curve the coupé "kept coming all the time towards us", and his further statement that when he got pretty near to the guard rail he saw the car coming, jumping in front, and he knew it was coming fast and got over as far as he could, "* * * and got just about to the sharp part of the turn when this car came around and the wheels (of the coupé) started to turn towards the river, towards the south". They had, moreover, his statement that the bus was travelling at 15 miles per hour and that he should have been able to stop it in about nine feet. They had before them also a blueprint of a plan of the highway, drawn to scale, shewing a total length of over 1,300 feet, upon which McElroy pointed out to them the point the bus had reached east of the guard rail when he first saw the coupé, which point would, according to the plan scale, be a short distance east of the east end of the guard rail and at least 300 feet east of the culvert within a few feet of which the collision occurred.

This testimony appears to me to be a conclusive answer to the following statement of the learned Appeal Judge in the closing part of his judgment: "No one gives any evidence so much as indicating that there was any delay in putting on the brakes as soon as an accident seemed imminent, or suggesting anything the driver could have done." Whether "it all happened in a split second," as His Lordship adds, apparently grounding the statement upon his acceptance of an answer which Billings made to one of the questions put to him by the plaintiffs' counsel, or whether McElroy had a reasonable opportunity of avoiding the collision after he became aware or should have become aware of the danger, was essentially a question of fact which it was the jury's exclusive function to determine, if there was sufficient evidence to enable them to reasonably do so, as I think there was. They had a right to accept or reject as much of the evidence of Smith and McElroy as they chose. Both were chauffeurs in the employ of the defendant at the time of the accident and were thoroughly familiar with the road. The jury evidently concluded that the bus was at least 125 feet away from the coupé when

the latter began to skid, as they were warranted in doing upon Smith's evidence, and that when McElroy was warned or became or should have become aware of the danger, he was some considerable distance farther east. Smith had sworn that when he warned McElroy, the latter started slowing down the bus—this obviously before the coupé had started to skid—and McElroy himself had pointed out to the jury on the road plan the point he had reached east of the east end of the guard rail when he first saw the coupé. If there were no other considerations than these, I would not feel prepared to say that the jury could not in any reasonable view of the evidence find that McElroy could have avoided the collision by applying his brakes sooner and stopping the bus before reaching the point where the coupé skidded across the road. We cannot justifiably substitute what may be our own views of the evidence upon such a question for those of the jury to whom the statute specially commits it for determination.

The finding therefore is, in my opinion, in itself a valid finding of ultimate negligence sufficiently supported by evidence. The question remains as to whether effect ought to be given to it as such, in the face of the finding against Koeppel. Obviously this can only be done by rejecting the latter finding as insupportable in any reasonable view of the evidence, whether regarded as a finding of contributory or of ultimate negligence. Convinced, as I am, that there is sufficient evidence to warrant the answers to questions 1 and 2 as a finding of ultimate negligence against McElroy, I am not prepared to hold, upon the whole evidence, that, but for this finding, a finding of either ultimate or contributory negligence on the part of Koeppel could not as well have been made in any reasonable view of the evidence. It is clear that both findings cannot stand either as findings of ultimate or of contributory negligence. In such a case and especially where, as here, the contest between the parties on the trial was so exclusively directed to the particular grounds of negligence set forth in the pleadings, and the learned trial judge, apparently for this reason, made no mention in his charge to the jury of McElroy's failure to apply his brakes sooner, which was the sole negligence found against him, or of the significance of the testimony with respect thereto as bearing upon the

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question of ultimate, as distinguished from contributory, negligence, I think that justice will best be served by ordering a new trial.

The plaintiffs' appeal to this court should be allowed and the judgment of the Appellate Division, dismissing their action with costs and allowing the judgment of the trial court on the defendant's counter-claim for $1,610 and costs, set aside, and a new trial ordered, with costs to the plaintiffs of the appeal here, but, in the circumstances, no order should be made for costs of the trial or on the appeal in the Supreme Court of Ontario.

Appeal dismissed with costs.

Solicitors for the appellants: *MacCraken, Fleming & Schroeder.*

Solicitors for the respondent: *Beament & Beament.*

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*May 16.
*June 16.

LADISLAS GEOFFROY ES-QUAL. AND DAME LUCIENNE BOULAIS (PLAINTIFFS) ..... } APPELLANTS;

AND

ANGLO-CANADIAN PULP & PAPER MILLS, LTD. (DEFENDANT)..... } RESPONDENT.

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

Workmen's Compensation Act—Accident—Inexcusable fault—Amount of damages—Statutory discretion of the Court—Section 6 of the Act, R.S.Q., 1925, c. 274.

One Joseph Geoffroy was employed as helper to one Lévesque, a millwright, in repairing some part of the interior machinery of one of three electrically operated revolving separators which were usually kept in operation together on the floor of the respondent's mill next above the blow pit floor. These separators, which were round wooden vats, were placed over what are called in the case basins, the walls of the basins being 3 to 4 feet wide, and stood about 3 feet above the level of the basin floors. There was an opening of about 18 inches diameter in the bottom of each separator. Lévesque and another millwright, Trépanier, were instructed by one of the respondent's foremen, to make the repairs in question. The electric switch, by which it was set in motion and which was placed on a wall some 10 feet or more from the separator beside the switches by which the

*PRESENT:—Duff C.J. and Rinfret, Smith, Cannon and Crocket JJ.

two other separators were started and stopped, was shut to enable the repairs to be made. While the repair work was in progress the power suddenly went off, putting out the regular lights as well as stopping all the machinery in that portion of the mill. The two millwrights resorted to an electric extension hand lamp to avoid delay in the repair work. Joseph Geoffroy was standing on the floor of the cement basin with the upper part of his body inside the separator endeavouring to continue the work with the improvised light, while his boss, Lévesque, was standing outside the separator within the basin wall, when, the electric current having been restored, the switch controlling the shaft by which the separator in question was operated was opened by one of the respondent's employees, the separator began to turn and Joseph Geoffroy was so injured that, although he was able to get himself through the opening in the bottom of the separator, he died soon afterwards. The respondent, recognizing its responsibility under the *Workmen's Compensation Act*, c. 274, R.S.Q., (1925), without awaiting the appointment of a tutor to represent her infant children, paid the widow $3,000—the maximum sum payable under the Act except in those cases which fall within the provisions of sec. 6—and $50 additional for funeral expenses. Ladislas Geoffroy, one of the appellants, was subsequently appointed tutor to the infant children, and in his quality as such brought, with the widow of the deceased as co-plaintiff, this action to recover further compensation to an amount of $20,000 under section 6 of the Act, alleging that "the accident was due to the inexcusable fault of the" respondent.

Held, reversing the judgment appealed from, that the accident was due to the inexcusable fault of the respondent company within the meaning of the *Workmen's Compensation Act*. The accident was one which would not have occurred if any precautions of any kind had been taken to protect the deceased in the dangerous position in which he was placed, and one for which there was no valid excuse—*Dufresne Construction Co.* v. *Morin* ([1931] S.C.R. 86) applied.

As to the amount by which the compensation should be increased, section 6 of the Act, in authorizing the Court to increase the compensation awarded where the accident "was due to the inexcusable fault of the employer," does not contemplate compensation estimated according to the standard of full reparation as in cases under arts. 1053 and 1054 C.C.—It is reasonable, in this case at all events, to limit the indemnity for the benefit of the children by reference to the principle of the enactment of section 4, ss. 2, by which compensation is payable "to the legitimate children * * * to assist them to provide for themselves until they reach the full age of sixteen years or more if they are invalids." This Court, in exercising its statutory discretion, is of the opinion that a fair award would be the sum of $10,000 from which must be deducted the sum of $3,000 already paid, this amount to be apportioned one half to the tutor for the benefit of the infant children in equal shares and the other half to the deceased's widow.

APPEAL from the decision of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court, Gibsone J., and dismissing the appellant's action to recover $20,000, as compensation for the

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death of one Joseph Geoffroy, who was killed while in the employ of the respondent company owing to the alleged inexcusable fault of the latter's employees.

The material facts of the case and the question at issue are fully stated in the above headnote and in the judgment now reported.

Ernest Lapointe K.C. and *Louis A. Pouliot K.C.* for the appellants.

Alfred Savard K.C. for the respondent.

The judgments of Duff C.J. and Rinfret, Smith and Crocket JJ. were delivered by

CROCKET J.—This is an appeal from the judgment of the Court of King's Bench of Quebec, confirming the judgment of Mr. Justice Gibsone of the Superior Court dismissing the appellants' action to recover compensation for the fatal injury of Joseph Geoffroy, father of the infants, represented by the above named tutor, and husband of the co-plaintiff, while engaged in the course of his employment in the defendant's paper mill in the city of Quebec.

The accident occurred on the night of December 13, 1927. There is no dispute as to the material facts. The deceased was employed as helper to one Lévesque, a millwright, in repairing some part of the interior machinery of one of three electrically operated revolving separators which were usually kept in operation together on the floor of the mill next above the low pit floor. These separators, which were round wooden vats, were placed over what are called in the case basins, the walls of the basins being 3 to 4 feet wide, and stood about 3 feet above the level of the basin floors. There was an opening of about 18 inches diameter in the bottom of each separator. Lévesque and another millwright, Trépanier, were instructed by one of the defendant's foremen, to make the repairs in question. The electric switch, by which it was set in motion and which was placed on a wall some 10 feet or more from the separator beside the switches by which the two other separators were started and stopped, was shut to enable the repairs to be made. While the repair work was in progress the power suddenly went off, putting out the regular lights as well as stopping all the machinery in that portion of the mill. The two millwrights resorted to an electric extension hand lamp

to avoid delay in the repair work. Geoffroy was standing on the floor of the cement basin with the upper part of his body inside the separator endeavouring to continue the work with the improvised light, while his boss, Lévesque, was standing outside the separator within the basin wall, when, the electric current having been restored, the switch controlling the shaft by which the separator in question was operated, was opened, the separator began to turn, and Geoffroy was so injured that, although he was able to get himself through the opening in the bottom of the separator, he died soon afterwards.

When the power went off the mill superintendent sent an employee named Stapleton up to the separator room from the floor below to see to the return of the power and the light. The separator switches had nothing to do with the light. Stapleton after the return of the current proceeded to turn on the separator switches, first one and then the other, the last one being the switch connecting with the separator in which Geoffroy was working. He did so of course without knowledge that Geoffroy was working inside this separator, neither Lévesque or Trépanier, who was standing outside the basin wall, having warned him, though both saw Stapleton open the first switch. When the latter turned on the third switch Trépanier shouted that there was a man inside the separator, but it was too late.

The defendant, recognizing its responsibility under the *Workmen's Compensation Act*, c. 274, R.S.Q., (1925), without awaiting the appointment of a tutor to represent her infant children, paid the widow $3,000—the maximum sum payable under the Act except in those cases which fall within the provisions of section 6, and $50 additional for funeral expenses. Ladislas Geoffroy was subsequently appointed tutor to the infant children, and in his quality as such brought this action to recover further compensation under sec. 6, which reads as follows:—

6. No compensation shall be granted if the accident was brought about intentionally by the person injured.

The court may reduce the compensation if the accident was due to the inexcusable fault of the workmen, or increase it if it was due to the inexcusable fault of the employer.

This Court in a judgment delivered by Duff J., in *Dufresne Construction Co.* v. *Morin* (1), without undertaking

(1) [1931] S.C.R. 86 at 93.

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Crocket J.

to lay down a definition of the word "inexcusable," as used in the *Workmen's Compensation Act*, unanimously declared the view that it is to be applied in its ordinary sense in the light of the context in which it occurs and of the subject-matter of the statute, quoting the dictum of Lord Cave in delivering the judgment of the Privy Council in *Montreal Tramways* v. *Savignac* (1), that "each case must be judged from its own facts."

We are of opinion that the accident was due to the inexcusable fault of the defendant company, within the meaning of the Act. It is not pretended that the deceased was himself in any way to blame. The opening of the switch by which the separator was put in motion while the deceased was within it engaged in the work he had been directed to do is inexplicable on any other ground than negligence on the part of some one or other of the defendant's employees. Whether the fault was the fault of the superintendent or Stapleton or Trépanier or Lévesque or the foreman who directed the repairs to be made is a matter of no consequence, so far as the responsibility of the defendant is concerned. All were servants of the company acting in the course of their employment. Their acts and omissions were all alike imputable to the company as their employer under art. 1054 of the Civil Code. The accident was one which would not have occurred if any precautions of any kind had been taken to protect the deceased in the dangerous position in which he was placed, and one for which there was no valid excuse. That is all that is necessary to entitle the plaintiffs to have the maximum compensation prescribed by sec. 4 increased.

As to the amount by which the compensation should be increased, we accept in principle the view upon which Mr. Justice Dorion proceeded in his dissenting judgment that, in authorizing the Court to increase the compensation awarded where the accident "was due to the inexcusable fault of the employer," the enactment does not contemplate compensation estimated according to the standard of full reparation, or according to some principle entirely unaffected by any considerations derived from the nature of the scheme of the Act. For example, the Court would not, we think, be justified in guiding itself by a rule that should

(1) [1930] A.C. 413.

admit, where death has not ensued, reparation for the suffering of the victim as such, apart altogether from its effect upon the victim's earning power, or the cost of providing for its alleviation. We think, moreover, that in this case at all events, it is reasonble to limit the indemnity for the benefit of the children by reference to the principle of the enactment of sec. 4, ss. 2, by which compensation is payable

> to the legitimate children * * * to assist them to provide for themselves until they reach the full age of sixteen years or more if they are invalids.

In the present case the children are very young and whether or not any one or more of them may fall, while still of tender years, within the class of "invalids" within the meaning of the enactment, only the future can determine. This last is a point which, we think, cannot be entirely neglected by the Court in exercising its discretion under section 6.

The majority of the court below have not afforded us any guide. We think that, keeping in view the limitations suggested by the provisions of the Act, a fair award would be the sum of $10,000 from which must be deducted, however, the sum of $3,000 already paid, this amount to be apportioned one-half to the tutor for the benefit of the infant children in equal shares and the other half to the co-plaintiff, deceased's widow.

The appeal will therefore be allowed and judgment entered accordingly against the defendant for $7,000, to be apportioned as stated, with costs throughout.

CANNON, J.—Je crois, comme mon collègue, l'honorable juge Crocket, que les circonstances de cette cause révèlent que l'accident est arrivé par une faute inexcusable du patron et de ses préposés. Si ces derniers avaient, en connaissance de cause et intentionnellement agi comme ils l'ont fait, ils auraient été coupables d'une acte criminel; il n'en faut pas autant pour conclure à l'existence d'une faute inexcusable. Je crois cependant, vu qu'il ne s'agit pas d'appliquer les articles 1053 et 1054 du code civil, que nous devons augmenter l'indemnité en restant dans le cadre de la loi des accidents du travail, essentiellement contractuelle et forfaitaire, basée entièrement sur le salaire que gagnait la victime; par conséquent, on ne peut réclamer quoi que ce

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soit qui ne représente pas une partie ou, tout au plus, le total du salaire perdu par la victime. L'article 2 de la loi donne droit à une indemnité réglée conformément à ses dispositions.

Il faut dire cependant que, en cas de mort, la loi pourvoit à une indemnité de manière à aider à pourvoir aux besoins des enfants jusqu'à l'âge de seize ans révolus, ou plus s'ils sont invalides. D'après l'article 4 du chapitre 274 S.R.Q. 1925, l'indemnité comprend une somme égale à quatre fois le salaire moyen annuel du défunt au moment de l'accident, ne devant dans aucun cas, sauf le cas de faute inexcusable du patron, être moindre que $1500 ni excéder $3000, plus $50 pour les frais de médecins et de funérailles.

La victime de la faute inexcusable de l'intimée gagnait $4.25 par jour, soit, pour 300 jours d'ouvrage, $1,275 par année. Mais, d'après l'article 7, si la rémunération annuelle de l'ouvrier dépasse $1,000, elle n'est prise en considération que jusqu'à concurrence de ce montant. Pour le surplus, et jusqu'à $1,500, elle ne donne droit qu'au quart des indemnités. Au-delà d'un salaire annuel de $1,500, la loi ne s'applique pas. Pour rester dans le cadre de la loi, le capital accordé, en case de faute inexcusable du patron, ne devrait, dans aucun cas, dépasser le montant requis pour payer une rente viagère de $1,500 à un individu de l'âge de la victime. L'honorable juge Dorion aurait accordé, en se basant, non sur le salaire de l'ouvrier, mais sur les besoins de la mère et des enfants, $6,300.

Tout en exerçant notre discrétion pour augmenter l'indemnité statutaire, car il ne s'agit pas dans l'espèce de fixer le montant des dommages subis, je crois que nous devons surtout tenir compte du salaire que l'ouvrier gagnait au moment de l'accident, soit $1,275 par année. Le dossier ne nous donne pas le chiffre qu'une compagnie d'assurance exigerait pour fournir une rente de ce montant. De plus, il ne faut pas oublier que le capital que nous accordons, tout en étant susceptible d'être placé à intérêt, en tout ou en partie, demeurera la propriété de la veuve et des enfants. Jusqu'à seize ans, les enfants vivront des revenus et entameront probablement le capital. D'après la loi, à seize ans, à moins d'invalidité, ils sont censés pourvoir eux-mêmes à leurs besoins et même être en mesure d'aider leur mère. Cette dernière devra tout probablement encore compter sur

sa part du capital pour vivre, même quand les enfants ne seront plus légalement à sa charge. Je crois qu'il sera raisonnable en leur donnant les moyens de se procurer un revenu de $600, soit moins que la moitié du salaire gagné par la victime, d'accorder $10,000. Il faudra évidemment retrancher les $3,000 déjà reçus.

Je maintiendrais l'appel et condamnerais la défenderesse à payer une somme de $7,000, en outre de celle qu'elle a déjà payée; et je partagerais cette somme également entre la demanderesse d'une part et ses enfants de l'autre, avec dépens des trois cours contre la défenderesse intimée.

Appeal allowed with costs.

Solicitor for the appellants: *Edgar Bournival.*

Solicitors for the respondent: *Savard, Savard & Savard.*

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HIS MAJESTY THE KING (OPPOSANT) ..... } APPELLANT;

AND

CENTRAL RAILWAY SIGNAL CO. INC. (PLAINTIFF) ..... } RESPONDENT;

AND

CANADIAN NATIONAL CHEMICAL WORKS (DEFENDANT).

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

Crown—Goods seized as forfeited under the Excise Act—Section 125—Goods situated in leased premises—Whether subject to seizure and sale for rent—Art. 1622 C.C.—Indemnity of the King from processual coercion in his own courts—Excise Act, R.S.C., 1927, c. 60, ss. 77, 79, 97, 116, 124, 125, 133, 181.

Goods seized as forfeited under the *Excise Act*, to which s. 125 of that statute applies, and in the possession of the Crown as such, in leased premises in the province of Quebec, are not subject to seizure at the instance of the landlord in proceedings by way of *saisie-gagerie* and to sale to satisfy the landlord's claim for rent.

Under a writ in the King's name, issued out of the Superior Court of the province of Quebec, goods which are the property of His Majesty and in the possession of His Majesty's officers cannot be seized and

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sold to satisfy a pecuniary claim of a subject.—Under the English law, the rule is absolute that no proceeding having for its purpose the issue of any process against His Majesty himself or against any of His Majesty's property is competent in any of His Majesty's courts; and there is nothing in the Quebec Act of 1774 (s. 8), in the two ordinances of 1777 establishing the courts of Quebec and regulating the proceedings in those courts or in the Civil Code or the Code of Civil Procedure, justifying an inference that there was any intention of in any way impairing such immunity of the sovereign from processual coercion in his own courts.

On the first point, Cannon J. stated further that these goods were *extra commercium* and therefore unseizable. He expressed no opinion on the second point which he deems unnecessary to decide the appeal.

APPEAL from the decision of the Court of King's Bench, appeal side, Province of Quebec, reversing, Tellier C.J. dissenting, the judgment of the Superior Court, P. Cousineau J. (1) and dismissing the demand made by His Majesty the King, by way of an opposition to withdraw, to enforce against the respondent, as lessor, the forfeiture of certain moveable property, which had been declared forfeited for violation of the *Excise Act*.

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

L. E. Beaulieu K.C. and *Ivan Sabourin* for the appellant.

G. Barclay K.C. and *Geo. Fortin K.C.* for the respondent.

The judgment of Duff C.J. and Rinfret, Smith and Crocket JJ. was delivered by

DUFF C.J.—The controversy in this appeal concerns the question whether goods seized as forfeited under the *Excise Act*, to which s. 125 of that statute applies, and in the possession of the Crown as such, in leased premises in the province of Quebec, are subject to seizure at the instance of the landlord in proceedings by way of *saisie-gagerie* and to sale to satisfy the landlord's claim for rent.

The Court of King's Bench has held that this question should be answered in the affirmative. We have come to the conclusion that a negative answer is dictated by the enactments of the *Excise Act*.

A very brief account of the facts will, perhaps, be useful. On the 4th of July, 1930, officers of the excise seized

(1) (1932) Q.R. 70 S.C. 446.

in the name of His Majesty certain goods, a number of gallons of ethyl acetate and the machinery and equipment consisting of boilers, tanks, pumps, still and accessories in the premises of the National Chemical Co. at Iberville as forfeited to His Majesty for violation of the *Excise Act*. The company had a licence for operating a chemical still but none for manufacturing beer or spirits. A sample of the spirits found was sent to the department which was informed that the "accused" had offered no explanation of the presence of the spirits on the premises. In the "opposition afin de distraire" filed subsequently in the Superior Court on behalf of His Majesty, it is alleged that the company had made use of

ces objets illégalement, ces articles ayant comme question de fait servi à manufacturer illégalement l'alcool, contrairement aux dispositions de la loi de l'accise et ces dits objets pouvant pour ces raisons être saisis en vertu de l'article 125 de la loi de l'accise, et l'opposant ayant aussi le droit de saisir ainsi ces objets et de les confisquer; et les objets sont ainsi sous saisie et confisqués depuis le 4 juillet 1930, en vertu de la loi de l'accise et des règlements du département qui en fait partie, étant depuis cette date sous la garde constante des officiers du département;

The National Chemical Co. having abandoned the premises, the articles seized on the 4th July remained in the custody of the officers of excise and in the possession of the Crown and were in such custody and possession on the 15th November, 1930. On that date, the respondent, the landlord of the premises, initiated proceedings by way of *saisie-gagerie* against the National Chemical Co., the tenant, and on the same day caused the property mentioned, in the possession of the Crown, to be attached.

The declaration having been filed on the 20th November claimed $600 for arrears of rent, $750 for rent for the residue of the term, possession of the demised premises and sale of the goods seized and payment of the landlord's claim by way of preference, and the Crown, on the 29th December, filed an "*opposition afin de distraire*" alleging that the Crown was the sole proprietor of the goods seized on the 4th July praying a declaration to that effect and a direction to the bailiff to release the goods from the seizure under the *saisie-gagerie*.

Some question was raised on the argument as to the effect of the seizure of the 4th July and as to its character as well. The point was not raised in the courts below and

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the evidence on the point is quite sufficient. It is not open to question on that evidence, that the goods were seized, and "seized as forfeited" for violation of the *Excise Act*. Nor is there any room for doubt as to the effect of such a seizure. It proceeds upon the assumption that the goods, having been forfeited *ipso jure*, in consequence of the violation of the Act, are at the time of seizure, and not as a consequence of it, the property of the Crown. There are several provisions of the statute under which forfeiture supervenes upon the commission of the offence, as a legal consequence of the offence, independently of any act on the part of the officers of excise or any conviction or other judgment of a court. Section 97, for example, under which in this case the officers seem to have been proceeding provides,

97. Every steam-engine, boiler, mill, still, worm rectifying apparatus, fermenting-tun, mash-tub, cistern, couchframe, machine, vessel, tub, cask, pipe or cock, with the contents thereof, and all stores or stocks of grain, spirits, malt, beer, tobacco, cigars, drugs or other materials or commodities which are in any premises or place subject to excise, shall be forfeited to the Crown, and be dealt with accordingly, if any fraud against the revenue is committed in any such place or premises, or if the owner of any such place, premises, apparatus, goods or commodities, his agent or any person employed by him, or any person having lawful possession or control of such place, premises, apparatus, goods, or commodities, is discovered in the act of committing, or is convicted of committing any act in or about such place or premises which is declared by this Act to be an indictable offence.

The enactments of the statute make effective provision for the protection of the Crown's possession of goods after forfeiture. Section 79, for instance, is in these words,

79. If any stock, steam-engine, boiler, still, fermenting-tun, machinery, apparatus, vessel or utensil, boat, vessel, vehicle or other article or commodity is forfeited under the provisions of this Act, for any violation thereof, it may be seized by the collector or other officer, or by any other person acting by the authority of such officer, at any time after the commission of the offence for which it is forfeited, and may be marked, detained, removed, sold or otherwise secured until condemned or released by competent authority, and shall not, while under seizure, be used by the offender; and if condemned, it shall be removed, sold or otherwise dealt with as the Minister directs.

Moreover, by force of the Act, certain definitely stated consequences flow from the seizure itself where the goods are "seized as forfeited". S. 116 provides as follows:

116. Every person who, whether pretending to be the owner or not, either secretly or openly, and whether with or without force or violence, takes or carries away any goods, vessel, carriage or other thing which has been seized or detained on suspicion, as forfeited under this Act, before the same has been declared by competent authority to have been seized

without due cause, and without the permission of the officer or person who seized the same, or of some competent authority, shall be deemed to have stolen such goods, vessel, carriage or other thing, being the property of His Majesty, and is guilty of theft and liable to three years' imprisonment.

It is convenient here to call attention also to s. 133 of the statute which is in these words,

133. All forfeitures and penalties under this Act, after deducting the expenses in connection therewith, shall, unless it is otherwise expressly provided, belong to His Majesty for the public uses of Canada: * * *

A good deal turns upon the effect of these sections and it is better that that should be now explained. But, first of all, attention ought to be called to the decision of this court in *The King* v. *Krakowec* (1), which deals with the words of s. 181. It was there held that the scope of the forfeiture contemplated by the Act could not be limited to the particular interest of the person or persons involved in the offence giving rise to it, but that it operates to vest in the Crown the absolute property of the thing forfeited.

I shall assume for the moment that the contention of the Crown is correct as to the effect of s. 125, viz., that in the events that happened the goods in question were, in point of law, condemned as forfeited to the Crown. At the time, therefore, of the attachment of the goods under the landlord's proceedings the goods were the property of the Crown. They were by force of s. 79 held by the Crown under the statutory enactment that they "shall be removed, sold or otherwise dealt with as the Minister directs". By s. 133 they belonged "to His Majesty for the public use of Canada". By the general law, being the property of the Crown, they were in the Crown's possession, but s. 116, which has just been quoted, deals with the possession of goods seized as forfeited in a very specific way before such goods have

been declared by some competent authority to be seized without due cause and without the permission of the officer or person who seized the same or some other competent authority.

If they are taken or carried away, with or without force or violence, by any person, they are deemed to have been stolen and the person having taken or carried them away is taken to be guilty of theft and liable to three years' imprisonment. The act, therefore, of interfering with the possession of the excise officer in such circumstances is an

(1) [1932] S.C.R. 142.

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Duff C.J.

illegal act, and any authority which might otherwise have been derived from Art. 1622 C.C. or any of the articles of the Code of Civil Procedure is overridden by the paramount force of the Dominion statute.

The argument for the respondent very largely centered upon the effect of s. 125 which is, accordingly, reproduced in its entirety:

> 125. All vehicles, vessels, goods and other things seized as forfeited under this Act or any other Act relating to excise, or to trade or navigation, shall be deemed and taken to be condemned, and may be dealt with accordingly, unless the person from whom they were seized, or the owner thereof, within one month from the day of seizure, gives notice in writing to the seizing officer, the collector in the excise division in which such goods were seized, or superior officer, that he claims or intends to claim the same.
>
> 2. The collector at the place where the seized articles are secured, or any superior officer, may order the delivery thereof to the owner, on receiving security by bond with two sufficient sureties, to be first approved by such collector or superior officer, for double the value in case of condemnation.
>
> 3. If such seized articles are condemned, the value thereof shall be forthwith paid to the collector and the bond cancelled; otherwise the penalty of such bond shall be enforced and recovered.
>
> 4. Such bond shall be taken to His Majesty's use in the name of the collector or superior officer, and shall be delivered to and kept by such collector or superior officer.

There does not appear to be any ground of substance for imputing ambiguity or obscurity to this language or even doubt as to what is signifies. In light of the provisions of the statute the phrase "seized as forfeited" can have only one meaning, as already indicated. It can only mean a seizure in consequence of the goods having been forfeited, the title to which has, by virtue of the forfeiture, become vested to the Crown. The context shews also that it does not contemplate a forfeiture which has occurred in consequence of a condemnation, and beyond question it includes a forfeiture following, without any act or proceeding of the Crown's officers, the commission of the offence, in cases in which the statute under which the forfeiture takes effect so provides.

What then follows? "All * * * goods * * * seized as forfeited", the section declares, "shall be deemed and taken to be condemned and may be dealt with accordingly," unless the owner or the person from whom they are taken gives notice within one month that he intends to claim them. The consequence that the goods shall "be deemed and taken to be condemned" is declared, in un-

qualified words, to be the consequence of the seizure unless the notice provided for is given within the specified time. If the notice is given, the seizing officer may deliver up the goods to the owner on receiving security by bond with sureties for double the value of the goods, to be available in the event of condemnation. In the absence of notice within one month, condemnation follows by force of the statute. If notice is given, the statute contemplates the usual proceedings for establishing the grounds of forfeiture and condemnation accordingly.

Mr. Barclay argued forcefully that the requirements of s. 124 must be observed before the condemnation declared by s. 125 could take effect.

It is plain from a mere inspection of these two sections that they are dealing with different things. S. 125 provides for a condemnation by force of the statute itself in the absence of notice. If notice is given, proceedings for condemnation will in the ordinary course follow, in which case the enactments of s. 124 may come into play, but in the absence of notice it is too clear for argument that no such proceedings are contemplated.

It was vigorously urged upon us that under this construction, s. 125 flagrantly violates the principle *audi alteram partem*. But, in truth, it is doubtful whether the provision for notice by posting in s. 124 affords any protection for the parties concerned more efficacious than that of s. 77, which directs the officer concerned in cases of seizure of property "as forfeited" to furnish one copy of the schedule to the person from whom the seizure is made, or to forward it to his last known post office address by registered letter.

It will be observed indeed that s. 125 embraces seizures not only under the *Excise Act*, but also under "any other act relating to excise or to trade or navigation," while the scope of s. 124 is restricted to proceedings in respect of things seized under the *Excise Act* and is not necessarily limited to cases where the things are "seized as forfeited".

In the course of his able argument, Mr. Barclay very properly called our attention to sections 163 and 164 of the *Customs Act* which deal with the effect of seizure of goods "as forfeited" by the officers of the Customs. There the words are,

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All such vessels, goods or other things seized as forfeited shall be deemed and taken to be condemned without suit, information or proceedings of any kind and may be sold. * * *

The difference in language, he contends, manifests a difference in intention and he asks us to infer from the absence from s. 125 of the words corresponding to the closing words of the sentence just quoted, that s. 125 contemplates only a condemnation after a proceeding in the ordinary course. If the language of s. 125 were ambiguous it might be permissible to resort to s. 164 for assistance. But, we repeat, the language of the former section is not ambiguous. Indeed, the phrase "shall be deemed and be taken to be condemned" manifests in the plainest way that an actual condemnation by judgment after suit is not what the section has in view, and the words in the *Customs Act* "without suit, information or proceedings of any kind," if inserted in s. 125 would be redundant. The legislature had in view a condemnation by construction of law taking effect the moment the prescribed conditions come into being. In modern statutes parsimony of words is not the rule. Redundancy, as every lawyer knows, is very common; in consequence, no doubt, of the necessity of meeting the difficulties suggested sometimes by inexpert persons during the passage of measures through Parliament. It would be a perilous proceeding to modify the effect of the unequivocal words of one statute by reference to the more copious style employed in a cognate provision of some enactment in *pari materia.*

This is sufficient for the disposition of the appeal in favour of the appellant, but we ought not, we think, to take leave of the case without dealing with the decision of the majority of the Court of King's Bench upon a question of fundamental importance and significance. That question is nothing less than this,—whether under a writ in the King's name, issued out of the Superior Court of the province of Quebec, goods which are the property of His Majesty and in the possession of His Majesty's officers can be seized and sold to satisfy a pecuniary claim of a subject. With great respect, in our opinion, the decision upon this point cannot be supported.

For the purposes of this discussion, we shall assume that the landlord has a privilege upon the goods of His Majesty situated on the demised premises in the sense that in a

proper proceeding by petition of right, in the proper court, he could have the goods sold and out of the proceeds have payment, by preference, of his claim for rent. It will, we think, be convenient first of all to state the doctrine of the English law as to the recourse given to a subject in respect of claims against His Majesty.

In respect of torts, the law permits no redress against the Crown. In respect of, perhaps, every other claim based upon legal right: for example for specific recovery of goods, recovery of land, for the enforcement of contract and, no doubt, for the enforcement of such a right as a landlord possesses in the goods of his tenant or of other persons who leave their property on the demised premises, the law permits such recourse by petition of right (*The Abbott of Feversham's* case, 4 Edw. III (1); although, of course, no order can be made against the Crown in such proceedings in the sense in which an order can be made against a subject (*Dominion Building Corp.* v. *The King* (P.C.) 9 May, 1933 (2).

Apart, however, from such remedies as the subject has by way of petition of right and in some special cases by statute, the rule is a rigorous one that His Majesty cannot be impleaded in any of His courts and this rule is just as rigorous in the case of an action *in rem* in which the proceeding is against some property belonging to His Majesty *(The Scotia)* (3). It is true that under modern procedure in certain cases a proceeding may be taken for a declaration of right by a subject against the Attorney General and in other cases where the interests of the Crown appear to be involved in litigation the Attorney General may be made a party (*Dyson* v. *Attorney General* (4); *E. & N. Rly. Co.* v. *Wilson* (5); but the rule is absolute that no proceeding having for its purpose the issue of any process against His Majesty himself or against any of His Majesty's property is competent in any of His Majesty's courts.

For our present purpose the reason for this rule may, perhaps, best be stated in the words of Blackstone who wrote in November, 1765, in his Commentaries on the Laws of England (1876, 1 Kerr 214-5),

(1) (1330) 14 Howell 60.
(2) [1933] A.C. 533.
(3) [1903] A.C. 501.
(4) [1911] 1 K.B. 410.
(5) [1920] A.C. 358.

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And, first, the law ascribes to the king, "or queen regnant," the *attribute* of *sovereignty* or pre-eminence. "*Rex est vicarious,*" says Bracton, "*et minister Dei in terra: omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo.*" He is said to have *imperial* dignity; and in charters before the conquest is frequently styled *basileus* and *imperator,* the titles respectively assumed by the emperors of the East and West. His realm is declared to be an *empire,* and his crown *imperial,* by many acts of parliament, particularly the statutes of 24 Hen. VIII, c. 12, and 25 Hen., VIII, c. 28; which at the same time declare the King to be the supreme head of the realm in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man. Formerly there prevailed a ridiculous notion, propagated by the German and Italian civilians, that an emperor could do many things which a king could not, as the creation of notaries and the like; and that all kings were in some degree subordinate and subject to the Emperor of Germany or Rome. The meaning, therefore, of the legislature, when it uses these terms of empire and imperial, and applies them to the realm and Crown of England, is only to assert that our king is equally sovereign and independent within these his dominions, as any emperor is in his empire; and owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the sovereign, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible unless that court had power to command the execution of it; but who, says Finch, shall command the king? Hence it is, likewise, that by the law the person of the sovereign is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, ... the independence of the kingdom would be no more; and if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the legislative power.

This passage is adopted by the Court of Appeal in *The Parlement Belge* (1) with this comment:

> In this passage, which has often been cited and relied on, the reason of the exemption is the character of the sovereign authority, its high dignity, whereby it is not subject to any superior authority of any kind.

It follows from this that no process of execution can issue against His Majesty or His Majesty's property from any of His Majesty's courts.

It has sometimes been said that this immunity of the sovereign from processual coercion, "the grandest of his immunities", to use the words of Maitland (Pollock & Maitland's History of English Law, Vol. I, 1st Ed., p. 502) rests upon the principle that the King by his writ cannot command himself, and this was laid down in the *Sadler's*

(1) (1880) 5 P.D. 206.

case (1); the immunity has also been ascribed to the fact that the courts are the King's own courts and to the same principle as that of the immunity of the feudal seigneur from process in his seigneurial court.

But Blackstone, probably, expressed with accuracy the view which generally prevailed among constitutional lawyers in the year in which the Quebec Act was passed. By s. 8 of that statute it is provided,

> And be it further enacted by the Authority aforesaid, That all His Majesty's Canadian subjects within the Province of Quebec, the religious Orders and Communities excepted, may also hold and enjoy their Property and Possessions, together with all Customs and Wages relative thereto, and all other their Civil Rights, in as large, ample, and beneficial Manner, as if the said Proclamations, Commissions, Ordinances, and other Acts and Instruments, had not been made, and as may consist with their Allegiance to His Majesty, and Subjection to the Crown and Parliament of Great Britain; and that in all Matters of Controversy, relative to Property and Civil Rights, resort shall be had to the laws of Canada, as the Rule for the Decision of the same; and all Causes that shall hereafter be instituted in any of the Courts of Justice, to be appointed within and for the said Province by his Majesty, his Heirs and Successors, shall, with respect to such Property and Rights, be determined agreeably to the said Laws and Customs of Canada, until they shall be varied or altered by any Ordinance that shall, from Time to Time, be passed in the said Province by the Governor, Lieutenant-Governor, or Commander in Chief, for the Time being, by and with the advice and consent of the Legislative Council of the same, to be appointed in Manner hereinafter mentioned.

It is to be observed that the part of the enactment which is of immediate practical importance is that

> in all matters of controversy relative to property and civil rights resort shall be had to the laws of Canada for the decision of the same; and all causes that shall hereafter be instituted in any of the courts of justice, to be appointed within and for the said province by His Majesty, his heirs and successors, shall, with respect to such property and rights, be determined agreeably to the said laws and customs of Canada until they shall be varied or altered by any ordinances which shall from time to time be passed in the said province. . . .

All this is subject, of course, as appears plainly from the language of the enactment to the proviso that such rules must be such as consist with the allegiance of the inhabitants to His Majesty, and their "subjection to the Crown and Parliament of Great Britain".

As foreshadowed in this enactment, a superior court of general jurisdiction was set up for the province in 1777 under the ordinance of that year. The court is described as a court of civil jurisdiction to be called the Court of

(1) (1588) 4 Co. Rep., 54 (*b*) and 55 (*a*).

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Common Pleas, and it is provided that appeal may be taken to the Governor in Council with a final appeal to His Majesty in Council. In the same year a further ordinance was enacted "To regulate the proceedings in the courts of civil judicature in the province of Quebec". Article 1 is in these words,

> In all causes or matters or property exceeding the sum or value of ten pounds sterling upon a declaration presented to any one of the judges of the court of common pleas, by any person setting forth the grounds of his complaint against a defendant, and praying an order to compel him to appear and answer thereto; such judge shall be, and hereby is empowered and required, in his separate district, to grant a writ of summons, in the language of the defendant, issuing forth in his majesty's name, tested and signed by one of the judges, and directed to the sheriff of the district, to summon the defendant to appear and answer the plaintiff's declaration, on some certain future day, regard being had to the distance of the defendant's abode from the place where the court sits; but if the judges, or any two of them, are satisfied by the affidavit of the plaintiff, or otherwise, that the defendant is indebted to him, and on the point of leaving the province, whereby the plaintiff might be deprived of his remedy against him, it shall be lawful for the said judges, or any two of them, to grant an attachment against the body of such defendant and hold him to bail, and in default of bail, to commit him to prison until the determination of the action against him. The declaration shall in all cases accompany the writ, and the plaintiff shall not be permitted to amend it, until the defendant shall have answered the matter therein contained, nor afterwards, without paying such reasonable costs as the court may ascertain.

By Article 4 (14) the execution sued out of any of the courts of civil jurisdiction shall be a writ issuing in the King's name.

It does not seem to be a proposition seriously open to debate that the courts contemplated by s. 8 of the Act of 1774, or that the courts set up by the ordinances just mentioned, were to be the King's courts in the ordinary sense of that phrase as known to English lawyers. The proposition, at all events, seems to be demonstrable that the court established by the first of the ordinances mentioned, the proceedings of which were regulated by the second, was one of the King's courts in that sense. The writ of summons which initiates the proceedings is a writ in the King's name; the writ of execution is a writ in the King's name. It would appear to follow that this legislation does not in any way contemplate the invasion of the immunity of the Crown already mentioned, that is to say, from being impleaded and from having his property subjected to any execution issued out of the court.

These observations apply to the Code of Civil Procedure as originally brought into force by which it is provided,

43. Toute action devant la Cour Supérieure commence par un bref d'assignation au nom du souverain; sauf les exceptions contenues dans ce code, et les autres cas auxquels il est pourvu par les lois particulières.

and by Art. 545,

Le jugement du tribunal ne peut être mis à exécution qu'au moyen d'un bref émanant au nom du Souverain et adressé au shérif du district (où il doit être exécuté.)

Ce bref est attesté et signé comme les brefs introductifs de l'action, et scellé du sceau du tribunal, et il doit contenir la date du jugement à exécuter, et fixer le jour où il doit être rapporté au tribunal.

These articles point with no uncertainty to the conclusion that the superior courts are the King's courts; and that the immunities of His Majesty in respect to the process of his own courts are not intended to be trenched upon.

On the argument, a good deal was said as to the distinction between major and minor prerogatives and public and private law as bearing upon this subject of the Crown's immunities in respect of legal proceedings. Such distinctions may be exceedingly useful for the purposes of exposition but we doubt if a line can be drawn between major and minor prerogatives or between public and private law with sufficient precision to provide a guide for the determination of individual cases. We think it is very clear that there is nothing in the Act of 1774 or in the legislation establishing the courts of Quebec or in the Civil Code or in the Code of Civil Procedure justifying an inference that there was any intention of in any way impairing this immunity.

There was some difference of judicial opinion in Quebec whether or not prior to the statute presently to be mentioned the courts in Quebec had jurisdiction to entertain a petition of right (*Laporte* v. *Les Principaux officiers d'Artillerie* (1)). In 1883, however, a statute (46 Vic., c. 27) was enacted to make provision for the institution of suits against the Crown by petition of right which is now reproduced in effect in the provisions of the Code of Civil Procedure (Arts. 1011 *et seq.*) The first section of that statute (now Art. 1011, C.C.P.) purports to define the circumstances in which a petition of right will lie and is expressed in comprehensive terms which, no doubt, embrace all the cases in which a petition would be proper at common law.

(1) (1857) 7 L.C.R. 486.

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In 1876 a statute (39 Vic., c. 27) regulating the procedure in respect of petitions of right was passed by the Dominion Parliament. It is in substance embodied in R.S.C., 1927, c. 158. That statute assumes, no doubt rightly, that the cases in which a petition would lie to the sovereign in right of the Dominion would be determined by the common law and by any other statute dealing with the subject; the respondent's claim, if well founded in point of substantive law, could, no doubt, have been put forward under the procedure instituted by that enactment.

The question does not at present arise whether an action claiming a declaration without consequential relief as against the Attorney General affecting the rights of the Crown could, in any and, if so, in what circumstances, be competent in the Superior Court of Quebec.

The respondents rely upon the decision of the Judicial Committee of the Privy Council in *Exchange Bank* v. *The Queen* (1). In that case Lord Hobhouse, delivering the judgment of the Judicial Committee, said,

> Their Lordships think it clear not only that the Crown is bound by the codes, but that the subject of priorities is exhaustively dealt with by them, so that the Crown can claim no priority except what is allowed by them.

It would be extending the language of their Lordships beyond its legitimate scope so to apply it as to give to the subject in all cases the same remedy against the Crown as against the private individuals. Arts. 1053 and 1054 C.C., for example, give, as against individuals, a right of action for *quasi délit* and the Code of Civil Procedure requires that all proceedings shall be initiated by a writ of summons issued in the King's name. It would be a strange thing, indeed, if the effect of these provisions was to give to the subject a right of action in tort against the Crown by a proceeding commenced in the King's own name. In truth, in the *Exchange Bank* v. *The Queen* (1), their Lordships were discussing a subject dealt with, and as they held, dealt with exhaustively, by the Code of Civil Procedure. It is well to remember that, in applying the decisions of the Privy Council, one must have regard to the rule stated by Lord Halsbury in *Quinn* v. *Leathem* (2), to the effect that every judgment must be read *secundum subjectam materiam.*

(1) (1885) 11 App. Cas. 157. (2) [1901] A.C. 495, at 506.

The appeal should be allowed and the intervention granted with costs throughout.

CANNON J.—La saisie-gagerie faite et pratiquée dans une cause est une mesure provisionnelle pour conserver le privilège du locateur sur le produit de la vente en justice des effets saisis.

L'article 1591 C.C. nous dit que les ventes forcées en exécution d'un jugement sont sujettes aux règles applicables aux contrats de vente.

L'article 1486 C.C. dit:

Peut être vendue toute chose qui n'est pas hors du commerce, soit par sa nature ou sa destination, soit par une disposition spéciale de la loi,

confirmant le principe général posé par l'article 1059 C.C. qu'

il n'y a que les choses qui sont dans le commerce qui puissent être l'objet d'une obligation.

L'article 399 C.C. nous dit que les biens qui appartiennent à l'Etat sont régis par le droit public ou par les lois administratives.

Or, d'après la décision de cette Cour dans l'affaire de *The King* v. *Karkowec* & al (1), les effets saisis en vertu de l'article 125 de la loi d'accise sont automatiquement confisqués et deviennent la propriété de la couronne et, en conséquence, hors du commerce et insaisissables.

Pour cette raison bien élémentaire et sans qu'il soit nécessaire de voir un acte de lèse-majesté dans la procédure adoptée, je crois que l'appel doit être maintenu avec dépens devant la Cour du Banc du Roi et devant cette Cour et l'opposition maintenue avec dépens contre l'intimée.

Appeal allowed with costs.

Solicitor for the appellant: *Ivan Sabourin.*

Solicitor for the respondent: *Georges Fortin.*

(1) [1932] S.C.R. 134.

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*May 12.
*June 28.

A. R. WILLIAMS MACHINERY & SUPPLY COMPANY, LIMITED (INTERVENANT) ..... APPELLANT;

AND

DAME MARIE STELLA MORIN (PLAINTIFF) ..... RESPONDENT.

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

Contract—Agreement called lease and promise of sale—Whether valid as such as to third party—Sale of goods—Conditional sale—Claim for rent—Saisie-gagerie—Right of vendor of goods to recover same—Art. 1622 C.C.—Bankruptcy—Writ issued without leave of court—Nullity—Section 126 of the Bankruptcy Act—Art. 871 C.C.P.

On the 2nd day of April, 1928, the respondent, widow of one Geo. Vezina, entered into an agreement, entitled "Lease and promise of sale," to transfer an immoveable property to an incorporated company, "Geo. Vezina Ltd.," for a sum of $26,000, of which $10,000 was paid cash and $16,000 payable in deferred payments twice a year, with interest half-yearly on the unpaid balance. The agreement was passed before a notary under the form of a lease at a rental equivalent to the deferred payments plus the interest on the unpaid balance, with an additional right of the lessee to have the property transferred to it for the sum of one dollar upon the expiration of the term and full payment of the "rents" or deferred instalments and interest. On December 1, 1930, the Vezina Company did not pay the "rent" then due, and on the 3rd of the same month made an assignment. The "bilan" signed by the bankrupt, which was sent and received by the respondent, described her as an hypothecary creditor for $14,000, and not as a privileged creditor for rent as a lessor. Moreover the respondent filed with the trustees a sworn claim for $14,391.50 for *balance due* and interest on a lease and promise of sale. In May, 1930, the Vezina Company had bought certain machines from the appellant company on the usual terms and conditions of conditional sales contract and payments were made regularly until the Vezina Company went into liquidation. The machines remained in the premises of the Vezina Company with the consent of all parties so as to enable the trustees to effect a more favorable sale of the assets; but in July, 1931, the appellant company, with the trustees' consent, decided to repossess the machines and secure their return to Montreal. Before the appellant could do so, the respondent secured, without leave of the court, the issuance of a writ of *saisie-gagerie* and seized the machines in satisfaction of "rents" then due. The appellant company filed an intervention demanding the dismissal of the seizure.

Held, reversing the judgment appealed from, that the appellant company's intervention should have been granted.

Per Duff C.J. and Lamont, Smith and Crocket JJ.—Although the transaction above described may be valid in all its terms as between the

*PRESENT:—Duff C.J. and Lamont, Smith, Cannon and Crocket JJ.

parties, the privilege given by art. 1622 C.C. and the use of the procedure therein provided cannot be invoked by the respondent under the circumstances of the case.

Per Cannon J.—The respondent by filing her claim with the trustees in bankruptcy for the balance of the purchase price and not for "rents," elected to act as unpaid vendor and could not, six months afterwards, substitute to this remedy, or add to it, a claim for rent in order to exercise a privilege on appellant's property under article 1622 C.C.

Held, also, that the proceeding (writ of *saisie-gagerie*) initiated by the respondent was incompetent, as having been taken without leave of the court. (*Bankruptcy Act,* s. 126—Art. 871 C.C.P.)

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Bouffard J., and dismissing the appellant company's intervention.

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

W. F. Chipman K.C. and *L. H. Ballantyne* for the appellant.

F. J. Gosselin for the respondent.

The judgments of Duff C.J. and Lamont, Smith and Crocket JJ. were delivered by

DUFF C.J.—The instrument of the 2nd of April, 1928, is not difficult to construe. The language is plain. The effect of it is that the parties have entered into an agreement to sell the property with which the instrument is concerned for a nominal price to be paid partly in cash and, as to the residue, in deferred payments, with interest half-yearly from time to time on the unpaid balance. The transaction is clothed in the form of a lease at a rental equivalent to the deferred payments plus the interest on the unpaid balance, with an additional right of the lessee to have the property transferred to him for the sum of one dollar upon the expiration of the term and full payment of the deferred instalments and interest.

As between the parties I am unable to see why such a transaction may not be valid. But, as regards the goods of others on the premises with their consent, an entirely different question arises. I do not think art. 1622 C.C. contemplates the invocation of the principle there given, and the use of the procedure therein provided for, in a case like

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this. On that ground alone I think the appeal should succeed.

There is another ground on which, in my opinion, the proceedings initiated by the vendor must fail. I see no reason to differ with the view taken by the Court of King's Bench in *Workman* v. *Lamarre* (1) in respect of the effect of s. 126 of the *Bankruptcy Act* and of Art. 871 C.C.P. The effect of that decision is that a proceeding such as that in question here, in the absence of leave by the Superior Court, is incompetent.

The court below seems to have thought that the trustee alone is entitled to raise this exception. With great respect, I am unable to agree with this view. The proceeding being incompetent, it cannot be used for the purpose of seizing and selling *in invitum* the goods of anybody and any person against whom the proceeding is directed for that purpose, is entitled to resist on the ground that the whole thing is illegal.

For these reasons the appeal should be allowed and the appellant's intervention should be granted with costs throughout.

CANNON, J.—Le 2 avril 1928, par un acte intitulé "Bail et Promesse de Vente", l'intimée, Dame Marie-Stella Morin, veuve de M. Georges Vézina, fils, mit en possession Georges Vézina, Limitée, d'un immeuble situé à Chicoutimi, avec l'atelier de menuiserie et les maisons et autres bâtisses, ainsi que toutes les machines, etc., servant à l'exploitation de l'atelier susmentionné, lesquelles machines et autres objets l'intimée déclarait vouloir laisser installés dans ledit atelier à perpétuelle demeure pour en faire partie intégrante. La compagnie se chargeait de toutes les charges du propriétaire, même de tenir les lieux clos et couverts, de payer les taxes, de tenir les constructions assurées contre le feu, et de payer $26,000, à compte duquel l'intimée reconnut avoir reçu $10,000, dont quittance, la compagnie s'obligeant de payer la balance de $16,000 à raison de $500 le 1er juin et $500 le 1er décembre de chaque année pendant seize années consécutives, le tout avec intérêt de 6% jusqu'à parfait paiement.

(1) (1932) Q.R. 53 K.B. 291.

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Nous trouvons aussi les stipulations suivantes:

Si le premier manque de remplir et exécuter fidèlement, régulièrement et à échéance l'une quelconque des charges, conditions et obligations ci-dessus stipulées ou de celles résultant de la loi, *la partie de première part aura le droit d'exiger et de demander la résolution des présentes dans un délai de trois mois après l'échéance du terme en arrérage,* mais si la partie de seconde classe a rempli toutes et chacune lesdites obligations, charges et conditions, elle aura droit à la fin du bail, ou avant si elle a payé par anticipation, d'acheter tous les droits de la partie de première part dans lesdits immeubles pour le prix de une piastre à être payé comptant.

Convenu expressément qu'au cas de résiliation du présent bail pour quelque cause ou raison que ce soit, la partie de première part restera propriétaire dudit loyer payé et de celui échu jusqu'alors, comme aussi dudit immeuble, avec toutes les constructions, améliorations, augmentations et travaux quelconques que la partie de seconde part y aura faits, sans avoir à lui payer ni le coût, ni la valeur de ces derniers, ni aucune indemnité à cause d'iceux et ce, à titre de dommages liquidés.

Un intérêt de six pour cent courra en faveur de la partie de première part sur tout terme de paiement qui tombera en arrérages et sur tous les déboursés que ladite partie de première part fera pour exécuter aucune des obligations du preneur et ce à compter de chaque échéance et de chaque déboursé et sans mise en demeure.

Il sera loisible à la partie de seconde part de payer entièrement ledit loyer par anticipation, et dans ce cas elle pourra s'acquitter en payant à la partie de première part les versements à écheoir avec en outre les intérêts accrus à la date du paiement. Ce paiement donnera droit à la partie de seconde part d'avoir son titre de propriétaire, pourvu qu'elle ait libéré préalablement la partie de première part de toutes ses responsabilités à propos dudit immeuble ou le concernant; et dans ce cas, le titre de vente à la partie de seconde part sera fait et consenti à ses frais.

La partie de seconde part pourra en outre faire des paiements partiels par anticipation pourvu que ces paiements soient faits à la date d'échéance des termes et qu'il n'y ait alors aucun arrérage en vertu des présentes.

Et la promesse de vente ci-dessus faite est complètement distincte du bail qui devra être interprété pendant et après sa durée, comme si ladite promesse de vente n'eût jamais existé.

La partie de première part s'oblige et s'engage de fournir à la partie de seconde part, avant paiement des quatre derniers termes du prix du présent bail, tous les titres des immeubles susdécrits jusqu'aux lettres-patentes inclusivement, et la partie de seconde part aura droit de différer le paiement de ces quatre derniers termes et des intérêts sur iceux jusqu'à ce que la partie de première part ait satisfait à cette obligation. Au cas de paiement par anticipation, elle devra fournir ces titres en recevant tel paiement, pourvu que la partie de seconde part lui ait donné un avis écrit de trois mois de son intention de faire tel paiement d'avance; à défaut de tel avis, la partie de première part aura un délai de trois mois pour fournir ces titres.

Par ces mêmes présentes, les parties résilient et annulent à toutes fins quelconques un certain acte de bail à loyer consenti par la partie de première part à la partie de seconde part, et reçu en minute par le notaire soussigné, le dix-huit décembre mil neuf cent vingt, nº 11240, enregistré à Chicoutimi le 22 décembre 1920 sous le nº 34565.

Voulant et entendant les comparants que cet acte soit à l'avenir considéré comme nul et de nul effet absolument comme s'il n'eût jamais

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été signé la partie de première part ayant cependant le droit de réclamer le loyer impayé jusqu'au trente et un mars dernier.

Il appert que ce document fut enregistré à Chicoutimi le 16 avril 1928.

Le 3 mai 1930, l'intervenante-appelante livra des machineries à la compagnie pour une valeur de $6,193.47. Il appert aux conventions de vente conditionnelle que ces machines devaient être installées sur les prémisses faisant l'objet du contrat ci-dessus, dont Georges Vézina, Limitée, déclarait être propriétaire.

Sur la foi de ces représentations, l'intervenante ne donna pas à l'intimée l'avis requis par l'article 1622 du code civil, ne croyant pas à l'existence possible d'un privilège pour loyer.

Georges Vézina, Limitée, tomba en faillite le 1er décembre 1930.

Le 5 décembre 1930, la compagnie déposa son bilan et porta à son actif les immeubles en question, avec boutique, maison et autres bâtisses dessus construites, évaluées à $15,400, avec, en outre, machinerie et outillage évalués à $21,400.81. Le nom de l'intimée paraît comme créancière hypothécaire en vertu d'une obligation pour $14,190.

Le 10 décembre 1930, l'intimée, après avoir reçu copie du bilan, produisit sa déclaration solennelle entre les mains des syndics, à l'effet que la compagnie était, à la date du 1er décembre 1930, justement endettée envers elle pour la somme de $14,391.50 et qu'aucune personne en son nom avait, sur son ordre, à sa connaissance ou à son avis, eu ou reçu paiement ou garantie d'aucune sorte, sauf et excepté comme suit:

> Le montant qui m'est dû consiste en une *balance due* et les intérêts sur un bail et promesse de vente consenti à Georges Vézina Limitée.

Il paraît donc par ces documents que, lors de la faillite, les parties à la promesse de vente ont considéré comme non avenu le terme accordé pour le paiement des $16,000, et la compagnie a opté et voulu s'acquitter en payant par anticipation à la partie de première part par les versements à écheoir; et cette déclaration au bilan signifiée à l'intimée semble suffisante pour constituer l'avis écrit de trois mois de faire tel paiement d'avance. La promesse de vendre, unilatérale jusque-là, était subordonnée, pour sa réalisation, à la volonté de l'acheteuse éventuelle; cette dernière ayant manifesté sa volonté d'acheter, l'intimée ne pouvait

pas se dérober à sa promesse (Voir: 10 Planiol & Ripert, *Droit Civil français*, page 187). En effet, elle semble elle-même avoir accepté cette situation et avoir renoncé à agir en vertu du bail pour exécuter la stipulation de promesse de vente. Elle pouvait, dans les trois mois du 1er décembre 1930, échéance du terme en arrérage, demander la résolution du contrat. Loin de le faire, elle a produit sa réclamation comme susdit. De consentement mutuel, l'on peut donc dire, la compagnie a pris possession comme propriétaire des immeubles en question; et la demanderesse, renonçant à agir comme propriétaire ou locatrice, a produit sa réclamation pour la balance du prix de vente convenu.

Telle était la situation en décembre 1930. Or, l'intervenante, qui avait été portée comme créancière privilégiée au bilan, obtint, le 16 juillet 1931, des syndics à la faillite l'autorisation de reprendre les machineries vendues à la compagnie et envoya son représentant à Chicoutimi dans ce but. C'est alors que la demanderesse a cru devoir reprendre vis-à-vis de la compagnie la position de locatrice et a pris une saisie-gagerie des meubles meublants et effets mobiliers garnissant l'immeuble en question, demandant, longtemps après l'expiration du délai de trois mois stipulé à l'acte, la résiliation du contrat et la somme de $2,351.80 comme suit:

1930			
Décembre	1.	A terme échu le 1er déc. 1930.....	$ 500 00
"	1.	A intérêt à 6% sur balance prix vente $14,000 du 1er juin 1930 au 1er décembre 1930...	420 00
"	1.	A intérêt à 8% sur arrérage de $920 du 1er décembre 1930 au 1er juin 1931.....	36 80
"	16.	A balance due sur prime d'assurance feu.....	208 20
		A intérêt à 8% sur $208.20 du 16 décembre 1930 au 1er juin 1931.....	7 60
1931			
Janvier	4.	Police nº 59573 Dominion Fire Ins. Co., $3,000.	43 20
Février	1.	A police nº 29645 Laurentian Co., $1,500.....	82 50
"	1.	A police 309779 Ins. Co. of North America $3,000	105 00
"	1.	A intérêt sur prime d'assurance.....	6 50
"	1.	A aqueduc	37 00
Juin	1.	A terme échu	500 00
"	1.	A intérêt sur balance du prix de vente..... $13,500 à 6% du 1er décembre 1930.....	405 00
			$2,351 80

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L'on notera que les intérêts réclamés ne sont pas réclamés sur le loyer, mais sur balance du prix de vente.

Cette poursuite fut prise sans autorisation spéciale, bien que la compagnie défenderesse fût en faillite. L'huissier ayant saisi les machineries qui sont la propriété incontestée de l'intervenante, cette dernière intervint pour prendre le fait et cause de la défenderesse, autant que cela pourrait être nécessaire, demanda le renvoi de l'action et conclut, à tout événement, à ce qu'elle fût déclarée propriétaire des machines saisies lui appartenant et à ce que la saisie fût déclarée nulle et de nul effet.

Les mis-en-cause Bédard & Bélanger ont comparu sur l'action principale mais n'ont pas plaidé.

L'intimée a contesté cette intervention et a prétendu n'avoir jamais reçu avis du droit de propriété de l'intervenante avant l'institution de l'action; et elle allègue la stipulation du contrat à l'effet que la promesse de vente est complètement distincte du bail, qui devait être interprété, pendant et après sa durée, comme si cette promesse n'eût jamais existé; que les relations entre elle et la défenderesse étaient celles de locatrice et de locataire; et qu'elle avait, en conséquence, le droit de faire saisir gager les meubles de l'intervenante en la possession de la défenderesse.

Ces prétentions ont été maintenues par la Cour Supérieure et par la majorité de la Cour du Banc du Roi, avec la dissidence de MM. les juges Rivard et Hall.

Il est à remarquer que la Cour du Banc du Roi, dans la cause de *Gravel* v. *Massicotte* (1), avait devant elle un document qui contenait précisément la clause invoquée ici par l'intimée, à l'effet que

> la promesse de vente est complètemeent distincte du bail, qui devait être interprété pendant et après sa durée comme si ladite promesse de vente n'eût jamais existé.

L'honorable juge Bernier faisait alors les observations suivantes, qui peuvent parfaitement s'appliquer à l'espèce actuelle:

> Toutefois, les obligations du prétendu locataire paraissent être, d'après le contrat, celles du tout propriétaire ordinaire.
>
> Sans doute, les parties à un semblable contrat peuvent bien lui donner le nom de *bail*; il n'en est pas moins vrai cependant, que nos tribunaux ont eu souvent à apprécier de tels contrats; que parfois ils lui ont reconnu plutôt un caractère de vente déguisée, alors surtout qu'il s'agissait d'immeubles avec translation de possession aux mains du locataire, avec assu-

(1) (1931) Q.R. 52 K.B. 146.

jettissement à toutes les obligations d'un véritable propriétaire; dans l'espèce, le prétendu loyer est de $250 par mois, faisant $3,000 par année; cependant, il y est stipulé que les intérêts à 7% devront courir sur toute la balance du montant de $27,500: d'autres clauses obligent le locataire à entretenir les lieux, et à payer les taxes et cotisations municipales, à payer les assurances, etc.

Sans doute, un tel contrat en est un qui n'est défendu par aucune loi; bail ou vente conditionnelle suivi de possession, il lie les parties contractantes; vis-à-vis des tiers, dont les intérêts cependant peuvent dépendre de la valeur légale d'un tel contrat, comme dans la présente espèce, il y aura à résoudre la question de savoir si c'est un bail ou plutôt une vente conditionnelle.

Mais, dans l'espèce, il semble que la commune intention des parties ne peut pas être douteuse, vu leur conduite réciproque lors de la faillite et durant l'intervalle d'au delà de six mois pendant lequel l'intimée s'est considérée comme venderesse non payée et la compagnie comme acheteuse de l'immeuble en question. Cet immeuble, d'après le dossier, forme partie de l'actif de la compagnie insolvable; et la demanderesse-intimée a accepté cette situation en produisant sa réclamation non pas pour le loyer, mais pour le solde total du prix de vente convenu. Elle a même laissé vendre par les syndics à M. Duperré le bois qu'elle aurait pu saisir pour garantir le loyer, si elle avait voulu agir comme bailleresse. Peut-elle, après six mois, pour empêcher l'intervenante de reprendre son bien, suivant le consentement des syndics à la faillite, prendre sans autorisation de justice une saisie-gagerie dans les circonstances relatées ci-dessus?

Pour ma part, je crois que cette procédure constitue un abus; et je doute fort qu'un juge de la Cour Supérieure l'aurait autorisée si, comme le veut l'article 126 de la loi des faillites, l'intimée avait demandé la permission spéciale requise pour procéder contre les biens de la faillite; car la saisie-gagerie a été prise pour mettre sous la main de la justice les biens qui s'y trouvaient déjà, étant encore sous la garde et en possession des syndics.

L'intimée, d'ailleurs, le reconnaît avec candeur:

It is our well recognized jurisprudence that a seizure by garnishment cannot be taken against a debtor who has made an assignment without leave of the Bankruptcy Court, and the failure of a plaintiff to obtain that leave, would be an absolute bar to the action whether formerly pleaded or not.

Elle prétend cependant que, dans l'espèce, il s'agit d'une saisie de biens appartenant non au débiteur, mais à une tierce personne, l'intervenante, sujets au privilège du loca-

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teur, mais n'appartenant pas à l'insolvable, et qui n'étaient pas, en conséquence, sujets à l'administration des syndics. Cette argumentation ne saurait valoir en face de la procédure; car l'huissier, d'après son procès-verbal, a saisi comme appartenant à la défenderesse les meubles et effets y énumérés, entre autres les machineries de l'intervenante, et l'on a mis en cause les syndics. Pourquoi? s'ils n'avaient pas possession des machines? Je crois donc qu'en vertu de l'article 126 de la loi des faillites l'action telle qu'intentée était irrégulière; mais je suis aussi d'avis que l'intimée, après avoir choisi son recours en produisant sa réclamation entre les mains des syndics pour la balance du prix de vente, ce qui constitue une demande en justice suffisante pour interrompre la prescription, en reconnaissant pendant six mois que les immeubles en question étaient devenus la propriété et formaient partie de l'actif de la compagnie, ne peut pas souffler le chaud et le froid et poursuivre cette même compagnie, non plus pour la balance du prix de vente, mais pour du loyer en vertu des clauses qu'elle invoque. *"Electâ unâ viâ, non datur recursus ad alteram."*

D'après le dossier, la demanderesse ne semble pas avoir obtenu jugement contre la compagnie défenderesse dans la présente action. Le seul jugement qui nous soit soumis est celui sur l'intervention. Il n'est donc pas nécessaire de décider du bien ou du mal fondé contre la défenderesse de cette réclamation pour loyer accompagnée d'une saisie-gagerie. Il est possible que la conduite des deux parties à l'acte depuis le 1er décembre 1930 équivaille à une renonciation à la stipulation que le bail devra être interprété, pendant et après sa durée, comme si la promesse de vente n'eût jamais existé.

Quoi qu'il en soit, vis-à-vis d'un tiers de bonne foi, comme l'intervenante en cette cause, cette stipulation, qui peut être valide entre les parties (Art. 1023 C.C.), ne saurait avoir l'effet de lui faire perdre son droit de propriété en invoquant un prétendu privilège dont la demanderesse-intimée ne s'est jamais prévalue en temps utile contre la défenderesse; au contraire, elle me paraît y avoir expressément renoncé. Cette renonciation à ses droits de locatrice dans une procédure judiciaire ne saurait être ignorée par les tribunaux. Ayant renoncé à la qualité de locatrice pour réclamer comme venderesse, non pas du loyer, mais le solde

du prix de vente, elle a renoncé en même temps aux droits et privilèges que la loi assure au locateur contre le locataire, y compris la saisie-gagerie.

Les faits spéciaux qui caractérisent cette cause en font une espèce toute particulière. Il ne s'agit pas tant de définir le contrat intervenu entre l'intimée et la compagnie défenderesse que de déduire les conséquences juridiques des actes que ces mêmes parties ont posés depuis la faillite. Mais il n'est pas inutile de rappeler que des contrats de ce genre, mixtes ou complexes, empruntant des caractères à différents contrats nommés, ont souvent, devant nos tribunaux, été considérés comme promesses de vente. En effet, comme le disent Planiol et Ripert, 6 *Droit civil,* 1930, p. 53: Quand les règles spéciales à chacun ne peuvent être appliquées cumulativement ou conciliées,

c'est du but essentiel de l'opération juridique que doit s'inspirer l'interprète pour assurer la prédominance de l'une de ces règles ou un recours aux seuls principes généraux.

La Cour de revision, composée des juges Loranger, Davidson et Doherty, dans la cause de *Evans* v. *Champagne* (1), a refusé de reconnaître les droits du locateur dans une cause analogue. Le juge Mathieu a fait de même dans une cause de *De Chantal* v. *Ranger* (2). Le juge Pagnuelo a agi de même dans *Picaud* v. *Renaud & Rochon* (3). Le juge-en-chef Langelier a jugé de même dans la cause de *Irving* v. *Monchamps* (4), comme suit:

Considérant que bien que ledit acte soit intitulé: *Promesse de vente et bail,* et qu'il contienne, en apparence, une promesse de vente et un bail de l'immeuble y désigné, il n'est en réalité, qu'une vente dudit immeuble avec stipulation que l'acheteur n'en deviendra propriétaire qu'après que l'acheteur aura payé $500 sur le prix outre $500 payés comptant lorsqu'il en prendra possession de suite, paiera l'intérêt de la balance du prix stipulé et que la vente sera résolue s'il manque de payer un montant quelconque du prix ou de ses intérêts;

Considérant que ladite action n'en est pas une résultant des rapports entre locateur et locataire;

Considérant que le demandeur n'avait pas le droit d'instituer ladite action, comme il l'a fait, d'après la procédure relative aux matières sommaires;

Maintient l'exception à la forme du défendeur et déboute la demanderesse de sadite action avec dépens, sauf à se pourvoir.

(1) Q.R. 7 S.C. 189.
(2) Q.R. 10 S.C. 145.
(3) Q.R. 15 S.C. 358.
(4) 3 R.P.Q. 430.

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Tout récemment, l'honorable juge Stein, dans la cause de *Morency* v. *St-Pierre* (1), a jugé:

> L'acte qualifié de bail d'immeuble, fait pour sept ans, par lequel le prétendu preneur s'engage à payer au prétendu bailleur $15 par mois, jusqu'à concurrence de $900, avec intérêt, et stipulant que le preneur, après avoir ainsi payé capital et intérêt durant sept ans, aura droit à un acte de vente quittancé, n'est pas un contrat de louage, mais une véritable vente.

Voir aussi: *Carey* v. *Carey* (2) (Cour de revision).

Cette solution donnée à plusieurs cas analogues ne lie pas cette cour. Mais nous voulons indiquer la tendance de la jurisprudence de la province de Québec. Nous n'y dérogeons pas en refusant de permettre à l'intimée d'agir comme bailleresse contre l'intervenante, à l'encontre de ses droits de propriétaire, lorsque tout indique que le contrat en question, ou pour employer l'expression des auteurs, le but essentiel de l'opération juridique, était d'assurer à la compagnie défenderesse n'ayant pas les capitaux nécessaires pour réaliser de suite l'acquisition, non la possession précaire à titre de locataire, mais bien la propriété définitive de l'immeuble en question.

L'intimée a reçu $10,000 à compte et a accordé du délai pour le reste. Lorsque la faillite a fait perdre à l'acquéreur le bénéfice du terme convenu, les parties, d'un commun accord et suivant la véritable intention de l'acte, ont considéré que la compagnie était propriétaire; d'un commun accord, elles ont laissé les immeubles et les bâtisses dans le patrimoine du débiteur et ont produit et accepté une réclamation privilégiée pour le plein montant dû à l'intimée. Nous ne saurions permettre à cette dernière de réclamer, en outre du solde de $14,391.50, montant de sa réclamation dans la faillite, une somme additionnelle de $2,351.80 par une saisie-gagerie prise six mois plus tard.

Je crois que l'intervenante a eu raison de demander le renvoi de cette action en autant qu'elle pouvait affecter ses droits de propriété sur les machines énumérées au paragraphe 1er de son intervention, dont elle doit être reconnue propriétaire.

L'appel doit donc être maintenu, avec dépens contre l'intimée, la saisie-gagerie doit être annulée et mainlevée donnée en autant que l'intervenante et ses biens sont con-

(1) 34 R. de P. 99. (2) Q.R. 42 S.C. 471.

cernés, le tout avec dépens en faveur de l'intervenante contre la demanderesse en Cour Supérieure et devant la Cour du Banc du Roi.

Appeal allowed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitor for the respondent: *F. J. Gosselin.*

ELECTRIC CHAIN COMPANY OF CANADA LIMITED (DEFENDANT).. } APPELLANT;

AND

ART METAL WORKS INC. AND DOMINION ART METAL WORKS, LIMITED (PLAINTIFFS)..... } RESPONDENTS.

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*June 8, 9.
*June 28.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Action for infringement—Parties—Right of action—Right to damages—Measure of damages.

A. Co., a foreign corporation, owner of a patent, sued defendant in the Exchequer Court of Canada for infringement of it. Defendant admitted infringement, but denied that plaintiff had suffered damages. On May 31, 1932, judgment was given for plaintiff upon the pleadings, a reference being directed as to damages. The referee found special damages of $10,013.17, and general damages of $1,000. The patented articles were manufactured and sold in Canada by D. A. Co., practically all the shares of which were owned by A. Co., whose profits from D. A. Co.'s operations were only through dividends on said shares. The special damages found were based on the profit which would have been made by D. A. Co. on articles sold by defendant which the referee found would otherwise have been sold by D. A. Co. Subsequent to the referee's report, A. Co. obtained an order adding D. A. Co. as a co-plaintiff, and the Exchequer Court gave judgment to plaintiffs for $8,663.14 (reducing the special damages found by the referee but otherwise confirming his report). The defendant appealed.

Held (1) D. A. Co. was, upon the facts in evidence, only allowed by A. Co. to make and sell the subject of the invention. A. Co. only, and not D. A. Co., had a cause of action within the pleadings against defendant. D. A. Co., not being the "patentee" or the "legal representative" of the patentee, had no right, at any rate after the judgment of May 31, 1932, to be a party to the action. (*Patent Act*, R.S.C., 1927, c. 150, ss. 2 (*e*), 2 (*c*), 30, 32, considered; *Hussey* v. *Whitely*, 2 Fish. Pat. Cas. 120, *Heap* v. *Hartley*, 42 Ch. D. 461, cited).

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*PRESENT:—Rinfret, Smith, Cannon, Crocket and Hughes JJ.

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(2) A. Co. was not entitled to damages on the basis adopted below. There was no evidence to shew that the dividends on the stock of D. A. Co. were in fact affected by the infringement or that the value of the shares of D. A. Co., owned by A. Co., were injuriously affected in any way by the infringement. But A. Co was entitled to substantial damages for infringement, which this Court fixed at $750. (*Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.*, [1921] 2 A.C. 465, at 475; *Collette* v. *Lasnier*, 13 Can. S.C.R. 563; *Meters Ltd.* v. *Metropolitan Gas Meters Ltd.*, 28 R.P.C. 157, at 163, 164; *Watson, Laidlaw & Co. Ltd.* v. *Pott, Cassels & Williamson*, S.C., (1913-1914) 18, at 31, 32; cited).

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada, confirming, subject to a certain reduction in the amount of special damages found, the report of the Registrar of that court upon a reference to him as to the amount of damages recoverable from the defendant for infringement of the patent in question, and adjudging that the plaintiffs recover from the defendant the sum of $8,663.14, with interest from the date of the judgment.

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

R. C. H. Cassels K.C. for the appellant.

O. M. Biggar K.C., *R. S. Smart K.C.* and *M. B. Gordon* for the respondents.

The judgment of the court was delivered by

HUGHES, J.—This action was brought in the Exchequer Court of Canada by Art Metal Works Incorporated, a New Jersey corporation, against the appellant for infringement of letters patent No. 288148 and for an injunction and other relief. The prayer when the statement of claim was filed on the 24th day of September, 1931, read in part as follows:

> The plaintiff therefore claims:
>
> (*c*) $1,000 damages or alternatively an account of profits as the plaintiff may elect.

On the 23rd day of November, 1931, the appellant delivered its statement of defence consisting of four paragraphs, denying that the plaintiff was the owner of the patent, denying the infringement and impeaching the patent.

On the 30th day of May, 1932, the appellant served a notice of motion for an order amending its statement of defence by striking out the whole four paragraphs above

mentioned and substituting therefor the following single paragraph:

The defendant admits the truth of the facts set forth in the plaintiff's statement of claim herein, but denies that the plaintiff has suffered any damages or that the defendant has made any profits from the alleged infringement.

On Tuesday, the 31st day of May, 1932, an order was made in the Exchequer Court of Canada as follows:

UPON the application of the defendant for an order permitting it to amend its statement of defence in this action by substituting for paragraphs 1 to 4 thereof the following paragraph, namely,

"The defendant admits the truth of the facts set forth in the plaintiff's statement of claim herein but denies that the plaintiff has suffered any damages or that the defendant has made any profits from the alleged infringement," upon reading the affidavit of Birger Elias Ekblad filed and the pleadings herein, and upon hearing what was alleged by counsel for both parties, This Court was pleased to order that the statement of defence be amended as prayed, counsel for defendant consenting that judgment be rendered upon the pleadings as amended, and upon reading the pleadings as so amended;

THIS COURT DOTH ORDER AND ADJUDGE that as between the plaintiff and the defendant the Letters Patent of the plaintiff, No. 288,148 bearing date the 26th day of March, 1929, for Improvements in Cigar Lighters, are valid, and infringed by the defendant.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant, its officers, servants, workmen and agents be and they are restrained from infringing said Letters Patent owned by the plaintiff and No. 288,148, and from making, constructing, using and vending to others to be used in the Dominion of Canada the said invention as described in the specification attached to the said Letters Patent during the continuance of the said Letters Patent:

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant do forthwith deliver up to the plaintiff all products or articles in the possession or control of the defendant which infringe the said Letters Patent;

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant do pay to the plaintiff such damages as it may have suffered or be entitled to by reason of the infringements complained of, and doth direct that there be a reference to the Registrar of this Court to enquire into and report as to the amount of such damages, if any;

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant do pay to the plaintiff its costs of this action forthwith after taxation thereof, and that the costs of the reference, if any, be reserved.

By the Court,
(Sgd.) "ARNOLD W. DUCLOS,"
Registrar.

The parties duly appeared before the Registrar and on the 15th day of August, 1932, the Registrar issued his report in which he found special damages of $10,013.17 and general damages of $1,000, making a total sum of $11,013.17.

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ELECTRIC CHAIN CO. OF CANADA LTD. v. ART METAL WORKS INC.

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On the 18th day of November, 1932, the learned President of the Exchequer Court of Canada heard a motion to confirm the report of the Registrar and also a motion of the appellant to vary or set aside the report. On this motion, the learned President gave leave to the New Jersey corporation to amend its statement of claim so as not to restrict its claim for damages to $1,000. The learned President also gave leave to the New Jersey corporation to move to add a Canadian corporation known as Dominion Art Metal Works Limited as a party plaintiff, it appearing according to counsel for the appellant, that the evidence before the Registrar was to the effect that the New Jersey corporation did not carry on business in Canada and that it was the Canadian company, if any, that had suffered damage by the infringement.

The New Jersey corporation thereupon applied for, and on the 16th day of December, 1932, obtained, an order for the joinder of the Canadian company as a co-plaintiff.

On the 6th day of February, 1933, the learned President gave judgment in favour of the respondents, reciting the two amendments above mentioned and reducing the damages to $8,663.14 plus interest and costs.

It was argued before us by the appellant that the Exchequer Court of Canada should not have permitted an increase in the amount of the claim for damages of the New Jersey corporation, and should not have permitted the joinder of another plaintiff in view of the fact, as the appellant's counsel alleged, that the judgment of the 31st day of May, 1932, was tantamount to a consent judgment.

On the other hand, counsel for the respondents contended that the two orders permitting the amendments, respectively above mentioned, were interlocutory orders of the Exchequer Court of Canada and that no appeal lay to the Supreme Court of Canada; that, even if they were final orders, they could not then be appealed as the thirty days referred to in section 82 of the *Exchequer Court Act* had long since expired, and lastly, that the appellant had appealed only against the final judgment of the 6th day of February, 1933.

It is not necessary to consider all of these arguments, and they are recited merely in order that the history of the proceedings may be clear.

The statement of claim alleges, the judgment of the 31st day of May, 1932, recites, and the evidence before the Registrar shows that the New Jersey corporation was the owner of the patent in question.

Section 2 (*e*) of the *Patent Act*, R.S.C. 1927, Chapter 150, is as follows:

2. (*e*) "patentee" means the person for the time being entitled to the benefit of a patent.

Section 32 of the *Patent Act* is as follows:

32. Every person who, without the consent in writing of the patentee, makes, constructs or puts in practice any invention for which a patent has been obtained under this Act or any previous Act, or who procures such invention from any person not authorized by the patentee or his legal representatives to make or use it, and who uses it, shall be liable to the patentee or his legal representatives in an action of damages for so doing; and the judgment shall be enforced, and the damages and costs that are adjudged shall be recoverable, in like manner as in other cases in the court in which the action is brought. 1923, c. 23, s. 32.

Section 2 (*c*) of the *Patent Act* is as follows:

"Legal representatives" includes heirs, executors, administrators, guardians, curators, tutors, assigns or other legal representatives;

Section 30, subsection 1, of the *Patent Act* is as follows:

Every patent issued for an invention shall be assignable in law, either as to the whole interest or as to any part thereof, by any instrument in writing.

It was not suggested that the patent had been assigned either as to the whole interest or any part thereof to the Canadian corporation.

Subsection 2 of section 30 reads:

2. Such assignment, and every grant and conveyance of any exclusive right to make and use and to grant to others the right to make and use the invention patented, within and throughout Canada or any part thereof, shall be registered in the Patent Office in the manner from time to time prescribed by the Commissioner for such registration.

Subsection 3 provides that every assignment shall be null and void against any subsequent assignee unless duly registered.

The section does not say that every grant and conveyance of any exclusive right to make and use and to grant to others the right to make and use the invention patented within and throughout Canada or any part thereof must be in writing and the statute is silent as to the effect of non-registration. *Dalgleish* v. *Conboy* (1).

On the relationship existing between the New Jersey corporation and the Canadian corporation, the following

(1) (1876) 26 U.C.C.P. 254.

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questions and answers in the cross-examination of Alexander Harris, secretary-treasurer of the New Jersey corporation, are relevant:

Q. Have you any agreement between the Art Metal Works Incorporated and the Dominion Art Metal Works Limited which gives them the right to manufacture under the patent of Art Metal Works Incorporated?—A. I do not believe any specific agreement exists in view of the fact that the Canadian company is wholly owned by the United States company.

Q. Just an implied agreement?—A. Yes, I think so.

Q. I suppose the Dominion Art Metal Works Limited does not pay any royalty to Art Metal Works Incorporated?—A. No, sir, it does not.

Q. The profit of Art Metal Works Incorporated is through dividends on shares of Dominion Art Metal Works Limited?—A. Yes.

This is not evidence of a "grant and conveyance of any exclusive right to make and use and to grant to others the right to make and use the invention patented within and throughout Canada or any part thereof."

It is rather evidence of a licence.

In *Hussey* v. *Whitely* (1), referred to in *Dalgleish* v. *Conboy, supra,* at page 261, the complainant had by a writen instrument granted the exclusive right to make and sell the subject of his invention, during the continuance of his patent, in twenty-three counties of Ohio, including that in which the defendants' factory was carried on, but the patentee expressly reserved to himself the right of sending machines of his own manufacture into the territory embraced in the contract. This was held to be a mere licence.

In *Heap* v. *Hartley* (2), the court considered the words which in section 2 (*e*) of our Act constitute the definition of a patentee, namely, "the person for the time being entitled to the benefit of a patent," 46-47 Victoria, chap. 57, sec. 46. In that case a patentee of machinery, by deed, granted to the plaintiff the full and exclusive licence to use and exercise the patented invention within a specified district for a limited period, and covenanted during that period not to sell or to grant any licence to exercise or use the invention to any other person in the same district; and in case the patent should be infringed, he covenanted to take all necessary proceedings for defending the same, and that in default of his so doing, it should be lawful for the plaintiff to take such proceedings in his (the patentee's) name.

(1) (1860) 2 Fish. Pat. Cas. 120. (2) (1889) 42 Ch. D. 461.

The defendants had bought two of the patented machines from some person other than the plaintiff and were using them within the district.

An action was brought by the plaintiff in his own name and without joining the patentee against the defendants and was dismissed.

Counsel for the appellant unsuccessfully contended, page 465, that since a patentee was according to section 46 of the Patents Act, 46-47 Victoria, chapter 57, "the person for the time being entitled to the benefit of a patent," an exclusive licensee for a particular district was *quâ* that district, and during the term of the licence, in the position of a person to whom the patentee had given his monopoly and all his beneficial rights, that he was practically an assignee *pro tanto* of the patent, and was entitled to maintain an action for infringement of his rights within the district in his own name, and without joining the patentee.

The distinctions between a grant of an interest and a licence are discussed fully in the judgments of Cotton L.J., and Fry L.J. The latter said at page 470:

> The plaintiff in this case sues under an exclusive licence to use a certain invention for a certain time, and within a limited district. He sues a person who he says is using that patented invention within the district, and without his licence. * * * He says: "* * * as exclusive licensee, I am in the position of an assign of the letters patent for that district and for that term, and as an assign of letters patent, I have a right to restrain any person who is infringing within the district." That argument appears to be based on an entire error with regard to the nature of a licence. An exclusive licence is only a licence in one sense; that is to say, the true nature of an exclusive licence is this. It is a leave to do a thing, and a contract not to give leave to anybody else to do the same thing. But it confers like any other licence, no interest or property in the thing. A licence may be, and often is, coupled with a grant, and that grant conveys an interest in property, but the licence pure and simple, and by itself, never conveys an interest in property. It only enables a person to do lawfully what he could not otherwise do, except unlawfully. I think, therefore, that an exclusive licensee has no title whatever to sue.

It appears, therefore, that only the New Jersey corporation had a cause of action within the pleadings against the appellant; and that the Canadian corporation, Dominion Art Metal Works, had no cause of action within the pleadings against the appellant.

It must follow that the Canadian corporation, not being the patentee or the legal representative of the patentee, had no right, at any rate after the judgment of the 31st day of May, 1932, to be a party to the action in the Exchequer Court of Canada at all.

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It was not contended before us by the respondents that it was not open to the appellant after the judgment of the 31st day of May, 1932, to deny the right of the New Jersey corporation to the damages sustained either by it or by the Canadian company. This point was mentioned in the report of the Registrar, but possibly was abandoned when on the 16th day of December, 1932, the New Jersey corporation secured from the Exchequer Court of Canada an order adding the Canadian corporation as a party plaintiff.

The learned President in his preliminary reasons for judgment dated November 18, 1932, made the following among other findings:

> The Canadian business of the plaintiff is carried on by a Canadian corporation, known as The Dominion Art Metal Works Ltd., with headquarters at Toronto, and this company manufactures and sells in Canada the lighter which is the subject matter of the plaintiff's patent. No formal licence apparently issued from the plaintiff to the Canadian company, but the latter was impliedly licensed to manufacture and sell in Canada, the invention covered by the plaintiff's patent. The plaintiff company own all the shares in the Canadian company, and the officers of both companies appear to be the same. No royalty was paid by the Canadian company to the plaintiff company for the use of the plaintiff's invention, and the only profit accruing to the plaintiff from the Canadian company was in the way of dividends upon the shares it held in that company. At the time material here the major portion of the business of the Canadian company consisted in the manufacture and sale of lighters.
>
> The registrar has reported, awarding damages to the plaintiff in the sum of $11,013.17. This amount was ascertained by taking the number of lighters admittedly sold by the defendant, viz., 5,553, and multiplying that by the profit which the Canadian company ordinarily made on each lighter sold by it in Canada, viz., $1.84, which would amount to $10,217.32; the Registrar allowed an additional sum of $1,000 in the nature of general damages for injury to the business, apparently, of the Canadian company.
>
> * * * I do not think any injustice will be done the defendant if I allow the plaintiff to amend its statement of claim in such a way as will not restrict its claim for damages to $1,000, and this I do. * * *
>
> The most serious point raised by the defendant's counsel was that the plaintiff could not recover damages, other than nominal damages, because it was the Canadian company that suffered damage, if any damage was caused by the defendant's infringement. And this point was raised by defendant's counsel before the Registrar. All the evidence given before the Registrar was apparently directed towards showing loss of profits or damages suffered by the Canadian company. Now it would seem to me to be unfortunate, there being some damages in the offing for some one, if the issue as to the amount of damages and to whom they should go, could not be concluded in this proceeding and without further litigation, particularly as infringement has been admitted. It seems to me therefore that the question as to whether or not the Canadian company should be added as a party to the cause should be determined before I proceed further.

On the 6th day of February, 1933, the learned President in his reasons for final judgment referred to the assessment of damages by the learned Registrar as follows:

> The Registrar assessed the damages under two heads. First, he allowed $10,217.52, that amount being reached by multiplying the number of lighters sold by the defendant by $1.84, the amount of profit the Canadian company claimed to make on each lighter which it manufactured and sold, but from this amount he made a deduction of 2 per cent, representing sales which the defendant made but which the plaintiff might not have made; and he allowed $1,000 in addition to cover damages generally for loss of profits, and for disruption of business, suffered by the plaintiffs, owing to the sale of the infringing article.

Counsel for respondent contended at bar that the New Jersey corporation owned all the shares or nearly all the shares of the Canadian corporation, and that it was therefore entitled to the damages which were awarded by the learned President as owner of all, or nearly all, the shares of the Canadian corporation, and therefore as recipient of all, or nearly all, the dividends paid by the Canadian corporation.

Counsel for the respondent also contended that the case came within the decision of this Court in *Palmolive Manufacturing Co. (Ontario) Ltd.* v. *The King* (1).

There was, however, no evidence adduced before the learned Registrar to shew that the dividends on the stock of the Canadian company, if they went to the New Jersey corporation, were in fact affected by the infringement or that the value of the shares of the Canadian corporation, owned by the New Jersey corporation, were injuriously affected in any way by the infringement.

Counsel for the respondent also contended that the New Jersey corporation owned all the assets of the Canadian corporation and that through this conection the former was entitled to the damages awarded by the learned President. This contention, however, cannot be well founded in the light of the evidence of Alexander Harris above set out.

As Lord Buckmaster said in *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (2):

> It not infrequently happens in the course of legal proceedings that parties who find they have a limited company as debtor with all its paid-up capital issued in the form of fully-paid shares and no free capital for working suggest that the company is nothing but an alter ego for the people by whose hand it has been incorporated, and by whose action it is controlled. But in truth the Companies Acts expressly contemplate

(1) [1933] Can. S.C.R. 131. (2) [1921] 2 A.C. 465 at 475.

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that people may substitute the limited liability of a company for the unlimited liability of the individual, with the object that by this means enterprise and adventure may be encouraged. A company, therefore, which is duly incorporated, cannot be disregarded on the ground that it is a sham, although it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence.

Moreover, in *Collette* v. *Lasnier* (1), this Court held that in the circumstances of that case the profits made by the defendants were not a proper measure of damages; that the evidence furnished no means of accurately measuring the damages, but that substantial justice would be done by awarding $100.

But the New Jersey corporation is undoubtedly entitled to substantial damages for infringement. In *Meters Ltd.* v. *Metropolitan Gas Meters Ltd.* (2), Fletcher Moulton L.J., at page 163, said:

> The defendants seek to diminish the damages by a variety of affidavits intended to show that the particular purchasers for whom they manufactured these infringements were customers who would not have purchased from the plaintiffs if they had not purchased from them. I am not for a moment going to say that evidence of that kind may not be relevant, but the argument based upon it was, that where a plaintiff proves the sale of infringing instruments by the defendants he does not establish any right to damages unless he shows how many of those particular instruments would have been purchased from him if the defendant had not sold them; and the counsel for the defendants were bold enough to say that in this case of infringement on a large scale there ought to be only nominal damages.

And at page 164:

> In the assessment of damages every instrument that is manufactured or sold, which infringes the rights of the patentee, is a wrong to him, and I do not think that there is any case, nor do I think that there is any rule of law which says that the patentee is not entitled to recover in respect of each one of those wrongs.

And in *Watson, Laidlaw & Company, Limited* v. *Pott, Cassels & Williamson* (3), Lord Shaw of Dunfermline said at page 31:

> The argument is—for indeed this instance covers sufficiently the whole ground—the argument is: Here it is demonstrated that the patentees have lost no trade which they could have obtained. And under the cover of certain judicial dicta the infringers are entitled to say that the entire measure of the patentees' damage is exhausted when restoration of the *status quo ante* has been obtained.

And at page 32:

> But in addition there remains that class of business which the respondents would not have done; and in such cases it appears to me that

(1) (1885) 13 Can. S.C.R., 563. (2) (1911) 28 R.P.C. 157.
(3) Session Cases (1913-1914) 18.

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the correct and full measure is only reached by adding that a patentee is also entitled, on the principle of price or hire, to a royalty for the unauthorized sale or use of every one of the infringing machines in a market which the patentee if left to himself, might not have reached. Otherwise that property which consists in the monopoly of the patented articles granted to the patentee has been invaded, and indeed abstracted, and the law, when appealed to, would be standing by and allowing the invader or abstracter to go free. In such cases a royalty is an excellent key to unlock the difficulty, and I am in entire accord with the principle laid down by Lord Moulton in *Meters, Limited* (1). Each of the infringements was an actionable wrong, and although they may have been committed in a range of business or of territory which the patentee might not have reached, he is entitled to hire or royalty in respect of each unauthorized use of his property. Otherwise the remedy might fall unjustly short of the wrong.

The result is that the judgment of the 6th day of February, 1933, and the report of the Registrar dated the 15th day of August, 1932, will be vacated and set aside and in lieu thereof the New Jersey corporation will have judgment against the appellant for damages which we fix at $750 with the costs of the action down to and including the judgment of the 31st day of May, 1932, only, and the appellants will have the costs of this appeal.

Judgment accordingly.

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

Solicitors for the respondents: *Smart & Biggar.*

IN THE MATTER OF GRAND RIVER MOTORS LTD. (DEBTOR) EX PARTE—COMMERCIAL FINANCE CORPORATION LTD.

1933

*June 12, 13.
*June 28.

COMMERCIAL FINANCE CORPORATION LTD (DEFENDANT)..... APPELLANT;

AND

N. L. MARTIN (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (SITTING IN BANKRUPTCY)

Conditional sale—Bill of sale—Validity as against trustee in bankruptcy—Trust—Estoppel.

Respondent, as trustee in bankruptcy of an automobile dealer in Ontario, disputed the right claimed by appellant, as vendor to the dealer under conditional sale agreements, in certain automobiles, in stock on the

* PRESENT:—Rinfret, Lamont, Smith, Cannon and Hughes JJ.

(1) (1911) 28 R.P.C. 157, at 163.

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dealer's premises at the time of the assignment in bankruptcy. Two of the automobiles, Viking cars, had been ordered by the dealer from the maker, and shipped to the dealer by freight, the bills of lading being sent to a bank with draft for price attached, so that the dealer could get possession by payment of the draft. The dealer, having ascertained the serial numbers of the cars, executed an "indenture," in reality a bill of sale, purporting to sell, assign, transfer, and set over the cars to appellant in consideration of the price represented by the drafts. The bill of sale was not registered. The appellant and the dealer then executed a conditional sale agreement (which was registered) by which appellant agreed to sell the cars to the dealer for the amounts represented by the drafts, the property in the cars to remain in appellant until the price was paid. Appellant then gave cheques to the dealer with which the dealer paid the drafts and got possession of the cars. In the case of the other cars, the dealer, when ordering one, sent its driver to the maker's factory with the dealer's blank cheque, which was filled in for the price and handed to the maker, the driver then taking possession of the car and driving it to the dealer's place of business, where it went into stock. The dealer then executed an "indenture," or bill of sale (not registered), of the car to appellant, which then executed a conditional sale (registered) of it to the dealer for the original price, or 90% of it, and gave its cheque to the dealer for that sum, thus enabling the dealer to meet its cheque to the maker of the car.

Held (affirming judgment of the Court of Appeal, Ont., [1932] O.R. 712), that, as against respondent, the bills of sale and conditional sale agreements were invalid.

As to the Viking cars—*Per* Rinfret, Smith and Hughes JJ.: The attempted transfer of ownership from the dealer to appellant, by means of the "indenture" or bill of sale and payment by appellant of the drafts, came within s. 14 of the *Bills of Sale and Chattel Mortgage Act,* R.S.O. 1927, c. 164 (s. 14 extending the Act to a sale of goods which may not be the property of or in the possession, custody or control of the bargainer or any person on his behalf at the time of the making of the sale), and, in the absence of registration, was void as against respondent. The presence of s. 14 in the Ontario Act distinguishes this case from *In re Estate of Smith & Hogan Ltd.,* [1932] Can. S.C.R. 661, which would have applied had s. 8 of the Act stood alone, as s. 8 (like s. 6 of the New Brunswick Act dealt with in the *Smith & Hogan* case) does not apply to a transfer of a mere right to acquire ownership of chattels (Ontario cases cited), and, at the time of execution of the "indenture," ownership was still in the shipper, and all the dealer had was a right to acquire ownership by payment of the draft, and this right or interest in the property was all that passed by virtue of the "indenture." *Per* Lamont J. (concurring that the bills of sale were invalid, but on different grounds): The documents and course of dealing clearly established an intention of the dealer and appellant that the dealer should acquire title to the cars from the shipper and then, having the property in them, should sell them to appellant, and appellant, should in turn sell them back to the dealer under a conditional sale agreement. The bill of sale was, for convenience, drawn up and executed preparatory to completion of the transaction, but was not to operate as a bill of sale until the dealer had the cars upon its premises. The order of

the steps toward completion was immaterial, the documents were effective from the moment the parties intended they should become operative. The *Smith & Hogan* case (*supra*) did not apply because, in the present case, a court could not, without doing violence to the language used in the bill of sale, find as a fact that the intention was that appellant, in consideration of the cheques which it advanced, was to have only an equitable right to acquire the ownership and possession of the cars, and not the absolute property in them.

As to the other cars—The ownership and property therein vested in the dealer upon delivery to it, and the "indenture" or bill of sale by it to appellant, without change of possession or registration, came within s. 8 of the Act and was void as against respondent.

Ownership never having passed to appellant as against respondent, appellant was not, as against respondent, in a position to make a conditional sale of the cars to the dealer, retaining the ownership.

Appellant's contention that, in view of the general course of dealings between the dealer and appellant in connection with the financing of the purchase of the cars, a trust was created, by which the dealer held the cars in trust for appellant, and unaffected by said Act, was rejected.

It was held further, that the giving up by respondent to appellant of possession of the cars had not, under the circumstances in question, raised an estoppel against respondent.

APPEAL (by leave of a judge of the Supreme Court of Canada) from the judgment of the Court of Appeal for Ontario (1) dismissing an appeal by the present appellant from the judgment of Sedgewick J. (2), sitting as a Judge in Bankruptcy upon the trial of an issue between the parties, whereby it was declared that certain alleged bills of sale (not registered) and conditional sale agreements (registered) were invalid as against the present respondent (trustee in bankruptcy of Grand River Motors Ltd.), and whereby it was ordered that the present respondent should recover from the present appellant the sum of $9,487.12, the value of certain automobiles mentioned in the said alleged bills of sale and conditional sale agreements, and which had been delivered by the present respondent to the present appellant.

The material facts of the case are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The appeal was dismissed with costs.

J. C. McRuer K.C. and *F. A. Brewin* for the appellant.

J. M. Bullen and *L. Davis* for the respondent.

(1) [1932] O.R. 712; 14 C.B.R. 165; [1932] 4 D.L.R. 657.
(2) [1932] O.R. 101; 13 C.B.R. 107; [1932] 1 D.L.R. 565.

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The judgment of Rinfret, Smith and Hughes JJ. was delivered by

SMITH, J.—Grand River Motors Limited, the debtor, carried on business in Galt and Hamilton as automobile dealers, and, in the course of their business, ordered and received the following automobiles, of the values set out:

La Salle coupé, Serial No. 413537....	$2,789 50
Viking sedan, Serial No. V.D.S. 979...	1,900 00
Oldsmobile coupé, Serial No. 27311...	780 43
Viking sedan, Serial No. V.B. 353....	1,800 00
Oldsmobile coupé, Serial No. 27529...	708 27
Oldsmobile coach, Serial No. 27588...	793 92
Oldsmobile coach, Serial No. 27456...	715 00
	$9,487 12

These automobiles were in stock in the debtor's premises at the time of the assignment.

The two Viking automobiles were ordered from the makers in the United States, and were shipped to the debtor by freight, and the bill of lading was sent to a bank with a draft for the price attached, so that the debtor was able to get possession by payment of the draft. The debtor ascertained from the bill of lading at the bank the serial numbers of the cars, and then went to the appellant company, and executed an "indenture" in form Exhibit 2 (*b*), in reality a bill of sale, purporting to sell, assign, transfer and set over to the appellant company these automobiles described by their serial numbers, in consideration of the price represented by the drafts. These bills of sale were not filed, as provided by the *Bills of Sale and Chattel Mortgage Act.*

The appellant and the debtor then executed a conditional sale agreement, by which the appellant agreed to sell the automobiles to the debtor for the amounts represented by the drafts, this purchase price to be paid by the debtor to the appellant at stated times, the property in the automobiles to remain in the appellant until the price should be paid.

On completion of these documents, cheques for the amount of the drafts payable to the bank were given the debtor, with which the debtor paid the drafts and got possession of the bills of lading, and the cars.

These facts place the transaction in connection with the two Viking cars practically on all fours with the facts in *In Re Estate of Smith & Hogan Ltd.* (1). The statutes having a bearing in that case were, the *Bills of Sale Act*, R.S.N.B. 1927, ch. 151, and the *Conditional Sales Act*, R.S.N.B. 1927, ch. 152. The gist of the decision in that case was that the vendor in the conditional sale agreement had acquired the legal title and ownership of the cars at the time the conditional sale agreement was made, and that this legal ownership had never passed to or become vested in the dealer, who was the purchaser under the conditional sale agreement. In both cases the cars were ordered by the dealer, were shipped to the dealer, and bills of lading sent with sight draft attached. The legal ownership, therefore, was retained by the shipper, and the dealer's only right at that stage was a right to obtain legal ownership by payment of the draft.

In the *Smith & Hogan* case (1) it was held that, by virtue of the various documents and the payment of the draft, the legal title and ownership, on payment of the draft, passed to the vendor in the conditional sale agreement, and not to the dealer, who was the vendee in that agreement.

Here, also, the dealer—that is, the debtor—obtained no legal title or ownership to the cars by virtue of the shipment and the sending of the bills of lading with sight draft attached; the title, at that stage, being still in the shipper. The "indentures" or bills of sale from the debtor to the appellant did not pass the legal title to the appellant, because the title or ownership still remained in the shipper, and could not be transferred to the appellant until the drafts were paid. Ownership, however, would, as between the two parties, pass to the appellant on payment of the draft, which would give the appellant complete title and ownership of the cars, unless the *Bills of Sale and Chattel Mortgage Act* of Ontario, R.S.O. 1927, ch. 164, makes a transfer of legal ownership by that method void as against the creditors.

In the *Smith & Hogan* case (1) it was held that the *Bills of Sale Act* of New Brunswick, sec. 6, has to do with a transfer or sale of chattels where the transferor or seller has

(1) [1932] Can. S.C.R. 661.

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the ownership of the chattels at the time of transfer or sale, and does not apply to a transfer of a mere right to acquire ownership of chattels.

This principle seems to have been well established by Ontario decisions under sec. 8 of the Ontario statute.

In *Burton* v. *Bellhouse* (1), it was held that a verbal agreement to buy from a manufacturer two half-finished locomotives, to be finished, passed the property, and that the Chattel Mortgage Act did not apply.

In *Coyne* v. *Lee* (2), it was held that a chattel mortgage of goods to be acquired by the mortgagor was good as against creditors, on the ground that the mortgagee acquired an equitable title, which became a legal title as soon as the goods were acquired.

In *Horsfall* v. *Boisseau* (3), Hagarty, C.J.O., says:

> Before the passing of the Act of 1892, there does not appear to have been any statutable provision respecting future goods brought into a stock in trade on which a chattel mortgage was given.

In *Banks* v. *Robinson* (4), Boyd, C., says:

> My opinion is, that the Bills of Sale and Chattel Mortgages Act, R.S.O., ch. 125, 1887, was not intended to cover agreements creating equitable interests in non-existing and future-acquired property. The Act relates to existing chattels capable of manual delivery and susceptible of full and certain description for the purpose of identification, at the date of the instrument.

Many other cases to the same effect might be cited. Here the goods were in existence, and fully identified, but, as already stated, the debtor had not the property in them, and they were not capable of delivery by the debtor at the date of the instrument; and a mere equitable title was transferred at that stage, capable of being converted into a full legal title by acceptance and payment of the draft.

R.S.O. 1927, ch. 164, sec. 8, is the same as sec. 6 of the New Brunswick statute and, if it stood alone, I am unable to see any distinction between the *Smith & Hogan* case (5) and this one, as far as these Viking cars are concerned. The "indenture", or bill of sale, in this case could not transfer the property and ownership in the cars to the appellant, because the debtor did not have such property and ownership, and surely could not transfer a property that it did not own, but which was still owned by the shipper. All that

(1) (1860) 20 U.C.Q.B. 60.
(2) (1887) 14 Ont. A.R. 503.
(3) (1894) 21 Ont. A.R. 663 at 665.
(4) (1888) 15 O.R. 618, at 622.
(5) [1932] Can. S.C.R. 661.

the debtor had when this "indenture" was executed was a right to acquire the ownership by payment of the draft, and this right or interest in the property was all that passed by virtue of the "indenture".

Section 8 referred to, like sec. 6 of the New Brunswick Act, deals only with a sale of chattels, which means a transfer of the ownership. On this principle it was held in the Ontario courts that the provisions of section 8 did not apply to property to be acquired by the vendor in future, or not capable of immediate delivery. The scope of sec. 8 in the original Act was enlarged, in 1892, by 55 Vict., ch. 26, sec. 1, which is now sec. 14, and reads as follows:

> This Act shall extend to a mortgage or sale of goods and chattels which may not be the property of or in the possession, custody or control of the mortgagor or bargainor or any person on his behalf at the time of the making of the mortgage or sale, and notwithstanding that such goods or chattels may be intended to be delivered at some future time, or that the same may not at the time of the making of the mortgage or sale be actually procured or provided or fit or ready for delivery, or that some act may be required for the making or completing of such goods and chattels or rendering the same fit for delivery.

This section seems to cover precisely the attempted transfer of the ownership in these Viking cars by means of the "indenture," or bill of sale, and payment of the drafts by the appellant. It was a sale, or attempted sale, of goods and chattels which were not the property of or in the possession, custody or control of the bargainor, or any person on his behalf, at the time of the making of the sale, which comes within the precise words of this section of the statute. That transfer, not having been filed or registered pursuant to the Act, becomes, by virtue of the Act, void as against creditors of the transferor. The language of the section is, no doubt, open to criticism, because it is difficult to understand how one is able to sell goods and chattels that are not his property, though there can be no doubt of his ability to transfer an interest which he may have in goods and chattels that he does not own. This section, however, in terms extends to any instrument that purports to sell goods of which the vendor is not the owner, and therefore extends to any interest in chattels transferred by such instrument.

Mr. McRuer realized that this section in the Ontario statute distinguishes the present case from the case of *Smith* and *Hogan Ltd* (1), and sought, in a very able argu-

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ment, to overcome this difficulty upon the theory that a trust was created by which the debtor held these cars in trust for the appellant, to which the *Bills of Sale and Chattel Mortgage Act* does not apply. Before dealing with this contention, I shall refer to the remaining cars in dispute, which were dealt with in an entirely different manner.

These were all purchased from the General Motors of Canada, Limited. When the debtor was ordering one of these cars, it would send its driver to the factory of the General Motors with a blank cheque of the debtor, which would be filled in for the price of the car to be taken over, and would be handed to the General Motors Limited. The driver would then take possession of the car, and drive it to the place of business of the debtor, where it would be taken into stock. The debtor would then execute an "indenture," or bill of sale of the car to the appellant, who would then execute a conditional sale of it to the debtor for the original price, or ninety per cent of it, and the debtor would receive appellant's cheque, payable to the debtor, for the purchase price stated in the conditional sale agreement. The debtor would then deposit this cheque to its credit in the bank, which would provide the funds required to meet the cheque given to the General Motors, if no funds, or no sufficient funds, were otherwise on hand to meet such cheque.

It seems to me impossible to argue that the ownership and property in these cars, purchased from the General Motors Limited, did not vest in the debtor upon delivery. The "indenture" or bill of sale of these cars to the appellant, without change of possession, and without registration, is a document coming precisely within the provisions of section 8 of the Act, and void as against creditors of the debtor. As against creditors, therefore, the appellant acquired no title or ownership by virtue of the bills of sale, and therefore, as against creditors, was not in a position to make a conditional sale of the cars to the debtor, retaining the ownership, because, as against the creditors, that ownership never passed to the appellant.

This difficulty, again, is sought to be avoided upon the theory of a trust having been created by the act and intention of the parties. It is argued that, in view of the general course of dealings between the debtor and the appel-

lant in connection with the financing of the purchase of these cars by the debtor, it should be held that such a trust was created. As between themselves, there was no occasion for the creation of any trust, because, as against the debtor, the appellant obtained complete title and ownership to these automobiles, and the conditional sale agreement was perfectly valid. In order to hold that the debtor was a trustee for the appellant, it must be determined that the legal title and ownership was vested in the debtor and the beneficial interest in the appellant. The very reverse was, however, the real situation, the appellant's difficulty being that its legal ownership, by virtue of the Act, was void as against creditors.

The argument of the appellant must be that the provision of the Act that makes the appellant's title void has, at the same time, the effect of vesting or retaining the legal ownership in the debtor as trustee, with a valid equitable ownership in the appellant. To hold that a trust in favour of the appellant was thus created, unaffected by the provisions of the statute, would virtually render the statute of no effect. This argument seems to be untenable.

It was also contended that the respondent was estopped by his own conduct from recovering the amount claimed. The appellant demanded from him, and obtained, possession of the cars, which the appellant sold; and it is argued that this giving up of possession by the trustee amounts either to an actual abandonment of the property by the trustee or is in the nature of an estoppel against the trustee. The learned trial judge holds that the trustee did not agree with the appellant that the appellant was entitled to possession of the cars by virtue of its securities, but intimated, in giving up possession, that the question of appellant's title was not admitted, and was being investigated by its solicitors. He further points out that the trustee cannot, without the authority of the inspectors, give up any right which the trustee has in respect of the debtor's property, and that therefore no act of the trustee, unauthorized by the inspectors, can raise an estoppel against the trustee.

I agree with the finding of the trial judge that there was no estoppel under the circumstances.

The appeal must be dismissed with costs.

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LAMONT, J.—In this case I concur in the conclusion reached by my brother Smith. In so far as the automobiles purchased from the General Motors are concerned, I concur for the reason stated in my brother's judgment. In so far as the two Viking cars are concerned, I concur for the reason that the evidence, in my opinion, clearly establishes an intention on the part of both the dealer (The Grand River Motors, Limited) and the Commercial Finance Corporation that the dealer should acquire title to the cars from the shipper and then, having the property in them, should sell them to the Corporation. The Corporation, it was understood, would in turn sell them back to the dealer under a conditional sales agreement. That such was the mutual intention is made clear by a perusal of the documents and an examination of the course of dealing between the parties.

When the cars arrived from the shipper, and the dealer was notified that the bill of lading with a draft attached for the price was at the bank, the dealer inspected the cars and ascertained the descriptive number and model of each. These numbers it took to the Corporation, got the Corporation's cheque for the price and gave the Corporation a bill of sale of the cars, which were still in the possession of the railway company, and which were to be delivered to the dealer on payment of the draft. The cheque of the Corporation paid the draft; the cars were handed over to the dealer, and were placed in the dealer's warehouse. That the dealer was to acquire the property in the cars before selling them is shewn by the bill of sale (designated an "Indenture"), given by the dealer and accepted by the Corporation. In that document the dealer is described as "vendor" and the Corporation as "purchaser." The document contains the following:—

> WITNESSETH that, in consideration of the said total selling price of lawful money of Canada paid by the PURCHASER to the VENDOR (the receipt thereof is by him acknowledged) the VENDOR hath sold, assigned, transferred and set over and doth hereby sell, assign, transfer and set over unto the PURCHASER, its successors and assigns, the motor vehicles of the respective numbers, makes and models and for the respective prices shewn on the margin hereof, which said motor vehicles are contained in, upon or about the premises of the VENDOR, situate and being at No. 70 John Street North, in the City of Hamilton, and County of Wentworth, Ontario.
>
> * * *

THE VENDOR hereby represents and warrants to the PURCHASER that the said motor vehicles are brand new, and COVENANTS that he, the VENDOR, is rightfully and absolutely possessed of and entitled to the said motor vehicles and rightfully entitled to sell the same to the PURCHASER, and that the latter has, by virtue hereof, become the rightful owner thereof by a good and sufficient title free and clear of all liens, charges and encumbrances whatsoever

By this document the parties in the clearest and most explicit language have declared:

1. That the dealer was selling to the Corporation the cars described in the document.

2. That the dealer was rightfully and absolutely possessed of the cars.

3. That it was entitled to sell them to the Corporation, and

4. That the Corporation, by virtue of this bill of sale, had become the rightful owner of the cars.

I do not think language more definite or explicit could be used to convey the idea that the dealer was selling to the Corporation and the Corporation was purchasing cars of which the dealer was the owner and of which it had absolute property.

It was, however, argued that at the moment the bill of sale was signed the dealer did not have title to the cars, that the title was then in the shipper and, therefore, the dealer could not pass to the Corporation property in the cars which he did not possess. The answer to this argument, in my opinion, is that the bill of sale was executed at that particular time for the convenience of the dealer in the ordinary course of business and to avoid the necessity of returning to execute it after he had paid the shipper's draft. It was, however, not intended to operate as a bill of sale until the dealer had the cars upon its premises, where he could not have them until after the draft was paid. This is shewn by the language used in the first of the above quoted paragraphs in which it is declared that the cars being sold

are contained in, upon or about the premises of the Vendor, situate and being at No. 70 John Street North, in the City of Hamilton,

and also by the declaration that the dealer was selling its own cars. What took place in this case was just an ordinary, everyday transaction in which the conveyance was drawn up and executed preparatory to the completion of the transaction. I cannot think that the legal effect of

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such a transaction can be made to depend upon whether the dealer executes the bill of sale before he pays the shipper's draft and receives the bill of lading, or afterwards. The order in which the various steps toward completion are taken is immaterial, the documents are effective from the moment the parties intended they should become operative.

The appellant strongly relied upon the judgment of this court in *In re Estate of Smith and Hogan, Limited* (1). In my opinion that case has no application to the one before us. In the *Smith* and *Hogan* case (1), which in some respects resembles the present one, there was no bill of sale from the dealer to the financial company which was supplying the dealer with money to carry on its business. There was, in that case, nothing to indicate the real nature of the transaction except the cheques representing the moneys advanced, the conditional sales agreement from the financial company to the dealer, and the course of business between the parties. There was no evidence, verbal or written, that the dealer had ever agreed to sell to the financial company, or that the company had agreed to purchase the automobiles described in the conditional sales agreement. The intention of the parties, therefore, had to be inferred from the conditional sales agreement and the course of dealing between the parties. This court, by a majority, drew the inference (p. 668),

> that both parties intended that the cheque was given on the condition that title was to pass to appellants, and it could only be so passed by use, on appellant's behalf, of Smith & Hogan's right to acquire ownership and possession.

and (p. 669)

> that an agreement was arrived at * * * by which Smith & Hogan, Limited, in consideration of the cheques, transferred to the appellant their right to acquire ownership and possession of the cars.

The ratio of that decision, therefore, was that both parties understood and intended that what the company was to obtain for its cheque was a transfer of the dealer's right to acquire ownership and possession of the cars, and not the cars themselves. In other words, the company was to receive what, in effect, would be an assignment of the dealer's rights under its contract to purchase.

As I have said, that case, in my opinion, can have no application here, for, in the case before us, it seems to me

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impossible for a court, without doing violence to the language used in the bill of sale, to find as a fact that the intention of the parties was that the Commercial Finance Corporation, in consideration of the cheques which it advanced, was to have only an equitable right to acquire the ownership and possession of the cars, and not the property in the cars themselves. The question involved, in my opinion, is one of fact.

CANNON J., without delivering written reasons, held that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Briggs, Frost & Birks.*

Solicitors for the respondent: *McMaster, Montgomery, Fleury & Company.*

FRED T. MACKLIN (DEFENDANT).....APPELLANT;

AND

JAMES A. YOUNG AND MARY I. YOUNG (PLAINTIFFS) ..... } RESPONDENTS.

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*June 13, 14.
*June 28.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor Vehicles—Husband and Wife—Collision of motor cars —Driver swerving to wrong side of road—Alleged sudden emergency from conduct of other driver—Jury's findings—Drivers found equally negligent—Damages recovered by driver's wife (riding with him) against driver of other car—Latter's claim to indemnity from the other driver (the husband)—Negligence Act, Ont., 1930, c. 27, s. 3—Married Women's Property Act, R.S.O., 1927, c. 182, s. 7.

M., driving his motor car northwards, and Y., driving his southwards, collided, after dusk, about 50 feet north of the north end of a curve, on a paved highway, in Ontario. Y.'s wife was riding with him. Y. and his wife sued M., and M. counterclaimed against Y., for damages. It was alleged against each driver that he was on the wrong side of the road. The jury found that negligence of M. and Y., equally, caused the collision, the negligence consisting, on M.'s part, "by being too far over on his wrong side, swerved to east (his right) side of road but was too late to avoid the accident," and on Y.'s part, "on seeing M.'s car coming towards him, swerved to the east (his wrong) side of the road in the direction of oncoming car." Based on the jury's findings (and having regard to the *Negligence Act*, Ont., 1930, c. 27), judgment was entered for Y. against M. for one-half of Y.'s damages, and for M. against Y. for one-half of M.'s damages, and for

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Hughes JJ.

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Y.'s wife against M. for the whole of her damages, and M. was awarded indemnity against Y. for one-half of the damages awarded to Y.'s wife. This judgment was varied by the Court of Appeal, Ont., which allowed Y. his full damages and dismissed M.'s counterclaim (leaving undisturbed Y.'s wife's judgment against M. and not allowing indemnity to M. against Y. in respect thereof). M. appealed.

Held: The judgment at trial should be restored, except that M. should have no indemnity against Y. as to damages awarded to Y.'s wife.

In view of all the evidence, the charge to the jury and the jury's findings, there was not adequate ground for holding that M., "by being too far over on his wrong side," had created a sudden emergency such as to relieve Y. from blame for his act (as found by the jury) of swerving to his left; and the finding of negligence against Y. should not be set aside.

The court could not award to M. indemnity against Y. in respect of the damages awarded to Y.'s wife; s. 3 of the *Negligence Act (supra)* provided for contribution and indemnity only in the case of joint and several liability, and, under the law (*Married Women's Property Act,* R.S.O., 1927, c. 182, s. 7), Y. could not be sued by his wife for damages caused by the accident, and therefore was not and could not be found liable jointly and severally with M. to her. (*McDonald* v. *Adams,* 41 Ont. W.N. 145, approved on this point; *Ralston* v. *Ralston,* [1930] 2 K.B. 238; *Gottliffe* v. *Edelston,* [1930] 2 K.B. 378; *Goldman* v. *Goldman,* 61 Ont. L.R. 657, *Coupland* v. *Marr,* [1931] O.R. 707; *Tetef* v. *Riman,* 58 Ont. L.R. 639, referred to).

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which varied, in favour of the plaintiff James A. Young, the judgment of Rose, C.J., on the findings of a jury.

The action was for damages caused by a collision between two motor cars, the one driven by the plaintiff James A. Young, in which his wife (the other plaintiff) was riding, and the other driven by the defendant. The plaintiffs charged the defendant, and the defendant (who counterclaimed) charged the plaintiff James A. Young, with negligence causing the collision.

The material facts and circumstances of the case are sufficiently stated in the judgments now reported.

At the trial the jury found negligence, causing the collision, in both the defendant and the plaintiff James A. Young, in equal degree, the negligence consisting, on defendant's part, "by being too far over on his wrong side, swerved to east (his right) side of road but was too late to avoid the accident"; and on plaintiff's part, "on seeing Macklin's car coming towards him, swerved to the east (his

(1) (1932) 41 Ont. W.N. 433.

wrong) side of the road in the direction of oncoming car." The jury found that the damages to the plaintiff James A. Young were $850, to the plaintiff Mrs. Young $1,000, and to the defendant $4,958.

On these findings, judgment was given at trial to the plaintiff Mrs. Young against the defendant for $1,000; and (having regard to the provisions of *The Negligence Act, 1930,* c. 27, s. 3), to the defendant for indemnity against the plaintiff James A. Young to the extent of one-half the amount recovered by the plaintiff Mrs. Young, to the plaintiff James A. Young against the defendant for $425, and to the defendant against the plaintiff James A. Young for $2,479.

This judgment was varied by the Court of Appeal (which held that, upon the facts and circumstances in evidence, the finding against plaintiff of negligence causing the collision was not justified), the judgment, as so varied, being that the plaintiff James A. Young recover from defendant $850; that the plaintiff Mrs. Young recover from defendant $1,000; and that defendant's counterclaim be dismissed.

The defendant appealed to the Supreme Court of Canada. By the judgment of this Court, the appeal was allowed, and the judgment of the trial judge restored, with the variation that (for reasons stated in the judgments now reported) the paragraph, in the formal judgment at trial, giving indemnity to the defendant against the plaintiff James A. Young, be struck out.

R. S. Robertson K.C. and *Duff Slemin* for the appellant.

C. W. R. Bowlby for the respondents.

Reasons were delivered, by Smith J. (dealing more at length, than in the reasons delivered by Hughes J., with the said question of indemnity to defendant), concurred in by Rinfret and Lamont JJ.; and by Hughes J., concurred in by Rinfret, Lamont, Smith and Cannon JJ.

SMITH J. (Concurred in by Rinfret and Lamont JJ.)—I agree with my brother Hughes, for the reasons stated by him, that this appeal should be allowed, and that judgment should be entered on the basis of the findings of the jury. According to these findings, the appellant Macklin and the respondent James A. Young were both negligent,

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and contributed to the accident in equal degrees. The respondent Mary I. Young, wife of the respondent James A. Young, was awarded $1,000 damages, which she is, of course, entitled to recover in full against the appellant.

Formal judgment in the trial court adjudges that the defendant (appellant) be entitled to be indemnified by the plaintiff (respondent) James A. Young to the extent of one-half of the amount so recovered by the plaintiff Mary I. Young (respondent). This point was not raised in the pleadings, but was discussed at the trial, as follows:

> His LORDSHIP: I suppose she is entitled to her judgment against Macklin regardless of the finding of the contributory negligence of Young, but I suppose that under the statute Macklin is entitled to contribution from Young to that—
>
> Mr. BOWLBY: I think that would be the result.

On behalf of the respondent James A. Young it was submitted in respondent's factum and on the argument that the appellant is not entitled to indemnity for any part of the damages awarded to the respondent Mary I. Young. No cross appeal was taken against this provision in the judgment, but we are of opinion that, in accepting the findings of the jury, this court ought to order the proper judgment that should follow from these findings to be entered. It therefore becomes necessary to adjudicate upon this point raised in the factum and upon the argument. The objection to the clause of the trial judgment referred to is that the respondent Mary I. Young, being the wife of the respondent James A. Young, had no right of action against her husband, and that the appellant, in consequence, has no right to indemnity for any part of the damages awarded against the appellant to the respondent Mary I. Young.

Section 7 of *The Married Women's Property Act*, R.S.O., 1927, ch. 182, reads as follows:

> 7. Every married woman shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property as if such property belonged to her as a *feme sole*, but, except as aforesaid no husband or wife shall be entitled to sue the other for a tort.

This section is almost an exact copy of sec. 12 of the English *Married Women's Property Act*. Under that section it was held by Macnaghten J., in *Ralston* v. *Ralston*

(1), that no action lay, by a wife against a husband, for libel, and this was followed by McCardie J., in *Gottliffe* v. *Edelston* (2), in an action for personal injury.

The same view, under sec. 7 of the Ontario Act, has been taken by Wright J. in *Goldman* v. *Goldman* (3), and by the Appellate Division in *Coupland* v. *Marr* (4). This is clearly the correct view, and, having regard to the words of the statute, would seem hardly to require argument, were it not for the suggestion that the wife might ground a right of action on an implied contract by the husband to carry her with reasonable care, rather than on tort. Such an argument, however, is not tenable, in view of the ultimate result of the authorities which are exhaustively reviewed by Mr. Justice Middleton in *Tetef* v. *Riman* (5).

In the present case, therefore, Mary I. Young had no right of action against her husband, James A. Young, for damages sustained by her through his negligence, and the appellant can have no right of indemnity against the husband unless it is expressly provided for by the statute. The statute relied upon is *The Negligence Act, 1930,* ch. 27; sec. 3 of which reads as follows:

> In any action founded upon the fault or negligence of two or more persons the court shall determine the degree in which each of such persons is at fault or negligent, and where two or more persons are found liable they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

The jury has found that the damage to Mary I. Young was the result of the negligence of the appellant and her husband, but, under the law as already stated, the husband was not and could not be found liable jointly and severally with appellant to the wife, and it is only in the case of joint and several liability that the section provides for contribution and indemnity.

I am therefore in accord with the decision of the Court of Appeal of Ontario in *McDonald* v. *Adams* (6), where it is held that there is no right to contribution under such circumstances.

(1) [1930] 2 K.B. 238.
(2) [1930] 2 K.B. 378.
(3) (1928) 61 Ont. L.R. 657.
(4) [1931] O.R. 707.
(5) (1926) 58 Ont. L.R. 639.
(6) (1932) 41 Ont. W.N. 145.

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The appeal will therefore be disposed of as set out in the reasons of my brother Hughes.

HUGHES J. (Concurred in by Rinfret, Lamont, Smith and Cannon JJ.).—This action arose out of a collision between two motor vehicles, which occurred after dusk on the evening of the 3rd day of November, 1930, on a paved highway which runs approximately in a northerly and southerly direction between the city of Brantford and the town of Simcoe in the province of Ontario. Fred T. Macklin was driving his motor vehicle in a northerly direction and had come around a gradual curve. The plaintiff James A. Young, accompanied by his wife, the plaintiff Mary I. Young, was driving his motor vehicle in a southerly direction and accordingly was approaching the same curve. The accident occurred approximately fifty feet north of the end of the curve and therefore at a place where the road was straight. The plaintiffs alleged that the motor vehicle of the defendant was wholly or partly on the west side of the road at the time of the collision. The defendant, on the other hand, contended that the motor vehicle of the plaintiff, James A. Young, was wholly or partly on the east side of the road at the time of the collision.

The action was tried before the Chief Justice of the High Court with a jury at Hamilton on the 11th, 12th and 13th days of April, 1932. The jury retired at 3.25 p.m., returned several times and finally brought in their verdict at 8.20 p.m., a duration of almost five hours.

The jury found that the drivers were equally negligent and answered the questions as to liability as follows:

Q. 1. Was the collision caused by the negligence of Macklin?—A. Yes.

Q. 2. If so, in what did such negligence consist?—A. By being too far over on his wrong side, swerved to east side of road but was too late to avoid the accident.

Q. 3. Was the collision caused by the negligence of James Young?—A. Yes.

Q. 4. If so, in what did such negligence consist?—A. On seeing Macklin's car coming towards him, swerved to the east side of the road in the direction of oncoming car.

Counsel for the plaintiffs thereupon submitted to the learned trial judge that the answer to question no. 4 was not negligence in law. This discussion is important. It is as follows:

Mr. BOWLBY: Well, my submission would be, my Lord, that the answer to question number 4, that is, the plaintiff's negligence, is not negligence in law at all.

His LORDSHIP: Why? "On seeing Macklin's car coming towards him, swerved to the east side of the road in the direction of the oncoming car." Why isn't it?

Mr. BOWLBY: Because, my Lord, the answer to question number 2 makes it clear that the defendant, as the plaintiff has always contended in this case, was driving on the wrong side of the road, and so far on the wrong side of the road that it was necessary for him to go to his right side in order to avoid an accident.

His LORDSHIP: In order for whom to go?

Mr. BOWLBY: For the defendant.

His LORDSHIP: That is what he was endeavouring to do, according to the jury.

Mr. BOWLBY: No; they said he went too late.

His LORDSHIP: "By being too far over on his wrong side, swerved to east side of the road." He swerved to the east; that is to his right.

Mr. BOWLBY: That is his right.

His LORDSHIP: But was too late to avoid the accident.

Mr. BOWLBY: Yes.

His LORDSHIP: What they mean is, I take it, that coming around the bend he took the larger side of the curve, the outside, and coming into the straight his intention was to get back on to the right side, and to give Young his half of the road, but that he put that off too long; and then they think that Young, making the little left turn that has been described, or the big left turn, whichever it was, frustrated that attempt of Macklin's.

Mr. BOWLBY: Well, of course, I do not want to enter into a long argument, but my submissions would be that if Macklin is on the wrong side of the road, and, as the evidence shows, coming straight for Young on his wrong side of the road, there was really nothing, in the flash of time that there was, that Young could do that could be negligence. As has been said by the courts, if A puts B in a position of grave danger and emergency, and B does the wrong thing, B is not negligent.

His LORDSHIP: In order that you can succeed at all, you have got to uphold the second finding, the finding of Macklin's negligence.

Mr. BOWLBY: Oh, yes.

His LORDSHIP: Now, if that finding is justified, and Macklin was really trying to get back to the right side, the very least little turn by Young to the left would frustrate that attempt, or might; and I should think the answer to the fourth question could for that reason be supported if the answer to the second question can stand. I think that the attack, if there is to be an attack, upon the findings would be rather against the answer to the second question than the answer to the fourth. If the fourth stood all by itself without the second, then there might be force in your suggestion, but, the second standing, I do not believe I can say there was no evidence to justify the fourth.

Mr. BOWLBY: It is not a question of no evidence, my Lord; it is a question of the negligence that the jury find not being negligence in law under the authorities.

His LORDSHIP: Simply because it is done in an emergency.

Mr. BOWLBY: Yes—on all the evidence. Of course, the plaintiff's contention from start to finish in this case has always been that Macklin was on his wrong side of the road.

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His LORDSHIP: I know.

Mr. BOWLBY: And the jury find that. Now, under those circumstances—I have authorities to bear out my contention—under those circumstances, there was only, on all the evidence, a flash of time.

His LORDSHIP: Yes, but I cannot conceive how a reasonably competent driver could, even in such an emergency as Young thought existed, have adopted the course that Young adopted.

Mr. BOWLBY: Well, there is a case on all fours—I mean, the facts are absolutely identical with this case, and Mr. Justice Orde said—

His LORDSHIP: Well, they are not identical; you never saw facts that were identical.

Mr. BOWLBY: However, I think there is a very strong contention there.

His LORDSHIP: Well, I do not know what you are going to do about it if you want—my present impression is against you on that. I have been thinking about it a bit since the verdict was rendered, and my present impression is, as I said before, that if the second answer stands the fourth can be supported, and that it was really for the jury to say whether this was a mere failure to do the best thing in a sudden emergency, or whether, having regard to all the facts, it was an act of want of reasonable skill, which, in the case of the driver of a motor car, is negligence, because it is negligent to be in charge if you have not reasonable skill.

The learned trial judge reserved judgment and on April 20, 1932, he gave judgment. After referring to *Harding* v. *Edwards* (1), and *Smith* v. *Cowan* (2), the learned trial judge said in his written reasons:

The point made is that the act which the jury say was negligence on the part of Young was one of those errors of judgment in a sudden emergency which the courts have said ought not to be called negligence, and the two cases cited are cases in which the trial judge, in considering an act somewhat like the act of Young, came to the conclusion that the act, because an act done in a sudden emergency, was not properly to be called an act of negligence. But this case is a case tried with a jury, and I think it was for the jury to say whether the act was an act of the class to which I have been referring or was an act of incompetence amounting to negligence; and my recollection is that I put to the jury the question—not in writing, but for their consideration—as to the category into which Young's act or any act of Young might fall. The jury, upon a charge which was not objected to, have said that Young was negligent; that means, I think, that they have found that Young's act was not an act falling within the category in which the acts referred to in the cases cited were found to fall, but an act falling within the other category. I see, therefore, no necessity of postponing the matter further in order to hear counsel for the parties who are not represented here today, and I shall proceed to direct the entry of judgment in accordance with the findings of the jury.

Formal judgment accordingly was entered for the plaintiff, James A. Young, for $425, being one-half of his dam-

(1) 64 Ont. L.R. 98; affirmed (*Tatisich* v. *Edwards*), [1931] Can. S.C.R. 167.

(2) (1926) 31 Ont. W.N. 110.

ages, and for the plaintiff, Mary I. Young, for $1,000, against the defendant; for the defendant on his counterclaim for $2,479, being one-half of his damages, against the plaintiff, James A. Young, and the defendant was awarded indemnity against the plaintiff, James A. Young, for one-half of the damages awarded to the plaintiff, Mary I. Young.

From this judgment the plaintiffs appealed to the Court of Appeal for Ontario, on the grounds, among others, that the verdict was unreasonable, that the effective cause of the accident was the negligence of the defendant, that the defendant had created an emergency, and that, accordingly, the act of Young in turning to the left was not negligence in law. On the 25th day of November, 1932, the Court of Appeal allowed the appeal of the plaintiffs and varied the judgment below by allowing the plaintiff, James A. Young, the full amount of his damages of $850 against the defendant, by dismissing the counterclaim of the defendant and by awarding costs throughout to the plaintiffs.

The learned Chief Justice in appeal was of opinion that the negligence of Macklin was the sole effective cause of the collision, and that the finding of the jury that Young was negligent was not a finding of negligence in law. Mr. Justice Riddell was of opinion that the finding of the jury was unreasonable; and Mr. Justice Fisher, that the defendant had created an emergency and was solely to blame.

From the judgment of the Court of Appeal, the defendant appealed to this Court.

Counsel for the respondents, when called upon, contended before us that the answer of the jury to question number 2 made it clear that the jury did not believe the evidence adduced by the appellant, that all the evidence at the trial which the jury did believe supported the contention of the respondents that the appellant had created a sudden emergency, and that, therefore, the remarkable act of the respondent, James A. Young, in turning his motor vehicle to the left was not, in the circumstances, negligence in law.

There was a serious conflict of testimony at the trial.

The respondents swore that the motor vehicle of the appellant was wholly or partly on the west side of the road, both before and at the time of the collision.

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The following witnesses, however, called by the appellant, were respectively asked the following questions and made the following answers, among others:—

S. H. Carson:

Q. Now, down to that time, you having the lights of the Macklin car in view, what side of the highway was he travelling on, the right or the left?—A. When Mr. Macklin came around the curve he was on the—what he would call his right side of the road; my left hand side.

Q. Your left hand side; that would be his right hand side?—A. Yes.

Q. Now, from that time, as he came around the curve on his own right hand side of the pavement, down to the time that Young made the turn that you have told us about, did Macklin come over to the other side of the pavement at all?—A. You mean did he come—

Q. Did he come over on his wrong side of the pavement?—A. No.

Q. Did he—you can tell us, because you say you were watching his lights until Young turned—did he deviate at all from his own side of the pavement, did Macklin?—A. Macklin—I couldn't tell his position until he rounded the curve, but after he rounded the curve he was in his proper position.

Q. And then when he had rounded the curve did you see him as he came along before Young made the turn?—A. Yes.

Q. And when you saw him coming along after—Macklin I am talking about now?—A. Yes.

Q. As you saw Macklin coming along after he had rounded the curve and made the turn, did Macklin or did he not continue on his own right hand side?—A. Yes.

Q. And was he or was he not on his right hand side at the time Young turned over?—A. Yes.

H. Persall:

Q. Were you or were you not able to see the Macklin car when it got to the end of the curve and straightened out, if it did?—A. Yes, I was.

Q. And at that time can you tell us about how far you were behind it?—A. I couldn't say; a hundred feet or more is what I was following him, but I couldn't say just exact.

Q. Well, would it or would it not be much more than a hundred feet?—A. No, I wouldn't think it would be.

Q. You wouldn't think it would be much more than a hundred feet that you were behind. Perhaps that answers it, my Lord. Then were you or were you not able to see at that time upon what part of the highway the Macklin car was travelling?—A. He was on his right hand side.

J. Davis:

Q. Then you have told us that you observed the car which was going along the highway in the Brantford direction ahead of you; did you notice upon what portion of the pavement it was proceeding?—A. It was on the pavement on the right side.

Dr. Quinn:

Q. Was, was he or was he not coherent in what he said?—A. He appeared to me to be a man who was very much confused at the office and at the time of the accident.

Q. And was he or was he not able to give you any rational account of what had occurred?—A. Naturally, knowing this road and having driven it so often, I was interested to know how an accident of this sort could occur on a slow curve, and Mr. Young expressed to me that he had become very confused and apparently had taken the wrong side of the road.

His LORDSHIP: Q. And what?—A. Apparently had taken the wrong side of the road.

Q. Oh, don't say apparently had done anything. Tell what he said? —A. Well, that is what I recall, sir—

Q. Listen: is that your gloss or his statement?—A. His statement, sir.

B. Milligan:

Q. When you spoke to Mr. Young, was he or was he not, as nearly as you could judge, able to answer you coherently?—A. Yes, I think so. I asked him—I asked for the drivers of the cars first. Someone told me that the driver of the coupe had been taken to the hospital, and Mr. Young came forward as the driver of the Nash sedan, and I asked him, I said, "What happened?" He says, "I don't know," he said, "I saw the lights of this car coming—appeared to be coming towards me."

Q. He said?—A. Yes.

Q. Yes?—A. "And I turned over to the left to avoid them." "Well," I said, "why didn't you pull over here to the right and stop?" Showed him the space on the right hand side. He said, "I don't know."

The learned trial judge charged the jury fully on their duty if they found that Macklin had created a sudden emergency, using the following words:

Supposing Macklin was on the wrong side of the road, then what about Young? Could Young have done something better than he did do, and ought he to have done something better than he did do? Now, it is true, as counsel have stated to you, that in a sudden emergency for which you are not responsible you are not held to be negligent simply because you did not do the thing which, thinking about it afterwards calmly, you can say was the right thing. You are bound—and I come back to what I started with—you are bound to use reasonable care, that is, the care of a reasonably careful man, you are bound to use reasonable skill, and if you have not reasonable skill you have no right on the road in control of a motor car, and reasonable skill is the skill of a reasonably competent driver, in this case; but you are not supposed to be a superman, you are not supposed to be able to think and to act, in a sudden emergency which you have not created, more quickly and more accurately, correctly, than the reasonably competent, careful man. And so, if you find that Macklin was on Young's side of the road, you will ask yourselves whether Young's act in turning, if you think he did turn, was the right act under the circumstances, or if it was not the right act whether it was an act that ought to be called a negligent act.

Then, supposing you find that Macklin was not on Young's side of the road—let me pause there a moment before I go to that question. In considering Young's act I think you ought to inquire as to how long it had been apparent to Young, or how long it would have been apparent to Young had he been paying all the attention that he ought to have been paying, that Macklin was on the wrong side of the road. Young

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does not speak of seeing Macklin—you will correct me if I am wrong—I think Young does not speak of seeing Macklin while Macklin was on the curve; I think Young's knowledge of Macklin's lights, according to Young, begins when Macklin was in or getting into the straight. Now, suppose that Macklin in the straight was on or partly on Young's side of the road; did Young become aware of that fact as soon as a reasonably competent, careful driver would have become aware of it? If not, was failure to become aware of Macklin's position sooner a bit of negligence which had to do with or was a cause of this accident?—because of course you are not concerned with any bit of negligence that did not enter into the accident itself.

Well, supposing Macklin, as I say, was on the wrong side of the road, then, having regard to the duty to see, and having regard to what I have said about action in an emergency, was Young negligent in what Young did if Young pulled to the left instead of pulling to the right, or instead of stopping, or instead of doing whatever else may be suggested?

There is no doubt that the jury weighed the conflicting evidence seriously. At one time the jury returned and the following discussion took place between the learned trial judge and the jury:

JUROR: We are deadlocked as to the testimony of several witnesses, and that is where we stand just at present.

His LORDSHIP: Do you mean deadlocked as to what the witnesses said, or as to—

JUROR: As to whether we consider—

His LORDSHIP: They ought to be believed?

JUROR: —they are right to the points or as to whether we should accept or reject—

His LORDSHIP: I see. It is not any doubt as to what they said?

JUROR: No, your Lordship.

The respondents have no finding from the jury that there was a sudden emergency. In fact, there is a great deal of evidence from which the jury may well have inferred that the respondent, James A. Young, if he had been keeping a proper look out, could, with or without a slight reduction of speed, have allowed Macklin to pass safely on the east side of the road.

The following questions and answers in the cross-examination of the respondent, James A. Young, are apposite:

Q. Yes, that is correct. We have already heard that this was November; the trees, of course, were bare of leaves, weren't they?—A. I would expect they would be, yes.

Q. Very much as the photograph, Exhibit 2, indicates?—A. Yes.

Q. No obstacle to prevent you seeing the headlights, the full headlights, of the Macklin car shining as it came into the curve, was there?—A. If I had been looking down that far, I couldn't—

Q. Well, that is it, Mr. Young. Now perhaps you will tell us, why weren't you looking?

Mr. BOWLBY: He said if he had been looking that far.

Mr. BELL: Q. Why weren't you looking?—A. Well, ordinarily driving you look fifty or a hundred feet ahead.

Q. Yes?—A. In around that direction.

Q. Yes?—A. This car came very rapidly into the orbit of my vision.

Q. And did you or did you not know that there was a curve there? —A. Not until afterwards, no.

Q. So that the situation is this, that, not knowing there was a curve there, you were not prepared for the appearance of anything swinging around the curve, and you could not tell whether or not it had got over to your side; is that putting it fairly?—A. No, that is not the way of it. The car was on my side when I saw it.

The respondents, moreover, have not a finding of the jury that the appellant was wholly or partly on the west side of the road at the time of the accident. In fact, it may be contended that the appellant has a finding of the jury that he was back to the east side of the road but was too late to avoid the accident, because the respondent, James A. Young, also swerved to the east side of the road.

Nor have the respondents a finding of the distance between the cars when the appellant swerved to the east side of the road except by inference from the words " too late," the tardiness therein expressed possibly having a causal relationship to the accident only by reason of the frustration spoken of by the learned trial judge.

In *Smith* v. *Schilling* (1), Lord Justice Scrutton said:

> Great attention is always paid to the view which the judge at the trial takes of the verdict of the jury.

This jury, fully charged, did not find any sudden emergency and put Young into the category of a negligent person. It is impossible to remove him from this category on the findings of the jury without also weighing directly conflicting evidence; and we do not suggest that, if we were permitted to weigh the evidence, we should exonerate him.

The appeal, therefore, should be allowed with costs against the respondent James A. Young here and in the Court of Appeal and the judgment of the learned trial judge restored, with this variation, however, that in accordance with *McDonald* c. *Adams* (2), with which we agree, paragraph 3 of the formal judgment which gave the appellant indemnity against the respondent James A. Young for

(1) [1928] 1 K.B. 429 at 432. (2) (1932) 41 Ont. W.N. 145.

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one-half of the damages awarded to the respondent Mary I. Young should be struck out.

Appeal allowed with costs; judgment at trial restored with variation.

Solicitors for the appellant: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

Solicitors for the respondents: *Bowlby & Turville.*

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* May 29, 30
* Oct. 3.

IN THE MATTER OF A REFERENCE CONCERNING REFUNDS OF DUES PAID UNDER THE TERMS OF SECTION 47 (F) OF THE TIMBER REGULATIONS, IN MANITOBA, BRITISH COLUMBIA, SASKATCHEWAN AND ALBERTA

Crown lands—Timber—Homesteads—Constitutional law—Agreements respecting transfer from Dominion to Western Provinces of Crown lands, etc. (confirmed by B.N.A. Act, 1930)—Obligation to refund dues to homesteaders pursuant to terms of S. 47 (f) of Timber Regulations promulgated under Dominion Lands Act—Whether an obligation of the Dominion or of the respective Provinces.

Sec. 47 (*f*) of the Timber Regulations, promulgated under the *Dominion Lands Act,* required the holder of an entry for a homestead, if he desired to cut timber on the land, for sale, to secure a permit, and to pay dues on timber sold to other than actual settlers, but provided that the amount so paid should be refunded when he secured his patent. After the agreements for the transfer of Crown lands, etc., to Manitoba, Saskatchewan and Alberta, and for retransfer of Crown lands in certain areas to British Columbia, became effective (in 1930), the question arose whether the obligation to refund dues as aforesaid was upon the Dominion or the Province. The agreement between the Dominion and Manitoba provided (and clauses in the other agreements were to the like effect) that the Crown's interest in Crown lands, etc., and all sums due or payable for such lands, etc., should belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and that "any payment received by Canada in respect of" any such lands, etc., before the agreement came into force, should continue to belong to Canada whether paid in advance or otherwise, the expressed intention being that (except as in the agreement otherwise specially provided) Canada should not be liable to account for any payment made in respect of any of the lands, etc., before the agreement came into force, and that the Province should not be liable to account for any such payment made thereafter; and that the Province would "carry out in accordance with the terms thereof every contract to purchase or lease" any Crown lands, etc., "and every other arrangement whereby

* PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon, Crocket and Hughes JJ.

any person has become entitled to any interest therein as against the Crown."

Held: The obligation to refund dues as aforesaid was, under the terms of the agreement, upon the Province.

The obligation to refund was a term of an "arrangement" whereby the homesteader had "become entitled to an interest" in "Crown lands" "as against the Crown," within the meaning of the agreement. (A homesteader's rights and the character thereof, with regard to timber on the land, discussed, with reference to the *Dominion Lands Act* and Regulations).

The moneys so received by the Dominion as timber dues were "payments" (and continued to belong to Canada without liability to account) within the contemplation of the agreement.

Said S. 47 (*f*) of the Regulations was validly promulgated under authority of the *Dominion Lands Act* (ss. 57 (1), 57 (2*b*) and 74 (*k*) of the Act particularly referred to and considered).

Held, further: The patentee of a homestead has, by force of the *B.N.A. Act, 1930* (confirming the agreements and giving them "the force of law"), a direct recourse, for such refund, against the Province.

REFERENCE by His Excellency the Governor General in Council, under the provisions of s. 55 of the *Supreme Court Act,* R.S.C. 1927, c. 35, to the Supreme Court of Canada, of the questions set out below.

The Reference was made by Order in Council dated May 4, 1933, which proceeded upon a report from the Acting Minister of Justice, with reference to the provisions of the regulations governing the granting of yearly licences and permits to cut timber on government lands in Manitoba, Saskatchewan and Alberta, and in what are commonly known as the "Railway Belt" and "Peace River Block" in British Columbia, which timber regulations were established by Order in Council of March, 26, 1924, and subsequent amending Orders in Council, under the authority of the *Dominion Lands Act,* now R.S.C., 1927, c. 113, and with reference, in particular, to the provisions of paragraphs (*e*) and (*f*) of s. 47 of the said regulations (which paragraphs (*e*) and (*f*) are set out in the judgment now reported).

Prior to the coming into force of the several Agreements entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba, Saskatchewan, Alberta, and British Columbia, respectively, whereby provision was made for the transfer to the said Provinces, respectively, on the terms and conditions therein set forth, of the natural resources therein described (which said Agreements were confirmed and given the force

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of law by the *British North America Act, 1930,* 20-21 Geo. V, c. 26 (Imp.)), permits to cut timber were, pursuant to the terms of paragraph (*f*) of s. 47 of the Timber Regulations, granted to entrants for homesteads, etc., on Dominion lands within the said several Provinces, and dues required to be paid, under said paragraph (*f*) of s. 47, were paid by the permittees to the Dominion Government. Under said paragraph (*f*) of s. 47, the amount so paid was to be refunded when the permittee secured his patent.

Subsequently to the coming into force of the said Agreements between the Dominion and the said respective Provinces, many of such permittees became entitled to and received patents, for the lands for which they had made entry, from the Crown in the right of the Province within which such lands were respectively situate, and thereupon became entitled to a refund of dues paid by them as aforesaid. The question then arose between the Dominion Government and the Government of each of the said Provinces, whether the obligation to make the refund of dues in such cases was, under the terms of the said Agreements, an obligation of the Provincial Governments, respectively, or of the Dominion Government.

The questions referred were as follows:

"(*a*) Under the terms of the several Agreements aforementioned, is the obligation to refund dues, pursuant to the terms of paragraph (*f*) of section 47 of the Timber Regulations, in the cases aforementioned, an obligation of the Dominion or of the respective Provinces?

"(*b*) If the obligation be that of the Dominion, is the Dominion entitled to be recouped by the Provinces respectively, the amount of the dues so refunded?"

C. P. Plaxton, K.C., and *J. E. Read, K.C.,* for the Attorney-General of Canada.

W. J. Major, K.C., Attorney-General of Manitoba.

O. M. Biggar, K.C., for the Attorney-General of Saskatchewan and the Attorney-General of Alberta.

E. F. Newcombe, K.C., for the Attorney-General of British Columbia.

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The judgment of the court was delivered by

DUFF C.J.—Our opinion is required touching matters involved in questions addressed to us by His Excellency the Governor in Council, in an order dated the 4th of May, 1933. These interrogatories concern the scope of a stipulation found in agreements between the Dominion of Canada and the provinces, British Columbia, Manitoba, Alberta and Saskatchewan, respectively. They are in these terms:

(*a*) Under the terms of the several Agreements aforementioned, is the obligation to refund dues, pursuant to the terms of paragraph (*f*) of section 47 of the Timber Regulations, in the cases aforementioned, an obligation of the Dominion or of the respective Provinces?

(*b*) If the obligation be that of the Dominion, is the Dominion entitled to be recouped by the Provinces respectively, the amount of the dues so refunded?

The general effect of the agreements, with Alberta (October 1, 1930), with Saskatchewan (October 1, 1930), and with Manitoba (July 15, 1930), is to provide for the transfer of the lands, mines and minerals of the Crown in the right of the Dominion, in these several provinces, to the provinces in which they are situate. The agreement with British Columbia provides for the re-transfer to the province of the Crown lands, mines and minerals in the areas known respectively as the Railway Belt and the Peace River Block.

The precise issue is whether or not the provinces severally assumed, by these agreements, an obligation to repay moneys received by the Dominion, as dues in respect of timber permits granted to entrants in occupation of homesteads, under regulations professedly promulgated under the *Dominion Lands Act*. The regulation which gives rise to the obligation to repay is no. 47 (*f*). We quote it textually, as well as no. 47 (*e*):

(*e*) Any holder of an entry for a homestead, a purchased homestead or a pre-emption, who, previous to the issue of letters patent, sells any of the timber on his homestead, purchased homestead or pre-emption, to owners of saw-mills or to any others without having previously obtained permission to do so from the Minister, is guilty of a trespass and may be prosecuted therefor before a justice of the peace and, upon summary conviction, shall be liable to a penalty not exceeding one hundred dollars, and the timber so sold shall be subject to seizure and confiscation in the manner provided in the Dominion Lands Act.

(*f*) If the holder of an entry as above described desires to cut timber on the land held by him, for sale to either actual settlers for their own use or to other than actual settlers, he shall be required to secure a permit

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from the Crown timber agent in whose district the land is situated, and shall pay dues on the timber sold to other than actual settlers at the rate set out in section 42 of these regulations, but the amount so paid shall be refunded when he secures his patent.

The articles of the several agreements in virtue of which, in the view of the Dominion, the provinces have assumed the repayment provided for in regulation 47 (*f*) are (we quote clauses 1 and 2 of the Manitoba agreement which, admittedly, are in substantially identical terms with the cognate clauses of the other agreements):

1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the *British North America Act, 1867*, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this agreement, and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

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

These clauses must, of course, be read together, and in light of the objects of the compacts as disclosed by their recitals, their provisions as a whole, and the circumstances all parties had in view in concluding them; but the matter in controversy may fairly be stated thus: Is the obligation to repay a term of an "arrangement" under which "any person became entitled to an interest" (within the meaning of these clauses) in any "Crown lands * * * as against the Crown"? The Dominion contends that the obligation is a term of an "arrangement" creating such

an "interest" in one or both of these senses: first, as one of the terms under which the entrant acquired and held his homestead; and, second, as a term of the "arrangement" under which the entrant obtained a permit to cut timber under regulation 47 (*f*).

By the *Dominion Lands Act* (s. 2 (h)) "homestead" is defined thus:

"homestead" means the land entered for under the provisions of this Act or of any previous Act relating to Dominion lands for which a grant from the Crown may be secured through compliance with the conditions in that respect prescribed at the time the land was entered for.

But this definition does not, of course, exhaustively describe the entrant's rights in relation to his homestead. The statute declares (s. 8) that lands of the character described in the section are open for homestead entry; it provides for application for entry (s. 11); and by subsection 2 of the last mentioned section it is enacted:

2. When application is so made for land then open to homestead entry, the local agent or officer acting for him shall accept it upon payment of the said fee and shall give the receipt hereinafter provided for; and the acceptance by the local agent, or the officer acting for him, of the said application and of the fee shall constitute entry, and the receipt given to the applicant in form D shall be a certificate of entry and shall entitle the recipient to take, occupy, use and cultivate the land entered for, and to hold possession thereof to the exclusion of any other person, and to bring and maintain actions for trespass committed on the said land; and the land shall not be liable to be taken in execution before the issue of letters patent therefor: Provided that occupancy, use and possession of land entered for as a homestead, shall be subject to the provisions of this Act or of any other Act affecting it, or of any regulations made thereunder.

Sections 16 and 25 prescribe the conditions upon which the entrant becomes entitled to conveyance of the lands comprised within his homestead by letters patent. They are in these words:

16. Every entrant for a homestead shall, except as hereinafter otherwise provided, be required, before the issue of letters patent therefor,

(*a*) to have held the homestead for his own exclusive use and benefit for three years;

(*b*) to have resided thereon at least six months in each of three years;

(*c*) to have erected a habitable house thereon;

(*d*) to have cultivated such an area of land in each year upon the homestead as is satisfactory to the Minister; and

(*e*) to be a British subject.

25. The entrant for a homestead, or, in the event of his death, his legal representative or his assignee, or, in the event of his becoming insane or mentally incapable, his guardian or committee or any person who, in the event of his death, would be his legal representative, may, after the expiration of the period fixed by this Act for the completion of the requirements for obtaining letters patent for a homestead, make application therefor; and upon proving to the satisfaction of the local agent, or the officer

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acting for him, that the said requirements have been fulfilled, if the proof is accepted by the Commissioner of Dominion Lands, the entrant, or, in the event of his death, his legal representative or his assignee, shall be entitled to letters patent.

A word of comment on these enactments will not be superfluous. The holder of a homestead during the term of his occupation, antecedent to the issue of the letters patent, has, subject to limitations not at present material, an exclusive right of occupation. It is not very profitable to seek, in the types of interests in land recognized by the common law, for some sort of common law description which may be supposed, by force of analogy, to be appropriate to the holder's interest in the land comprised within his homestead. That interest is most conveniently envisaged as a statutory interest *sui generis,* the character of which, as well as the rights annexed or incidental to it, must be ascertained from the *Dominion Lands Act,* and other statutes, as well as from any statutory regulations, "affecting it". (R.S.C., 1927, c. 113, s. 11 (2)).

As to the entrant's rights in relation to the timber on his homestead, in which we are especially concerned, the statutory conditions require him to hold "the homestead for his own exclusive use and benefit" for the statutory period; to reside there six months in each of the three years; to cultivate "such an area * * * in each year * * * as is satisfactory to the Minister".

These requirements seem clearly to imply, having regard to the well known conditions under which homestead duties are usually performed, a right, in addition to the right of protection against trespass, to cut timber, not only for the purposes of cultivation, but also for fencing, for building, for fuel and for all other purposes involved in the maintenance of his occupation and in the working of the homestead, in the manner contemplated by the statute. If there could be any doubt of this, it would be swept away by reference to regulations 50, 51, 52 and 54 quoted in the Dominion's factum, and to s. 103 of the statute, of which regulation 47 (*e*) is a textual reproduction.

The right to cut, for the purposes of enabling him to enjoy the homestead as exclusive occupant, as cultivator, and for his own domestic purposes, seems to be all that can reasonably be implied, as necessary or incidental to the exercise of rights expressly conferred, or necessary to enable him to perform his duties.

Furthermore, s. 103 of the Act which, as already mentioned, is textually reproduced in 47 (*e*), must be taken into account, for the purpose of ascertaining the character of the holder's right in relation to the timber on his land. That section seems to imply that possession of the timber on the land (which includes trees standing, fallen or cut (s. 2 (*j*)) remains in the Crown. Moreover, by s. 63 of the statute, no person cutting or carrying away any timber from Crown lands acquires any right to such timber. By s. 65, where it is mixed with other timber so that it is impossible to identify it, the whole mass is deemed to have been cut without authority, and, further, the property of the Crown is not lost by reason of the fact that it has been used for building purposes.

The right given by regulation 47 (*f*) is a right conditional upon obtaining a permit to cut timber either for sale to actual settlers for their own use or to others than actual settlers.

It is of no importance whether you regard this right to cut timber for commercial purposes, given by the regulation, as (1) an item in the sum of rights of the entrant as the holder of a homestead, or as (2) a separate right. It is plain that the right must be exclusive, as, admittedly, the statute does not contemplate the issue of licences or permits for cutting timber, on land within the boundaries of a subsisting homestead, to others than the holder; and, from either point of view, this right to cut timber would appear to vest in the holder of it an "interest in land" within the meaning of the agreements.

We think the former of these two ways of regarding this right is the better one. In effect, the statute and the regulations together give to the entrant the right to cut timber on his homestead "without stint", provided he complies with the conditions of the regulation. From this point of view, his right on obtaining his Crown grant to be repaid the dues paid by him under his permit seems to be plainly one of the "terms" of "the arrangement" under which he acquires, first, the rights enjoyed during his occupancy, and, afterwards, his right to a patent.

But, even considering the right to cut under the regulation as a separate right, we think it constitutes "an interest" in "Crown lands * * * as against the Crown" within the meaning of s. 2 of the agreements.

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Indeed, any other construction of these words would lead to singular results.

By s. 57 of the statute, the Governor in Council is authorized to make regulations for the "issue (to settlers) of permits to cut timber for building purposes on their farms or for fuel for themselves"; "to steamboat owners, for use on their steamboats"; "in connection with * * * mining * * * operations"; "for the construction of railways, bridges, churches, schools and public buildings, or any public works"; "for sale as cordwood"; "for pulpwood". By s. 57 (2) the Governor in Council may make regulations for the issue of permits "to cut timber as cordwood, pulpwood, fence posts, telegraph poles or props for mining purposes or for any other purpose". Acting under the powers so conferred upon him, the Governor in Council promulgated regulations authorizing permits in most, if not all, of these cases.

Consider a permit, for example, under s. 57 (1*g*) to cut timber "for sale as cordwood", or, under s. 57 (2*b*), for "telegraph poles", and in force on the date when the agreements took effect. It would be strange if the rights of the holder of such a permit were not protected by the agreement; and we think such protection was intended to be and is provided by the words of clause 1,

> subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same,

when read and construed (as they must be) together with the correlated words of clause 2,

> every other arrangement whereby any person has become entitled to any interest therein as against the Crown.

"Interest," in our opinion, includes, at least, every interest which it was the duty of the Crown to recognize, as trust embraces every obligation savouring of the nature of trust or equitable obligation affecting the lands, mines and minerals transferred, to which the Crown was under duty to give effect. From this point of view the right of repayment is one of the terms upon which he acquires his permit.

But it is necessary to notice an argument addressed to us to the effect that the right of the patentee to repayment is not a right arising under an "arrangement," within the meaning of the agreements. The words of clause 2, "and every other arrangement whereby," etc., must, it is argued, be construed in compliance with the rule *noscitur*

a sociis as extending only to arrangements of a "contractual nature."

The subject of the clause comprises two classes of arrangements, (1) contracts "to purchase or lease any Crown lands, mines or minerals," and, (2) "every other arrangement whereby any person has become entitled to any interest therein as against the Crown".

It is quite impossible, of course, to contend that the second class includes only arrangements which are strictly contracts, because if that had been the purpose of the clause, the word "contract" would have been used, instead of "arrangement," to describe the kind of transactions falling within it.

Then, is the statutory system, under which the homestead entrant becomes entitled to the rights which the statute conditionally gives him, an "arrangement," within this second class? It would not be misleading, though, perhaps, not technically accurate, to speak of the provisions of the statute as an offer, and the performance of the conditions as an acceptance, and the resulting statutory rights as rights arising from the offer so made and so accepted. This is, we repeat, not a precise legal description of what takes place, but at least it may be stated that, if this statutory system under which these rights arise, involving, as it does in its working, co-operation between the entrant, in the performance of the prescribed statutory conditions, and the Crown and the officers of the Crown, in recognizing the resulting statutory rights of the entrant, and giving effect to them, is not an "arrangement" or does not involve arrangements of such a nature as to bring it within the second class, then the scope of that class, except in so far as it comprehends transactions which are simply and strictly contracts, embraces only an extremely narrow field. We think the language of the clause is altogether too explicit to justify such a restriction of its scope. It seems to us that the character of the arrangements contemplated is clearly defined by the adjectival phrase "whereby any person has become entitled to any interest therein as against the Crown"; and that these words should be construed in their ordinary sense.

As to the term "arrangement" itself, comment seems unnecessary. It clearly extends to the transaction or series of transactions, by which the entrant becomes entitled,

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first, to his homestead, and afterwards to his Crown grant; as well as to the transaction by which he acquires his rights under a permit.

We now turn to an argument vigorously urged upon us by the provinces and,, especially, and very ably, in the factum filed on behalf of Manitoba. It is based upon this sentence in clause 1:

> any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

The argument is that the moneys received by the Dominion as timber dues under the regulation are not "payments," within the contemplation of the agreement. In one form of the argument, it is contended that these moneys are in the nature of a security for the performance of the conditions entitling the holder of the permit to a patent. It is also put in this way: the Dominion did not acquire these moneys, it is said, as owner, but held them only in trust or *in medio*, for disposition, according to the event, on the issue of letters patent, or the abandonment or cancellation of the homestead, as the case might be.

We see nothing to justify the conclusion that the Dominion did not receive these moneys as owner. There is nothing to indicate that they are to pass to a separate fund, or that they are to be dealt with in any other way than moneys received from any other source of revenue. It is impossible to doubt that, in considering the facts bearing upon the financial readjustments provided for, or contemplated by the agreements, moneys received from this source would be taken into account as against the Dominion. In our view, the contemplated character of the transactions in respect of these moneys is precisely what they appear to be on their face: first, a receipt of timber dues as revenue, dealt with in the same way as all such revenues are dealt with; secondly, a payment back to the patentee, of the moneys so paid in, under a statutory right, which came into existence on the issue of the patent. We are, therefore, unable to give effect to this contention.

There remains the question whether regulation 47 (*f*) was promulgated under statutory authority. We think this question must be answered in the affirmative on two grounds. First, the authority given by s. 57 (2*b*) which is in these words:

> permits to cut timber as cordwood, pulpwood, fence posts, telegraph poles or props for mining purposes or for any other purpose, over tracts of land not exceeding one square mile in area, except in the case of permits to cut pulpwood which may apply to tracts of such area as may be determined by the Governor in Council:

seems to us to be adequate to support the regulation.

There was some suggestion that the words "for any other purpose" must be limited in obedience to *noscitur a sociis* in such a way as to exclude a regulation like regulation 47 (*f*) from its purview. We think you cannot exclude commercial purposes from the scope of the phrase "any other purpose". When the whole of s. 57 is looked at it is plain that there is much overlapping and, we think, you cannot, in construing it, assume a series of strict logical disjunctions. We doubt if, regarding the section as a whole, the *ejusdem generis* rule has any proper application to the phrase "any other purpose". We are satisfied, moreover, that regulation 47 (*f*) falls within the ambit of the powers conferred on the Governor in Council by s. 57 (1).

Admittedly, as already observed, the statute does not contemplate subjecting land held under homestead to the same regulations respecting the grant of permits or licences to cut timber as those governing the granting of such permits or licences in respect of lands still in possession of the Crown. But s. 57 does not itself regulate the issue of permits; it leaves the whole subject to the Governor in Council, and we see no reason for concluding that Crown timber on homestead land is not within the regulatory authority conferred by the section, which must, of course, be exercised in consonance with other provisions of the statute relating to homesteads.

There is another basis upon which the regulation can be sustained. By s. 74 (*k*) the Governor in Council is empowered to

> make such orders as are deemed necessary to carry out the provisions of this Act, according to their true intent, or to meet any cases which arise, and for which no provision is made in this Act; and further make any regulations which are considered necessary to give the provisions of this section full effect.

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We cannot think of any reason for excluding such regulations as 47 (*e*) and (*f*) from the ambit of the authority hereby created.

There is still a further question, and that is whether or not the patentee has, by force of the statute, a direct recourse against the province. Had we felt any doubt on the subject, we should have considered it improper to answer the question in the absence of some argument in the interest of the patentees. It is clear to us, however, that the *B.N.A. Act, 1930,* gives statutory force to the obligations of the provinces under arts. 1 and 2 of the agreements; this, we think, is the effect of s. 1 of the statute which is in these terms:

> 1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the *British North America Act, 1867,* or any Act amending the same, or any Act of Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

The phrase "shall have the force of law," when found in the statutory enactment and in the context in which it appears, can, we think, have no other meaning.

The answers which we shall respectfully submit to His Excellency are:

To the Interrogatory numbered One: The said obligation is an obligation of the respective provinces;

To the Interrogatory numbered Two: In view of the answer to Interrogatory No. One, this question does not arise; but, if our view had been that the provinces were not under a direct obligation to refund, we should have considered that the Dominion, on refunding such dues, would be entitled to recoupment from the province concerned.

Questions answered accordingly.

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

Attorney-General of Manitoba: *W. J. Major.*

Solicitor for the Attorney-General of Saskatchewan: *Alex. Blackwood.*

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

Solicitor for the Attorney-General of British Columbia: *Eric Pepler.*

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SPOONER OILS LIMITED, AND ARTHUR GILLESPIE SPOONER (PLAINTIFFS) ..... } APPELLANTS;

*April 26, 27.
*Oct. 3.

AND

THE TURNER VALLEY GAS CONSERVATION BOARD AND THE ATTORNEY GENERAL OF ALBERTA (DEFENDANTS) ..... } RESPONDENTS.

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

Constitutional law—Statutes (construction, validity)—Turner Valley Gas Conservation Act, Alta., 1932, c. 6—Competency, in so far as it affects leases from Dominion Government under Regulations of 1910 and 1911 (made under authority of Dominion Lands Act, 1908, c. 20)—Agreement between the Dominion and the Province of Alberta respecting transfer to Province of public lands, etc. (confirmed by B.N.A. Act, 1930)—B.N.A. Act, 1867, ss. 91, 92.

Appellant was holder of a lease from the Dominion Government, granted under the regulations of March, 1910 and 1911 (made under authority of the *Dominion Lands Act,* 1908, c. 20), of a tract of land in the Turner Valley gas field, in the province of Alberta, for the purpose of mining and operating for petroleum and natural gas. Sec. 2 of the agreement between the Dominion and the Province, dated December 14, 1929 (respecting transfer to the Province of public lands, etc.; and which agreement was confirmed and given "the force of law" by the *B.N.A. Act, 1930,* c. 26) provides that "the Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise" except with consent or "in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province * * *." In 1932 (c. 6) the Province passed the *Turner Valley Gas Conservation Act,* the broad purpose of which was to reduce the loss of gas in the said field by burning as waste, and which subjected a lessee's operations to the control of a Board whose duty it was to limit the production of natural gas, in the said field, and from any particular well by reference to the amount of naphtha the well ought, in the Board's opinion, to be permitted to produce.

Held: The said Act of the Province "affected" the "terms" of the lease and of similar leases made under said regulations, within the meaning of s. 2 of said agreement (and did not come within the exceptions in said s. 2), and was, in so far as it affected such leases, incompetent.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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(Judgment of the Appellate Division, Alta., [1932] 3 W.W.R. 477, [1932] 4 D.L.R. 750, reversed in this respect).

The Act "affected" the lease, notwithstanding that the lease required the lessee to work the mines "in such manner only as is usual and customary in skilful and proper mining operations of similar character when conducted by proprietors themselves on their own lands." Conforming to such standard of working did not require following methods dictated by considerations of public policy, as contradistinguished from the interests of proprietors as proprietors.

Sec. 29 of the Dominion regulations of 1928 (published in 1930), which (among other provisions) required a lessee to take precautions against "waste" of natural gas, did not apply to the lease in question. The rule that a legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main* v. *Stark*, 15 App. Cas. 384, at 388), unless the language in which it is expressed requires such a construction, operated against such application; the Order in Council bringing s. 29 into force contained nothing in its language to indicate that s. 29 was intended to take effect upon the mutual rights of lessors and lessees arising under the terms of leases granted pursuant to the regulations of 1910 and 1911. Neither the terms of the lease itself, nor the regulations of 1910 and 1911, justified a construction by which s. 29 was made to constitute a part of the contract. But even assuming that s. 29 applied, it afforded no escape from the conclusion that the terms of the lease were disadvantageously "affected" by the provincial Act; whatever might be the exact effect of such a requirement against "waste" (if it applied to the lease), the provincial Act, limiting arbitrarily the gross production of the field, and subjecting the lessee, in respect of the production of gas, to the "uncontrolled discretion" (s. 13 of the Act) of an administrative Board, in this respect radically altered the status of the lessee under the terms of his lease.

Sec. 2 of said agreement between the Dominion and the Province precluded the Province from legislating in such a way as to "alter" or "affect" any "term of any such lease," irrespectively of any possibility that such legislation might be of such a character as to fall under powers of legislation possessed by the Province prior to the agreement. But, further, had the provincial Act in question been passed prior to the agreement, and while the public lands were still held by the Dominion, it would have been inoperative, as regards such leases as that in question, on the grounds (1) that it was repugnant, in so far as it affected tracts leased under the regulations of 1910 and 1911, to those regulations, and the Dominion statute under which they were promulgated; and (2) that, in so far as it authorized the Board to make regulations (taking effect by orders of the Board which were given statutory force) concerning the production of natural gas and naphtha from lands held under lease from the Dominion for the purpose of working them for the production of those minerals, it was legislation strictly concerning the public property of the Dominion (reserved for the exclusive legislative jurisdiction of the Dominion by s. 91 (1) of the *B.N.A. Act, 1867*).

Held also (agreeing in this respect with the judgment of the Appellate Division, *supra*): The Act of the province could not be said to be invalid on the ground that, as a whole, it dealt with matters falling strictly under s. 91 (2) (regulation of trade and commerce), or, at all

events, with matters outside the scope of s. 92, of the *B.N.A. Act, 1867. (Union Colliery Co. of British Columbia Ltd.* v. *Bryden,* [1899] A.C. 580, at 587, cited). The Act was, in substance, legislation providing for the regulation of the working of natural gas mines in the Turner Valley area from a provincial point of view and for a provincial purpose; nothing had been shown to indicate that the working of the mines (excepting the wells upon lands leased from the Dominion) was a matter which, by reason of exceptional circumstances, had ceased to be, or had ever been, anything but a matter "provincial" in the relevant sense.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Alberta (1).

The plaintiff Spooner was the holder of a lease of land dated August 31, 1912, from His Majesty the King, represented therein by the Minister of the Interior of Canada, for the "sole and only purpose" of mining and operating for petroleum and natural gas, and of laying pipe lines, etc. The lease was granted under the Regulations of March, 1910 and 1911, made under the authority of the *Dominion Lands Act,* 1908, c. 20, s. 37. The appellant company was the owner in fee simple of certain lands, and held a sub-lease of sixty acres of the tract leased to the plaintiff Spooner. All the lands were in the Turner Valley gas field in the province of Alberta. The plaintiffs brought an action, attacking an order made by The Turner Valley Gas Conservation Board as being illegal and unauthorized (The plaintiffs' contention below that the Board's order was not authorized by the provincial Act in question was not argued in the present appeal); attacking the *Turner Valley Gas Conservation Act,* Statutes of Alberta, 1932, c. 6, as being contrary to the terms of s. 2 of the agreement dated December 14, 1929, made between the Government of the Dominion of Canada and the Government of the Province of Alberta (respecting transfer to the Province of public lands, etc.), and set out as a schedule to c. 26 of the Imperial Statutes of 1930 (the *British North America Act, 1930,* which confirmed said agreement and gave it "the force of law"); and attacking the said Act of the Province as being legislation in regard to the "regulation of trade and commerce" (*B.N.A. Act, 1867,* s. 91 (2)), and therefore *ultra vires;* and attacking s. 20 of the said Act of the Province as imposing indirect taxation and being, therefore, *ultra vires.*

(1) [1932] 3 W.W.R. 477; [1932] 4 D.L.R. 750.

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Ewing J. dismissed the action (1). The Appellate Division (2) varied his judgment so as to declare that ss. 20, 21 and 22 of the said Act of the Province were *ultra vires* (as imposing indirect taxation. Ewing J., for reasons stated in his judgment, did not make a declaration on this point), and in all other respects affirmed his judgment. The plaintiffs appealed (by leave of the Appellate Division) to the Supreme Court of Canada. (There was no cross-appeal against the declaration that ss. 20, 21 and 22 were *ultra vires*, and this matter was not in issue in the present appeal).

The material facts, and the questions in issue on the present appeal, are more fully set out in the judgment now reported.

The appeal was allowed with costs, and judgment was directed declaring that the impeached legislation was invalid as respects the leasehold properties of the appellants.

H. S. Patterson, K.C., for the appellants.

W. S. Gray, K.C., for the respondents.

The judgment of the court was delivered by

DUFF C.J.—The appellant Spooner is the holder of a "lease" of a tract of land in the Turner Valley gas field, which gives him the right to work the tract for petroleum and natural gas. The term of the lease is twenty-one years and is renewable at its expiration. The lease was granted under the Regulations of March, 1910 and 1911, and it will be necessary to consider the provisions of it with some particularity.

The Turner Valley gas field is what is known as a "wet field"; one, that is to say, where the natural gas coming to the surface holds crude naphtha in suspension. The practice of the operators in that field was, up to the time the impugned legislation was enacted, to extract the naphtha from the natural gas by passing the gas through separators, and thereby effecting a liquefaction of the naphtha.

For the natural gas produced in this field there is no sufficient market, and, since, to allow it to escape into the atmosphere (after the extraction of the naphtha) might

(1) [1932] 2 W.W.R. 454; [1932] 4 D.L.R. 729.
(2) [1932] 3 W.W.R. 477; [1932] 4 D.L.R. 750.

endanger the health of people living in the vicinity, it is for the most part burned as refuse. Some of it is transported to Calgary and Lethbridge for consumption there in the production of light and heat; and some is used in refineries; but, while the ratio of the volume of gas consumed as waste to that which is usefully consumed varies from month to month, it may be stated, without substantial inaccuracy, that very little more than ten per cent. of what passes out of the wells is, except for the recovery of naphtha, applied to any useful purpose.

In 1932 the Legislature of Alberta passed a statute, *The Turner Valley Gas Conservation Act* (1932, c. 6); the broad purpose of which is to reduce the loss of gas in this field by burning as waste. A Board is constituted, The Turner Valley Gas Conservation Board, the general function of which, the statute declares, is to take measures for the conservation of gas in the Turner Valley field.

The appellant company are the owners, in fee simple, of several tracts in the field, and hold a sub-lease of sixty acres of the tract leased to the appellant Spooner. The appellants, who are plaintiffs in the action, seek a declaration that the legislation of 1932 is *ultra vires,* as a whole, on the ground that it deals with matters falling within the ambit of s. 91 (2) of the *British North America Act,* or, at all events, with matters outside the scope of s. 92. They contend, in the alternative, for a declaration that, in so far as the legislation affects the rights of the appellants under the lease mentioned (as well as of other holders of similar leases), it is an invasion of the legislative sphere reserved to the Dominion by s. 91 (1) of the *B.N.A. Act* in respect of "The Public * * * Property", and consequently, to that extent (if not in its entirety), *ultra vires,* and further that the legislation "affects" the provisions of such leases within the meaning of s. 2 of the compact between the Province and the Dominion, to which the *B.N.A., 1930,* gives "the force of law", and is, therefore, incompetent. Article 2 of the compact is in these words:

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

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apply generally to all similar agreements relating to lands, mines or minerals in the province or to interests therein, irrespective of who may be the parties thereto.

We have come to the conclusion that the first of these contentions fails, and we shall postpone the discussion of that for the present. We are unable, however, to agree with the decision of the courts below with regard to the second contention.

We think that the legislation of 1932 does "affect" the "terms" of the appellant's lease, and of similar leases, within the meaning of the article quoted, and that it is, therefore, incompetent in so far as it does so "affect" such leases.

Contrasting the rights of the appellant Spooner and of any lessee, as lessee, under the provisions of a lease, granted under the Regulations of 1910 and 1911, and under the Regulations, a copy of which is annexed to Spooner's lease, with the position of a lessee under a lease of identical terms, but brought under the dominion of the provincial statute, there can, we think, be no dispute that the terms of leases governed by the regulations alone and the rights of the lessee under such terms are "affected" in a substantial degree by the legislation; if the legislation can take effect upon such leases.

We quote textually two clauses of Spooner's lease which are the only provisions immediately pertinent:

> NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the rents and royalties hereinafter reserved and subject to the provisos, conditions, restrictions and stipulations hereinafter expressed and contained, His Majesty doth grant and demise unto the lessee, for the sole and only purpose of mining and operating for petroleum and natural gas, and of laying pipe lines and of building tanks, stations and structures thereon necessary and convenient to take care of the said products,

the tract demised for the term defined, and renewable as stipulated.

By article 8 it is agreed,

> That the lessee shall and will during the said term, open, use and work any mines and works opened and carried on by him upon the said lands in such manner only as is usual and customary in skilful and proper mining operations of similar character when conducted by proprietors themselves on their own lands, and when working the same shall keep and preserve the said mines and works from all avoidable injury and damage, and also the roads, ways, works, erections and fixtures therein and thereon in good repair and condition, except such of the matters and things last aforesaid as shall from time to time be considered by any inspector or other person authorized by the Minister to inspect and report

upon such matters and things to be unnecessary for the proper working of any such mine, but so that no casing placed in any mine shall be removed or impaired, and in such state and condition shall and will at the end or sooner determination of the said term deliver peaceable possession thereof and of the said lands to His Majesty.

The lessee has, under the terms of the lease, the right, during the currency of the term, of "mining and operating for petroleum and natural gas" subject only to the conditions and restrictions prescribed by the provisions of article 8. Under that article, the standard by which the lessee is to govern himself in opening, using and working "any mines and works opened and carried on by him" is the standard set by the manner of doing so "in skilful and proper mining operations", which is "usual and customary" among proprietors working their own lands. This involves two things: the lessee's manner of working the demised property is to conform to that which is "usual and customary" with proprietors working their own lands; but that again is qualified by the condition that the manner of working must conform to what is "usual and customary" in "skilful and proper mining operations" carried on by such persons in such lands.

There is no suggestion here that, in working his property conformably to the standard of "skilful and proper mining operations", the proprietor is supposed to be aiming at any object other than exploiting his own property in a profitable way. Any method of working lands for gas and petroleum which is "usual and customary" among proprietors exploiting their own property, for their own profit, and which, from that point of view, is "skilful and proper", could not be condemned, as in contravention of article 8, merely because considerations of public policy, as contradistinguished from the interests of proprietors as proprietors, might dictate a different course.

Turning now to the enactments of the statute of 1932. The Act (s. 13) requires the Board to

proceed to reduce the production of gas from all the wells in the area to an aggregate amount of not more than two hundred million cubic feet of gas per day, and to prescribe the daily rate of permitted production for each of every such well, * * *

It is also enacted that, for this purpose, the Board

may by order prescribe the periods during which any specified well or wells may be permitted to produce, and the total amount of the production which may be permitted during any such period from any such well or wells, and the working pressure at which all wells or any specified well

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shall be operated, and may by subsequent order and from time to time increase or reduce the amount of the permitted production of any well as the Board in its uncontrolled discretion deems proper.

The Board is further directed, (after certain tests provided for have been made) to determine the total amount of daily production which ought to be permitted for the time being from all wells and from each well in the area.

The operations of the lessee are subjected, by the statute, to the control of a Board whose duty it is to limit the production of natural gas in the whole of the Turner Valley field; and to limit the production of natural gas, from any particular well, by reference to the amount of naphtha the well ought, in the opinion of the Board, to be permitted to produce. The effect of the Order of the Board, of which the appellants complain (and this we mention by way of illustration only), upon the operations of the appellant company has been to reduce its production of naphtha by something like 95%.

On the 4th of May, 1932, the Board issued an order known as Order No. 1 in which, *inter alia,*

* * * the Board does order and prescribe that on and after the ninth day of May, 1932, the amount of gas permitted to be produced daily from the respective wells set out in (the schedule to the Order) shall not be greater than is required to produce the amount of naphtha set out opposite the description of each such well in said schedule following * * *

The Order further requires that every person operating a well set out in the schedule to the Order

shall so operate it so as not to permit such well to produce a greater daily flow of gas than will produce the number of barrels of naphtha set in said schedule opposite the description of such well.

It may be observed, although our conclusion is in no way dependent upon it, that it seems to be conceded that, as a rule, proprietors in the Turner Valley field carried on their operations in the manner above described; and that there really is no evidence to show, nor indeed is there any suggestion, that such a method of working a well of the type found in that field, which prevailed prior to the coming into force of the Order of the Board, was a method not permitted by article 8 of the appellant's lease. There is nothing pointing to the conclusion that such a manner of working is not a manner

usual and customary in skilful and proper mining operations of similar character when conducted by proprietors themselves on their own lands.

By the terms of the lease, the lessee undertook certain obligations therein defined. What the legislation professes to do is to substitute for these obligations a discretionary

control by an administrative body which is governed, in the exercise of its discretion, by general principles and rules laid down in the statute, pursuant to a policy of conserving natural gas in the entire field in the general public interest; with no regard (or at all events only in a very subordinate degree) to the standards, or the rules governing proprietors acting in the usual and customary manner in skilfully and properly working their own land for their own profit.

The respondents advance the argument that this reasoning is met by reference to s. 29 of the Regulations of 1928 which were published in 1930. That section contains this provision:

> In case natural gas is discovered through boring operations on a location, the lessee shall take all reasonable and proper precautions to prevent the waste of such natural gas, and his operations shall be so conducted as to enable him, immediately upon discovery, to control and prevent the escape of such gas.

The respondents rely upon that part of the provision which relates to "waste". Several points are involved in the examination of this contention.

First (assuming s. 29 to apply to leases granted under the regulations of 1910 and 1911) the provision quoted does not afford to the respondents a way of escape from the conclusion that the terms of the lease are disadvantageously "affected" by the legislation of 1932. The obligation under s. 29, upon which the argument is founded, is to "take all reasonable and proper precautions to prevent the waste" of natural gas. Whether the use of the natural gas for the purpose of recovering the naphtha held in suspension is "waste" within the meaning of this provision would, in a controversy between the Crown and the lessee, be a question to be determined by the courts.

The application of gas to the useful purposes of creating light and heat necessarily involves the destruction of it. The production of gas for the purpose of recovering from it the naphtha in suspension necessarily (necessarily, that is to say, in a practical business sense) involves the loss of the gas for which there is no market as gas. From the point of view of the proprietor there is no evidence that this loss of gas is not more than compensated for by the value of the naphtha recovered; and, as already observed, there are no facts before us justifying the conclusion that the obligation to "take all reasonable and proper precautions to prevent waste" imports a prohibition upon

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production for such a purpose. The legislation of 1932 limits, but does not prohibit, such production and neither the enactments of the statute nor the orders of the Board go to the length of declaring, that such production necessarily involves waste, which, from any point of view, ought to be prohibited.

Whatever be the exact effect of this provision of s. 29, it is quite clear that, while if, in the opinion of the Minister, the lessee infringes it, the Minister may call upon him to answer for his delinquency in the courts, yet, under the provision, such appeal to the courts is, apart from the cancellation of the lease, his only remedy. The enactments of the provincial statute, limiting arbitrarily the gross production of the field, and subjecting the lessee, in respect of the production of gas, to the "uncontrolled discretion" of an administrative Board, in this respect radically alter the status of the lessee under the terms of his lease. This appears to have been, in substance, the view of the Apellate Division.

The next point for consideration is whether s. 29 applies to leases granted under the Regulations of 1910 and 1911. It must be examined from two aspects. The first aspect is that under which it was envisaged by the learned trial judge (who held that the rights of the lessee are governed by the section), in which s. 29 is regarded simply as a regulation made under the regulative authority conferred upon the Governor in Council by s. 35 of the *Dominion Lands Act* (c. 113, R.S.C. 1927) (which does not in any pertinent sense differ from s. 37 of the Act of 1908). The appropriate rule of construction has been formulated and applied many times. A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main* v. *Stark* (1)), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

(1) (1890) 15 App. Cas. 384, at 388.

On the construction of this paragraph of s. 29 for which the respondents contend, the paragraph, if applicable, imposes *ab extra* by the force of law new terms, as broad, in scope, as the statute of 1932, which, as already observed, radically alter, to his prejudice, the rights and duties of the lessee under the stipulations of the existing contract of lease. The same thing could properly be stated of any construction which would leave it to the Crown to determine in its "uncontrolled discretion" what is and what is not "waste" within the meaning of the section. Moreover, the argument seems to involve the proposition that the whole of s. 29, and not alone the particular paragraph relating to "waste", applies to the leases in question; and there are still other provisions of s. 29, which, if operative, would, apart altogether from that provision, most materially affect his contractual rights and obligations.

First, there is the provision reserving to the Minister the right to make additional regulations, as it may appear necessary or expedient to him, governing the manner in which the boring operations shall be conducted, and the manner in which the wells shall be operated.

Then, there is the further provision vesting in the discretion of the Minister the power of cancellation in the event of non-compliance with the requirements set out in the section in relation to boring operations, or with any requirement which the Minister may consider it necessary to impose with respect to boring or operating.

We think there is nothing in the language of the Order in Council bringing into force this section 29 which requires us to hold that it was intended to take effect upon the mutual rights of lessors and lessees arising under the terms of leases granted pursuant to the Regulations of 1910 and 1911.

The other aspect, from which this point must be considered, presents for examination the question whether s. 29 constitutes a part of the contract, between the Crown and the lessee, by force of the contract itself. We think this question must be answered in the negative.

The lease declares, in express terms, that it is granted by the Minister of the Interior, pursuant to regulations made for the disposal of petroleum and natural gas rights, by Orders in Council dated respectively the 11th days of

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March, 1910 and 1911, "a copy of which regulations is hereto appended".

The term is twenty-one years and the lease is renewable for a further term of twenty-one years provided the lessee furnishes evidence satisfactory to the Minister of the Interior to show that during the term of the lease he has complied fully with the conditions of such lease and with the provisions of the regulations under which it was granted.

Among the "provisos, conditions, restrictions and stipulations" of the lease there is this:

2. That the lessee shall and will well, truly and faithfully observe, perform and abide by all the obligations, conditions, provisos and restrictions in or under the said regulations imposed upon lessees or upon the said lessee.

The Regulations "appended" to the lease contain the following:

21. The lease shall be in such form as may be determined by the Minister of the Interior, in accordance with the provisions of these Regulations.

It appears that the lease is framed upon the view that the rights of the parties *inter se* are to be ascertained from the provisions of the lease, from the Regulations, a copy of which is appended thereto, and such further orders and regulations and directions as may be made from time to time during the currency of the lease under article 9 of the lease or sections 23 and 24 of the Regulations. The last mentioned sections are in these words:

23. No royalty shall be charged upon the sales of the petroleum acquired from the Crown under the provisions of the Regulations up to the 1st day of January, 1930, but provision shall be made in the leases issued for such rights that after the above date the petroleum products of the location shall be subject to whatever Regulations in respect of the payment of royalty may then or thereafter be made.

24. A royalty at such rate as may from time to time be specified by Order in Council may be levied and collected on the natural gas products of the leasehold.

But, it is argued that, notwithstanding the form of the lease itself, the concluding words of s. 1 of the Regulations of 1910 and 1911 have the effect of incorporating, as conditions of the lease, all subsequent regulations made during the currency of the term. The sentence in which these words occur is this:

The term of the lease shall be twenty-one years, renewable for a further term of twenty-one years, provided the lessee can furnish evidence satisfactory to the Minister to show that during the term of the lease he has complied fully with the conditions of such lease and with the provisions of the Regulations in force from time to time during the currency of the lease.

"The Regulations in force from time to time during the currency of the lease" should be read, it is argued, as embracing all subsequent regulations whether incorporated in the terms of the lease, by force of some provision of the lease or of the existing Regulations, or not.

We cannot agree with this view of the effect of these words.

We think the better view is that they extend only to regulations made in exercise of a right reserved by the regulations of 1910 and 1911 or of the lease itself. Sections 23 and 24 contemplate such regulations, while by stipulations in the lease itself, the terms of which are left to his discretion, the Minister may, of course, consistently with the existing regulations, reserve the right to make further regulations. Article 9 of the lease in question contains such a reservation.

The view suggested involves the result that the terms of the contract may in every respect be altered (as regards rental, as regards royalties, as regards the obligations of the lessee in respect to the working of the mine); and by one party to the lease acting alone, without consultation with the other; and with the result (a result which, as we have seen, actually follows in this case from the acceptance of the respondent's contention) that a contract radically new, in its essential terms, may be substituted for that explicitly set forth in the document executed by the parties and the specific regulations that it incorporates.

It will be observed that the proviso, in express terms, affects only the right of renewal. On the supposition that the proviso relates to this right of renewal, and to that right alone, we arrive (on the construction advocated by the respondents) at the truly extraordinary result, that, even under the renewed lease, the lessee is not bound by s. 29; although his right of renewal is dependent upon compliance with that section prior to the completion of the original term. It is difficult, no doubt, to think it could have been intended that the lessee's right of renewal should be conditioned upon the performance, during the term antecedent to its renewal, of obligations which the lessee was not required to observe as contractual terms of the lease. But to us it seems clear that, if it had been intended to incorporate, as one of the terms of the lease, a stipulation

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that all future regulations touching the working of the property should become part of the lease as contractual stipulations, that intention would have been expressed, not inferentially, but in plain language.

Reverting to the form of the lease itself, as distinguished from the Regulations, and to the evidence it affords as to the view of the Minister, that the existing Regulations alone, and not Regulations subsequently enacted, are embodied in the lease, as forming part of the contract between the lessor and the lessee; it is not immaterial to recall what has already been stated, that, admittedly, this lease was in the usual form. The practice of the Department based upon this view of the effect of the Regulations of 1910 and 1911 is not without weight in a controversy as to its proper construction (*Webb* v. *Outrim* (1)). It may further be observed that, on this point, neither the Appellate Division nor the trial judge expressed an opinion in the respondent's favour. On the contrary, the Appellate Division appears to have entertained the view we have now expressed.

We turn now to the question which the Appellate Division regarded as the question of substance on the appeal. That court has taken the view that article 2 of the Compact has not the effect of depriving the provinces of any power of legislation which they possessed anterior thereto. This view is challenged by the appellants.

The question which thus arises is strictly a narrow one. The legislation of 1932 provides for the regulation of mining operations, for the production of natural gas, having naphtha in suspension, with the object of conserving the natural gas in the Turner Valley field. By its terms, it extends to operations in lands which (but for the *B.N.A. Act, 1930*) would have been public lands of the Dominion, as well as lands owned in fee simple by private individuals. The question may be put thus: Would it have been competent to the provincial legislature, if these public lands had not been transferred to the province, to regulate or to authorize an Administrative Board to regulate such operations, in private lands as well as Dominion public lands (held under lease to private individuals), by orders having the force of statute in the manner directed or contemplated by this legislation. The lessees, in virtue of leases under

(1) [1907] A.C. 81, at 89.

the Regulations of 1910 and 1911, became, by force of Dominion statute, entitled to exercise the rights vested in them by the leases. Indeed, the public lands of the Dominion are vested in Parliament, in the sense that only by virtue of Parliamentary authority can such lands be disposed of or dealt with. The right of the lessee, in each case, is to take from a specified tract of land, which is leased to him for that purpose alone, certain substances and to convert them to his own use. Until so taken, they remain, subject to his right to take them during the specified term, the property of the Dominion—part of the public lands of the Dominion. To take away this right, or to prohibit the exercise of it, would be to nullify *pro tanto* the statutory enactment creating the right. It is obvious, of course, that the provincial legislature could not validly have passed the enactments of the *Dominion Lands Act,* or the Regulations of 1910 and 1911, under which the lessee became entitled to exercise his rights. The appropriate principle seems to be that expressed by Lord Haldane in *Great West Saddlery Co. Ltd.* v. *The King* (1) in the words:

> Neither the Parliament of Canada nor the provincial legislatures have authority under the Act to nullify, by implication any more than expressly, statutes which they could not enact.

The principle applies to such a measure of regulation as that which is attempted by the legislation of 1932. It is nothing to the purpose that the legislation is expressed in general terms, applying to all wells in the Turner Valley area. The regulation takes effect by orders of the Board constituted under it, having the force of statute, which may apply, not only to the field generally, but to each well *eo nomine.* Every such order constitutes in effect a statutory edict, governing the operations in, and connected with, each several well against which it is directed.

Nor is it material that, by the lease, an interest in the tract has passed to the lessee. The *Dominion Lands Act,* and the Regulations enacted pursuant to it, give statutory effect to plans for dealing with Dominion public lands, including lands containing petroleum and natural gas, which, it must be assumed, were conceived by Parliament, and the authorities nominated by Parliament, as calculated to serve the general interest in the development and exploitation of such lands and the minerals in them. It is

(1) [1921] 2 A.C. 91, at 116-117.

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not competent to a provincial legislature *pro tanto* to nullify the regulations, to which Parliament has given the force of law in execution of such plans, by limiting and restricting the exercise of the rights in the public lands, created by such regulations in carrying the purpose of Parliament into effect. Indeed, an administrative order, which the legislature has professed to endow with the force of statute, directed against a tract of public land, the property of the Dominion, held by a lessee under the Regulations of 1910 and 1911, and which professed to regulate the exercise, by the lessee, of his right to take gas and petroleum from the demised lands, would truly be an attempt to legislate in relation to a subject reserved for the exclusive legislative jurisdiction of the Dominion by s. 91 (1), "The Public * * * Property" of the Dominion.

On these two grounds, therefore, first, that the legislation of 1932 is repugnant, in so far as it affects tracts leased under the Regulations of 1910 and 1911, to those Regulations, and the statute under which they were promulgated; and, second, on the ground that, in so far as it authorizes the Board to make regulations concerning the production of natural gas and naphtha from lands held under lease from the Dominion for the purpose of working them for the production of those minerals, it is legislation strictly concerning the public property of the Dominion; on both of these grounds, the legislation of 1932 would, if these public lands were still held by the Dominion, be inoperative, as regards the leases with which we are concerned.

As respects tracts of land held in fee simple, totally different considerations apply. Such tracts have ceased to be the public property of the Dominion, and in the absence of some Dominion enactment relating to matters comprised within the subject of the public property, that would have the effect of limiting the jurisdiction of the provinces (under s. 92 (10), (13) and (16)), there is no ground on which such legislation could, as affecting such lands, be held to be *ultra vires*. (*McGregor* v. *Esquimalt & Nanaimo Ry.* Co. (1)).

(1) [1907] A.C. 462, at 468.

We have not considered it necessary to attempt the formulation of any general rule by which (apart from the enactments of the *B.N.A. Act, 1930*) the validity of provincial legislation affecting the holders of leases and other particular and limited interests in the public lands of the Dominion may be tested. Speaking broadly, it may be stated without inaccuracy that such legislation cannot lawfully take effect if it is repugnant to some statutory enactment by the Dominion passed in exercise of its powers to legislate in relation to its public lands. This is involved in the judgment of the Judicial Committee in the *Great West Saddlery Co.* case (1) already cited. The occupant of Dominion lands under a legal right may be taxed in respect of his occupancy. But it is necessary to be cautious in inferring from this that such taxation can in every case be enforced by remedies involving the sale or appropriation of the occupant's right, without regard to the nature of that right. Where the right is equivalent to an equitable title in fee simple, probably no difficulty would arise (*Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta* (2)); but if the enforcement of a tax, imposed by provincial legislation, would involve a nullification in whole or in part of competent Dominion legislation under which the right is constituted, then it is, to say the least, doubtful, whether such provisions could take effect.

The judgment in the *Great West Saddlery Co.* case (1) discussed the matter of the enforcement of a provincial tax levied upon a Dominion company incorporated under the residuary clause of s. 91. Lord Haldane there adverts to some of the difficulties attendant upon holding that it is competent to a provincial legislature to enforce the payment of a tax upon a Dominion company by a penalty involving the abrogation of some capacity or power competently bestowed upon it by the Parliament of Canada. Similar questions may be suggested as arising in other connections; for example, the question whether it is competent to a legislature to sanction measures for the enforcement of a tax imposed upon a Dominion railway which would involve the dismemberment of the railway.

In *Smith* v. *Vermilion Hills* (3), the proceeding was an action against Smith, who was assessed as tenant. The

(1) [1921] 2 A.C. 91. (2) (1911) 45 Can. S.C.R. 170.
(3) [1916] 2 A.C. 569.

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sole question in the action was that of Smith's personal liability to pay the tax. He

was duly assessed in respect of the land comprised in the two leases, and the question is whether the assessment was valid. (P. 573.)

The real question is whether this restriction (the restriction in virtue of s. 125 of the *B.N.A. Act*) prevents (the legislature of Saskatchewan) from imposing the tax in controversy upon a tenant of Crown lands. (P. 572.)

No question arose as to any remedy by proceedings affecting the title to the lands or the lease. This point was adverted to in this Court in *Smith* v. *Vermilion Hills* (1).

In *City of Montreal* v. *Attorney-General for Canada* (2), Lord Parmoor points out that the remedy of the municipality was necessarily limited in such a way as to exclude the operation of the provisions of the Charter of Montreal giving recourse against the immoveable occupied by the tenant.

Once again, as regards the amenability of occupants of Crown property to provincial laws in respect of nuisances (such as, for example, legislative provisions for the suppression of noxious weeds, mentioned in the judgment) which, as a rule, impose upon occupiers generally duties enforceable against the occupier personally by penalty, it is not out of place to observe that the validity of legislation empowering an administrative board to prescribe rules in relation to such matters, having the force of statute, with respect to any individual tract of land, including tracts which are the public property of the Dominion, might possibly, as affecting such tracts, be subject to different considerations. Where the regulations, under which Dominion lands are leased, or the stipulations of such leases, contain provisions dealing with the very subject matter of the provincial legislation, then it is quite obvious that such regulations and stipulations must prevail in case of conflict. (*Madden* v. *Nelson & Fort Sheppard Railway Co.* (3); *Can. Pac. Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (4); *Can. Pac. Ry. Co.* v. *The King* (5); *Great West Saddlery Co. Ltd.* v. *The King* (6).

(1) (1914) 49 Can. S.C.R. 563, at 573-4.
(2) [1923] A.C. 136.
(3) [1899] A.C. 626.
(4) [1899] A.C. 367, at 372-3.
(5) (1907) 39 Can. S.C.R. 476, at 482-3.
(6) [1921] 2 A.C. 91, at 116-7.

We think it desirable to say this much, in order to indicate the difficulty of drawing an abstract line, assigning boundaries to the provincial fields of the general powers vested in the provinces by s. 92, and marking them off from the sphere of the essential powers of the Dominion, under one of the enumerated heads of s. 91, and s. 91 (1) in particular, or from the larger sphere which includes the Dominion's ancillary powers as well.

It may be observed, in view of some observations made by the Appellate Division, that land held under an estate in fee simple in a province is not necessarily subjected to an unlimited control by the province in the field of "property and civil rights." Such is not the case, for example, where land so held is part of a Dominion railway. (*Wilson* v. *Esquimalt & Nanaimo Ry. Co.* (1)).

It may be proper also to utter a word of caution with regard to the authority of the provinces in relation to the "confiscation" of property.

The term "confiscation," of course, connotes, according to ordinary usage, something in the nature of *privilegium*, of a special law dealing with a particular case. Now, it might be difficult, in most cases, to hold that a statute specifically appropriating to the Crown in the right of the province the interest of a lessee in Dominion lands, was not legislation dealing with the subject of the public property of the Dominion; and apart from that, it would probably also be difficult, in most cases, to escape the conclusion that an attempt to substitute the Crown as lessee, in place of a lessee, for example, who has acquired his lease under the Regulations of 1910 and 1911, was repugnant to such regulations and to the statute by which they were authorized.

We are, therefore, unable to concur with the Appellate Division in the reasons which led them to dismiss the appellant's appeal from the learned trial judge. We agree with them that the legislation of 1932 does not come within the exception set out in s. 2 of the compact. The exception is in these words:

except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.

(1) [1922] 1 A.C. 202, at 207-8.

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Admittedly there was no consent, and it is hardly disputed that the legislation does not apply "to all similar agreements relating to lands, mines or minerals in the Province or to interests therein."

We cannot, however, agree with the Appellate Division that the governing consideration, in applying s. 2 of the agreement, is that upon which they base their judgment. That section deals in specific terms with specific things. The Province is not to "alter," nor is it to "affect," except under conditions which, as we have said, do not exist here, ("by legislation or otherwise") "any term of any such * * * lease" of "Crown lands, mines or minerals."

We think the natural reading of these words is that which precludes the province from legislating in such a way as to "alter" or "affect" any "term of any such lease," irrespectively of any possibility that such legislation might be of such a character that it would fall under the powers of the provincial legislature, even if the public lands of the Dominion had not been transferred to the province.

We have said something to indicate some of the difficulties in the process of ascertaining the precise limits of the powers of the province to enact legislation affecting the public property of the Dominion. We think that the limits of these powers, as exercisable after the transfer of the land, were intended to be fixed by the stipulations of the agreement, as regards the matters therein dealt with; and must now, in any particular case, be determined by reference to the true construction of those stipulations.

It follows from all this that the impugned legislation is invalid in so far as it affects leases under the Regulations of 1910 and 1911.

It was not contended before us that the effect of this is to invalidate the impugned enactments in their entirety. It was not argued that, on the grounds we have been considering, the legislation ought to be held invalid in so far as it provides for the regulation of wells held under a title in fee simple. On this point we express no opinion and our judgment will be limited accordingly.

We have still to consider the question whether the statute is invalid on the ground that, as a whole, it deals with matters falling strictly under s. 91 (2), or, at all events, with matters outside the scope of s. 92. The subject has been

discussed fully, and very ably, in the judgment of the Appellate Division, and we think it right to say that, in this respect, we are in complete agreement with that judgment.

In *Union Colliery Company of British Columbia Ltd.* v. *Bryden* (1), Lord Watson, speaking for the Judicial Committee, said, at p. 587, that the Coal Mining Regulations there in question might "be regarded as merely establishing a regulation applicable to the working of underground coal mines," and he added that if that had been "an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial legislature, by virtue either of s. 92, subs. 10, or s. 92, subs. 13." We think that is what this legislation now before us in substance is: legislation providing for the regulation of the working of natural gas mines in the Turner Valley area. It rests upon those who impeach the statute as *ultra vires* on the ground that it deals with matters outside the scope of s. 92, to adduce some reason for ascribing to it another character. In this we think the appellants have failed.

The statute provides for the regulation of the wells in that area from a point of view which is provincial and for a purpose which is provincial,—the prevention of what the legislature conceives to be a waste of natural gas in the working of them. In its substance it deals neither with "trade in general" nor with trade in any "matter of interprovincial concern"; nor is there anything before us to indicate that the working of these mines (excepting, of course, the wells situate upon lands leased from the Dominion) is a matter which, by reason of exceptional circumstances, has ceased to be, or has ever been, anything but a matter "provincial" in the relevant sense.

The appeal must be allowed with costs and judgment given for the plaintiffs in accordance with the views herein expressed.

Appeal allowed with costs. Judgment declaring that the impeached legislation is invalid as respects the leasehold properties of the appellants.

Solicitors for the appellants: *Patterson & Hobbs.*

Solicitors for the respondents: *W. S. Gray* and *J. J. Frawley.*

(1) [1899] A.C. 580.

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*Oct. 6.
*Oct. 26.

DUNCAN A. CARMICHAEL AND DAISY CARMICHAEL (PLAINTIFFS) } APPELLANTS;

AND

THE CITY OF EDMONTON (DEFENDANT) RESPONDENT.

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

Municipal corporation—Negligence—Pedestrian falling on icy sidewalk—Notice of accident—Not given within time prescribed by charter—Section 519 Edmonton charter—Whether city "prejudiced in its defence"—Findings of trial judge, as to reasonable excuse for delay and as to existence of prejudice, can be reviewed on appeal.

The appellants, husband and wife, brought an action for damages against the city respondent for personal injuries to Daisy Carmichael caused by falling on an icy sidewalk. The respondent alleged lack of notice of the accident within the delays prescribed by section 519 of the city charter. Subsection 1 provides that no action can be brought against the city in any case of injury due to negligence, unless notice is served within sixty days of the happening of the accident and within ten days "in the case of personal injury caused by snow or ice on a sidewalk." Subsection 2 further provides that "the want or insufficiency of the notice * * * shall not be a bar to an action if the" trial judge "considers there is reasonable excuse * * * and that the city has not thereby been prejudiced in its defence." The first notice was given by the appellants ten weeks after the accident and the city respondent had no knowledge of it until then.

Held that the appellants' action should be dismissed for want of notice required by section 519 of the respondent's charter. The inherent probability of prejudice to the respondent in making its defence arises from the undisputed circumstance of the lack of notice within ten days of the accident, coupled with the established lack of knowledge of the respondent. The respondent was deprived of any opportunity of inspecting the locality or condition of the sidewalk within ten days of the accident, and, after the lapse of ten weeks, no evidence of any weight upon these points could be procured.

Held, also, that the findings of the trial judge, that there was reasonable excuse for the appellants' delay in giving notice of the accident and that the respondent city had not been prejudiced in its defence by such delay, can be reviewed upon appeal; the words in subsection 2 of s. 519 "if the judge considers" do not give any discretion to the trial judge, the exercise of which should not be reviewed on appeal.

Judgment of the Appellate Division ([1933] 1 W.W.R. 533) aff.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial court, Ives J., and dismissing the appellants' action for damages.

*PRESENT:—Duff C.J. and Lamont, Smith, Cannon and Hughes JJ.

(1) [1933] 2 D.L.R. 702; (1933) 1 W.W.R. 533.

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

J. A. Ritchie K.C. for the appellants.
G. B. O'Connor K.C. for the respondent.

The judgment of the Court was delivered by

SMITH J.—The appellants, husband and wife, sue for damages resulting from the wife, just after midnight on the 23rd of December, 1931, having slipped and fallen on an alleged icy part of a sidewalk in the city of Edmonton. Her leg was broken, and the fracture has not yet knit.

No notice was given to the respondent within ten days, as provided by section 519 of the Edmonton Charter, which reads as follows:—

519. Save as otherwise by law provided, no action shall be brought by reason of the death of or any injury to any person or any injury to the property of any person arising out of any accident alleged to be due to the negligence of the City, its officers, employees or agents, unless notice in writing of the accident and the cause thereof has been served upon the City Clerk or the City Commissioners, within sixty days of the happening of the accident, (except in the case of personal injury caused by snow or ice on a sidewalk, in which case such notice shall be served within ten days of the happening of the accident) and any action for damages brought in respect thereof shall be commenced within six months after such right of action shall be barred and extinguished.

(2) In case of the death of any such person, the want of notice shall not be a bar to the maintenance of the action, and in other cases the want or insufficiency of the notice hereby required shall not be a bar to an action if the court or judge before whom the action is tried considers there is reasonable excuse for the want of such notice or insufficiency thereof, and that the City has not thereby been prejudiced in its defence.

The first notice was given to the respondent corporation ten weeks after the accident, and the corporation had no knowledge of it until then.

The evidence of the appellants and of witnesses for the appellants who examined the place where the accident occurred in the morning, a few hours after the accident, and of other witnesses who had observed the condition at this place for some time before and after the accident, was to the effect that the surface of the vacant lot adjoining the sidewalk at the west was considerably higher than the sidewalk, and that ice had accumulated on the sidewalk all along the frontage of this vacant lot, including the place

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where the accident happened, extending over the westerly two-thirds of the sidewalk, being about eight inches thick adjoining the higher land of the lot, and sloping from there over the two-thirds width of the walk to a feather edge, the slippery and sloping surface making the place specially dangerous.

On behalf of the respondent corporation, the city street foreman and five men working under him testified that they were cleaning out ice and snow from the gutters on the 21st of December, 1931, and that they cleaned off the whole sidewalk at the place of the accident down to the cement, that the ice and snow came off in flakes, and was carted away with the ice and snow that was being taken away from the gutters; and that, when the ice was removed in this way, the sidewalk was left so clean that it was not slippery, and that it required no ashes.

On this contradictory evidence, the learned trial judge accepted the evidence on behalf of the appellants, and held that the sidewalk was in the dangerous condition alleged, and that the city was guilty of gross negligence. He also held that the female plaintiff (appellant) was excused by reason of her condition and suffering from giving notice within ten days, as required by section 519; and that the city was not prejudiced, within the meaning of that section; and gave the female plaintiff judgment for the damages.

The respondent appealed to the Appellate Division of the Supreme Court of Alberta, which did not disturb the trial judge's findings that there was gross negligence and that the lack of notice within ten days was excused; but reversed the finding of no prejudice. All the judges assumed, without expressly so holding, that the lack of notice within the ten days was excused, and, with the exception of Mr. Justice Clarke, based their conclusions upon the view that the defendant (respondent) was prejudiced in its defence. Mr. Justice Clarke took the view that even if there was excuse for not giving the notice within ten days, the female plaintiff was still bound to give notice within sixty days, and that there was no excuse for failure to give notice within that longer period. He expressed no opinion upon the other questions discussed. The judgment appealed

from was therefore set aside and the action dismissed; and from that judgment the plaintiffs appeal.

The appellants contend that the words "if the judge considers" give a discretion to the trial judge, the exercise of which should not be reviewed on appeal. *Ormerod* v. *Todmorden Mill Co.* (1), is cited, which holds that there must be a plain and clear case to justify the Court of Appeal in interfering with the discretion of the judge below, but the Court of Appeal will review the discretion if it be exercised in consequence of an opinion on a point of law which is wrong.

The cases of *Shotts Iron Co. Ltd.* v. *Fordyce* (2); *Burrell* v. *Holloway* (3), and *Hayward* v. *West Leigh Colliery Co.* (4), are also cited. These three cases, however, arose under the English *Workmen's Compensation Act,* where there is no appeal on a question of fact, and the finding can be reviewed only on questions of law. They therefore turned on the question of law as to whether or not there was any evidence upon which the trial judge could reasonably base his conclusion.

In *City of Kingston* v. *Drennan* (5), Sedgwick J., delivering the judgment of the majority of the court, said:

> I do not feel called upon to decide whether, in the present case, the certificate of the trial judge is reviewable.

The trial judge, in considering whether there was or was not prejudice, must come to his conclusion from considering and weighing the evidence and facts bearing on the question, and the conclusion that he reaches in this way is in fact an adjudication. His finding therefore, in my view, can be reviewed upon appeal, the same as other findings by a trial judge. It may be that in some cases the trial judge's finding as to prejudice would depend upon contradictory evidence relevant to the question of prejudice or no prejudice, and in such case a court of appeal would follow the usual rule in reference to a trial judge's finding of fact after weighing the evidence. In the Ontario courts, the law seems to be settled that the finding of the trial judge on the question of prejudice is open to review upon appeal: *O'Connor* v. *City of Hamilton* (5).

(1) (1882) 8 Q.B.D. 664.
(2) [1930] A.C. 503.
(3) (1911) 4 Butt. W.C.C. 239.
(4) [1915] A.C. 540.
(5) (1897) 27 S.C.R. 46.
(5) (1904) 8 O.L.R. 391; (1905) 10 O.L.R. 529.

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Here there seems to be no dispute as to the facts relevant to the question of prejudice or no prejudice. No fact on that issue is in dispute. The respondent had no notice or knowledge of the accident until ten weeks after it happened, according to the only evidence on the record.

In the *Hayward* case (1), Lord Loreburn, discussing the arbitrator's finding of no prejudice from lack of statutory notice, says (p. 545):—

> I do not think it means that there is to be a presumption one way or another, but simply if upon all the facts before him the arbitrator is not satisfied that there was no prejudice, then the appellant fails.

Then after discussing the facts and circumstances, he refers, as a ground of his conclusion, to the fact of

> there being no inherent probability that I can see from the facts that the company would be prejudiced by the absence of notice for a few days.

Was there inherent probability of prejudice to the respondent in making its defence in this case? In my view there was. The respondent was deprived of any opportunity of inspecting the locality or having it inspected within ten days of the accident. It might, on receipt of notice within ten days, have had its foreman and five workmen, who claimed to have cleaned off the sidewalk on the 21st, make an inspection to ascertain the then condition and refresh their memory as to what they had done on the 21st. If this had been done, and they adhered to their story after such inspection, much more weight might have been given to their evidence. Other witnesses, who had opportunity of observing the conditions at the locality on or about the day of the accident, might have been questioned, and might have been able to give important evidence on the disputed question of the conditions of the sidewalk. After the lapse of ten weeks, no evidence of any weight upon these points could be procured.

Burrell v. *Holloway* (2), mentioned above, was a decision of the Court of Appeal in England. The claim was by a workman for injuries where the requisite notice was not given. Cozens-Hardy, M.R., in delivering the judgment of the Court, says:

> Every opportunity of challenging or testing the statement as to the source of the accident, the place where it happened, and the circumstances under which it happened, had been, I might almost say, lost to the employers by the delay.

* * *

(1) [1915] A.C. 540.

(2) (1911) 4 Butt. W.C.C. 239.

> It is a very different thing to go the following day or within two or three days of the accident, when everything is fresh in everybody's mind, and the matter can be properly investigated. I think that it would be a most dangerous thing if we were to allow the employers to be held liable in a case like this.

The provision of the charter itself requiring notice within the shorter period of ten days in the special case of an action based on gross negligence owing to the presence of ice and snow indicates that the legislature regarded the short notice as necessary to prevent prejudice to corporations in such cases in the absence of circumstances shewing the lack of prejudice.

Against this inherent probability of prejudice arising from the bare circumstances, there might, in many cases, be offered by a plaintiff important evidence that there was no prejudice. If, for instance in the present case, the plaintiff had been able to shew that the respondent had actual knowledge of the accident within ten days, and as a result had investigated and had obtained such evidence as it could as a result of that knowledge and investigation, it might reasonably be held, on such evidence, that there was no prejudice. The inherent probability of prejudice, arising from the bare fact of the accident and the lack of notice, does not therefore necessarily prevail to counteract the excuse in every case. In the present case the inherent probability of prejudice arises from the undisputed circumstance of the lack of notice, coupled with the established lack of knowledge of the respondent; and there is absolutely no evidence that would go to refute the inference arising from these circumstances.

For these reasons, I agree with the conclusions of the majority of the Appellate Division, and find it unnecessary to discuss the point raised in the reasons of Mr. Justice Clarke.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Steer, Jackson & Gaunt.*

Solicitor for the respondent: *J. C. F. Bown.*

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*Mar. 20, 21.
* June 28.

THE TRUSTS AND GUARANTEE COMPANY LIMITED AND DORA MILLER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HARRY MILLER, DECEASED (PLAINTIFFS) ..... } APPELLANTS;

AND

MEYER BRENNER; AND MALCOLM STOBIE AND CHARLES J. FORLONG, FORMERLY CARRYING ON BUSINESS IN PARTNERSHIP AS STOBIE, FORLONG & COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Bankruptcy Act, R.S.C. 1927, c. 11, ss. 24, 104—"Debts provable in bankruptcy"—Action brought, without leave of court, against assignor in bankruptcy—Costs—Leave nunc pro tunc on conditions—Action against stock brokers for unauthorized sale of shares and unauthorized use of proceeds—Nature of claim—"Breach of trust"—Brokers acting on instructions of unauthorized person—Latter's liability to person for whom he assumed to act, nature of claim against him and measure of damages.

Defendants S. and F. carried on business in partnership as stock brokers. Defendant B's relation with them was that of "customer's man"; he received a share of commissions earned on business he brought to them, which included business of M. S. and F. held stocks on margin for M., who was, unknown to S. and F., too ill to do business. The prices of the stocks were falling, and, acting on instructions given (without M.'s authority) by B. (and with concurrence of M.'s son who acted in concert with B.), S. and F. sold the stocks, realizing, net, $41,822, and (again on unauthorized instructions as aforesaid) used this money in speculative trading, resulting in its loss. Subsequently S. and F. made an assignment in bankruptcy. Later the plaintiffs, representing the estate of M. (who had died), brought action, without obtaining leave of the court under s. 24 of the *Bankruptcy Act*, against B., S. and F., their claims including an accounting; damages for wrongful conversion, breach of contract, fraud and fraudulent breach of trust; and, alternatively, an accounting and judgment for the amount of the proceeds of the sales of the stock. At trial, judgment was given against defendants for $41,822 (the sum above mentioned). This judgment was varied by the Court of Appeal, Ont. ([1932] O.R. 245), which held that the liability of S. and F. was a "debt provable in bankruptcy" within s. 104 of the *Bankruptcy Act*, and, leave not having been obtained under s. 24, the action against them should be dismissed, without prejudice to rights of plaintiffs proceeding in bankruptcy; and that there should be a reference to determine the sum recoverable from B. Plaintiffs appealed.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon and Crocket JJ.

Held: The shares having been sold, even though wrongfully (which might well be open to question on the facts and circumstances), the proceeds, which were traceable, were in equity M.'s property (*Sinclair* v. *Brougham,* [1914] A.C. 398, at 441-2). Having regard to the cause of action asserted, and S. and F. being (as found) innocent of fraud, the charge established against S. and F. in respect of the proceeds of sale was breach of trust; and the claim, being one arising out of a breach of trust (provable in bankruptcy under s. 104), was unenforceable against them except by leave under s. 24. But, under the circumstances, leave to bring action should be granted *nunc pro tunc* (*Blais* v. *Bankers' Trust Corp.,* 14 D.L.R. 277, referred to with approval), and judgment given for said sum of $41,822 against S. and F., subject to conditions imposed (that plaintiffs do not use the judgment except as one determining the amount for which they may rank upon the estate in bankruptcy and then as no more than *prima facie* evidence of that amount); plaintiffs to pay costs of S. and F. throughout.

As to B., there were not sufficient reasons for reversing the trial judge's finding that he acted fraudulently; he was chargeable as having fraudulently brought about the breach of trust; and should be held liable to plaintiffs in said sum of $41,822 (statement of the law in 28 Halsbury's Laws of England, p. 204, par. 407, approved and applied; *Gray* v. *Johnston,* L.R. 3 H.L. 1, at 11, cited).

Cannon J. dissented in part, holding that the plaintiffs' claim, as made and pursued, was such as entitled them to remedy against S. and F., as well as against B., in the present action as brought, and that the judgment at trial should be restored in its entirety, with costs to plaintiffs throughout.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1) which varied the judgment of Logie J. given in favour of the plaintiffs.

The plaintiffs were the executors of the estate of Harry Miller, deceased, who died on December 22, 1929.

The defendants Stobie and Forlong formerly carried on business in partnership as stock brokers, under the name of Stobie, Forlong & Company. The defendant Brenner's relation with them was that of "customer's man"; he brought customers to Stobie, Forlong & Co., and received a share of commissions earned on business so brought to them, which included business of Miller. Stobie, Forlong & Co. held certain shares of stock on margin for Miller. The prices of these stocks were falling and, acting on instructions from Brenner (and with concurrence of Miller's son who acted in concert with Brenner), Stobie, Forlong & Co. sold them, realizing, net, $41,822, and (again on instructions as aforesaid) used the money in speculative trading, resulting in its loss. The said transactions

(1) [1932] O.R. 245; 13 C.B.R. 518; [1932] 2 D.L.R. 688.

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(sale of the stocks and use of the proceeds) were (as found by the court) unauthorized by Miller, who was at the time too ill to do business (of which condition Stobie, Forlong & Co. were unaware).

Stobie, Forlong & Co. made an authorized assignment under the *Bankruptcy Act* (R.S.C. 1927, c. 11) on January 30, 1930.

The action was begun in May, 1930, without leave being obtained under s. 24 of the *Bankruptcy Act*. The plaintiffs claimed (*a*) an accounting, (*b*) "damages for wrongful conversion, breach of contract, fraud and fraudulent breach of trust," or in the alternative, (*c*) judgment for the amount found due to Miller at the time of the transfer of his account to Stobie, Forlong & Co., or in the alternative, (*d*) judgment requiring defendants to account for the proceeds of the sales of the stock and judgment for such amount. (The statement of claim is set out in full in the judgment of Cannon J. now reported).

Secs. 24 and 104 of the *Bankruptcy Act* provide as follows:

24. On the making of a receiving order or authorized assignment, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor or shall commence or continue any action, execution or other proceedings for the recovery of a debt provable in bankruptcy unless with the leave of the court and on such terms as the court may impose.

* * *

104. Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy or in proceedings under an authorized assignment.

2. Save as aforesaid, all debts and liabilities, present or future, to which the debtor is subject at the date of the receiving order or the making of the authorized assignment or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order or of the making of the authorized assignment, shall be deemed to be debts provable in bankruptcy or in proceedings under an authorized assignment.

3. The court shall value, at the time and in the summary manner prescribed by General Rules, all contingent claims and all such claims for unliquidated damages as are provable by this section, and after, but not before, such valuation, every such claim shall for all purposes of this Act, be deemed a proved debt to the amount of its valuation.

The action was tried before Logie J., who gave judgment for the plaintiffs against the defendants for $41,822 (which was the net sum realized on sale of the stocks as above mentioned). An appeal by the defendants was al-

lowed by the Court of Appeal for Ontario (1), which varied the judgment below, the judgment, as so varied, dismissing the action as against Stobie and Forlong, "but without prejudice to the rights of the plaintiffs proceeding in bankruptcy" as against the said defendants Stobie and Forlong; and directing a reference as to in what sum, if any, the defendant Brenner was liable to the plaintiffs.

Subsequent to the delivery of reasons for judgment of the Court of Appeal, as reported (1), that court delivered a "memorandum" as follows:

In view of the dissatisfaction of the plaintiff with the judgment of the court, herein, as settled, we think it proper to state for the information of all concerned, as well as of any appellate tribunal which may be called upon to deal with it:

We had hoped that the case might be settled on the terms set out in the reasons for judgment, already handed out; but that hope has proved illusory, and all parties are insisting on their legal and strict rights.

We decided:—

1. The cause of action was the liability of an agent or bailee to account to the principal or bailor, for the proceeds of property improperly sold by him;

2. The evidence indicated that Brenner, as agent, was liable in some sum; but that the sum found by the Trial Judge was so found on evidence, some of which, at least, was not admissible against him. Consequently, he was entitled to have the true amount determined by the Master;

3. The brokers were originally liable on the same principle; but they had gone into bankruptcy, and consequently, as no leave had been granted by the court, the action against them was irregular and, in strictness, should be dismissed with costs.

We had hoped that the amount appearing by the evidence before the court, namely, $41,822 and interest, to be the amount due from the brokers would be accepted, and the matter arranged as is set out in [1932] O.R. at p. 253. But dealing with the case and the parties on their strict rights, we do not think that without the consent of the assignee in bankruptcy, we should declare that the insolvents were liable for the sum, which, were the action against them, regular, would seem to be proved—the assignee, representing the body of creditors, may have evidence unknown, overlooked or intentionally left uncalled—their interest in the matter was academic, at the time, whereas the interest of the assignee is actual and substantial. We think the assignee should have an opportunity to contest the claim, if so advised; and, consequently, we decline to adjudge against him in his absence that his estate is indebted in any sum whatever. We leave to the plaintiff to take such steps to establish a claim against the bankrupt estate as he may be advised.

This is his real and only objection taken before us—he is not willing to prove his claim in bankruptcy, but desires to have a judgment binding upon the assignee, which was obtained in an irregular action without his being made a party. This we decline to declare, as it would be an obvious injustice.

There is nothing whatever to prevent the plaintiff proceeding regularly to prove any claim it may have against the bankrupt estate,

(1) [1932] O.R. 245; 13 C.B.R. 518; [1932] 2 D.L.R. 688.

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and this, we think, in the absence of consent of the assignee is the only course for it to pursue; if it is supposed that we allowed the action to proceed, *nunc pro tunc* absolutely and without regard to opposition to the settlement we suggested, it is an error; if it could be suggested that such language as was used was an order to that effect, it is withdrawn, no formal order having been taken.

The plaintiffs appealed to the Supreme Court of Canada.

D. L. McCarthy K.C. and *I. Levinter* for the appellants.

R. S. Robertson K.C. for the respondents Stobie and Forlong.

L. Kert for the respondent Brenner.

The judgment of the majority of the court (Duff C.J. and Rinfret, Lamont and Crocket JJ.) was delivered by

DUFF C. J.—This case has been considered very fully by the Court of Appeal for Ontario. One naturally feels some diffidence in giving effect to views which are not entirely in agreement with that of judges who are so adequately fitted to deal with such matters, but it is, of course, one's duty to act upon one's own conclusions.

There are some findings of fact by the learned trial judge which are important. The initiation of the transactions out of which the dispute arises was a sale of certain shares held by Stobie, Forlong & Co. for Harry Miller. Harry Miller was at that time incapable of doing business. It is not disputed that Stobie, Forlong & Co. were unaware of this, and Meyer Brenner who, as the learned trial judge found, was acting in concert with one Ben Miller, the son of Harry Miller, was aware of it. Brenner's relation with Stobie, Forlong & Co. was that described by the phrase " customer's man." He had an office of his own in the office of Stobie, Forlong & Co. He brought customers to them and received one-half of the commissions which Stobie, Forlong & Co. earned on the business so brought them.

The initial date is the 9th of May, 1928. On that date and succeeding dates, Stobie, Forlong & Co., acting on the instructions of Brenner who professed to be proceeding upon the instructions of Harry Miller, but had no authority from him, sold shares which had been transferred by Harry Miller from E. A. Pierce & Co., his brokers, to Stobie, Forlong & Co. The learned trial judge has found that the amount realized from these sales, over and above brokers'

loans, was $41,822. There seems to me no ground for doubting the liability of Stobie, Forlong & Co. to account for these monies as trust monies. They proceeded on the instructions of Brenner, who was acting without any authority whatever from Harry Miller who was incapable of doing business during the period, to use these monies in speculative trading and, admittedly, the result of these operations was that Miller's credit disappeared. A broker is not strictly an express trustee, but the manner in which equity has treated monies received by a broker from the sales of his client's property may be stated in the words of Lord Parker in *Sinclair* v. *Brougham* (1),

> Equity treated the matter from a different standpoint. * * * the money in their hands was (treated) for all practical purposes (as) trust money. Starting from a personal equity, based on the consideration that it would be unconscionable for any one who could not plead purchase for value without notice to retain an advantage derived from the misapplication of trust money, it ended, as was so often the case, in creating what were in effect rights of property, though not recognized as such by the common law.

In my judgment, the claim against Stobie, Forlong & Co. is a claim arising out of breach of trust and, therefore, unenforceable against them except by leave under s. 24.

It may well be open to question whether on the facts Stobie, Forlong & Co. acted wrongfully in selling the shares originally placed in their hands by Harry Miller himself. The prices of these shares, which were held on margin, were falling and a call had been made. There was apparently no further money available (Harry Miller was in such condition that he could not be approached) and Stobie, Forlong & Co., in ignorance of his condition, acted as already mentioned upon the directions of Brenner with the concurrence of Miller's son, Ben Miller. The shares having been sold, even though wrongfully, the proceeds, if traceable, which is not disputed, were in equity the property of Harry Miller under the principle of Lord Parker's observations quoted above. At common law, Harry Miller could waive the tort and hold Stobie, Forlong & Co. accountable *in assumpsit* for the amount of the proceeds as monies received to his use.

In equity a trustee *de son tort* is accountable just as an express trustee would be in such circumstances.

(1) [1914] A.C. 398, at 441-2.

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The statement of claim, which has been carefully analysed by Riddell J. A., treats these monies as monies held by Stobie, Forlong & Co. for the account of Harry Miller; and the cause of action asserted against all parties is fraud and fraudulent breach of trust in dealing with these monies. Stobie, Forlong & Co. were plainly not guilty of fraud and the only charge alleged and proved against them in respect of these monies is breach of trust, which is clearly established.

In point of law, Brenner's position is not precisely the same. He was not a trustee for Miller. It was not suggested that, even as regards the transactions in question, he was a partner of Stobie, Forlong & Co. The learned trial judge, however, has found that he assumed the responsibility of putting himself forward as acting on Miller's behalf which he knew he had no authority to do. He has also found that during one or two brief lucid intervals in the course of Miller's unfortunate malady he deliberately concealed his operations from Miller. He was not a participant in the physical acts which constituted the wrongful conversion of Miller's money; or, as observed, a partner of those who were. The question is not merely whether in the circumstances Brenner is liable to Miller's estate for his wrongful acts, but whether the estate has a claim against him arising out of breach of trust.

It is a proper inference, if not, indeed, an inevitable one, that had it not been for Brenner's conduct in misleading Stobie, Forlong & Co. they would not have proceeded to deal as they did with Miller's money. In a business sense, Brenner's instructions as coming from Miller were an integral part of the transactions. In the treatise on trusts which is a part of Lord Halsbury's collection, it is said, a

> person renders himself liable for the consequent loss to the trust estate where he knowingly becomes an active party to a fraudulent or improper disposition of the trust property in breach of the trust affecting it. (28 Hals., p. 204, par. 407.)

I think this passage correctly states the law and applies to the circumstances here.

In *Gray* v. *Johnston* (1) it was said by Lord Cairns that, in order to make bankers liable for breach of trust, there must be

(1) (1868) L.R. 3 H.L. 1, at 11.

proof that the bankers are privy to the intent to make the misapplication of the trust funds. And to that I think I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed.

In the present case, Brenner was not merely "an active party" or "in privity," his was the mind that conceived—he was the person who, acting on an unfounded assumption of authority, in effect directed—the breach of trust; Stobie, Forlong & Co. being throughout the ignorant instrument in the "improper disposition" of the funds.

We do not think there are sufficient reasons for reversing the finding of the trial judge that Brenner acted fraudulently. He industriously concealed the facts from Stobie, Forlong & Co. and, during the lucid intervals of Harry Miller, from him also. He is chargeable as having fraudulently brought about the breach of trust. We have fully considered the evidence and are satisfied it is ample to support the judgment of the learned trial judge in respect of the amount for which the parties are accountable.

As to Stobie, Forlong & Co., we think that there might have been formidable difficulties in the appellants' way if the action had not been directed against both parties, and that the appellants should have leave *nunc pro tunc,* subject to the conditions to be stated. We think the judgment of Beck J. in *Blais* v. *Bankers' Trust Corporation* (1), pronounced twenty years ago, was well decided.

There will be judgment against both parties for $41,822, but the appellants must undertake not to use this judgment against Stobie, Forlong & Co. except as a judgment determining the amount for which they may rank upon the estate of the bankrupt, and then as no more than *prima facie* evidence of that amount. The appellants will pay the costs of Stobie, Forlong & Co. throughout; Brenner will pay the costs of the appellants throughout.

CANNON J. (dissenting in part)—The statement of claim, issued on the 27th of May, 1930, represents:

1. The plaintiffs are the executors and trustees of the estate of Harry Miller, late of the city of Toronto, in the county of York, who died on or about the 22nd day of December, 1929.

2. The defendant, Meyer Brenner, is a stock broker residing in the said city of Toronto, and formerly carried on business either alone or in

(1) (1913) 14 D.L.R. 277.

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association with Stobie, Forlong & Company. The defendants Malcolm Stobie and Charles J. Forlong also reside in the said city of Toronto and prior to their bankruptcy carried on business in partnership as stock brokers under the name of Stobie, Forlong & Company. The said Malcolm Stobie and Charles J. Forlong made an authorized assignment under the Bankruptcy Act on the 30th day of January, 1930.

3. Prior to the 9th day of May, 1928, the late Harry Miller had a brokerage account with the firm of E. A. Pierce and Company and the following stocks were held in the said account:

4,000 Continental Oil of Delaware,
3,000 Dome Mines Limited,
100 Lago Oil & Transport Corporation,
2,500 Marland Oil Company Limited,
200 National Radiator Limited,
13/49 North American Company,
200 Pure Oil Company,
1,000 Texas Pacific Coal & Oil,
100 Hudson Bay Mining & Smelting Company.
1,000 Mining Corporation of Canada Limited,
1,000 Teck Hughes Gold Mines Limited.

4. On or about the said 9th day of May, 1928, the said stocks were transferred to the defendants Meyer Brenner and to the said Stobie, Forlong & Company to hold the same for the said Harry Miller.

5. The said defendant, Meyer Brenner, and Stobie, Forlong & Company duly paid E. A. Pierce and Company the amount required to transfer the stock and the said stock when transferred was placed in the account of the said Harry Miller.

6. The plaintiffs allege and the fact is that at the time of the transfer to the said defendants, the said Harry Miller had an interest or equity in the stocks transferred to an amount in excess of $70,000.

7. At the time of the said transfer the said defendants, according to the record furnished by the defendants to the plaintiffs, also held the following stocks for the said Harry Miller:—

1,000 Wright Hargreaves Mines Limited,
1,000 Mining Corporation of Canada Limited,
3,000 Amulet Mines Limited,
100 Muirhead Cafeteria Limited,
100 Hudson Bay Mining & Smelting Company.

8. In or about the early part of June, 1928, without authority, instructions or consent from the said Harry Miller, in breach of faith and duty, the said defendants, Meyer Brenner and Stobie, Forlong & Company wrongfully, fraudulently and illegally commenced to trade with the said stocks above referred to with the exception of 100 shares of Muirhead Cafeteria Limited and to wrongfully, fraudulently and illegally deal with the same on their own initiative and without the consent or authority of the said Harry Miller, wrongfully, fraudulently and illegally sold and disposed of the said stocks and wrongfully, fraudulently and illegally misapplied the proceeds of the said stocks and converted them to their own use.

9. The plaintiffs allege and the fact is that after the wrongful and fraudulent disposition and conversion of the said stocks were made, there was a credit in favour of the said Harry Miller in a sum approximating

$42,000 plus 100 shares of Muirhead Cafeteria Limited, after allowing for any moneys that may have been owing thereon, which said amount was wrongfully converted by the defendants.

10. The plaintiffs allege and the fact is that the defendants are responsible for the proceeds of the sale of the said stock in the said account, as having made profits or gain therefrom as agents of the said Harry Miller.

11. The plaintiffs allege and the fact is that the said cause of action arose by reason of the fraud and fraudulent breach of trust on the part of the said Malcolm Stobie and Charles J. Forlong and Meyer Brenner.

12. The plaintiffs therefore claim:

(*a*) An accounting from the defendants in respect of all dealings between the said Harry Miller and defendants, Meyer Brenner and Stobie, Forlong & Company and for this purpose that all necessary references be had and accounts taken.

(*b*) Damages for wrongful conversion, breach of contract, fraud and fraudulent breach of trust or *in the alternative*

(*c*) Judgment for the amount found due to the said Harry Miller at the time of the transfer of the said account from E. A. Pierce & Company to the said defendants, or *in the alternative*

(*d*) Judgment requiring the defendants to account for the proceeds of the sales of the said stock and judgment for such amount plus the value of 100 shares of Muirhead Cafeteria Limited or the recovery of the said 100 shares of Muirhead Cafeteria Limited.

(*e*) The costs of this action.

(*f*) Such further and other relief as the nature of the case may require.

The defendant Brenner, by a separate plea, denied that he carried on a brokerage business himself and alleged that he was, in effect, a salesman for the other defendants, admits the transfer of the stocks to the latter, denies all other allegations so far as they relate to him, and states that he did not at any time:

(*a*) Receive or hold any stocks or securities or the proceeds thereof for the late Harry Miller.

(*b*) Wrongfully, fraudulently or illegally sell or deal with any of the said stocks.

(*c*) Wrongfully, fraudulently or illegally mis-apply the proceeds of the said stocks.

(*d*) Convert any of the proceeds to his own use.

(*e*) Make any profits or gains from or through the said stocks.

(*f*) Commit any fraud or fraudulent breach of trust.

6. The said defendant, Meyer Brenner, further alleges that the said late Harry Miller duly authorized and instructed all transactions in relation to the shares and securities mentioned in the Statement of Claim of the said plaintiffs and was duly advised of what was done from time to time and further adopted and confirmed the same.

The defendants Stobie and Forlong denied the allegations in the statement of claim, and further said that any account of the late Harry Miller with the former partnership firm of Stobie, Forlong & Company was an ordinary trading account in which transactions were had from time to time

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by the said late Harry Miller, and the said account was closed in the lifetime of the said late Harry Miller.

In any event, these defendants said, on the 30th day of January, 1930, they made an assignment under the provisions of the *Bankruptcy Act* and one Norman L. Martin was subsequently, under the provisions of the said Act, appointed Trustee of their estate, and all the assets of these defendants thereupon became vested in the said Trustee for the benefit of their creditors. These defendants say that by reason of the said proceedings in bankruptcy the plaintiffs, even if they were otherwise entitled, cannot proceed to recover any remedy against the property or person of the debtors, or commence or continue this action.

This last allegation was, with some hesitation, dismissed by the trial judge, who condemned the brokers to pay the net proceeds of the sale of securities, viz $41,822; but it was accepted by the Appellate Division and the action dismissed with costs as against the brokers, because it was illegally taken after bankruptcy, it being a claim provable in bankruptcy. Sections 24 and 104 of the *Bankruptcy Act*. The finding of fraud against Brenner and the condemnation against him was also set aside and a reference ordered to ascertain the exact damages, if any, that he should pay to the appellants after their claim in bankruptcy should have been disposed of, and any dividend received from the insolvent estate duly credited.

Both parties, on the evidence, are liable. The fraudulent and deceitful conduct of Brenner is clearly shown, as found by the trial judge. The brokers should have kept for, or paid to Harry Miller the net proceeds of his stock, after deduction of their claim, instead of lending themselves to an orgy of speculation with Miller's money, reaping for Brenner, their close associate, and themselves, commissions amounting to $9,485.50, plus interest on large amounts allegedly advanced. The plaintiffs come before the court, expose how they have been defrauded by the joint wrongdoing of the defendants and ask for remedy. Have they, by asking alternative conclusions, waived their right of proceeding in tort? I do not think so. They have made no election and left it to the court to give the necessary order.

The trial judge's findings are as follows:

But, as I see the case, there was an unauthorized sale, on the instructions of both Ben Miller and Meyer Brenner, by Stobie Forlong of stocks

which the late Henry Miller held with the latter company. That this sale was fraudulent, and was concealed from the late Harry Miller, I can have no doubt; Brenner said so to me. I think both Ben Miller and Meyer Brenner acted as the result of a conspiracy between them to deal with these stocks, in the way in which they were dealt with. It is true that Ben Miller put it on the ground of filial affection, and the danger of disclosure to his father's health, but I can come to no other conclusion than that both of them knew that Mr. Harry Miller could not transact business, and both of them took advantage of that condition in gambling with Harry Miller's money.

Under those circumstances I have no hesitation in finding that there was fraud. Ben Miller had no authority of any kind to authorize, or give instructions for the sale of these stocks by Stobie Forlong Company, or by any one. Therefore, Stobie Forlong having sold the stocks on the instructions of an unauthorized agent, ought to have held the proceeds for Harry Miller, instead of which they misapplied the money, the property of their principal, who was Harry Miller, by permitting it to be used in speculative transactions, and are unquestionably liable for the proceeds.

The only question remaining is whether the claim against Stobie Forlong Company should be proved in bankruptcy or not. Leave was not obtained. I have very grave doubt if such a claim, being in reality for deceit, is provable in bankruptcy under section 104; but I think it is better for the Appellate Division to determine whether the class of action disclosed by the evidence is provable in bankruptcy. It is true that the sale of the stocks might be described as a breach of contract with Harry Miller by Stobie Forlong, but I do not think that the claim arising out of the misapplication of funds is such a demand in the nature of unliquidated damages arising out of a contract as is provable in bankruptcy. I will leave a higher court to correct me if I am wrong in that.

The learned trial judge, not the plaintiffs, directed that the proceeds of the unauthorized sales, of some of the tortious acts complained of in paragraphs 8 and 9 of the statement of claim, should be reimbursed to the victim of defendants' illegal and improper course. The fact that they deliberately took their action after Stobie Forlong's bankruptcy without claiming in bankruptcy and persistently considered, despite the latter's pleading, throughout the trial, that their claim was not provable in bankruptcy, shows that they never elected to make the unauthorized sale their own; they still persist in calling it a fraudulent conversion and they ask that the measure of damages resulting from the fraud be the net value of the securities when they were sold without Miller's knowledge or consent. The learned trial judge thought that they were entitled to what would have been saved from the wreck immediately after the unauthorized sale, if the defendants had not continued their tortious acts by gambling with the proceeds, the property of Harry Miller, when the latter was incapable of trans-

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acting any business. Those are the damages, unliquidated before the trial, but ascertained by the trial judge, representing the loss or *damnum* suffered by Harry Miller when his money was frittered away by the defendants. The latter did not pretend to act by reason of a contract, promise, or even in breach of a trust, but had no possible shadow of an excuse to act as they did: they purely and simply took for their own purposes what did not belong to them.

Under such circumstances, the action against the joint tort feasors should not be defeated by technicalities.

Smith v. *Baker* (1) does not apply. In that case, the plaintiff did not commence any action in law for the tort, but resorted to the Court of Bankruptcy and made a successful application to have the bill of sale declared void. The plaintiffs here, as explained above, do not claim "*exclusively*" the proceeds of the sale, but mention them only as an alternative remedy against those who stole their money. They always treated both the sale and the subsequent transactions as tortious acts, and never acknowledged that Harry Miller had contracted with, or entrusted the defendants with his money. The plaintiffs explained how the transfer of shares had taken place and complained of the fraud through which subsequently a sick man had been victimized by people who knew that he was not capable of protecting his interest.

I, therefore, with due respect, beg to differ from the holding of the Court of Appeal that the demand in tort was waived by the plaintiffs.

In *Smith* v. *Baker* (2) it is said:

> There may be other instances where an act may amount to a conclusive election in point of law to waive the tort. But there is another class of cases in which an act is of an ambiguous character, and may or may not be done with the intention of adopting and confirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law.

In *Rice* v. *Reed* (3), at page 64, Lord Russell of Killowen, C.J., says:

> * * * an application for the proceeds of goods said to have been tortiously dealt with is not conclusive proof of election to affirm the transaction.

(1) (1873) L.R. 8 C.P. 350.

(2) (1873) L.R. 8 C.P. 350, at 355-6.

(3) [1900] 1 Q.B. 54.

At page 65, Smith, L. J., says:

> In the present case the plaintiff sued Soltan in trover, and in the alternative for money had and received. If nothing more had occurred, no court could say that the plaintiff, by suing in the alternative for tort and for money had and received, had waived the tort and elected to affirm the transaction. It is clear that no authority goes so far as that.

At page 66, Smith, L. J., agrees with the dictum in *Smith* v. *Baker* (1) that the question whether a tort has been waived is a matter of fact rather than law.

See also *Keating* v. *Marsh; Marsh* v. *Keating* (2).

As pointed out by Brenner's counsel, "they (the appellants) never elected to confirm sales made by us" (the respondents). There is no evidence that appellants waived their cause of action in tort by proving in the bankruptcy proceedings. And I find, like the trial judge, that, as a matter of fact, the appellants never waived their right of proceeding in tort for unliquidated damages, and they are therefore entitled to a remedy. The plaintiffs have proven their whole case; the defendant Brenner has failed to establish his plea, and, in view of the record, paragraph 6 thereof is a clear sample of bad faith and may be considered as a deliberate attempt to mislead the court. It was not disputed here, nor in the Court of Appeal, that the brokers are liable to the plaintiffs for the amount of the surplus of the proceeds, after deducting their claim against Miller for moneys paid on his behalf to E. A. Pierce & Company.

But Brenner says: If we had not sold the stocks, if the account had remained dormant till Harry Miller's death, the plaintiffs would have lost all the equity and would have suffered the same loss on account of the continued decline of the market prices of their securities. Therefore they are not entitled to damages.

This is sophistry. The case is not to be determined on what might have happened if the defendants had not done what they did. They jointly, illegally and without even colour of right, gambled with Miller's money—the net proceeds of their first unauthorized sale of securities—over and above what was required by Stobie & Forlong for marginal or other purposes. The amount is clearly established, is not even disputed. I believe that the trial judge

(1) (1873) L.R. 8 C.P. 350 at 355-6.

(2) (1834) 1 Montagu & Ayrton's Bankruptcy Reports, pp. 582 and 592.

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took the right view of the whole case, refused to be stopped by ingenious but unfounded objections and applied himself to carry out his duty under the following section 15, subsection (*h*), of the *Judicature Act*, R.S.O. 1927, chapter 88:

15. In every civil cause or matter law and equity shall be administered according to the following rules:

(*h*) The Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as it shall deem just, all such remedies as any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them in such cause or matter so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided.

There is no need for a reference or for a retrial of this case before the Bankruptcy Court. The defendants should reimburse what they converted to their own purposes without even trying to consult with the owner thereof, or responsible members of his family; these funds so misappropriated amount to $41,822, as found by the trial judge. His judgment should be restored and the appeal maintained with costs here and before the Appellate Division against the respondents.

Appeal allowed and judgment given in the terms as indicated in the judgment of Duff C. J.

Solicitors for the appellants: *Luxenberg & Levinter.*
Solicitors for the respondent Brenner: *Singer & Kert.*
Solicitors for the respondents Stobie and Forlong: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

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*May 18, 19.
*Oct. 3.

HIS MAJESTY THE KING (PLAINTIFF) . . . APPELLANT;

AND

NATIONAL TRUST COMPANY (DEFENDANT) . . . . . RESPONDENT.

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

Constitutional law—Succession duties—Bonds or debentures of railway companies (G.T.P. Ry. Co. and C.N. Ry. Co.) having head offices in the province of Quebec, at Montreal, where they were registered and transferable—Owner at his death domiciled in the province of Ontario—Whether subject to succession duties under section 5 of the Quebec Succession Duties Act, R.S.Q., 1925, c. 29, as modified by (Q.) 18 Geo. V, c. 17—Powers of provincial legislature to fix situs of intangible property—Specialties.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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The Crown, in the right of the province of Quebec, by its action claimed the sum of $15,775.95, as representing succession duties alleged to be due by the respondent as sole trustee and executor of the estate of the late Sir Clifford Sifton who died in New York in 1929 and was at the time of his death domiciled in the province of Ontario. Amongst the assets of his estate were certain bonds or debentures of the Grand Trunk Pacific Railway Company and the Canadian National Railway Company, respectively, guaranteed by the Government of Canada. These bonds or debentures, registered in Montreal, were at the time of Sir Clifford Sifton's death in the possession of the latter in Toronto. Succession duties were paid to the Government of the province of Ontario; but the Government of the province of Quebec also claimed succession duties on the ground that these bonds or debentures were to be considered for succession duty purposes as property situate in the province of Quebec according to the definition of the word "property" in section 5 of the *Succession Duties Act* (R.S.Q., 1925, c. 29), because the two companies debtors had their head offices at Montreal and the bonds and debentures were registered and transferable on the companies' registers in that city.

Held that these bonds or debentures had not, in the relevant sense, a local situation within the province of Quebec, and, therefore, were not subject to the payment of succession duties in that province. *Brassard* v. *Smith* ([1925] A.C. 371) dist.

Held, also, that a provincial legislature is not competent to prescribe the conditions fixing the situs of intangible property (which has no physical existence) for the purpose of defining the subjects in respect of which its powers of taxation under section 92 (2) B.N.A. Act may be put into effect. Therefore, section 5 of the Quebec *Succession Duties Act* is *ultra vires* of the legislature of that province, when invoked by it for the purpose of claiming succession duties upon property which has no local situation in that province, within the definition laid down implicitly, if not explicitly, by decisions of the Judicial Committee of the Privy Council. *Woodruff* v. *Atty. Gen. for Ont.* ([1908] A.C. 508); *Rex* v. *Lovitt* ([1912] A.C. 212); *Toronto General Trusts Corp.* v. *The King* ([1919] A.C. 679); *Royal Trust Co.* v. *Atty. Gen. for Alberta* ([1930] A.C. 144); *English, etc., Bank* v. *Commissioners of Inland Revenue* ([1932] A.C. 238); *Commissioners of Stamps* v. *Hope* ([1891] A.C. 476); *N.Y. Life Ins. Co.* v. *Public Trustee* ([1924] 2 Ch. 101); *Atty. Gen.* v. *Bouwens* ((1838) 4 M. & W. 171) discussed and referred.

Comments on the legal institution of the common law known as specialty. Debentures authorized by the Parliament of Canada and charged by statute upon the Consolidated Revenue Fund have the character of specialties. The Grand Trunk Pacific Ry. Co. has statutory powers to create bonds having the character of specialties. The bonds in this case must, as respects the obligation of the railway company, be considered specialties, although the head office of the company is fixed by statute in Quebec; and, in view of the statute law applicable to the case, it must be held such a specialty has its situs in Ontario. Neither, for the reasons fully stated in the judgment, have the bonds of the Canadian National Railway Company in question in this case a situs in Quebec.

Judgment of the Court of King's Bench (Q.R. 54 K.B. 351) affirmed.

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APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Surveyer J., and dismissing the appellant's action with costs.

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

Chs. Lanctot, K.C., and *Aimé Geoffrion, K.C.*, for the appellant.

A. Chase Casgrain, K.C., for the respondent.

The judgment of the Court was delivered by

DUFF C. J.—The statutory enactments under consideration are sections 3 and 5 of the Quebec *Succession Duties Act*. So far as pertinent, the provisions of these sections are as follows:—

3. All property, moveable or immoveable, the ownership, usufruct or enjoyment whereof is transmitted owing to death, shall be liable to the following taxes calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of death * * *

5. The word "property" within the meaning of this division includes all property, moveable or immoveable, actually situate within the province, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein; the whole whether the deceased at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province.

The property in respect of which the dispute arises consists of certain bonds or debentures of the Grand Trunk Pacific Railway Company and the Canadian National Railway Company, respectively, guaranteed by the Government of the Dominion of Canada. These bonds were the property of Sir Clifford Sifton who, at the time of his death on the 17th of April, 1929, was domiciled in the province of Ontario where the bonds were in his possession.

The enactments of the statute purport to impose a tax upon property transmitted owing to death; and, therefore, they only affect subjects having a situs within the province (*Woodruff* v. *Attorney General for Ontario* (2); *Rex* v. *Lovitt* (3); *Toronto General Trusts Corporation* v. *The King* (4); *Brassard* v. *Smith* (5); *Provincial Treasurer of Alberta* v. *Kerr*, P.C. Appeal No. 1 of 1933).

(1) (1932) Q.R. 54 K.B. 351.
(2) [1908] A.C. 508.
(3) [1912] A.C. 212.
(4) [1919] A.C. 679.
(5) [1925] A.C. 371.

The question we have to consider is whether or not these bonds have, in the relevant sense, a local situation within that province.

Some propositions pertinent to that issue may, we think, be collected from the judgments of the Judicial Committee of the Privy Council, if not laid down explicitly, at least, as implicit in them. First, property, whether moveable or immoveable, can, for the purposes of determining situs as among the different provinces of Canada in relation to the incidence of a tax imposed by a provincial law upon property transmitted owing to death, have only one local situation. In applying this proposition, of course, it is necessary to distinguish between a tax upon property and a tax upon persons domiciled or resident in the province. (*Toronto General Trusts Corp.* v. *The King* (1); *Brassard* v. *Smith* (2); *Provincial Treasurer of Alberta* v. *Kerr*).

Then, it seems to be a corollary of this proposition that situs, in respect of intangible property (which has no physical existence) must be determined by reference to some principle or coherent system of principles; and again, the courts appear to have acted upon the assumption that the British Legislature, in defining, in part, at all events, by reference to the local situation of such property, the authority of the province in relation to taxation, must be supposed to have had in view the principles of, or deducible from, those of the common law. (*The King* v. *Lovitt* (3); *Toronto General Trusts Company* v. *The King* (1); *Brassard* v. *Smith* (2); *Royal Trust Co.* v. *Attorney General for Alberta* (4).

We think it follows that a provincial legislature is not competent to prescribe the conditions fixing the situs of intangible property for the purpose of defining the subjects in respect of which its powers of taxation under s. 92 (2) may be put into effect.

On this appeal we are concerned with debts, or obligations to pay money. As is well known, rules for the determination of such situs for various purposes have been drawn from those which defined the jurisdiction of the ecclesiastical tribunals respecting probate. (*The Royal Trust Co.* v. *The Attorney General for Alberta* (5); *English, etc., Bank* v. *The Commissioners of Inland Revenue* (6). In those

(1) [1919] A.C. 679.
(2) [1925] A.C. 371.
(3) [1912] A.C. 212.
(4) [1930] A.C. 144.
(5) [1930] A.C. 144 at 150.
(6) [1932] A.C. 238 at 242

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rules, a broad distinction was observed between specialties and simple contract debts. The latter were *bona notabilia* in the jurisdiction in which the debtor had his personal residence; the former, where the instrument constituting the specialty was found at the death of the testator. The case of judgment debts which were deemed to be situated where the judgment was recorded, may be regarded as a special one.

Situs has been ascribed in conformity with these rules to such property, when regarded as items in a succession, "for the purposes of representation and collection," for the purpose of giving effect to testamentary dispositions, of ascertaining the incidence of stamp duties and of determining the incidence of death duties. (*English, etc., Bank* v. *The Commissioners of Inland Revenue* (1).)

In the *Royal Trust Co.* v. *Atty. Gen. for Alberta* (2) the rule in relation to specialties was held to govern, for the now relevant purpose, the local situation of "statutory obligations of the Dominion of Canada evidenced by bonds" which were "authenticated in the manner prescribed by the Legislature"; and which were by statute (*The Consolidated Revenue Act,* s. 7) charged upon the Consolidated Revenue Fund; and it was there decided that the locality of such statutory obligations, evidenced by particular bonds, was at the place where the bonds were found at the death of the testator.

In the evolution of the legal principles derived from the rules governing the earlier practice and their application to new states of fact, novel questions will naturally arise. A corporation debtor may have more than one residence, and, consequently, it may be necessary to determine which of these is the residence of the corporation for the purpose of the inquiry. The reason given by Lord Field in *Commissioner of Stamps* v. *Hope* (3) for assigning the locality of the debt to the place of the personal residence of the debtor is that there the assets for paying the debt may be presumed to be. Another reason has been given, viz., that there, in the ordinary course, payment of the debt may be enforced, or that there the debt is "properly recoverable." (*N.Y. Life Ins. Co.* v. *Public Trustee,* per Atkin L.J. (4); Westlake 7th ed. 209; Dicey, p. 342).

(1) [1932] A.C. 238 at 242-244.
(2) [1930] A.C. 144.
(3) [1891] A.C. 476.
(4) [1924] 2 Ch. 101.

The circumstances of a particular case may be such that, to them, none of the rules as formulated and applied in decided cases or books of authority is strictly appropriate; and then one must have recourse to analogy, and to the principles underlying the decisions or the rules as formulated or deducible therefrom. (*N.Y. Life Ins. Co.* v. *Public Trustee*) (1).

Applying the rules and principles so ascertained, is it established that these bonds are locally situated in the province of Quebec?

The Crown puts its case on two grounds: First, it is said that the domicile, in each case, of the primary debtor, is in Quebec and that the locality of the obligation is, therefore, there. The contention of the respondent, that the situs of the obligation is determined in each case by the fact that it is a specialty, is met by the argument that the obligation receives its character from the law of Quebec, and that the institution of the common law, known as specialty, is not recognized by the law of that province. Secondly, it is argued that the bonds, in both cases, being registered in Quebec, and being, as the Crown contends, transferable only on the company's register in that province, the situs of the obligation is, by virtue of that circumstance, in that province, even assuming that the rule as to specialties would otherwise be applicable, and that the facts do not bring the case within the rule under which residence is the criterion.

It is convenient to examine, first the last mentioned contention.

The Crown argues that, as the bonds were transferable only on the company's register in the province of Quebec, the situs is fixed in that province by force of the rule laid down in the judgment of the Judicial Committee in *Brassard* v. *Smith* (2). The subjects of taxation in respect of which the controversy in that case arose were shares in the capital stock of the Royal Bank of Canada. It was held that, since, by the provisions of the *Bank Act*, the place of registration of the shares was in Nova Scotia, and there, and only there, except in circumstances having no relevancy, the shares could be validly transferred, they had locality in that province, and not in Quebec. The test applied is stated in the judgment of Lord Dunedin at p. 376 as,

(1) [1924] 2 Ch. 101, at 119, 120. (2) [1925] A.C. 371.

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the circumstance that the subjects in question could be effectively dealt with within the jurisdiction (that is to say, in Nova Scotia).

It is an important rule that the scope of a decision should not, speaking generally, be determined by reference to expressions in the judgment, and without regard to the subject matter upon which the court is pronouncing. Judgments must be read, as the phrase is, *secundum subjectam materiem*. Their Lordships in *Brassard* v. *Smith* (1) were not dealing with debts. They were dealing with shares in the capital stock of a corporation, a different kind of property, and the judgment of the Judicial Committee in the *Royal Trust Co.* v. *Attorney General for Alberta* (2) requires us, we think, to hold that the decision of the matter now in debate is not ruled by the observation just quoted from the judgment of their Lordships in *Brassard* v. *Smith* (1).

It was sought to liken (says Lord Merivale in the course of the judgment in the *Royal Trust Co's case* (2)) the bonds to the shares of a joint stock company so as to apply the principle affirmed in *Brassard* v. *Smith* (1), that in the case of such shares the test of local situation is supplied by the question, "Where could the shares be effectively dealt with?" But these securities were statutory bonds and not shares. The conditions of the bonds as to registration are in no way analogous to the provisions in articles of association for the incorporation of shareholders in a joint stock company by the entry of their names on the register of shareholders at its authorized place of being.

It may not be out of place to observe that the phrase cited by Lord Dunedin from the judgment in this court in *Smith* v. *Lévesque* (3) is, in the latter judgment, shewn to be a quotation from Mr. Dicey's book at p. 342, and that in the passage in that book where the phrase quoted occurs, the situs as determined by the test expressed in that phrase, when applied to debts, is "the country where" the debt is "properly recoverable or can be enforced"; which, it may be added, is the test given in the judgment of Atkin L.J. in *New York Life Ins. Co.* v. *Public Trustee* (4).

The judgment in *Attorney General* v. *Bouwens* (5), at the pages mentioned in the judgment delivered in this court (pp. 191-2) (3), distinguishes simple contract debts from debts by specialty, as well as from debts embodied in nego-

(1) [1925] A.C. 371.
(2) [1930] A.C. 144, at 151-2.
(3) [1923] S.C.R. 578, at 586.
(4) [1924] 2 Ch. 101.
(5) (1838) 4 M. & W. 171.

tiable instruments, that is to say, instruments the delivery of which effects a transfer of the debt. Negotiable instruments are treated as instruments

> of a chattel nature capable of being transferred by acts done here, and sold for money here

as "in fact a simple chattel"; therefore, it is said,

> such an instrument follows the nature of other chattels as to the jurisdiction to grant probate.

The criterion expressed in Mr. Dicey's words may fairly be said to be that approved in the judgment in *Attorney General* v. *Bouwens* (1)) as respects negotiable instruments and other kinds of intangible property which are "dealt with" ordinarily and naturally by transferring them. But, we do not doubt (independently of the binding force of the judgment in the *Royal Trust Co.* v. *Attorney General for Alberta* (2)) that there is nothing in the judgment in *Brassard* v. *Smith* (3), or in the judgment in *Attorney General* v. *Bouwens* (1), the principle of which that judgment adopts, to justify the conclusion that a specialty debt, non-negotiable, has (either necessarily, or *prima facie*) its situs at a place where some formality has to be observed in order effectually to transfer it.

On the contrary, the rules by which the courts have uniformly governed themselves in ascertaining the locality of specialties or simple contract debts (except in the case of negotiable instruments) have been those already stated, unless the circumstances have been such (as, for instance, in *Toronto General Trust Corporation* v. *The King* (4)) as to make them inapplicable. If the criterion adopted in *Brassard* v. *Smith* (3) were to be considered appropriate to debts (other than specialties and negotiable instruments) then the words "the place where it can be effectively dealt with" must be understood, as Mr. Dicey uses them, in relation to such debts, as denoting "the place where it is properly recoverable or can be enforced." (See *Attorney General* v. *Glendinning* (5) per Phillimore J.)

The bonds now under consideration were, in neither case, negotiable (transferable by delivery) at the date of the testator's death. As regards the bonds of the Grand Trunk Pacific Railway Company, we shall presently give our reasons for the conclusion that they are specialties. As regards

(1) (1838) 4 M. & W. 171.
(2) [1930] A.C. 144, at 151.
(3) [1925] A.C. 371.
(4) [1919] A.C. 679.
(5) (1905) 92 L.T. 87.

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the bonds of the Canadian National Railway, somewhat different considerations come into play. We are not satisfied that the obligation of the company itself, under these bonds, is a specialty debt; but the argument of the Crown, immediately under discussion, as respects these bonds, fails, nevertheless, on the facts. The clause dealing with the subject of registration is in the following terms:

> Unless registered this bond shall pass by delivery. This bond may be registered as to the principal sum in the name of the holder on the books of the company at the head office of the corporate trustee in the borough of Manhattan city and state of New York, or at the office of the company in the city of Montreal, Dominion of Canada, such registration being noted thereon. After such registration no transfer shall be valid unless made at one of said offices by the registered holder in person or by his attorney duly authorized, and similarly noted hereon, but this bond may be discharged from registration by being in like manner transferred to bearer, and thereupon transferability by delivery shall be restored; and this bond may again from time to time be registered or transferred to bearer as before.

We have quoted the pertinent provision in its entirety. It is quite plain that a bond registered in Montreal may be transferred in New York, and a bond registered in New York transferred in Montreal. Duplicate registers are obviously contemplated. Registration at either place is registration in both. The language of the bond is explicit and cannot properly be read as requiring transfer at the place of registration.

It is worth while, perhaps, to compare the language of this bond with the language of the Grand Trunk Pacific Railway Company's bond, in which it is unequivocally stated that, after registration of the bond, transfer can be effectuated only "on the company's books at the office where such registration was made."

Coming then to the contentions (*a*) that the rule as to specialties is irrelevant, and (*b*) that the locality of the obligation is determined, in each case, by the residence of the corporation.

We shall first consider whether the bonds are, in the present connection, to be treated as specialties.

The view to which we have already referred, viz., that the rules for determining situs, in applying the enactment of s. 92 (2) of the B.N.A. Act, must rest upon the principles of the common law of England, does not, by any logical necessity, involve the consequence that an obligation in its scope and nature governed by the rules of the law of Que-

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bec is, for this purpose, a specialty, merely because such obligation created in like circumstances in one of the other provinces of the Dominion and having *inter partes* the like scope and effect, would, by the rules of the common law, fall within the category of specialty. It is unnecessary now to discuss or consider any such question.

The bonds with which we are concerned are the guaranteed bonds of Dominion railway companies. There can, we think, be no controversy as to the power of the Parliament of Canada to authorize a Dominion railway company to execute specialties. Normally, the undertaking of such a company is a work extending through two or more provinces of Canada; and such companies must, frequently, in the ordinary course, become concerned in transactions in provinces other than Quebec, which involve the execution of deeds of conveyance and deeds of covenant. The authority of the Dominion must necessarily extend to empowering such companies to execute instruments having the effect of a common law specialty, and the exercise of this power cannot be affected by the circumstance that the head office of the company is fixed by statute in Quebec.

It is unnecessary to consider what restrictions may affect the exercise of the power as respects transactions which, apart from Dominion legislation, would, ordinarily, under the accepted principles of private international law, be governed by the civil law of Quebec. There can be no doubt that, as regards bonds charged by trust deed or otherwise upon the company's undertaking as a whole, Parliament is competent to empower the company to execute transfers by deed having the effect of a deed at common law, to execute covenants having the force of, and being, specialties, at common law, and to give the same effect to the bonds and debentures to which securities attach; as well as to bonds and debentures not so secured, issued in the exercise of the borrowing powers of the Company. Nor have we any doubt that such is the effect of the statutes and Orders in Council by which the bonds now in question were authorized.

First of the Grand Trunk Pacific Railway Company. That company's bonds were guaranteed by the Government

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of Canada pursuant to the provisions of a statute known as the *Grand Trunk Pacific Guarantee Act*, 1914 (c. 34 of the statutes of that year).

By this statute, His Majesty, upon certain conditions, which have been fulfilled, may " for the purpose of aiding the company provide " certain monies

> and upon and subject to the conditions hereinafter set out guarantee payment of the principal and interest of an issue of bonds to be made by the company.

The statute enacts (s. 4) that the bonds are to be secured by a trust deed or deeds " granting fixed and floating mortgages or charges "; and, by s. 5,

> The kind of securities to be guaranteed hereunder and the forms thereof, and the forms and terms of the new trust deed, and the trustee, and the times and manner of the issue of the guaranteed securities, and the disposition of the moneys to be raised thereon, by sale, pledge or otherwise, and the forms and manner of guarantee or guarantees shall be such as the Governor in Council approves, and such terms, provisions and conditions as the Governor in Council may consider expedient or necessary shall be included in the new trust deed.

It is unnecessary to go further for the purpose of establishing the power of the company to create bonds having the character of specialties.

The bonds are under the seal of the company. A seal is not necessary for compliance with the forms and conditions prescribed by the *Railway Act* (s. 132 (2), c. 170, R.S.C. 1927). It cannot be presumed that the execution of the bonds under seal, as prescribed by the Governor in Council, was an idle ceremony merely. The bonds must, we think, as respects the obligation of the company, be considered specialties.

As to the guarantee of the Government of Canada, the Parliament of Canada has exclusive jurisdiction by force of the enactments of s. 91 (1) to make laws in relation to the subject of the " Public Debt." We see no reason to think that the subject defined in these words does not include the form and the effect of the instruments authorized by Parliament to evidence the public obligations; and the case already cited (*Royal Trust Co.* v. *Attorney General for Alberta* (1)) is conclusive authority for the proposition that debentures authorized by Parliament and charged by statute upon the Consolidated Revenue Fund have the character of specialties.

(1) [1930] A.C. 144, at 151.

By s. 6 of the *Guarantee Act*, it is enacted that,

The said guarantee shall be deposited with the trustee, signed by the Minister of Finance or such officer as is designated by the Governor in Council, and upon being signed and deposited as aforesaid His Majesty shall become liable as guarantor for the payment of principal and interest of the guaranteed securities according to the tenor thereof, and the said payment shall form a charge upon the Consolidated Revenue Fund, and the guarantee so signed and deposited shall be conclusive evidence that the requirements of this Act respecting the guaranteed securities and the new trust deed and all matters relating thereto have been complied with.

In exercise of his powers under s. 5 (quoted above) the Governor in Council approved the form and the terms of a mortgage and of the bonds and the form and manner of the guarantee; and authorized the Minister of Finance, upon the due execution, delivery and deposit of the mortgage in the form approved, to sign and deposit with the trustee, the Royal Trust Co., a guarantee of the bonds. This guarantee is in the form of a certificate by which the Minister of Finance certifies

that the bonds * * * are guaranteed as to the payment of both principal and interest by the Dominion of Canada.

One of the stipulations of the bond itself is that it shall not become valid or obligatory for any purpose until authenticated by the certificate of the trustee endorsed upon it. In the certificate the trustee certifies that the

bond is one of a series * * * guaranteed by the Government of Canada, described in the within-mentioned mortgage, executed by the Grand Trunk Pacific Railway Company to the undersigned as trustee.

Another stipulation of the bond is this:—

A copy of the guarantee of the Government of the Dominion of Canada is endorsed on this bond.

By Art. 4 (2) and (3) of the mortgage it is provided as follows:—

Section 2. The said guarantee shall be deposited with the trustee, signed by the Minister of Finance or such officer as is designated by the Governor in Council, and upon being signed and deposited as aforesaid, His Majesty shall become liable as guarantor for the payment of the principal and interest of the said bonds according to the tenor thereof, and the said payment shall form a charge upon the Consolidated Revenue Fund. A copy of the said guarantee, with a facsimile of the signature of the Minister of Finance, or such other officer, may be engraved upon the said bonds.

Section 3. No extension, waiver, or other modification of the obligations of the company, given or granted pursuant to the provisions in this mortgage contained by the trustee, or by all or any of the bondholders, or by such bondholders and trustee acting together, shall release or discharge the Government from its obligations as guarantor of the said bonds or upon its covenants herein contained.

From all this it is quite clear that, by force of s. 6 of the *Guarantee Act*, quoted above, His Majesty is liable

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"as guarantor for the payment of principal and interest" of each of the bonds "according to the tenor thereof"; and that "the said payment," that is to say, "the payment of principal and interest" of the bonds, forms "a charge upon the Consolidated Revenue Fund."

The debt under the guarantee is, therefore, not only the debt of His Majesty, it is a debt by statute and as such is charged upon the Consolidated Revenue Fund. As regards the guarantee, these circumstances bring the obligation plainly within the principle of the *Royal Trust Co.* v. *Attorney General for Alberta* (1).

As to the situs of the specialty,—the bond was in the possession of the testator in the province of Ontario. The copy of the guarantee endorsed upon the bond in compliance with the terms of the approval of the Governor in Council, acting under statutory authority, together with the certificate of the trustee in the form approved by the Governor in Council acting under the same authority, constituted, and were intended to constitute, a representation to persons dealing in the bonds that the conditions of the statutory guarantee had been complied with, and that the charge, conditionally created by the statute, was operative. (Ex parte, *Asiatic Banking Corp.* (2); *Bhugwandass* v. *Netherlands &c. Insce Co.* (3). The bond, in the hands of the holder, in itself, constitutes the evidence, and it alone constitutes the evidence, of the holder's individual right to demand payment in execution of the guarantee. Again, on the principle of *The Royal Trust Co.* v. *Attorney General for Alberta* (1), the proper conclusion seems to be that the specialty had its situs in Ontario.

The definition of His Majesty's liability under art. 4, s. 2, of the mortgage, which is to arise upon the fulfilment of the condition laid down in that section, is expressed in language which is identical with the language of s. 6.

The Grand Trunk Pacific Railway Company's bonds are, therefore (as respects both the obligation of the company and the guarantee of the Government) specialties which had their situs in Ontario at the critical date.

Secondly, of the Canadian National Railway Company's bonds.

(1) [1930] A.C. 144. (2) (1867) L.R. 2 Ch. App. 391.
(3) (1888) 14 A.C. 83.

These bonds were executed by the Canadian National Railway Company, under the authority conferred by s. 26 of c. 13 of the Dominion statutes of 1919; and, pursuant to an Order in Council of the 13th of September, 1924, a guarantee was signed by the acting Minister of Finance on behalf of His Majesty. This Order in Council, and the guarantee given pursuant to it, were authorized by *The Appropriation Act* (No. 3) of 1924, being c. 75 of the statutes of that year and schedule "A" thereto.

By the last mentioned statute, the Governor in Council was empowered to pay and to apply a sum not exceeding $159,543.39 for the charges and expenses of the public service from the 1st of April, 1924, to the 31st of March, 1925, not otherwise provided for (being the aggregate of two-thirds—the residue—of the amount of each of the several items, less deductions set forth in schedule "A"). Item 137 relates to a sum of $56,000,000 appropriated to meet expenditures made, and indebtedness incurred, by or on behalf of the Canadian National Railway Company or any one or more of its constituent companies; and it is enacted as follows:

> The amount herein authorized may be applied from time to time, in the discretion of the Governor in Council:—
>
> (*a*) To meet expenditures made or indebtedness incurred by the company in respect of railways, properties and works entrusted to the company as aforesaid.
>
> (*b*) By way of loans in cash, or by way of guarantee, or partly one way and partly the other, subject, however, as follows:—
>
> If by way of loans, the amount or amounts advanced shall be repayable on demand, with interest at the rate fixed by the Governor in Council, from time to time, payable half-yearly, secured if and when directed by the Governor in Council by mortgage or mortgages upon such properties, in such form and containing such terms and conditions, not inconsistent herewith, as the Governor in Council may approve.
>
> If by way of guarantee, any such guarantee may be of the principal and interest of the notes and obligations or securities of one or more of the said companies specified by the Governor in Council, and may be signed by the Minister of Finance, on behalf of His Majesty, in such form and on such terms and conditions as the Governor in Council may determine to be appropriate and applicable thereto.

While the language is not as precise as in the section already quoted from the *Guarantee Act* of 1914, the effect of the *Appropriation Act* and the schedule seems to be very clearly this: the Governor in Council may, by guarantee given within the period mentioned, of the principal and interest of notes and obligations or securities of the Canadian

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National Railway Company or one or more of its constituent companies, charge the Consolidated Revenue Fund with the payment of such notes, obligations or securities; the guarantee to be executed by the Minister of Finance on behalf of His Majesty, in such form and on such terms and conditions, as the Governor in Council may determine.

The form of the bonds, and of the trust deed referred to in it, were duly approved by the Order in Council mentioned. By the trust deed, an original counterpart of the guarantee is to be deposited with the corporate trustee, and a copy of it to be endorsed upon all the bonds with the same effect as if the original guarantee were endorsed thereon; the guarantee, when deposited with the corporate trustee, is to be absolute and unconditional; it is unnecessary for the trustees or for any holders of the bonds to take any steps or proceedings for enforcing their rights against the company in order to preserve or enforce their rights against the Government.

The bond itself declares the

payment of the principal and interest of the bonds of this issue as and when the same become respectively due and payable is unconditionally guaranteed by His Majesty the King acting in the right of the Dominion of Canada, by guaranty, a copy of such guarantee being hereon endorsed with the same effect as if the original guarantee were hereon endorsed.

It is also stipulated that the bonds shall not be obligatory for any purpose until authenticated by the certificate of the corporate trustee under the trust agreement endorsed thereon.

The nature of the guarantee clearly appears to be that of an unconditional obligation resting upon His Majesty to pay the principal and interest of the bonds according to their tenor. The approval of the form of the bond and of the trust agreement by the Governor in Council, acting as the delegate of the legislature, and its direction to the Minister of Finance to execute the guarantee have the same effect as if such approval and direction formed part of an Act of Parliament. The debt incurred is a debt created by statute. And, once again, the individual right of the holder is evidenced by the bond, and by the bond alone, that is to say, by the instrument as a whole, the promise of the company, the declarations contained in the bond and the copy of the guarantee attached to, and the certificate of the trustee endorsed upon it. The instrument, in so far as it

embodies an obligation of His Majesty unconditionally to pay principal and interest when due according to the terms of the bond, seems clearly, on the principle to which effect was given in *The Royal Trust Co.* v. *Attorney General for Alberta* (1), to be a specialty and to have had its situs, where it was at the testator's death, in his possession in the province of Ontario.

It is necessary, however, to consider the nature of the obligation of the company, which is not under the company's seal.

First, we think the obligation of the company itself is not a specialty debt. It is not a specialty in form; and the obligation is clearly not a debt by statute within the meaning of the rule applied in the *Royal Trust Co's* case (1).

Then, treating the company's obligation as a simple contract debt. The company has its head office in Montreal. The company has, therefore, a residence there. The bonds as we have seen were registered there. On both grounds, as we have already noticed, it is argued that the situs of this obligation was in Quebec.

The effect of registration in Montreal has been discussed.

What weight is to be attached to the fact that the head office of the company is in Quebec?

The evidence afforded by the public statutes and the evidence in the appeal book touching the amalgamation of the Canadian National Railway Company with the Grand Trunk Pacific Railway Company require us to take notice of the fact that the Canadian National Railway Company carries on business in other provinces, including Ontario, as well as in Quebec. The debt of the company is primarily payable in New York. But the company is bound to provide for payment of the bonds at Toronto and at Ottawa as well as in New York and Montreal. Payment is not, moreover, contemplated at the head office of the company, or indeed at any office of the company. In each of the places mentioned the bonds are payable at the principal office of the Bank of Montreal.

Either of the reasons, above mentioned, for the rule fixing the situs of simple contract debts by reference to the residence of the debtor, would justify the assignment of locality to the bonds in Toronto or Ottawa as well as in Montreal.

(1) [1930] A.C. 144.

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New York is, as mentioned, the primary place of payment, and, again, there is sufficient evidence in the public statutes that the Canadian National Railway Company carried on business in the state of New York at the pertinent date, to require us to take judicial notice of that fact; although we cannot judicially know however notorious it may be, that the Canadian National Railway Company at that date carried on business in New York city.

In light of these facts, the residence of the debtor, in the circumstances stated, does not seem to afford, in itself, a criterion for the selection of any one among these jurisdictions as the situs of the bonds.

On the other hand, there are other considerations derived from the circumstances that are not without considerable weight.

The guaranteed bond is the sole evidence of the holder's individual right as against the company as well as against the Crown. Since the instrument embodies a specialty debt, that of the Crown, and since, being in Ontario, it was an asset there, and it could not justifiably be dealt with there, possession of it, for the purpose of transferring it, could not lawfully be assumed there, except by sanction of an Ontario probate, or an Ontario grant of administration (*Attorney General* v. *N.Y. Breweries* (1). Moreover, as an asset having its situs in Ontario, it could not justifiably be reduced into possession in Ontario, for presentation on behalf of the estate of Sir Clifford Sifton for payment in New York or Montreal, except under such sanction.

Probate or administration in Ontario would not, of course, alone entitle the executors to receive payment elsewhere than in Ontario. But the point I am now emphasizing is that, if the bond became due on the date named in it, or by the happening of any of the events having that effect under the trust deed, payment would, in the ordinary course, be provided for in Ontario, where Sir Clifford Sifton resided in his lifetime, and where on his death his legal personal representative in Ontario would be entitled to receive payment; and, in the last mentioned event, nobody would be entitled to take possession of it in Ontario for the purpose of presenting it for payment but such legal personal representative. Moreover, on fulfilment of the

(1) [1899] A.C. 62.

conditions entitling the holder of the bond to enforce payment directly against the company, the debt would be "properly recoverable," in every sense, in Ontario.

Furthermore, the primary right of the holder of the bond, on default, is not to enforce the obligation directly against the company, it is to call upon the trustees to proceed on behalf of the holders of all the outstanding bonds. That right would appear to be a right primarily exercisable and situate in New York where the trustees are.

Again, in the event of default continuing for sixty days, the trustees are entitled to require payment to themselves in New York. The rights of the trustees could be asserted in Ontario or in New York as well as in Quebec.

It is unnecessary, therefore, for the purpose either of transfer or of collection, to resort to the province of Quebec, while for the purpose of asserting the holder's primary rights in case of default, resort to the trustees in New York is necessary, and, for the purpose of getting possession of the bond, probate or administration in Ontario, in the event of death, is necessary.

The question before us is a question as to the locality of certain assets of the estate of the testator. These assets are guaranteed bonds. In assessing the assets to succession duty, no attempt has been made, and probably such an attempt would be merely idle, to segregate the value of the obligation of the company from the value of the obligation of the Government, as an asset. In point of fact, the company was empowered only to issue a guaranteed bond, the payment of which was charged upon the Consolidated Revenue Fund. In view of the considerations just mentioned, it seems to be difficult to assign one situs to the bond as guarantee and another to the simple contract obligation of the company. There is a sense in which it may be said that the obligation of the company, if that obligation had a separate situs in Quebec, would receive its value from the fact that it is guaranteed by a statutory charge and that the situs of this charge is *non ad rem;* but the value derived from the statutory charge is nevertheless a value primarily attaching to something in Ontario; and, at the date of the event which happened, the event on which succession duties became payable, viz., the death of Sir Clifford Sifton, this thing was part of the *bona notabilia* of

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his estate in Ontario, and could not rightfully be taken possession of or realized except by an executor or administrator acting under the sanction of Ontario law.

For these reasons it seems to be the more conformable to the rules determining the situs of *bona notabilia* from which the principles by which we are governed are derived, to hold that this asset had not a situs in Quebec.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Charles Lanctot.*

Solicitors for the respondent: *Casgrain, Weldon, Demers & Lynch-Staunton.*

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*Nov. 10.
*Nov. 15.

WILLIAM McLEAN ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

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

Criminal law—Murder—Jury—Proper instructions as to circumstantial evidence—Prospective jurors—Examination on voir dire—Not given under oath—Mention by the trial judge as to the possibility of executive clemency.

The appellant was convicted of murder and sentenced to be hanged. Upon appeal the conviction was affirmed, McGillivray J. dissenting. The questions of law upon which the latter based his dissent are: (1) that the trial judge failed to give to the jury a proper direction with respect to the law relating to circumstantial evidence; (2) that his ruling with respect to the questions permitted to be asked of the prospective jurors on their examination on the *voir dire* was erroneous and that the examination was not under oath—the alleged error was that, although the trial judge allowed the accused to ask each juror challenged for cause, if, from what he had heard or read, he had formed an opinion on the case to be tried, he refused to allow a further question as to the nature of that opinion—; and (3) that the direction of the trial judge to the jury respecting the possibility of executive intervention was, as given, insufficient.

Held that the appeal should be dismissed.

On the first point, this Court is of the opinion that the accused had no substantial ground of complaint, taking the charge to the jury as a whole, although the trial judge could have given a more proper direction to the jury as to the circumstantial evidence. There is no single formula which it is the duty of the trial judge to employ; but as a

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon, Crocket and Hughes JJ.

rule he would be well advised to adopt the language, or its equivalent, of Baron Alderson, in the *Hodge* case (2 Lewin C.C. 227): the trial judge should instruct the jury that, in so far as they relied upon circumstantial evidence in the case before them, they must be satisfied not only that the circumstances proved were all consistent with the guilt of the accused, but also that they were inconsistent with any other rational conclusion.

On the second point, this Court is of the opinion that the accused had a fair trial. Whether the accused had a right to have the question, which the trial judge disallowed, put to the jurors, it is unnecessary to determine, for, assuming that he had, he had suffered no prejudice by the trial judge's refusal. As to the objection that the juror witnesses were not sworn, *held* that it was the duty of the accused, as the challenging party, to see that the witnesses he called to support the challenge were properly sworn.

On the third point, although the reference to the executive clemency was an unfortunate one, this Court is satisfied that no harm has been done to the accused, if the trial judge's instructions to the jury are taken as a whole.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Alberta, dismissing his appeal by a majority of the Court from his conviction by Ewing J. and a jury, for murder.

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

E. F. Newcombe K.C. and *Neil Primrose* for the appellant.

J. J. Frawley for the respondent.

The judgment of the Court follows:

THE COURT:—The appellant was convicted of the murder of Walter James Parsille, near Manville, Alberta, and sentenced to be hanged. Upon appeal the conviction was affirmed by the Appellate Division of the Supreme Court of Alberta (McGillivray J. dissenting).

The questions of law upon which McGillivray J. based his dissent, and to which we are confined in this appeal, are set out in the formal judgment of the court as follows:

(1) That the learned trial judge failed to give to the jury a proper direction with respect to the law relating to circumstantial evidence.

(2) That his ruling with respect to the questions permitted to be asked of the prospective jurors on their examination on the voir dire was erroneous and that the examination was not under oath.

(3) That the direction of the learned trial judge to the jury respecting the possibility of executive intervention was, as given, insufficient.

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(1) The respect in which the learned judge's charge is said to be insufficient as a proper direction to the jury is that he did not instruct them that, in so far as they relied upon circumstantial evidence in the case before them, they must be satisfied not only that the circumstances proved were all consistent with the guilt of the accused, but also that they were inconsistent with any other rational conclusion. This is the rule laid down by Baron Alderson as far back as the *Hodge* case (1), and it has ever since been recognized as a proper direction to jurors.

It is of last importance, we do not doubt, where the evidence adduced by the Crown is solely or mainly of what is commonly described as circumstantial, that the jury should be brought to realize that they ought not to find a verdict against the accused unless convinced beyond a reasonable doubt that the guilt of the accused is the only reasonable explanation of the facts established by the evidence. But there is no single exclusive formula which it is the duty of the trial judge to employ. As a rule he would be well advised to adopt the language of Baron Alderson or its equivalent.

One most important element in the case advanced against the appellant was the evidence of one Ward. The accused, Ward deposed, admitted to him when they were in gaol together in Knoxville, Tennessee, that he (the accused) and his father, having decided to rob the deceased Parsille, decided also, in order to avoid a possible subsequent recognition of them by the deceased, that it would be necessary to kill him. This design, according to the statement of the accused as recounted by Ward, was carried out and the deceased was shot by the father in the presence of the son.

The learned trial judge did not explicity tell the jury that they ought not to convict the prisoner unless they believed the testimony of Ward, but, on the other hand, he did not explicitly tell them that it would be open to them to find a verdict against the accused if they disbelieved Ward. As to this there are, first of all, these three relevant sentences:—

> It may be that in the trial of a criminal charge there are facts or sets of facts which are very suggestive but which if standing alone would fall far short of being sufficient to establish the guilt of the accused beyond

(1) (1838) 2 Lewin C.C. 227.

any reasonable doubt. But it may also be that there are facts or sets of facts in sufficient number and of sufficient cogency which combined may amount to proof beyond all reasonable doubt. Such facts or sets of facts if appearing in sufficient numbers and of sufficient force may prove beyond all reasonable doubt not only that the accused committed the offence but that on no other reasonable hypothesis could anyone else have committed it.

If these sentences contain a suggestion that the jury might find a verdict of guilt without regard to Ward's testimony, then they seem also to convey, pretty clearly, the caution that, if they should proceed upon the circumstantial evidence alone, they must be satisfied beyond reasonable doubt that the only rational conclusion, consistent with the facts proved, was that the accused was guilty. But the final sentence of the learned judge's remarks on this subject is this:

> You will weigh all the evidence in this case including all these statements alleged to have been made to Ward and if you believe them to have been made and if you believe them to be true you will say whether or not they satisfy you beyond all reasonable doubt of the guilt of the accused.

We think that this sentence, when read with the learned judge's exposition of the facts and the evidence in the earlier part of his charge, would be calculated to convey to the jury the impression that their verdict ought to turn chiefly, if not entirely, upon their belief or disbelief of the testimony of Ward and of the truth of the statement of fact which, according to Ward's account, was made to him by the accused.

We are satisfied that the accused has no substantial ground of complaint under this head.

(2) The error alleged in the judge's ruling as to the questions which might be put to prospective jurors on their examination on the voir dire was, that, although the judge allowed the accused to ask each juror challenged for cause, if, from what he had heard or read, he had formed an opinion on the case to be tried, he refused to allow a further question as to the nature of that opinion.

The accused had challenged several jurors for cause, and the challenges were tried. In the case of three jurors the triers found against the challenge and declared the jurors indifferent. In each such case the accused challenged peremptorily. When the full complement of jurors had been sworn the accused had one peremptory challenge left, and he had a jury, every man of which the accused, through

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his counsel, had expressly declared to be unobjectionable. Notwithstanding this the accused now contends that he had a right to put to each of these jurors the question which the learned judge disallowed, and that, as his rights were denied him, he is entitled to a new trial.

We are fully conscious that in the administration of criminal justice nothing is more important than that the constitution of the jury should be free from all objection and that the accused should have the full advantage of every safeguard which the law has provided to enable him to secure this right, which is of the very essence of a fair trial. We, however, think that the accused had a fair trial. Whether the accused had a right to have the question, which the trial judge disallowed, put to the jurors, it is unnecessary to determine, for, assuming that he had, he has suffered no prejudice by the judge's refusal. By his own act in peremptorily challenging these jurors, he elected to pursue that remedy instead of having the question of their indifference as between himself and the King determined by way of challenge for cause. This was held in the case of *Whelan* v. *The Queen* (1). In that case the accused desired to challenge for cause one S., one of the jurors called. The judge ruled that he must first exhaust his peremptory challenges. In deference to the judge's ruling the accused challenged S. peremptorily. Afterwards, having exhausted his twenty challenges, including S., he claimed the right to challenge peremptorily one H. on the ground that he had been compelled to challenge S. peremptorily and should not be obliged to count him as one of the twenty. It was held that the trial judge was wrong in ruling that the accused must exhaust his peremptory challenges before challenging for cause and that if S. had been sworn there must have been a *venire de novo*, but it was also held that by the peremptory challenge of S., which excluded him from the jury, the error in the judge's ruling was nullified. As to H. the objection could not be maintained because the accused had, in fact, twenty peremptory challenges. That judgment was given by a very strong court and, in our opinion, the point was rightly determined, and governs the objection now under consideration.

(1) 28 U.C.Q.B. 108.

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In reference to the further objection that these juror witnesses were not sworn, it is sufficient to point out that it was the duty of the accused, as the challenging party, to see that the witnesses he called to support the challenge were properly sworn.

As to the third ground of objection, the passage in question is in these words:—

> You need not concern yourselves with the penalty that is attached to this or to any offence. It does not follow that because a man is convicted on a capital charge that he will necessarily be hanged. It is true that the Criminal Code of Canada makes it incumbent upon the Court to pronounce the sentence of death but the responsible officers of the Crown may in their wisdom if they see fit commute that sentence. In any case that responsibility is theirs and not yours or mine. The oath which you have taken calls upon you to decide this case upon the evidence which you have heard from this witness box and upon nothing else. And I need scarcely add you need have no moral fear about doing your duty whether that duty leads you to conviction or to acquittal.

We have no doubt that the reference to the executive clemency was an unfortunate one. There was not the least ground for supposing that a verdict against the accused founded on the evidence adduced and on a proper charge would be interfered with. Such a reference could not assist the jury in performing their duty to decide the issue of fact before them, and there is always some risk that a suggestion that the verdict is to be reviewed may result in some abatement of the deep sense of responsibility with which a jury ought to be brought to regard their duty in passing upon any criminal charge, and, preeminently, when the offence charged is murder, to which the law attaches the capital penalty. Such observations as those addressed to the jury by the counsel for the defence can always, if they seem likely to be harmful, be counteracted without resorting to suggestions which may mislead the jury into a misconstruction of their own duty.

In this case, however, we are satisfied that no harm was done. There is, first, the immediate context of the impeached observations; which in itself was perhaps sufficient to counteract the effect of those observations. But, however that may be, the learned judge's observations, as a whole, were admirably calculated to impress upon the jury a sense of the duty, with which they were charged, to examine for themselves, and to bring to the test of their own judgment, all the matters submitted to them; and the con-

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text of the two sentences of which the accused complains must, we are satisfied, have made it quite clear to the jury that those sentences were not intended to qualify the instructions already given to them, or to modify the impressions they must have received from what had already been said.

The appeal will therefore be dismissed with costs.

Appeal dismissed.

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*Oct. 23.
*Nov. 15.

SAMUEL REINBLATT ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

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

Criminal law—Appeal—Jurisdiction—Formal judgment of appellate court —Mere mention of dissenting opinion—Not specifying grounds of dissent—Section 1023 Cr. C.—Subsection 6 of section 1013 Cr. C.—21-22 Geo. V, c. 28, s. 14.

The appellant was convicted under subsection (*a*) of s. 415 Cr. C. Upon appeal, the conviction was affirmed by a majority of the Court, the dissent of one judge being merely mentioned in the formal judgment. Under a recent amendment (s. 14 of c. 28 of 21-22 Geo. V), subsection 6 was added to s. 1013 Cr. C. providing that, in case of a dissenting opinion, the formal judgment should specify the grounds in law on which such dissent was based. The Crown contended that, owing to the failure of the appellate court so to specify the grounds of dissent, an appeal to this Court was not open to the appellant.

Held that this Court had jurisdiction to entertain this appeal. The only section of the Criminal Code dealing with the jurisdiction *de plano* of the Supreme Court of Canada is section 1023, under which the fact that there has been a dissent on a question of law is the sole condition for the foundation of its jurisdiction: the circumstance that the grounds of dissent are not specified in the formal judgment of the appellate court does not avoid the fact of there having been a dissent, which is the only requirement contained in section 1023 Cr. C.

APPEAL by the defendant from the judgment of the Court of King's Bench, appeal side, province of Quebec, dismissing his appeal by a majority of the Court from his conviction by the Court of King's Bench, criminal side.

The appellant was convicted of the following offence: Being president and general manager of a company called

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Hughes JJ.

Rayon Trimmings Limited, which company had been declared insolvent and was being wound up, he has, during the year preceding the winding up order of the company, committed the following indictable offence, to wit: "Acting in his capacity of president and general manager, with intent to defraud, he did destroy, alter, mutilate and/or falsify the books, papers, writings, valuable securities and documents belonging to the Rayon Trimmings Limited, and/or concur in the same being done." This is an offence against subsection (*a*) of section 415 of the Criminal Code. The accused had also been found guilty of an offence under section 417 of the Criminal Code, but his appeal was unanimously allowed on this last conviction by the appellate court. The Crown contended that the appeal to this Court should be dismissed, because the judgment of the appellate court was not rendered in accordance with section 1013 of the Criminal Code as amended. In 1931, 21-22 Geo. V, c. 28, s. 14, subsection (6) was added to 1013 of the Criminal Code reading as follows: "Whenever an appeal under this section is dismissed by the Court of Appeal, and any judge of such Court expresses an opinion dissenting from the judgment of the Court, the formal judgment of the Court shall specify any ground or grounds in law on which such dissent is based either in whole or in part."

The formal judgment of the appellate court did not specify the grounds in law on which the Honourable Judge Howard was dissenting: it merely stated that Howard J. was dissenting.

On the appeal to this Court, it was held that the Supreme Court of Canada had jurisdiction to entertain the appellant's appeal. On the merits of the appeal this Court held that there was evidence on which it could well be found that the appellant was guilty.

Lucien Gendron K.C. and *Moses Doctor* for the appellant.

Gérald Fauteux K.C. for the respondent.

The judgment follows:

THE COURT:—The appellant was convicted under subsection (*a*) of section 415 of the Criminal Code.

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Upon appeal, the conviction was confirmed by the majority of the Court of King's Bench, but Mr. Justice Howard dissented. In the formal judgment of the Court, the dissent is merely referred to as follows:

> This is the judgment of this Court, Mr. Justice Howard dissenting.

Under a recent amendment (sec. 14 of s. 28 of 21-22 Geo. V), the following subsection was added to section 1013 of the Criminal Code:

> (6) Whenever an appeal under this section is dismissed by the Court of Appeal and any judge of such court expresses an opinion dissenting from the judgment of the court, the formal judgment of the court shall specify any ground or grounds in law on which such dissent is based either in whole or in part.

In this case, the formal judgment does not specify the grounds on which the dissent of Mr. Justice Howard is based, and the Attorney-General, invoking former judgments of this Court (*Davis* v. *The King* (1); *Gouin* v. *The King* (2), and *De Bortoli* v. *The King* (3)), contends that, owing to the failure so to specify the grounds of dissent, an appeal to the Supreme Court of Canada was not open to the appellant.

We are of opinion that such contention cannot be upheld. The only section of the Code dealing with the jurisdiction *de plano* of the Supreme Court of Canada is section 1023. It gives to

> any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section 1013 (the right of appealing) against the affirmance of such conviction on any question of law on which there has been dissent in the Court of Appeal.

The fact that there has been dissent on a question of law is therefore the only requirement.

In the *Davis* case (1) and in the others referred to by the Crown, upon the state of the law as it then was, no dissenting judgment could be legally pronounced, unless the court of appeal directed to the contrary, and unless the direction was plainly "evidenced by the order of the Court" (*Gouin* v. *The King* (4)); and this Court held that dissenting opinions expressed contrary to the prohibition of the statute should be treated as non-existent—the consequence being that there was to be found, in the record, no dissent as a result of which the right of appeal could operate under section 1023 of the Code.

(1) [1924] S.C.R. 522.
(2) [1926] S.C.R. 539.
(3) [1927] S.C.R. 454.
(4) [1926] S.C.R. 439, at 540.

But the restrictions to the power of a judge of the court of appeal to pronounce a dissent have been removed. The cases relied on by the Attorney-General therefore no longer apply. The new enactment does not forbid a dissent from being expressed without leave of the Court; and the circumstance that the grounds of dissent are not specified in the formal judgment of the court does not avoid the fact of there having been a dissent,—which remains the sole condition for the foundation of our jurisdiction, provided the dissent was in respect of a question of law.

Here, the ground of Mr. Justice Howard, the dissenting judge, is that there was no evidence whatever upon which the trial judge could convict. This raises a question of law; and the effect was, by force of section 1023, to give the appellant a right of appeal to this Court. The objection to our jurisdiction therefore must fail.

When, however, we turn to the examination of the matter, we are clearly of opinion that there was evidence on which it could well be found that the accused was guilty.

We do not lose sight of the point submitted by counsel for the appellant that the evidence was wholly circumstantial, and that this would be a case where the well known rule laid down by Baron Alderson would apply (*Hodge's case* (1)). Bearing that in mind, we think the evidence

(1) 2 Lewin's Crown Cases, p. 227.

was of such character that the inference of guilt of the accused might and could legally and properly be drawn therefrom. That is sufficient to dispose of the appeal on the question of law raised by the dissenting opinion of Mr. Justice Howard. The further question whether guilt ought to have been inferred in the premises was one of fact, with which we are not concerned here.

For these reasons, the appeal should be dismissed.

Appeal dismissed.

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70887—3

CONDITIONAL SALE — *Bill of sale—Validity as against trustee in bankruptcy—Trust—Estoppel.*] Respondent, as trustee in bankruptcy of an automboile dealer in Ontario, disputed the right claimed by appellant, as vendor to the dealer under conditional sale agreements, in certain automobiles, in stock on the dealer's premises at the time of the assignment in bankruptcy. Two of the automobiles, Viking cars, had been ordered by the dealer from the maker, and shipped to the dealer by freight, the bills of lading being sent to a bank with draft for price attached, so that the dealer could get possession by payment of the draft. The dealer, having ascertained the serial numbers of the cars, executed an "indenture," in reality a bill of sale, purporting

CONSTITUTIONAL LAW—*Continued*

the regulations of March, 1910 and 1911 (made under authority of the *Dominion Lands Act*, 1908, c. 20), of a tract of land in the Turner Valley gas field, in the province of Alberta, for the purpose of mining and operating for petroleum and natural gas. Sec. 2 of the agreement between the Dominion and the Province, dated December 14, 1929 (respecting transfer to the Province of public lands, etc.; and which agreement was confirmed and given "the force of law" by the *B.N.A. Act*, 1930, c. 26) provides that "the Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise" except with consent or "in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province * * *." In 1932 (c. 6) the Province passed the *Turner Valley Gas Conservation Act*, the broad purpose of which was to reduce the loss of gas in the said field by burning as waste, and which subjected a lessee's operations to the control of a Board whose duty it was to limit the production of natural gas, in the said field, and from any particular well by reference to the amount of naphtha the well ought, in the Board's opinion, to be permitted to produce.—*Held*: The said Act of the Province "affected" the "terms" of the lease and of similar leases made under said regulations, within the meaning of s. 2 of said agreement (and did not come within the exceptions in said s. 2), and was, in so far as it affected such leases, incompetent. (Judgment of the Appellate Division, Alta., [1932] 3 W.W.R. 477, [1932] 4 D.L.R. 750, reversed in this respect).—The Act "affected" the lease, notwithstanding that the lease required the lessee to work the mines "in such manner only as is usual and customary in skilful and proper mining operations of similar character when conducted by proprietors themselves on their own lands." Conforming to such standard of working did not require following methods dictated by considerations of public policy, as contradistinguished from the interests of proprietors as proprietors.—Sec. 29 of the Dominion regulations of 1928 (published in 1930), which (among other provisions) required a lessee to take precautions against "waste" of natural gas, did not apply to the lease in question. The rule that a legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main* v. *Stark*, 15 App. Cas. 384, at 388), unless the language in which it is expressed requires such a construction, operated against such application; the Order in Council bringing s. 29 into force contained nothing in its language to indicate that s. 29 was intended to take effect upon the mutual rights of lessors and lessees arising under the terms of leases granted pursuant to the regulations of 1910 and 1911. Neither the terms of the lease itself, nor the regulations of 1910 and 1911, justified a construction by which s. 29 was made to constitute a part of the contract. But even assuming that s. 29 applied, it afforded no escape from the conclusion that the terms of the lease were disadvantageously "affected" by the provincial Act; whatever might be the exact effect of such a requirement against "waste" (if it applied to the lease), the provincial Act, limiting arbitrarily the gross production of the field, and subjecting the lessee, in respect of the production of gas, to the "uncontrolled discretion" (s. 13 of the Act) of an administrative Board, in this respect radically altered the status of the lessee under the terms of his lease.—Sec. 2 of said agreement between the Dominion and the Province precluded the Province from legislating in such a way as to "alter" or "affect" any "term of any such lease," irrespectively of any possibility that such legislation might be of such a character as to fall under powers of legislation possessed by the Province prior to the agreement. But, further, had the provincial Act in question been passed prior to the agreement, and while the public lands were still held by the Dominion, it would have been inoperative, as regards such leases as that in question, on the grounds (1) that it was repugnant, in so far as it affected tracts leased under the regulations of 1910 and 1911, to those regulations, and the Dominion statute under which they were promulgated; and (2) that, in so far as it authorized the Board to make regulations (taking effect by orders of the Board which were given statutory force) concerning the production of natural gas and naphtha from lands held under lease from the Dominion for the purpose of working them for the production of those minerals, it was legislation strictly concerning the public property of the Dominion (reserved for the exclusive legislative jurisdiction of the Dominion by s. 91 (1) of the *B.N.A. Act*, 1867).—*Held* also (agreeing in this respect with the judgment of the Appellate Division, *supra*): The Act of the province could not be said to be invalid on the ground that, as a whole, it dealt with matters falling strictly under s. 91 (2) (regulation of trade and commerce), or, at all events, with matters outside the scope of s. 92, of the *B.N.A. Act*, 1867.

CONTRACT—*Continued*

Tacit renewal—Arts. 1642, 1667, 1668, 1670 *C.C.*] The respondent alleged a verbal contract of lease or hire of his services as Assistant Manager of the appellant company "at an annual salary of $6,000 *per annum* dating from 1st of May, 1927, payable $500 a month" with the free use and occupancy of a dwelling house belonging to the company; and he further alleged that this oral agreement had been confirmed by a letter from the president of the company, dated 5th May, 1927, as follows: "Mr. Cook has agreed to join us on the conditions mentioned at $6,000 *per annum*, and use of Penhale's house." The appellant company alleged the oral agreement was for hire from month to month; but the only evidence tendered on either side was the letter of the 5th of May. The respondent continued in the discharge of his duties until the 31st August, 1929, when he was dismissed and paid $1,875, being his salary to that date plus three months' pay in lieu of notice. The respondent then brought an action claiming the balance of his salary up to the 1st of May, 1930, on the ground that he was entitled to his salary up to the end of the current year.—*Held*, Anglin C.J.C. and Cannon J., dissenting, that the respondent was not entitled to the surplus of salary claimed by him.—*Held*, also, that the respective claims of the parties must be determined by the terms of the letter, as no other evidence had been adduced. According to its literal meaning, a contract of lease or hire of personal services at so much per year or month is not a contract for a fixed term but one for an indeterminate period; and there is no provision in the Civil Code to the effect that a contract of hire of personal services, whose duration has not been agreed upon, will be deemed to have been made for one year when the salary has been fixed at so much per year. Article 1642 of the Civil Code, relating to the lease or hire of houses, is not applicable to lease or hire of personal services.—Anglin C.J.C. (dissenting) was of the opinion that, under the circumstances of the case, a new trial should be ordered.—*Per* Cannon J. dissenting.—According to the terms of the letter coupled with the circumstances of the case fully detailed in the reasons for judgment, the engagement of the respondent's services by the appellant company was for a term of one year; and such contract had been continued from year to year by tacit renewal. ASBESTOS CORPORATION LTD. *v.* COOK **86**

2 —— *Construction — Claim, under agreement, to possession and control of theatre property—Claimant suing his assignors' trustee in bankruptcy for damages for dispossession by trustee—Nature, purpose and effect of the agreement, and extent of claimant's rights and security thereunder—Bankruptcy Act, R.S.C.*, 1927, *c.* 11, *ss.* 64, 54—*"Change of possession" of chattels (Bills of Sale Act, Alta.*, 1929, *c.* 12, *s.* 2 (*b*)). Appellant, claiming that he was entitled to possession and control of theatre property under an agreement with B. & H., and that respondent, to whom B. & H. had made an assignment under the *Bankruptcy Act*, had wrongfully dispossessed him, sued respondent for damages.—*Held* (affirming, Crocket J. dissenting, the judgment of the Appellate Division, Alta., 26 Alta. L.R. 393): On construction of the agreement, appellant's personal interest in the equitable interest assigned by the agreement to him was, at most, to hold it as his security for the 5% of the gross receipts which he was to receive for his wages as manager. His contract for services as manager ended with the assignment in bankruptcy. He would have no right to retain possession of the property to enforce a contract for personal services (*Stocker* v. *Brocklebank*, 20 L.J. Ch. 401; *Frith* v. *Frith*, [1906] A.C. 254); his only remedy being an action for damages for breach of contract (*Ogden* v. *Fossick*, 4 DeG. F. & J. 426). (As to provision made in the agreement for the payment of a debt of B. & H. to one Hoar (who was not a party to the agreement or the action)—it was very doubtful if that provision made the property in appellant's hands a security for that debt. Appellant, who was suing only for his own personal damages, could not rely on any rights of Hoar. Moreover, if the agreement and transfer was to secure Hoar's account, it was for that purpose fraudulent and void as against respondent). Appellant, after the assignment in bankruptcy, had no personal right to possession, either of the realty or chattels. Further, as to the chattels, there was not such a "change of possession" as defined by the *Bills of Sale Act*, Alta.; moreover, respondent was protected by the provisions of s. 54 of the *Bankruptcy Act*.—*Per* Crocket J. (dissenting): The agreement was not essentially a contract for personal services. Its terms, as well as the whole evidence as to the acts and conduct of the parties under it, indicated rather that its main purpose was to vest in appellant all the title and interest of B. & H. in the property, and to transfer to him the actual possession and complete control thereof, in order that the business might be placed on a profitable basis in the interest and for the benefit of both parties. If appellant was in any sense an agent of B. & H. under the agreement, it was an agency created to secure some benefit to him beyond his mere remuneration as agent, and therefore an agency irrevocable until its purposes were fulfilled. B. & H. had no right to

a jury's verdict of acquittal of appellant on a charge of murder, and ordering a new trial, was affirmed, on the ground that the trial judge charged the jury in such a way as to give the impression that they should not convict on the uncorroborated evidence of an accomplice and, unless they found corroborative evidence, their duty was to acquit; that this was a misdirection in law; and, under the circumstances, probably had a material effect upon the jury's minds.—The jury should be told that it is within their legal province to convict, but should be warned that it is dangerous to convict, and may be advised not to convict, on the uncorroborated evidence of an accomplice. *Rex* v. *Baskerville* [1916] 2 K.B. 658; *Rex* v. *Beebe*, 19 Cr. App. R. 22; *Gouin* v. *The King*, [1926] Can. S.C.R. 539, and other cases referred to.—Crocket J. took also the ground that the trial judge erroneously refused to allow a certain ballistic expert witness to state his opinion as to whether or not the bullet which caused the death had been fired from the revolver produced. (Rinfret, Lamont and Smith JJ., while holding that the trial judge's ruling out was wrong, were of opinion that, in view of later evidence from the same witness, the ruling out had not much effect.)—Rinfret, Lamont and Smith JJ. held that the trial judge had rightly refused to allow the evidence of a certain witness as to certain letters being in appellant's handwriting, as the witness' competency to testify in that regard had not been established; a witness may be competent to testify as to a person's handwriting by reason of having become familiar with his handwriting through a regular correspondence; but in the present case the evidence to establish competency did not shew sufficient to constitute a "regular correspondence." PITRE *v.* THE KING..... **69**

2 —— *Jurisdiction — Conflict of decisions —Seditious words—Joint indictment— Criminal Code, R.S.C.*, 1927, *c.* 36, *sections* 133, 133*a enacted by* 20-21 *Geo. V., c.* 11 *and* 134 *re-enacted by* 20-21 *Geo. V., c.* 11. CHALMERS *v.* THE KING..... **196**

3——*Appeal—Leave to appeal to Supreme Court of Canada—Court of appeal judgment conflicting with judgment of another court of appeal in like case—Both judgments not necessarily in similar cases, but upon similar questions of law—Section* 1025 *Cr. C.*] In order to obtain leave to appeal to the Supreme Court of Canada in a criminal case under section 1025 Cr. C., it is not necessary that the judgment from which it is sought to appeal and that of any other court of appeal should have been rendered in cases in all respects the same; but there should be a conflict between the two judgments upon a question of law similar in both cases.—*Barré* v. *The King* ([1927] S.C.R. 284) foll.; *The King v. Boak* ([1926] S.C.R. 481) and *Liebling* v. *The King* ([1932] S.C.R. 101) ref. THIFFAULT *v.* THE KING **242**

4——*Statements made by accused in the presence of several police officers, who were not produced as witnesses—Admissibility in evidence of such statements—Inquiry by trial judge as to voluntary character of— Not a mere matter of discretion for trial judge—Declaration by accused as to previous arrest.*] The Court, reversing the judgment of the Court of King's Bench, appeal side, quashed a conviction for murder and granted a new trial, on the ground that a statement in writing alleged to have been made by the appellant to certain police officers has been improperly received in evidence upon his trial. *Sankey* v. *The King* ([1927] S.C.R. 436) foll. and *Rex* v. *Seabrooke* (58 C.C.C. 323) ref.—Determination of any question raised as to the voluntary character of a statement by an accused elicited by interrogatories administered by police officers is not a mere matter of discretion for the trial judge. Where such a statement is elicited in the presence of several officers, the statement ought, as a rule, not to be admitted unless (in the absence of some adequate explanation of their absence) those who were present are produced by the Crown as witnesses, at least for cross-examination on behalf of the accused; and, where the statement professes to give the substance of a report of oral answers given by the accused to interrogatories, without reproducing the questions, then the written report ought not to be admitted in evidence unless the person who is responsible for its compilation is (here again in the absence of some adequate explanation of his absence) called as a witness.—Upon the evidence, although the document was read over to the appellant before he signed it, it was not, in one most important particular, a correct statement of what the accused appellant said and intended to say. Moreover the statement made by the accused in this case contained a declaration that he had been once arrested "for a fight * * * and I had paid the costs." The fact that the accused had been arrested for a criminal offence and had paid "the costs" could not be competent evidence—not only on the ground that the fact itself would be in law wholly irrelevant, but on account of the unfair prejudice to the accused which would be the likely effect of the reception of evidence of it; and a document professing to embody admissions obtained as the admissions of the accused were in this

case, which included a record of an admission of a fact that would be inadmissible against him, and which was calculated to prejudice him, could not properly be received in evidence. It might in a proper case be used by a witness to refresh his memory; but the use of the document itself as evidence could not be justified. THIFFAULT *v.* THE KING.. **509**

5 —— *Murder — Jury — Proper instructions as to circumstantial evidence—Prospective jurors—Examination on voir dire—Not given under oath—Mention by the trial judge as to the possibility of executive clemency.*] The appellant was convicted of murder and sentenced to be hanged. Upon appeal the conviction was affirmed, McGillivray J. dissenting. The questions of law upon which the latter based his dissent are (1) that the trial judge failed to give to the jury a proper direction with respect to the law relating to circumstantial evidence; (2) that his ruling with respect to the questions permitted to be asked of the prospective jurors on their examination on the *voir dire* was erroneous and that the examination was not under oath—the alleged error was that, although the trial judge allowed the accused to ask each juror challenged for cause, if, from what he had heard or read, he had formed an opinion on the case to be tried, he refused to allow a further question as to the nature of that opinion; and (3) that the direction of the trial judge to the jury respecting the possibility of executive intervention was, as given, insufficient.—*Held* that the appeal should be dismissed.—On the first point, this Court is of the opinion that the accused had no substantial ground of complaint, taking the charge to the jury as a whole, although the trial judge could have given a more proper direction to the jury as to the circumstantial evidence. There is no single formula which it is the duty of the trial judge to employ; but as a rule he would be well advised to adopt the language, or its equivalent, of Baron Alderson, in the *Hodge* case (2 Lewin C.C. 227): the trial judge should instruct the jury that, in so far as they relied upon circumstantial evidence in the case before them, they must be satisfied not only that the circumstances proved were all consistent with the guilt of the accused, but also that they were inconsistent with any other rational conclusion.—On the second point, this Court is of the opinion that the accused had a fair trial. Whether the accused had a right to have the question, which the trial judge disallowed, put to the jurors, it is unnecessary to determine, for, assuming that he had, he had suffered no prejudice by the trial judge's refusal. As to the objection that the juror witnesses were not sworn, *held* that it was the duty of the accused, as the

challenging party, to see that the witnesses be called to support the challenge were properly sworn.—On the third point, although the reference to the executive clemency was an unfortunate one, this Court is satisfied that no harm has been done to the accused, if the trial judge's instructions to the jury are taken as a whole. MCLEAN *v.* THE KING.. **688**

6 —— *Appeal — Jurisdiction — Formal judgment of appellate court—Mere mention of dissenting opinion—Not specifying grounds of dissent—Section* 1023 *Cr. C.—Subsection* 6 *of section* 1013 *Cr. C.—*21-22 *Geo. V, c.* 28, *s.* 14.] The appellant was convicted under subsection (*a*) of s. 415 Cr. C. Upon appeal, the conviction was affirmed by a majority of the Court, the dissent of one judge being merely mentioned in the formal judgment. Under a recent amendment (s. 14 of c. 28 of 21-22 Geo. V), subsection 6 was added to s. 1013 Cr. C. providing that, in case of a dissenting opinion, the formal judgment should specify the grounds in law on which such dissent was based. The Crown contended that, owing to the failure of the appellate court so to specify the grounds of dissent, an appeal to this Court was not open to the appellant.—*Held* that this Court had jurisdiction to entertain this appeal. The only section of the Criminal Code dealing with the jurisdiction *de plano* of the Supreme Court of Canada is section 1023, under which the fact that there has been a dissent on a question of law is the sole condition for the foundation of its jurisdiction; the circumstance that the grounds of dissent are not specified in the formal judgment of the appellate court does not avoid the fact of there having been a dissent, which is the only requirement contained in section 1023 Cr. C.—REINBLATT *v.* THE KING..... **694**

7——*Proceedings under Immigration Act.* **36**

See IMMIGRATION 1.

8 —— *Crown — Immigration—Release of convict from prison prior to completion of term of sentence without his consent—Validity and effect—"Endured the punishment adjudged"* (*Cr. C., s.* 1078)*—Expiry of sentence or term of imprisonment within s.* 43 *of Immigration Act—Liability to deportation proceedings upon serving sentence or upon release from prison prior to expiry of term of sentence*..... **269**

See IMMIGRATION 2.

CROWN—*Goods seized as forfeited under the Excise Act—Section* 125*—Goods situated in leased premises—Whether subject to seizure and sale for rent—Art.* 1622 *C.C.—Immunity of the King from processual coercion in his own courts—Excise Act,*

EVIDENCE—*Continued*

that he was also justified in reaching the conclusion that the respondent had failed to establish his title. Crocket J. dissenting.—*Held*, also, Crocket J. dissenting, that the statements made by James and John Fitzgerald to the respondent, when the sale was being negotiated and they were trying to establish their title, would appear to be inadmissible, as having been made in favour of interest and at a time when, in the circumstances of the case, the title itself and the question of relationship had already become matters in controversy within the principle of the rule stated below. At all events, the interest of James and John Fitzgerald was so obvious and of such a character as to entitle the Court to regard their declarations as destitute of evidentiary weight. Declarations as to pedigree made by deceased persons are receivable to establish the particular issue, provided they were made *ante litem motam* (i.e., "before the commencement of any controversy, actual or legal, upon the same point"), and provided the deceased are proved *aliunde* to be members of the family by extrinsic evidence. The declarant's relationship must be proved independently and cannot be established by his own statement. The rule must be understood in this sense, that the party on whom the onus lies to establish the affirmative of the issue and who, for the purposes of the issues, must show that A was in family relation with B (as, for example, in such cases as the present where the party seeks to establish a right to property through inheritance from B) must adduce some evidence that the declarant was "*de jure* by blood or marriage" a member of the family of B.—*Per* Crocket J. (dissenting).—The trial judge has erred in excluding the declarations of John and James Fitzgerald as evidence that they were grandsons of the original grantee from the Crown; and, when the whole record of the trial, including these declarations, is considered, the decision of the Appeal Division in favour of the respondent should be affirmed. The rule as to pedigree evidence, applicable to this case, is that any declaration made by a deceased person touching his own pedigree is *prima facie* admissible as proceeding from one who is presumed to possess competent knowledge of the matter of which he speaks, and that no interest, which falls short of constituting a *lis mota* or actual or legal controversy upon the precise question which is the subject-matter of such a declaration, will render it inadmissible. If it appears, either from the declaration itself or from any other evidence which may be tendered, that there was, before or at the time the declaration was made, such a controversy upon the particular fact of which the declaration speaks and which it is sought to prove by it, the declaration will not be received. PEJEPSCOT PAPER CO. v. FARREN..... **388**

EVIDENCE—*Continued*

2——*Criminal law—Statements made by accused in the presence of several police officers, who were not produced as witnesses—Admissibility in evidence of such statements—Inquiry by trial judge as to voluntary character of—Not a mere matter of discretion for trial judge—Declaration by accused as to previous arrest.*] The Court, reversing the judgment of the Court of King's Bench, appeal side, quashed a conviction for murder and granted a new trial, on the ground that a statement in writing alleged to have been made by the appellant to certain police officers has been improperly received in evidence upon his trial. *Sankey* v. *The King* ([1927] S.C.R. 436) foll. and *Rex* v. *Seabrooke* (58 C.C.C. 323) ref.—Determination of any question raised as to the voluntary character of a statement by an accused elicited by interrogatories administered by police officers is not a mere matter of discretion for the trial judge. Where such a statement is elicited in the presence of several officers, the statement ought, as a rule, not to be admitted unless (in the absence of some adequate explanation of their absence) those who were present are produced by the Crown as witnesses, at least for cross-examination on behalf of the accused; and, where the statement professes to give the substance of a report of oral answers given by the accused to interrogatories, without reproducing the questions, then the written report ought not to be admitted in evidence unless the person who is responsible for its compilation is (here again in the absence of some adequate explanation of his absence) called as a witness.—Upon the evidence, although the document was read over to the appellant before he signed it, it was not, in one most important particular, a correct statement of what the accused appellant said and intended to say. Moreover the statement made by the accused in this case contained a declaration that he had been once arrested "for a fight * * * and I had paid the costs." The fact that the accused had been arrested for a criminal offence and had paid "the costs" could not be competent evidence—not only on the ground that the fact itself would be in law wholly irrelevant, but on account of the unfair prejudice to the accused which would be the likely effect of the reception of evidence of it; and a document professing to embody admissions obtained as the admissions of the accused were in this case, which included a record of an admission of a fact that would be inadmissible against him, and

IMMIGRATION — *Aliens — Immigration Act, R.S.C.*, 1927, *c.* 93, *ss.* 41, 42, 21—*Complaint — Warrant — Examination by Board of Enquiry—Resolution for deportation—Appeal to Minister—Detention—Habeas corpus—Sufficiency of complaint—Examination of evidence.*] Each of the appellants was taken into custody under a warrant or order issued under s. 42 of the *Immigration Act* (R.S.C., 1927, c. 93), pursuant to a complaint, by the Commissioner of Immigration, expressed to be "made under section 41 of the Immigration Act and Regulations that (appellant) is a person other than a Canadian citizen, who advocates in Canada the overthrow by force or violence of the Government of Canada, the overthrow by force or violence of constituted law and authority and by word or act creates or attempts to create riot or public disorder in Canada." A Board of Enquiry found each appellant guilty of the acts alleged in the complaint and passed a resolution for his deportation. Each appellant appealed to the Minister of Immigration and Colonization, and also, before the Minister's decision, applied for discharge from custody under the *Liberty of the Subject Act*, R.S.N.S., 1923, c. 231, and obtained *ex parte* an order *nisi* in the nature of *habeas corpus* with *certiorari* in aid. To this order the Board made its return. Carroll J. refused the applications (5 M.P.R. 151), his decision was affirmed by the Supreme Court of Nova Scotia *en banc* (*ibid*), and appellants appealed to this Court.—*Held*: Appellants were entitled to apply to the court. Broadly speaking, every alien who has been admitted into and is actually in Canada and who has been taken into custody on a charge for which he may be deported, is entitled to the benefit of the writ of *habeas corpus* to test in court if his detention is according to law.—Appellants' detention was authorized under the *Immigration Act*, and their applications for release were rightly dismissed.—The complaint was sufficient, notwithstanding that it did not state the date when, or the particular place where, the acts charged had been committed. All that is necessary is that it makes known with reasonable certainty to the person against whom the investigation is directed his alleged conduct, in violation of the Act, to which objection is taken. (*Samejima* v. *The King*, [1932] Can. S.C.R. 640, distinguished). There is no analogy between a complaint under the *Immigration Act* and an indictment on a criminal charge (*The King* v. *Jeu Jang How*, 59 Can. S.C.R. 175, *Immigration Act*, ss. 33 (2) 42 (2), referred to). Moreover, the objection of insufficiency in the complaint was not open to appellants because (1) they did not challenge the return, which stated that the case was considered by a Board of Enquiry constituted under the provisions of the *Immigration Act*, and, under English law, the facts stated in a return to a writ of *habeas corpus* or order in lieu thereof are taken to be true until impeached; and (2) in the proceedings before Carroll J. and the Court *en banc* they did not question the regularity or sufficiency of the complaint or the warrant; and, before this Court, they stated they were not impeaching the validity of the warrant.—After the Board's decision, and pending the Minister's decision on the appeals to him, the appellants were lawfully detained under s. 21 of the *Immigration Act*.—The court was not entitled to examine the evidence as to its sufficiency to justify the Board's decision (*McKenzie* v. *Huybers*, [1929] Can. S.C.R. 38; *Samejima* v. *The King*, [1932] Can. S.C.R. 640, referred to). VAARO, WOROZCYT AND OTHERS *v.* THE KING..... **36**

2 —— *Crown — Criminal law—Immigration—Release of convict from prison prior*

while driving allowed his left elbow to protrude slightly from the open window to his left, the rack also struck his arm, which was severely injured. The trial judge found that the respondent's truck in crossing the bridge was as near the right railing as he could safely go, but that the real cause of the accident was the overhanging rack, of which the appellant's son had no knowledge, owing to fog and darkness. He found both drivers at fault, awarding ¼ of the fault to the appellant's son and ¾ to the respondent's employee. The majority of the Court of Appeal reversed this judgment on the ground that on the facts it was impossible to find negligence on the part of the respondents.—*Held*, reversing the judgment of the Court of Appeal (45 B.C.R. 234), Rinfret and Lamont JJ. dissenting, that the judgment of the trial judge should be restored. The respondents owed a special duty, under the circumstances of the case fully stated in the judgment, on a foggy night, to the appellant's son on account of the wide vehicle under his control and he should have used special care in approaching the narrow bridge.—*Per* Rinfret and Lamont JJ. dissenting. According to the finding of the trial judge, the respondent's employee was, at all times material to the action, "to the right from the centre of the travelled portion of the highway," as provided by section 19 of B.C. *Highways Act*; and the only way the collision could have happened was by the appellant's son driving over to respondent's side of the centre line. Therefore respondents cannot be held to have been in any way responsible for the collision. BALDWIN *v.* BELL. **1**

2——*Person struck by street car while crossing track in front of car, intending to board it—Liability of railway company—Jury's findings—Jury's apportionment of fault (The Negligence Act*, 1930, *Ont., c.* 27, *s.* 7).] Plaintiff sued for damages for injuries caused by her being struck by defendant's street car while she was crossing on a concrete walk traversing the defendant's double-tracked right of way from the north platform to the south platform at defendant's Ottawa Civic Hospital terminal station, intending to board the car. The station and tracks were in a field beyond the city limits. It was daytime. The car was going easterly. Passengers waiting at the station to return to the city were allowed to board cars from the south platform, when the cars stopped at the station, before proceeding east to turn west at a loop about 700 feet beyond the station. Plaintiff, before she reached the station, had seen the car coming and persons standing on the south platform. The jury found defendant negligent in not

having the car under proper control, and plaintiff negligent in not taking a second look before crossing, and apportioned the blame for the injuries, 90% to defendant and 10% to plaintiff. The trial judge, however, dismissed the action on the ground that there was no evidence upon which a reasonable jury could find for the plaintiff. His judgment was affirmed by the Court of Appeal, Ont., [1932] O.R. 389. Plaintiff appealed.—*Held* (reversing the judgments below): Plaintiff should have judgment in accordance with the jury's findings, which there was evidence to support.—As to defendant's negligence—It was not a question as to its motorman being under a duty to stop at the south platform or to expect that any person desiring to board his car for return to the city would be coming to the south platform; but a question whether, having regard to all the circumstances and conditions obtaining at the time and of which he was or should have been aware, he exercised due care in approaching and rushing through the station at the speed he did. There was clear evidence of negligence in his approaching and passing through the station at a speed which disabled him from exercising that degree of control which, under the circumstances, he should have been able to exercise for the reasonable safety of people whom he might have expected to be passing, as they had a right to do, over the walk to the south platform to board the car.—The jury's apportionment of fault (*The Negligence Act*, 1930, Ont., 20 Geo. V, c. 27, s. 7) must stand as the basis for the apportionment of the damages, the court not being prepared to hold that it was one which could not fairly and honestly be made in any reasonable view of the evidence. NIXON *v.* OTTAWA ELECTRIC RY. CO..... **154**

3——*Master and servant—Use of motor car—Disobedience—Act in course of employment—Master's liability—Distinction between "in the performance of the work" and "during the period of work"—Art.* 1054 *C.C.*] The appellant was receiving guests at dinner, at his home, on New Year's eve. One C. had been invited with his wife, but she had been unable to come as she found the distance too great for walking. The appellant then offered to C. the use of his automobile to go and get her. C. took the car, but stopped on his way. One R.M., nephew of the appellant but not his employee as chauffeur or otherwise, happened to pass on the street where the car was parked, and, seeing nobody in charge, thought fit to notify his uncle by telephone. The appellant then gave the following instructions to his nephew: "Take my automobile and bring it back

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here immediately and don't go anywhere else." The nephew took the car, but, instead of bringing it back immediately to his uncle's home, he left the direct route towards it and drove off to a neighbouring town with friends. After having left them there, he started his return trip alone; and, on his way back, he overtook a sleigh driven by the respondent, hit it from the rear and upset all the passengers including the respondent's minor daughter, who had to be extricated from under the sleigh and suffered serious injuries. The accident occurred before R.M. had reached the intersection of the road which would have been the direct road between the place where the appellant's car was parked and the latter's home. The respondent's action in damages was maintained for $4,000 by the trial judge, which judgment was affirmed by the appellate court.—*Held*, reversing the judgment of the Court of King's Bench (Q.R. 52 K.B. 183), that the appellant was not liable, for, at the time of the accident, the appellant's nephew was not "in the performance of the work" which had been entrusted to him. (Art. 1054 C.C.).—In interpreting the meaning of the last paragraph of article 1054 C.C., it would be an error in law to assimilate to an offence committed by a servant or workman "in the performance of the work for which they are employed," a similar offence committed "during the period" of that work. *Plump* v. *Cobden* ([1914] A.C. 62) ref.—*Curley* v. *Latreille* (60 Can. S.C.R. 131), *Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* ([1923] S.C.R. 414), *Cox* v. *Hall* (Q.R. 39 K.B. 231), *Clermont Motor Ltd.* v. *Joly* (Q.R. 45 K.B. 265) and *Prain* V. *Bronfman* (Q.R. 69 S.C. 187) referred to and valuable comments made upon these decisions. MOREAU *v.* LABELLE **201**

4 —— *Dredging operations — Fishing net —Damages — Jurisdiction — Public work —Interference with navigation—Exchequer Court Act, section* 19 *(c)—Fisheries Act, s.* 33.] At Livingstone Cove, Nova Scotia, is a breakwater owned by the Crown to provide a shelter for boats of shallow draught. In this cove the respondent had set a salmon trap net under licence from the Department of Marine and Fisheries, the leader of the net being attached to the breakwater. Dredging operations were being carried on in the vicinity of the Department of Public Works under the supervision and direction of one of its officers. The tug A., hired by the Crown, whilst moving a loaded scow to the dumping grounds, came into contact with the respondent's net, seriously damaging it. The action is to recover the value or cost of repairing

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the net and the loss of its use for about one month.—*Held* that the Exchequer Court of Canada had jurisdiction to hear the case. According to the circumstances, the master and crew of the tug *A.*, the crew of the scow and the master and crew of the dredge were servants of the Crown acting within the scope of their "duties or employment" upon a "public work" within the meaning of section 19 (*c*) of the *Exchequer Court Act.*— *Held*, also, that the accident was attributable to the negligence of the servants of the Crown in the management of the tug and scow under the circumstances and conditions existing at the time of the accident, and that the respondent was entitled to damages for the injury caused to his net and damages for the loss of its use.—*Held*, further, that, upon the evidence, the respondent's net was not an interference with navigation within the meaning of section 33 of the *Fisheries Act.* That section should not be interpreted as relieving those in charge of any vessels of the duty to exercise due care to avoid damage to the property of others, whether that property constitutes an obstruction to navigation or not.—Judgment of the Exchequer Court of Canada ([1933] Ex. C.R. 1) affirmed. THE KING *v.* MASON **332**

5 —— *Tramway — Pregnant mother — Fall from car—Infant born with club feet— Right of infant to sue for damages after birth—Whether deformity of the child's feet resulted from accident to mother—Evidence —Reasonable inference—Jury's finding.*] The respondent's wife, being seven months pregnant, was descending from a tram car belonging to the appellant company when, by reason of the negligence of the motorman, she fell, or was thrown, from the car and was injured. Two months later she gave birth to a female child who was born with club feet. The respondent, as tutor to his child, brought an action against the appellant company, claiming that the deformity of the child was the direct consequence of the negligence of the appellant company by which the mother was injured. The action was tried with a jury who found in favour of the respondent and judgment for $5,500 was rendered accordingly, which was affirmed by a majority of the appellate court.—*Held*, Smith J. dissenting, that the judgment appealed from should be affirmed and the appeal dismissed.—*Held*, also, Smith J. dissenting, that there was sufficient evidence adduced at the trial to produce in the jury's minds a conviction that it was reasonably probable that the deformity of the child resulted as a consequence of the mother's injury, and, consequently, their verdict should not be disturbed. The fact that

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the appellant's fault caused the deformity of the child cannot, from the nature of things, be established by direct evidence. It may, however, be established by a presumption or inference drawn from facts proved to the satisfaction of the jury. These facts must be consistent one with the other and must furnish data from which the presumption can be reasonably drawn. It is not sufficient that the evidence affords material for a conjecture that the child's deformity may have been due to the consequences of the mother's accident. It must go further and be sufficient to justify a reasonable man in concluding, not as a mere guess or conjecture, but as a deduction from the evidence, that there is a reasonable probability that the deformity was due to such accident.—*Per* Smith J. (dissenting).—The evidence of the medical experts called on behalf of the respondent establishes that medical science has not yet discovered the cause of club feet and such evidence has merely put forward more or less plausible theories on that subject. Therefore, having regard to the scientific problem involved, there was no evidence sufficiently positive and definite upon which the jury could reasonably find as a fact that the child's club feet resulted from the injury to the mother.—*Held*, further, Smith J. dissenting, that under the civil law, a child, who suffers injury while in its mother's womb as the result of a wrongful act or default of another has the right after birth to maintain an action for damages for the injury received by it in its prenatal state.—*Per* Rinfret, Lamont and Crocket JJ.—The answer to the appellant's contention that an unborn child being merely a part of its mother had no separate existence and, therefore, could not maintain an action under article 1053 C.C., is that, although the child was not actually born at the time the appellant by its fault created the conditions which brought about the deformity to its feet, yet, under the civil law, it is deemed to be so if for its advantage. Therefore when it was subsequently born alive and viable it was clothed with all the rights of action which it would have had if actually in existence at the date of the accident. The wrongful act of the appellant produced its damage on the birth of the child and the right of action was then complete.—*Per* Cannon J.—The action in damages, and consequently the possibility of exercising it, has its existence from the date the injured person has suffered prejudice. In this case, the right of the infant child to claim damages was not entire before its birth. The child, while in its mother's womb, was not suffering any prejudice nor inconvenience and no complete right of action then existed.

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Right to damages was born at the same time as the child when the deformity was revealed and therefore the respondent's action was well founded in law.—*Per* Rinfret, Lamont, Smith and Crocket JJ.—The great weight of judicial opinion in the common law courts denies the right of a child when born to maintain an action for pre-natal injuries; *per* Rinfret, Lamont and Crocket JJ., although it has been held that the doctrine, which regards an unborn child as born if for its benefit, had been adopted in England by the Ecclesiastical and Admiralty courts, and to some extent by the Court of Chancery. MONTREAL TRAMWAYS CO. *v.* LÉVEILLÉ **456**

6——*Automobile—Placed by owner at disposal of a friend—Accident—Patron momentané—Evidence—Declarations by the owner admitting his liability—Proof by the injured person.*] The respondent, who was vice-consul for Italy, and also a physician and surgeon, carrying on the practice of his profession in the city of Montreal, had amongst his patients the appellant. On the 17th December, 1928, the appellant required by telephone the services of the respondent during the course of the afternoon, but the respondent had some professional calls to make before he was free to call upon the appellant. The latter accordingly—as he had done on former occasions—placed at the disposal of the respondent his automobile, together with his chauffeur, in order that the respondent might make his other professional visits and then call at the appellant's residence. Between the hours of six and seven o'clock in the afternoon, the chauffeur of the appellant, in approaching from the south the subway under the Canadian Pacific Railway tracks over St. Denis street, drove the automobile against one of the steel uprights dividing the lane for vehicles of this nature from the lanes provided for the tramway lines, and as a result of the impact the respondent sustained serious injuries, for which he claimed damages from his friend and patient, the appellant. Before the trial, the appellant's counsel proceeded to the examination of the respondent on discovery (art. 286 C.C.P.); and the latter swore that the appellant admitted to him, in the presence of other witnesses, that the accident "was the chauffeur's fault" and that "he (the appellant) was liable * * * for the accident and its consequences." At the trial, the respondent merely proved the amount of damages and produced no further evidence as to the chauffeur's fault. The appellant's grounds of appeal were, first, that the record did not show any evidence that the accident was due to the fault of his chauffeur and, secondly,

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that the respondent, at the time of the accident, was the *patron momentané* of the chauffeur, and as such had no claim against the appellant.—*Held*, affirming the judgment appealed from, (Q.R. 54 K.B. 197), that the respondent's examination on discovery established sufficiently the existence of facts which explained the acknowledgment by the appellant of his liability, as sworn to by the respondent and which also fully justified the judgment appealed from in favour of the respondent. Such examination taken under the provisions of art. 286 C.C.P. forms part of the record under art. 288 C.C.P., it contains evidence of "aveux extra-judiciaires" by the appellant in which he admits his liability and his chauffeur's fault. These "aveux" were expressly alleged by the respondent in his statement of claim, and, as this is a case where parol evidence is admissible, they could be proved by the respondent under his oath.—*Held*, also, that the respondent was not, at the time of the accident the *patron momentané* of the appellant's chauffeur. The appellant had retained for himself the power and the right to give instructions to his chauffeur; and the respondent, being merely the appellant's guest in his car, had no control over the acts of the chauffeur. Under the circumstances of the case, there has been no transfer to the respondent of the appellant's control over the chauffeur's acts and of his power to give orders to the driver of the car. GRIMALDI *v.* RESTALDI 489

7 —— *Contributory negligence — Ultimate negligence—The Negligence Act*, 1930 (*Ont.*), *c.* 27—*Collision between motor vehicles—Jury's findings—Whether findings reasonably warranted by the evidence—Setting aside of verdict.*] A motor car driven by one of the plaintiffs, and in which the other plaintiff was riding, collided with the defendant's motor bus at a curve on a wet pavement. Plaintiffs claimed, and defendant counterclaimed, for damages. At the trial each party contended that the vehicle of the other had crossed the middle line of the road and caused the collision, and the evidence was largely directed to this issue. In answers to questions put to them, the jury found negligence in defendant's driver, causing the injuries to plaintiffs, in that "driver had been warned (this referring to a passenger's remark on seeing the motor car's approach) and might have applied brake sooner;" and also found negligence in plaintiff driver, causing the injuries to plaintiffs and damage to defendant, in that, "owing to the wet surface of road and worn condition of his front tires, he should have taken more precaution in making this

NEGLIGENCE—*Continued*

curve;" and found the degrees of negligence: plaintiff driver 70%, defendant 30%; in accordance with which judgment was given at trial (*The Negligence Act*, 1930, *Ont.*, *c.* 27). This judgment was varied by the Court of Appeal, Ont., which dismissed the plaintiffs' action and sustained defendant's judgment against plaintiff driver. Plaintiffs appealed. *Held* (Cannon and Crockett JJ. dissenting): Plaintiffs' appeal should be dismissed.—*Per* Rinfret, Lamont and Smith JJ.: The jury's finding of negligence against plaintiff driver was a finding that he did not exercise the care which a reasonable and prudent man would have exercised in the circumstances, and further, by implication, that the accident occurred on defendant's side of the road. By their answer as to defendant's negligence, the jury found in effect that, notwithstanding that through plaintiff's negligence his car crossed the middle line and went in front of the bus, the bus driver by applying his brakes more promptly could and should have avoided the accident. This was a finding of ultimate negligence, and, if supported by the evidence, left defendant responsible for the whole resulting damage. But the evidence did not reasonably warrant such a finding. (As to lack of time to act, *Swadling* v. *Cooper*, [1931] A.C. 1, at 10, referred to). The verdict against defendant could not be sustained and should be set aside (reference to *Can. Pac. Ry. Co.* v. *Fréchette*, [1915] A.C. 871, at 881).—*Per* Cannon J. (dissenting): The jury's findings were in effect that the negligent driving of both plaintiff and defendant's driver contributed (in the degrees mentioned) to cause the accident; and, upon the evidence, their verdict should not be set aside as unreasonable. (As to cases of contribution, *Admiralty Commissioners* v. *S.S. Volute*, [1922] 1 A.C. 129, at 144, cited). The judgment at trial should be restored.—*Per* Crocket J. (dissenting): The jury's finding against the defendant was a finding of ultimate negligence, and was reasonably warranted upon the evidence. But also the finding against the plaintiff driver was, on its face, a finding of ultimate negligence, and, but for the finding of ultimate negligence against defendant, a finding of either ultimate or contributory negligence against the plaintiff driver would have been reasonably supportable upon the evidence. The two findings (of the negligence in each which "caused" the injuries), upon the wording of the questions and answers, were contradictory, and both could not stand, either as findings of ultimate or of contributory negligence. (The law as to contributory negligence and ultimate negligence discussed). For above reason, and having regard to the direction,

STATUTES—*Continued*

STATUTES—*Concluded*

59——*R.S.Q.* [1925] *c.* 274, *s.* 6 (*Workmen's Compensation Act*)..... **548**
See WORKMEN'S COMPENSATION.

60——(*Que.*) 60 *Vict., c.* 52 (*repealing Arts.* 1323 *et seq., C.C., and replacing by other articles*)..... **162**
See COMMUNITY OF PROPERTY.

61——(*Que.*) 18 *Geo. V, c.* 17 (*amending Quebec Succession Duties' Act*)..... **670**
See CONSTITUTIONAL LAW 2.

62——(*Alta.*) 19 *Geo. V, c.* 12, *s.* 2 (*b*) (*Bills of Sale Act*)..... **115**
See CONTRACT 2.

63——(*Alta.*) 21 *Geo. V, c.* 32, *s.* 157 (*School Act*)..... **47**
See SCHOOLS 1.

64——(*Alta.*) 22 *Geo. V, c.* 6 (*Turner Valley Gas Conservation Act*)..... **629**
See CONSTITUTIONAL LAW 1.

65——*R.S.B.C.* [1924] *c.* 127, *s.* 34 (*Land Registry Act*)..... **411**
See ASSESSMENT AND TAXATION 6.

66——*R.S.B.C.* [1924] *c.* 254, *ss.* 2, 4 (*Taxation Act*)..... **411**
See ASSESSMENT AND TAXATION 6.

67——(*B.C.*) 20 *Geo. V, c.* 24, *s.* 19 (*Highway Act*)..... **1**
See NEGLIGENCE 1.

68——*R.S.N.B.* [1927] *c.* 149, *s.* 28 (2) (*Sale of Goods Act*)..... **172**
See CONTRACT 3.

69——*R.S.N.S.* [1923] *c.* 231 (*Liberty of the Subject Act*)..... **36**
See IMMIGRATION 1.

70——*R.S.S.* [1930] *c.* 199, *s.* 126 (*Landlord and Tenant Act*)..... **453**
See APPEAL 7; BANKRUPTCY 2.

STOCK BROKERS — *Stock exchange — Broker and client—Stocks delivered as collateral security—Wrongful conversion—Evidence.*] The respondent employed as stock brokers the appellants who carried on business first as partners and later as a limited company. From time to time the respondent delivered to them stocks, shares and bonds as security to finance his transactions with the appellants with whom he carried on an active trading account. In each case, before depositing the shares, the respondent endorsed the certificates in blank, and they became what is known as "street certificates." The respondent, when placing orders to buy or orders to sell, received from the appellants confirmation in the form of a bought or sold note and also during the whole course of his trading, received each month a statement showing the position

STOCK BROKERS—*Continued*

of his account. The respondent took no exception to the bought and sold notes or to the monthly statements, and, at the time, accepted them as correct. The securities were first transferred over from the partners to the limited company and, when it closed out, they were at the respondent's request turned over to newly employed firm of stock brokers. Several months later, without making any previous demand upon the appellants, the respondent brought an action for damages for wrongful conversion of the securities so deposited with them. The appellants did not give evidence other than calling the secretary and a member of the Vancouver Stock Exchange, who testified as to the rules and customs of the exchange. The respondent, however, not without objection, secured the production of the appellants' books and documents. An extract of the ledger so produced showed in respective columns the name of the stock deposited by the respondent, the date of the deposit, the number of shares, the number of the certificate and its date, that it was received from the respondent, and then, under the heading "To whom delivered," an indication that delivery had been made either to "H.O." (head office) or to certain brokers whose names were given, together with mention of the date on which such delivery was made. The trial judge held against the appellants on the ground that the entries in the books showed that the appellants "dealt with these securities as if they were their own property, without notice and regardless of the rights of the plaintiff." This judgment was unanimously affirmed by the Court of Appeal: Martin and McPhillips, JJ.A., agreed with the conclusions arrived at by the trial judge, although Martin, J.A., admitted the case was "not free from doubt," and Macdonald, C.J., thought the respondent's evidence was "insufficient to support the action"; but he was of opinion that the onus was upon the appellants "to show that, in accordance with their duty, they had properly disposed of the collateral securities."—*Held* (reversing the judgment appealed from) that the respondent's action ought to have been dismissed on the ground that, on the record submitted and upon the evidence, the court could not come to the conclusion that wrongful conversion had been established. *Smith* v. *Great Western Ry.* [1922] A.C. 178, foll.—*Semble* that the onus was upon the respondent to prove wrongful conversion. SOLLOWAY ET AL. *v.* BLUMBERGER..... **163**

2——*Action against stock brokers for unauthorized sale of shares and unauthorized use of proceeds—Nature of claim—"Breach of trust"—Brokers acting on instructions*

WORKMEN'S COMPENSATION — *Accident — Inexcusable fault—Amount of damages—Statutory discretion of the Court —Section 6 of the Workmen's Compensation Act, R.S.Q.,* 1925, *c.* 274.] One Joseph Geoffroy was employed as helper to one Lévesque, a millwright, in repairing some part of the interior machinery of one of three electrically operated revolving separators which were usually kept in operation

WORKMEN'S COMPENSATION— *Continued*

together on the floor of the respondent's mill next above the blow pit floor. These separators, which were round wooden vats, were placed over what are called in the case basins, the walls of the basins being 3 to 4 feet wide, and stood about 3 feet above the level of the basin floors. There was an opening of about 18 inches diameter in the bottom of each separator. Lévesque and another millwright, Trépanier, were instructed by one of the respondent's foremen, to make the repairs in question. The electric switch, by which it was set in motion and which was placed on a wall some 10 feet or more from the separator beside the switches by which the two other separators were started and stopped, was shut to enable the repairs to be made. While the repair work was in progress the power suddenly went off, putting out the regular lights as well as stopping all the machinery in that portion of the mill. The two millwrights resorted to an electric extension hand lamp to avoid delay in the repair work. Joseph Geoffroy was standing on the floor of the cement basin with the upper part of his body inside the separator endeavouring to continue the work with the improvised light, while his boss, Lévesque, was standing outside the separator within the basin wall, when, the electric current having been restored, the switch controlling the shaft by which the separator in question was operated was opened by one of the respondent's employees, the separator began to turn and Joseph Geoffroy was so injured that, although he was able to get himself through the opening in the bottom of the separator, he died soon afterwards. The respondent, recognizing its responsibility under the *Workmen's Compensation Act*, c. 274, R.S.Q., [1925], without awaiting the appointment of a tutor to represent her infant children, paid the widow $3,000—the maximum sum payable under the Act except in those cases which fall within the provisions of sec. 6—and $50 additional for funeral expenses. Ladislas Geoffroy, one of the appellants, was subsequently appointed tutor to the infant children, and in his quality as such brought, with the widow of the deceased as co-plaintiff, this action to recover further compensation to an amount of $20,000 under section 6 of the Act, alleging that "the accident was due to the inexcusable fault of the" respondent. —*Held*, reversing the judgment appealed from, that the accident was due to the inexcusable fault of the respondent company within the meaning of the *Workmen's Compensation Act*. The accident was one which would not have occurred if any precautions of any kind had been taken to protect the deceased in the dangerous position in which he was placed, and one for which there was no valid excuse—*Dufresne Construction Co.* v. *Morin* ([1931] S.C.R. 86) applied.—As to the amount by which the compensation should be increased, section 6 of the Act, in authorizing the Court to increase the compensation awarded where the accident "was due to the inexcusable fault of the employer," does not contemplate compensation estimated according to the standard of full reparation as in cases under arts. 1053 and 1054 C.C.—It is reasonable, in this case at all events, to limit the indemnity for the benefit of the children by reference to the principle of the enactment of section 4, ss. 2, by which compensation is payable "to the legitimate children * * * to assist them to provide for themselves until they reach the full age of sixteen years or more if they are invalids." This Court, in exercising its statutory discretion, is of the opinion that a fair award would be the sum of $10,000 from which must be deducted the sum of $3,000 already paid, this amount to be apportioned one half to the tutor for the benefit of the infant children in equal shares and the other half to the deceased's widow. GEOFFROY *v.* ANGLO-CANADIAN PULP & PAPER MILLS, LTD..... **548**

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