1947

CANADA
LAW REPORTS

Supreme Court of Canada

Editors

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1948

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. THIBAUDEAU RINFRET C.J.C.
" Hon. PATRICK KERWIN J.
" " ALBERT BLELLOCK HUDSON J.
" " ROBERT TASCHEREAU J.
" " IVAN CLEVELAND RAND J.
" " ROY LINDSAY KELLOCK J.
" " JAMES WILFRED ESTEY J.
" " CHARLES HOLLAND LOCKE J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Right Hon. J. L. Ilsley K.C.

99312—1½

MEMORANDA

On the sixth day of January, 1947, the Honourable Albert Blellock Hudson, Puisne Judge of the Supreme Court of Canada, died.

On the third day of June, 1947, Charles Holland Locke, one of His Majesty's Counsel, learned in the law, was appointed a Puisne Judge of the Supreme Court of Canada.

On the twenty-second day of September, 1947, the Honourable Thibaudeau Rinfret, Chief Justice of Canada, was appointed a member of His Majesty's Most Honourable Privy Council.

ERRATA

in volume 1947

Page 45, at line 6 of captions, for "Admissibly" read "Admissibility".

Page 184, f.n. (2) read "5 Co. R. 59a".

Page 211, at line 6 of head-note, for "1925 Cr. C." read "1025 Cr. C.".

Page 388, at f.n. (2), for "1954" read "1854".

Page 407, f.n. (2) read "(1909) Commonwealth L.R. 330".

Page 530, at line 6, the sentence beginning "Where a question" should read as follows: "Where a question as to the care to be used arises between persons using as of right the place, where they respectively act, infancy as such is no more a status conferring right, or a root of title imposing obligations on others to respect it, than infirmity or imbecility; but a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operation."

Page 545 to 554, in margin, for "1946" read "1947".

Page 559, f.n. (3) read "(1842) 4 D. & War. 1; S.C. 2 H.L.C. 186".

Page 571, at line 13, for "whom" read "who".

Page 575, solicitors for the appellant read: Lillico & Macpherson.

NOTICE

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

Attorney General for Ontario and Others v. *Attorney General for Canada and Others* (Bill No. 9) [1940] S.C.R. 49. Appeal dismissed, 13th January, 1947.

Attorney General for Saskatchewan v. *Attorney General for Canada and Another, in matter of Farm Security Act* [1947] S.C.R. 394. Special leave to appeal granted, 17th December, 1947.

Compagnie du Pont Plessis Belair v. *Attorney General for Quebec and Another* [1946] S.C.R. 473. Special leave to appeal refused, 21st May, 1947.

Executors of Hon. Patrick Burns v. *Minister of National Revenue* [1947] S.C.R. 132. Special leave to appeal granted, 1st July, 1947.

Fiberglass Canada Limited v. *Spun Rock Wools Limited* [1943] S.C.R. 547. Appeal allowed, 25th February, 1947.

Fraser D. R. and Co. Ltd. v. *Minister of National Revenue* [1947] S.C.R. 157. Special leave to appeal granted, 1st July, 1947.

Greenlees v. *Attorney General for Canada* [1946] S.C.R. 462. Special leave to appeal withdrawn, 13th January, 1947.

Kelly v. *Robertson* [1934] S.C.R. 550. Appeal dismissed, 26th June, 1947.

Lessard v. *Hull Electric Co.* [1947] S.C.R. 22. Special leave to appeal refused, 19th March, 1947.

Ludditt and Others v. *Ginger Coote Airways Ltd.* [1942] S.C.R. 406. Appeal dismissed, 5th February, 1947.

Quinlan v. *Robertson* [1934] S.C.R. 550. Appeal dismissed, 26th June, 1947.

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between the 1st of January and the 20th of December, 1947, delivered the following judgments, which will not be reported:—

Boyd et al v. *Kuhn* [1947] 1 W.W.R. 706. Appeal allowed with costs here and below, and judgment of the trial judge restored, 14th October, 1947.

Caron v. *Larouche* Q.R. [1946] K.B. 735. Appeal dismissed with costs, subject to varying the amount from $4,566.82 to $4,511.82, 27th June, 1947.

Cross v. *Gray.* Not reported (Ont.). Appeal allowed and judgment entered for $16,980.00. Appellant entitled to costs of the action and of this appeal. Respondent entitled to costs in the Court of Appeal. The Chief Justice and Rand J. would have awarded only the sum of $6,980.00, 7th October, 1947.

Curley et al v. *Ottawa Electric Ry. Co. et al* [1946] O.W.N. 597. Appeal dismissed with costs, 2nd June, 1947.

Daniluk v. *The King* [1947] 4 D.L.R. 337. Appeal allowed and conviction quashed, 18th June, 1947.

Emond v. *The King* Q.R. [1947] K.B. 411. Appeal dismissed, 2nd June, 1947.

Ferrie G. and Ferrie J. v. *Ferrie G. et al* [1947] 2 D.L.R. 585. Appeal allowed and order of the judge of the first instance restored. The parties are entitled to their costs throughout out of the estate; those of the trustees as between solicitor and client, 7th October, 1947.

Giesbrecht et al v. *Wolfe & Sons et al* [1946] 2 W.W.R. 139. Appeal of the appellant Giesbrecht dismissed with costs. Appeals of the other appellants allowed with costs throughout and judgment entered in favour of these appellants for the amounts already determined at the first trial, 10th June, 1947.

Gula v. *The B. Manischewitz Co.* [1946] Ex. C.R. 570. Appeal dismissed with costs, 7th October, 1947.

Johanson v. *The King* [1947] 2 D.L.R. 458. Appeal allowed and conviction quashed, the Chief Justice and Kerwin J. dissenting, 18th June, 1947.

Kingsway Transports Ltd. v. *Township of Kingston et al* [1946] O.W.N. 585. Appeal allowed and judgment at the trial restored with costs throughout. There will be no costs of the cross-appeal in the Court of Appeal. Kerwin J. would have allowed the claims of the appellant in toto, 10th June, 1947.

Myers v. *Verchomin* [1947] 1 W.W.R. 446. Appeal allowed and judgment of the trial judge restored. The plaintiff will have his costs of the appeal to this Court and of the appeal to the Appellate Division of the Supreme Court of Alberta, 3rd November, 1947.

Post v. *Bean* [1947] M.P.R. 168. Appeal dismissed with costs, 13th May, 1947.

St. Germain R. v. *Fortin L. et al* Q.R. [1947] K.B. 18. Appeal dismissed with costs, 21st October, 1947.

Sinclair v. *Blue Top Brewing Co. and N. G. Trottier et al* [1945] 3 D.L.R. 344. Appeal dismissed without costs, 7th October, 1947.

Stewart M. v. *Ottawa Electric Ry. Co.* [1945] 4 D.L.R. 400. Appeal dismissed with costs, 27th June, 1947.

Zubatoff v. *Canadian Transfer Co. Ltd.* Q.R. [1946] K.B. 572. Appeal allowed and new trial directed, Kerwin J. and Taschereau J. dissenting. Appellant entitled to his costs in this Court and the Court of King's Bench (Appeal Side). The costs of the abortive trial will be dealt with by the judge presiding at the new trial, 27th June, 1947.

A TABLE

OF THE

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

THE BELL TELEPHONE COMPANY OF CANADA ..... APPELLANT;

AND

THE CORPORATION OF THE COUNTY OF MIDDLESEX ..... RESPONDENT.

1946

*Jun. 6
*Oct. 1

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Statutory law—Telegraphs and telephones—Wire crossing—Future change of location—Highways located neither in cities or towns—Statutory powers of company—Jurisdiction of Board—Terms, conditions and limitations—Railway Act, R.S.C., 1927, c. 170, s. 373, ss. 2, 3, 4, 5, 6, 7.

The appellant company, by section 3 of its Incorporation Act, was given the power to "construct, erect and maintain its lines along the sides of and across or under any public highway * * *"—Subsection (2) of section 373 of *The Railway Act* enacts that "no telegraph or telephone line * * * shall * * * be constructed by any company upon, along or across any highway * * * without the legal consent of the municipality having jurisdiction over such highway * * *" and section (3) provides that, if such consent is not granted, the company may apply to the Board.

The Board of Transport Commissioners, by Order made in July, 1945, authorized the appellant company to construct its lines of telephone (buried cable) under certain highways in the respondent corporation; and the Board, at the same time, directed that questions relating to terms and conditions be reserved for further consideration. In October, 1945, the Board imposed certain terms and conditions as set out in the Order and, more particularly, directed that, in case of disagreement between the Company and the Municipality, following a request by the latter to change in the future the location of the works, the Board may order the company to make such change, each to pay such part of the costs as the Board may direct.

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

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Held, Hudson J. dissenting, that the Board had no power to make the last mentioned order.

Held, also, that, upon the proper construction of the language of sub-section (2) of section 373, which refers to construction of telegraph or telephone lines "upon, along or across any highway * * *," the proposed construction of the lines of the Company under the County highways does not fall within that subsection, as the word "across" does not include "under". Hudson and Rand JJ. dissenting.

Per The Chief Justice and Kerwin and Taschereau JJ.:—"Across" means over from side to side; and it is made clearer by the context of sub-section (2) and by the history of the legislation. Parliament, in enacting that subsection, had in mind only above surface construction and was preoccupied with the right of travel particularly referred to in subsection (*a*) of section 373. The appellant company, under section 3 of its Incorporation Act, is specifically given the power to construct its lines under the highways in the respondent corporation; and, for such purpose, the appellant does not need the legal consent of the respondent, and not only does it not need the authorization of the Board but the latter has no jurisdiction to give such authorization.

Per Hudson J. dissenting:—Subsection (2) of section 373 deals with the construction of a telegraph or telephone line "across any highway". The word "across" means "from side to side" and, taken by itself, is wide enough to cover a crossing at any level. The "highway" to be crossed includes not merely the surface of the road but what has been called the "area of user", i.e. "all the stratum of soil below the surface * * * required for the purposes of the street as street".—The appellant company, in placing its line "across a highway" must "not interfere with the public right of travel (s. 373, ss. (1) (*a*)) and any alterations by the company in the sub-surface of a highway might affect the safety and convenience of the public using the surface.—Thus, the Board, having jurisdiction in the matter, had under sub-sections 4 and 5 power to make the Order appealed from.

Per Rand J.:—The provisions of sub-section 7 as a whole constitute a code regulating the construction of telephone lines in and on highways; and the statute is clear that, with the exception in sub-section 6 where changes may be ordered in cities and towns, once the installations have been made, they may thereafter be maintained and operated free from the Board's control.—The Order appealed from has in effect added the provisions of sub-section 6 to new constructions outside cities and towns, while these provisions have by implication the effect of denying the Board power to impose conditions as to future changes of location of newly constructed lines outside cities and towns.

APPEAL by the Bell Telephone Company of Canada (by leave of the Board and upon a settled statement of facts) from an Order (No. 66533) of the Board of Transport Commissioners for Canada (1) imposing certain terms, conditions and limitations in respect to works which the

(1) (1945) 58 C.R.C. 301.

appellant Company, by a previous order, had been authorized to construct across and under certain highways within the respondent County Corporation.

Leave to appeal to this court was given upon the question, which in the opinion of the Board was one of law and of jurisdiction, as to whether the Board had power to make Order No. 66533.

N. A. Munnoch K.C. and *F. A. Burgess* for the appellant.

No counsel for the respondent.

The judgment of The Chief Justice and of Kerwin and Taschereau JJ. was delivered by

THE CHIEF JUSTICE:—The parties hereto have agreed upon the following statement of facts:—

(1) The appellant is a company incorporated by Act of the Parliament of Canada, (1880, 43 Victoria, chapter 67). It carries on and provides a public telephone service within the Dominion of Canada and elsewhere. By section 3 of its Act of Incorporation, it is granted the right to: construct, erect and maintain its line or lines of telephone along the sides of and across or under any public highways, streets, bridges, watercourses or other such places, etc., upon the terms and conditions therein set forth.

(2) The respondent is a municipal corporation within the province of Ontario, governed by the *Municipal Act* (R.S.O. 1937, chapter 226). It has municipal jurisdiction over the public county roads, highways and road allowances within its municipal boundaries.

(3) In the early part of the year 1945, the appellant proposed to construct an underground or buried cable system of long distance telephone lines from the city of London to the city of Windsor in the province of Ontario; and it was necessary for the cables to cross under the surfaces of certain public highways, roads and road allowances that intersected their courses. In the case of the county of Middlesex, it was necessary for the said cables to pass under the surfaces of ten different public highways or roads under the municipal jurisdiction of the respondent.

(4) The appellant applied to the respondent for the latter's legal consent to these ten highway crossings.

(5) On June 14, 1945, the council of the respondent passed and enacted by-law no. 2159, granting the requisite legal consent, but upon the following term and condition:

"Provided further that the County will assume no further costs in connection with lowering of the Company's cable which might be made necessary by the County road work or works".

(6) This was not acceptable to the appellant; and this feature of the by-law was discussed between the parties by correspondence.

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(7) The appellant thereupon filed an application to the Board of Transport Commissioners for Canada, dated July 19, 1945, for leave of the Board to construct the aforesaid ten underground cable crossings; and on July 20, 1945, moved the Board *ex parte* for the requisite order.

(8) By Order no. 66276, dated the 23rd day of July, 1945, the Board authorized the appellant to construct the aforesaid crossings, at the same time directing that:

"all questions relating to terms and conditions in respect of this application and the works hereby authorized be and they are hereby reserved for further consideration and order of the Board".

(9) Following the issue of this Order, the respondent wrote to the Secretary of the Board on July 26, 1945:—

"I have no objection whatever to the making of the Order and am perfectly willing to leave the terms on a statutory basis."

(10) By letter addressed to the Secretary of the Board on August 14, 1945, Mr. Moss, the solicitor for the respondent, stated that, in his opinion, no public hearing was necessary; that the sole question was as to who should bear the cost of any future alteration of the appellant's lines; and that the respondent had no objection to the appellant exercising its statutory powers as long as it did not exceed such powers.

(11) In turn, by letter addressed to the Secretary of the Board dated August 21, 1945, the appellant agreed that no public hearing was necessary, but expressed the view that the final paragraph of Order no. 66276 made it an interim Order only, and suggested that it should be made final by the issue of a supplementary Order to the effect that the works authorized be subject to the terms and conditions contained in the appellant's Act of Incorporation, 43 Victoria (1880) chapter 67, section 3, so far as such terms and conditions were applicable to works of the nature authorized.

(12) Subsequently, without any hearing of the parties in the present case, but after having heard a similar case, the Board issued a judgment on October 4, 1945, and the Order which gives rise to the present appeal, namely, Order no. 66533, by which the Board ordered that the authority granted to the appellant to construct, erect and maintain the works should be subject to the following term, condition or limitation:

"If, from time to time, in order to enable the municipality to construct, reconstruct, alter or repair a highway, waterpipe line, sewer or other work of the municipality, the municipality requests the company to change the location of any of the works authorized by Order no. 66276 and the company does not agree to make such change, or does not agree to make such change otherwise than upon terms and conditions unacceptable to the municipality, the municipality may apply to the Board for an order or orders directing the company to make such change; and if, upon such application or applications, the Board deems it expedient, having due regard to all proper interests, that the location of any of the works in question should be changed, the company shall make such changes in the location of the works in question as the Board may direct; and the municipality and the company shall each pay such part of the cost of changing the location of the works as the Board may direct."

(13) On November 30, 1945, the appellant moved the Board for leave to appeal to the Supreme Court of Canada under section 52 (3) of the *Railway Act*, from Orders nos. 66276 and 66533.

By Order no. 66893 dated the 14th day of December, 1945, the Board granted the appellant leave to appeal to the Supreme Court of Canada upon the following question, which the said Order declares to be, in the opinion of the Board, a question of law and jurisdiction:

Had the Board power to make Order no. 66533, dated the 4th day of October, 1945?

In its reasons for judgment on questions relating to terms and conditions reserved by paragraph 2 of Order no. 66276, the Board amongst other things states:

The letter of Mr. Moss raises a question of considerable importance. Order no. 66276 authorizes the company to construct its lines across and under certain highways in the municipality. What will be the postion of the municipality if at some time in the future the municipality wishes the company to make some change in the location of any of the works authorized by Order no. 66276? In the absence of any condition imposed by the Board under subsection 4 of section 373 of the *Railway Act,* it appears that the municipality would have no remedy. Subsection 6 of section 373 confers power on the Board to order (*inter alia*) a change in the location of a telephone line, but subsection 6 applies only to lines in a city or town. The Board's view is that Parliament, in giving the Board power to impose "terms, conditions or limitations", intended the Board to accommodate the interests of the company and the municipality in a practical common sense way; and the Board deems it "expedient, having due regard to all proper interests", that in the present case the following term, condition and limitation be imposed by order.

(then comes the term and condition already reproduced above).

And the reasons proceed:

In some other applications of a similar kind which have come before the Board recently, the company has contended that the Board has no power to make such a provision as is above set out, and this contention merits consideration. Subsection 4 is very wide. But the suggestion is that the provisions of subsection 6 by implication cut down or restrict the meaning of subsection 4 and have the effect of denying the Board the power to impose terms, conditions or limitations as to future changes of location of telephone lines in municipalities other than towns and cities. The Board does not agree that such is the effect of subsection 6. The subsection applies to (*inter alia*) lines which are already in existence, and applies whether they were constructed under the authority of the Board or not. In view of the broad terms of subsection 4, the Board is unable to see that any inference should be drawn from subsection 6 that the Board, in authorizing the construction of a new line in a rural municipality, has no power to safeguard its interests by such a provision as is above set out.

The appeal in this Court was argued *ex parte,* the respondent taking no part in the argument.

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Here, the appellant raised a question which does not appear to have been submitted to the Board and of which, at all events, no trace can be found in the correspondence or the Orders of the Board, or the reasons therefore.

This new question is to the effect that the Board had no jurisdiction whatever to deal with the application because the latter is in respect of the construction of cables or lines "under highways" and that in such a case, neither the legal consent of the municipality having jurisdiction over such highways, nor the authorization of the Board of Transport Commissioners is required by the Bell Telephone Company, the appellant, to carry on such work.

It must be noted that we are dealing here with county highways, and that is to say with highways located neither in a city nor in a town; and also that the cables or lines of the appellant are to cross the highways in question entirely beneath the surface of the ground; in fact, they are to be buried in the ground itself.

Now, the Company invokes section 3 of its Incorporation Act authorizing it to construct and maintain its lines of telephone "along the sides of and across or under any public highway"; and provides that

> in cities, towns and incorporated villages, the location of the line or lines and the opening up of the street for the erection of poles or for carrying the wires underground shall be done under the direction and supervision of the engineer or such other officer as the Council may appoint, and in such manner as the Council may direct, and that the surface of the street shall, in all cases, be restored to its former condition by and at the expense of the Company.

By section 4 of an amending Special Act (45 Victoria, 1882, chapter 95, section 2), the works of the company authorized by this Act of Incorporation "are hereby declared to be for the general advantage of Canada".

Of course, the situation in which the appellant finds itself is really of its own making, because its present contention is directly contrary to the position it took when it applied first for the legal consent of the county of Middlesex and afterwards for the authorization of the Board.

In effect, the action of the appellant assumed that the legal consent of the respondent was necessary, and implied that the Board had jurisdiction to make the Order applied for.

But, of course, jurisdiction can never be conferred by consent; and, if the Board has no jurisdiction as now contended, it does not matter that the appellant first elected to go before it; the absence of jurisdiction of the Board still remains.

The Board has no inherent jurisdiction. It has only the powers and authority given to it by the Statute. Its jurisdiction over telegraphs, telephones, power and electricity is governed by sections 367 to 378 inclusive of the *Railway Act* (R.S.C. 1927, c. 170). Of these, sections 367 to 371 deal with telegraphs and telephones on railway for railway purposes, or telephone connections with railway stations, or putting wires across railways or other wires.

In the premises, section 373, dealing with the putting of lines or wires across or along highways, is the section to be looked at for the purpose of answering the question submitted to this Court by the Board of Transport Commissioners. Section 374 deals with the price and supply of certain power. Section 375 contains special provisions governing telegraphs and telephones, and subsection 12 thereof states the limitations imposed by Parliament upon the jurisdiction and powers of the Board with regard to telegraph and telephone companies.

Moreover, we are not concerned here with sections 376, 377 and 378 which have reference to marine electric telegraphs or cables, and to Government use and construction of telegraphs and telephones.

Turning therefore to section 373, which is the section that has to be construed here, we find that:

> subject to the provisions of this section, any company empowered by Special Act or other authority of the Parliament of Canada, to construct, operate and maintain telegraph or telephone lines, may, for the purpose of exercising the said powers, enter upon, and, as often as the company thinks proper, break up and open any highway, square, or other public place * * *

It is therein provided that the company shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building. Then follow certain provisions some of which specifically apply only in cities, towns and incorporated or

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police villages; others deal with poles, trees, supervision, restoration, the times when it is necessary to cut wires or remove poles, and there is a provision that the telegraph or telephone company

shall be responsible for all unnecessary damages which it causes in carrying out, maintaining or operating any of its said works.

Then comes a series of subsections and it is necessary to reproduce in full subsections 2, 3 and 4, because, if the Board of Transport Commissioners has jurisdiction in the matter, it is there that such jurisdiction must be found.

Subsection (2).

Notwithstanding anything in any Act of the Parliament of Canada or of the legislature of any province, or any power or authority heretofore or hereafter conferred thereby or derived therefrom, no telegraph or telephone line, within the legislative authority of the Parliament of Canada, shall except as hereinafter in this section provided, be constructed by any company upon, along or across any highway, square or other public place, without the legal consent of the municipality having jurisdiction over such highway, square or public place.

Subsection (3).

If any company cannot, in respect of any such line, obtain such consent from such municipality, or cannot obtain such consent otherwise than subject to terms and conditions not acceptable to the company, such company may apply to the Board for leave to exercise such powers and upon such application shall submit to the Board a plan of such highway, square or other public place showing the proposed location of such lines, wires and poles.

Subsection (4).

The Board may refuse or may grant such application in whole or in part, and may change or fix the route of such lines, wires or poles, and may by order impose any terms, conditions, or limitations, in respect of the application which it deems expedient, having due regard to all proper interests.

As will be seen, subsection (2) requires the legal consent of the municipality having jurisdiction over the highways, only when the telegraph or telephone line is to be constructed "upon, along or across any highway". No mention is made of a line to be constructed "under the highway".

And what is to be observed is that

if any company cannot, in respect of any such line obtain such consent from such municipality, or cannot obtain such consent otherwise than subject to terms and conditions not acceptable to the company, such company may apply to the Board for leave to exercise such powers.

Then, the Board may refuse or grant such application in whole or in part, and may

by order impose any terms, conditions or limitations in respect of the application which it deems expedient, having due regard to all proper interests.

The repetition of the word "such" throughout subsections (3) and (4) makes it clear that both the consent from the municipality is required, and the jurisdiction of the Board exists only if the work is to be constructed "upon, along or across any highway", for such is the work for which, under subsections (3) and (4) the application may be made to the Board, if the company cannot "obtain such consent from such municipality". And it is only upon such application

that the Board is empowered to act in either refusing or granting same, and at the same time impose terms and conditions or limitations.

The answer to the question submitted to the Court must, therefore, depend upon the construction of the language of subsection (2) of section 373.

The lines to be constructed by the company and with which we are concerned are not to be upon or along the highways, and if the present construction of the lines falls at all within subsection (2), it is only if the word "across" includes "under". Otherwise, a construction "under" is not covered by subsection (2) and, therefore, no legal consent of the municipality is required, nor has the Board jurisdiction to deal with it. My view is that the word "across" does not include "under". "Across" means over from side to side. It is made clearer by the context of subsection (2) and by the history of the legislation. It is evident that in subsection (2) Parliament had in mind only above surface construction. It was preoccupied with the right of travel particularly referred to in subsection (*a*) in the first part of section 373.

Moreover, it must be noted that in the Special Act of the Bell Telephone Company of Canada (43 Victoria, 1880, chapter 67, section 3) the company is empowered to

construct, erect and maintain its lines, along the sides of and across or under any public highways (and) across or under any navigable waters.

It is a well known rule of construction that Parliament is not supposed to speak for nothing and that all the words it uses in its legislation must be given their application.

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The fact that the same Act contains both the words "across" and "under" shows that in using those words Parliament intended by the word "under" something more than and different from "across".

A comparison, in that respect, between the *Railway Act* (1906) and the *Railway Act* (1919) is also illuminating and instructive.

In the Act of 1906, the matters dealt with in sections 247 and 248 correspond to section 373 in the Act of 1919.

The 1906 Act provided (subsection 2 of section 248) that the telephone company

> shall not, except as in the section provided, construct, maintain or operate its lines of telephone upon, along, across or under any highway * * * within the limits of any city, town or village, incorporated or otherwise, without the consent of the municipality;

and, if such consent of the municipality was not forthcoming, the telephone company could then apply to the Board for leave to exercise its powers upon the highways. The Board could then grant such application and, at the same time, by Order, "impose any terms, conditions or limitations in respect thereof".

Some exceptions were provided for in subsections 4 and 5 of section 248 with regard to long distance line or service or any trunk line or service connecting two or more exchanges in any city, town or village.

In section 373 of the *Railway Act* of 1919, we find several significant changes or modifications.

First, section 373 (2) does not contain the word "under" any highways. That word has been deleted and the section then reads "upon, along or across any highway", leaving out the word "under" which appeared in subsection (2) of section 248 of the 1906 Act.

On the other hand, while the same section of the 1906 Act provides for the necessity of the consent of the municipality only for highways "within the limits of any city, town or village", now, in section 373 (2) the necessity of the consent of the municipality is no longer limited to a city, town or village, but it is required in the case of all municipalities having jurisdiction over such highways.

Some object must be ascribed to the fact that Parliament, when enacting the *Railway Act* of 1919, left out the word "under". That object might be that while heretofore between 1906 and 1919, a telephone company had to obtain the legal consent of a city, town or police village even to construct "under" the highways over which such municipality had jurisdiction, after the adoption of the Act of 1919, consent was necessary from all municipalities to construct upon, along or across any highways; but the consent was no longer required from any municipality to construct "under".

The above view is in accordance with the definition given in Standard dictionaries: Webster's New International Dictionary; the New English Dictionary (Oxford); The Imperial Encyclopedic Dictionary; Century Dictionary & Cyclopedia; Funk & Wagnall's New Standard Dictionary; Ordways Dictionary of Synonyms and Antonyms (published by Harrap & Co., London). From all of these, whether we refer to the words "upon", "along" or "across", it appears that these words as used in section 373 (2) can not apply to the lines in question, because such lines are constructed beneath the surface of the highways and, as so constructed, merely cross under said highways from one side to the other, while the word "across" used alone, means from side to side of and over or above.

In the *South Eastern Railway Company* v. *the European and American Electric Printing Telegraph Company and Frend* (1), it was held that the word "across" does not include "under".

Many examples of cases where above-ground construction only is intended can be found in the *Railway Act*:

Sections: 162 (*d*) 173
" 162 (*e*)
" 193; 295 (1)
" 246; 247
" 255; 256; 257
" 373 (2); 403
" 256; 257 (2)
" 372 (*a*)
" 281 (3)

(1)(1854) 9 Exch. 363.

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But where, in the *Railway Act*, Parliament intended that underground construction be authorized or included, it expressly said so by the use of the word "under".

Sections: 162 (*k*)
" 162 (*l*)
" 162 (*m*)
" 245
" 246
" 258
" 250
" 251
" 252 (3) (*c*), 256 (5), 264, 266
" 256 (5), 257
" 264, 401 (*a*)
" 268
" 269 (*a*), (*b*), (*c*), 270 (2), (4)
" 269 (3)
" 271

Section (3) of the appellant's Special Act draws a clear distinction between overhead and underground lines. Under it, the appellant is specifically given the power to construct, erect and maintain its lines along the sides of and across or under any public highways, and there is no doubt about the right of the company to construct its lines under the ten highways in question in the county of Middlesex; but, in my view, there is also no doubt that, for such purpose, the appellant does not need the legal consent of the respondent, and not only does it not need the authorization of the Board of Transport Commissioners, but the Board has no jurisdiction to give such authorization.

In *Toronto, Corporation of the City of*, v. *Bell Telephone Company of Canada* (1), the Judicial Committee dealt with, among other things, the argument that the Company by reason of its application to the Ontario legislature was precluded or estopped from disputing the competency of that legislature and that the enactment making the consent of the Corporation a condition precedent amounted to a legislative bargain between the Company and the Corporation, and at page 59 appears the following:

> No trace is to be found of any such bargain and * * * nothing has occurred to prevent the Company from insisting on the powers which the Dominion Act purports to confer upon it.

(1) [1905] A.C. 52.

Similarly here the application by the Company for the consent of the County and its subsequent application to the Board do not prevent the Company from relying upon the powers conferred upon it by its special Act.

I need only add that we should not refer to subsection (6) or subsection (7) of section 373 because they do not apply here. Subsection (6) comes into play only "upon the application of the municipality" and is restricted to a "city or town". Subsection (7) applies only to telephone lines "heretofore constructed". As for subsection (8) of section 373, it deals solely with cases where the Special Acts applying to the telephone companies specifically require the consent of the municipality, which is not the case for the Bell Telephone Co. of Canada. *Toronto, Corporation of the city of* v. *The Bell Telephone Co. of Canada* (1).

For these reasons, I would answer in the negative the question submitted.

HUDSON J.:—This is an appeal by leave from the Board of Transport Commissioners. The terms of this order and the circumstances under which it was made are fully set forth in the judgment of my Lord the Chief Justice. The appeal was heard *ex-parte* but the Court had the benefit of a very fair and exhaustive argument by counsel for the appellant.

The grounds of appeal are first: that the Board had no jurisdiction to make any order in the matter, and secondly: that even if it had such power it had no power to impose the conditions which were included therein.

The jurisdiction of the Board in the matter is set forth in section 373 of the *Railway Act*, R.S.C. 1927, chap. 107. By this section it is provided:

373. Subject to the provisions of this section, any company empowered by Special Act or other authority of the Parliament of Canada to construct, operate and maintain telegraph or telephone lines, may, for the purpose of exercising the said powers, enter upon, and, as often as the company thinks proper, break up and open any highway, square or other public place, provided always that

(*a*) such company shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building:

(1) [1905] A.C. 52.

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(e) the opening of any street, square, or other public place for the erection of poles, or for the carrying of wires under ground, shall be subject to the supervision of such persons as the municipal council may appoint, and such street, square or other public place shall, without any unnecessary delay, be restored, as far as possible, to its former condition;

* * *

2. Notwithstanding anything in any Act of the Parliament of Canada or of the legislature of any province, or any power or authority heretofore or hereafter conferred thereby or derived therefrom, no telegraph or telephone line, within the legislative authority of the Parliament of Canada, shall except as hereinafter in this section provided, be constructed by any company upon, along or across any highway, square, or other public place, without the legal consent of the municipality having jurisdiction over such highway, square or public place.

3. If any company cannot, in respect of any such line obtain such consent from such municipality, or cannot obtain such consent otherwise than subject to terms and conditions not acceptable to the company, such company may apply to the Board for leave to exercise such powers, and upon such application shall submit to the Board a plan of such highway, square or other public place showing the proposed location of such lines, wires and poles.

4. The Board may refuse or may grant such application in whole or in part, and may change or fix the route of such lines, wires or poles, and may by order impose any terms, conditions or limitations in respect of the application which it deems expedient, having due regard to all proper interests.

5. Upon such order being made, and subject to any terms imposed by the Board, such company may exercise such powers in accordance with such order, and shall in the performance and execution thereof, or in the repairing, renewing or maintaining of such lines, wires or poles conform to and be subject to the provisions of subsection one of this section, except in so far as the said provisions are expressly varied by order of the Board.

There are also two additional subsections, 6 and 7, which will be hereafter referred to.

The appellant company was incorporated by a statute of Canada, 43 Vict. Chap. 67, and by section 3 thereof was granted the right to

construct, erect and maintain its line or lines of telephone along the sides of and across or under any public highways, streets, bridges, watercourses or other such places, or across or under any navigable waters, either wholly in Canada or dividing Canada from any other country.

The argument on the first point is that by this Special Act the Company was given power to construct lines "under" any public highway, and this without consent of the municipality; that by subsection 2 of section 373 the Board was not given power to act where the Company proposed to place its lines *under* a highway, that is, that

the words in subsection 2 "upon, along or across any highway" were not sufficiently broad to cover a case as here where the Company had authority to lay wires or cables *underneath* the ground.

It must be kept in mind that what we are called on to construe here is the provision in the *Railway Act,* and not the Special Act. The significant words are "across" and "highway".

The word "across", as most commonly used, means "from side to side". It is clear that under paragraph (*a*) of section 1, in placing its line across a highway the telephone company must not interfere with the public right of travel. The word taken by itself is wide enough to cover a crossing at any level. Obviously, in this instance Parliament did not contemplate a permanent crossing at the surface level. Such a crossing would in all reasonable probability constitute an interference with the use of the highway in the first place, and in the second place it would not be of any value to the telephone company. The crossing contemplated must be either above or below the surface. The "highway" to be crossed includes not merely the surface of the road but what has been called the "area of user", that is:

> all the stratum of air above the surface, and all the stratum of soil below the surface which in any reasonable sense can be required for the purposes of the street as street.

This quotation is from a judgment of Collins, M. R. in the case of *Finchley Electric Light Company* v. *Finchley Urban District Council* (1). Under various statutes in England dealing with main roads, etc. all streets being highways reparable by the inhabitants at large were vested in and under the control of urban authority. Collins, M. R. was dealing with a case arising under one of these statutes, and other cases of the same kind are *Mayor etc. of Tunbridge Wells* v. *Baird* (1), Lord Halsbury at p. 437 and Lord Herschell p. 442; *Wandsworth Board of Works* v. *United Telephone Co.* (2), Lord Bowen.

In Ontario the freehold in the soil of the highways is vested in the municipal bodies under section 454 of the *Municipal Act,* R. S. O. 1937, chap. 266. Even before this provision was enacted the municipalities were vested with

(1) [1903] 1 Ch. 437, at 441.
(2) [1896] A.C. 434.
(3) (1884) 13 Q.B.D. 904.

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powers similar to the Boards referred to in England and their duty was and still is to provide for the maintenance of highways and the safety and convenience of the public who desire to use them. In order to do this, the highways must be of such a character as to bear the traffic which would normally flow thereon. Any alterations in the sub-surface of that portion of the highway being used for traffic might affect the safety and convenience of the public using the surface. Any interference with what is called the "area of user" would be a trespass on the highway. For these reasons, it would appear that the word "across" here must mean at least any such crossing as lies within the area of user. It would seem inconceivable that Parliament had anything else in mind.

The extent of the area of user might of course vary depending on the facts in each particular case, but here the application to the Board was made by the telephone company itself, and this might be taken as an acknowledgment that the crossing they had in mind was probably within this area. In any event, it is a matter for consideration of the facts by the Board in order to protect the interests of the public and it might well be in the interest of the telephone company itself.

Many authorities were cited in regard to the meaning of the word "across" in other statutes of Canada and elsewhere. With respect, it does not seem to me that in this case they are sufficient to justify any departure from the cardinal rule of construction, namely:

> The object of all interpretation of a statute is to determine what intention is conveyed, either expressly or impliedly, by the language used, so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it.

See Maxwell on Statutes, p. 1.

For these reasons, I am of opinion that the Board had jurisdiction.

The second point made is that the condition imposed in the order as follows:

> If, from time to time, in order to enable the municipality to construct, reconstruct, alter or repair a highway, waterpipe line, sewer or other work of the municipality, the municipality requests the company to change the location of any of the works authorized by Order no. 66276,

and the company does not agree to make such change, or does not agree to make such change otherwise than upon terms or conditions unacceptable to the municipality, the municipality may apply to the Board for an order or orders directing the company to make such change; and if upon such application or applications the Board deems it expedient, having due regard to all proper interests, that the location of any of the works in question should be changed, the company shall make such changes in the location of the works in question as the Board may direct; and the municipality and the company shall each pay such part of the cost of changing the location of the works as the Board may direct.

cannot be exercised because of the provisions of subsections 6 and 7. Subsection 6 provides:

6. Notwithstanding any power or authority heretofore or hereafter conferred upon any company by or under any Act of the Parliament of Canada, or of the legislature of any province, or any other authority, the Board, upon the application of the municipality, and upon such terms and conditions as the Board may prescribe, may order any telegraph or telephone line, within the legislative authority of the Parliament of Canada, in any city or town, or any portion thereof, to be placed underground, and may in any case order any extension or change in the location of any such line in any city or town, or any portion thereof, and the construction of any new line, and may abrogate the right of any such company to construct or maintain, or to operate, or continue, any such line, or any pole or other works belonging thereto, except as directed by the Board; and where such a line or lines within the legislative authority of the Parliament of Canada and such a line or lines within the legislative authority of a province, run through or into the same city or town, and such municipality is desirous of having any such lines placed underground, and there exists in such province a provincial commission, public utilities or other board or body having power to order such a line within the legislative authority of such province to be placed underground, the Board and such provincial commission, or public utilities board or body, may by joint session of conference, or by joint board, order any such lines within such city or town, or any portion thereof, to be placed underground, and abrogate any right to carry the same on poles, and the provisions of subsection three of section two hundred and fifty-three of this Act, with the necessary adaptation, shall apply to every such case.

Subsection 6 applies only to cities and towns and only to cases where the municipality is the applicant and seeks to compel the telephone company to lay its lines beneath the surface. This is an altogether different case from the present where the application is made by the company itself to the Board under subsection 2, to authorize the underground crossing without the consent of the municipality.

Subsection 7 applies only to lines "heretofore constructed", that is, prior to the passing of this particular provision and many years before the present application.

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The particular condition attacked did not appear in the original order permitting the laying of the underground lines, but such original order contained an express reservation to the effect that the Board might make any amendments which it thought necessary in the future. This, I think, is quite in accord with the final phrase of subsection 5 above quoted:

> except in so far as the said provisions are expressly varied by order of the Board,

which clearly gives the Board the power to make or amend the previous order.

The application on which the Board acted was made by the telephone company itself and it requested action by the Board under section 373, subsection 3, as well as other relevant sections of the Act.

Under the provisions of subsection 4, there is no limitation on the conditions which the Board may impose when granting an order. The Board may well find on the facts that the conditions with which it has to deal, when considering the order, are in the case of particular municipalities substantially the same as conditions which exist in cities and towns. If so, there would appear to be no reason why they should not be permitted to exercise the same powers.

I think that the legal advisers of the company were right in their first thought and that the Board had jurisdiction and, once this is admitted, the Board had under subsections 4 and 5 jurisdiction to make the order.

For these reasons, I am of opinion that the answer to the question submitted by the Board in this appeal should be in the affirmative, namely, that the Board had power to make Order no. 66533. There should be no costs.

RAND J.:—The Bell Telephone Company, being unable to obtain from the Corporation an unqualified consent to carry a telephone line across certain highways by underground construction, applied for leave to do so to the Board of Transport Commissioners under the provisions of subsections 2 and 3 of section 373 of *The Railway Act* which are in these words:

> 2. Notwithstanding anything in any Act of the Parliament of Canada or of the legislature of any province, or any power or authority heretofore or hereafter conferred thereby or derived therefrom, no

telegraph or telephone line, within the legislative authority of the Parliament of Canada, shall except as hereinafter in this section provided, be constructed by any company upon, along or across any highway, square or other public place, without the legal consent of the municipality having jurisdiction over such highway, square or public place.

3. If any company cannot, in respect of any such line, obtain such consent from such municipality, or cannot obtain such consent otherwise than subject to terms and conditions not acceptable to the company, such Company may apply to the Board for leave to exercise such powers, and upon such application shall submit to the Board a plan of such highway, square or other public place showing the proposed location of such lines, wires and poles.

The powers of the Board on such an application are set forth in subsection 4 of the same section:

4. The Board may refuse or may grant such application in whole or in part, and may change or fix the route of such lines, wires or poles, and may by order impose any terms, conditions or limitations in respect of the application which it deems expedient, having due regard to all proper interests.

The Board granted leave, but subject to this condition:

If, from time to time in order to enable the municipality to construct, reconstruct, alter or repair a highway, waterpipe line, sewer or other work of the municipality, the municipality request the company to change the location of any of the works authorized by Order no. 66276 and the company does not agree to make such change, or does not agree to make such change otherwise than upon terms and conditions unacceptable to the municipality, the municipality may apply to the Board for an order or orders directing the company to make such change; and if, upon such application or applications, the Board deems it expedient, having due regard to all proper interests, that the location of any of the works in question should be changed, the company shall make such changes in the location of the works in question as the Board may direct; and the municipality and the company shall each pay such part of the cost of changing the location of the works as the Board may direct.

Against the inclusion in the leave of that condition the Company appeals. Mr. Munnock, in an able argument, places his case on three grounds: that, as the works are underground, they are not within subsection 2 as being constructed "across" a highway; that the Board, under subsection 4, may impose conditions relating only to construction and not as to maintenance as here; and that the condition in question is in conflict with the implication of subsections 6 and 7 of the same section.

The purpose of Parliament in enacting section 373 was to place within the discretion of an important administrative body the adjustment of conflicts between the exercise

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of various public rights and services in highways. As these become more complex, the need becomes greater that their accommodation be made with efficiency and fairness, having regard to all interests involved. The object sought is a flexibility in functioning and an incidence of work and cost which, in the judgment of an experienced tribunal, best accord with the harmonious working of the services and uses as a whole.

The interpretation of such legislation as *The Railway Act* must have regard to those administrative purposes; and ever since the enactment of that statute the Judicial Committee has consistently adopted constructions of its provisions that have ensured a wide discretion to the Board. I must then approach the language vesting these powers in the Board so as to give it that plain and practical meaning which the nature of the subject matter and the character of the Board's function unite in requiring.

In that interpretive attitude, I reject the first ground raised against the order: but as I have come to the conclusion that the last is well founded, I do not deal with the former in detail. Nor do I find it necessary to examine the second beyond observing that in one aspect it is involved with the third.

Subsections 6 and 7 are as follows:

6. Notwithstanding any power or authority heretofore or hereafter conferred upon any company by or under any Act of the Parliament of Canada, or of the legislature of any province, or any other authority, the Board, upon the applicaion of the municipality, and upon such terms and conditions as the Board may prescribe, may order any telegraph or telephone line, within the legislative authority of the Parliament of Canada, in any city or town, or any portion thereof, to be placed underground, and may in any case order any extension or change in the location of any such line in any city or town, or any portion thereof, and the construction of any new line, and may abrogate the right of any such company to construct or maintain, or to operate, or continue, any such line, or any pole or other works belonging hereto, except as directed by the Board; and where such a line or lines within the legislative authority of the Parliament of Canada and such a line or lines within the legislative authority of a province, run through or into the same city or town, and such municipality is desirous of having any such lines placed underground, and there exists in such province a provincial commission, public utilities or other board or body having power to order such a line within the legislative authority of such province to be placed underground, the Board and such provincial commission, or public utilities board or body, may by joint session or conference, or by joint board, order any such lines

within such city or town, or any portion thereof, to be placed underground, and abrogate any right to carry the same on poles, and the provisions of subsection three of section two hundred and fifty-three of this Act, with the necessary adaptation, shall apply to every such case.

7. Except as provided in the last preceding subsection, nothing in this section shall affect the right of any telegraph or telephone company to operate, maintain, renew or reconstruct underground or overhead systems or lines, heretofore constructed.

The section as a whole furnishes a code regulating the construction of telephone lines in and on highways and other public places; and the statute is clear that, except in one respect and except when the Company is exercising powers granted under subsection 1, once the installations have been made, whether that has taken place before the Board's jurisdiction was created, or thereafter with the consent of the Municipality or with an order under subsection 3, they may thereafter be maintained and operated free from the Board's control. The exception is in subsection 6 where changes may be ordered in cities and towns.

Now what the order challenged does is in effect to add the provisions of subsection 6 to new constructions outside of cities and towns. The implication of that subsection is perfectly clear that outside of cities and towns no such changes can be ordered. Can that implictaion be nullified by the condition of an order under subsection 3? I do not think so. Parliament no doubt had in mind the necessities of public services in the streets of cities and towns, as contrasted with country highways, as they become more numerous and congested and in subsection 6 it has dealt inclusively with the alterations of constructed works; if, under subsection 4 such a general condition could be annexed to an order, there would have been no need of limiting the power to order changes to cities and towns, certainly for subsequent construction. Under that condition, such works could exist side by side with others, belonging to the same or any other company, free from any administrative control whatever. That anomally has been avoided in subsection 6 by placing all lines, whenever constructed, under the authority of the Board. Whether such a condition, specifically related to existing works, could in any circumstances be justified, I do not enquire; its generality here

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in effect removes the limitation to cities and towns in subsection 6 in relation to new construction and cannot be held to be within the scope of subsection 4.

The appeal should be allowed and Order no. 66533 set aside. The original Order no. 66276, including section 2, remains in force. There should be no costs.

Question answered in the negative.

Solicitors for the appellant: *Munnoch & Venne.*

Solicitor for the respondent: *W. D. J. Moss.*

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*Jun. 19, 20, 21.
*Oct. 1.

PARMELIA LESSARD (PLAINTIFF).....APPELLANT;

AND

HULL ELECTRIC COMPANY (DEFENDANT).....RESPONDENT.

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

Negligence—Workman killed by electric wire while painting railway bridge —Defendant (railway) company held not responsible—Light and power system sold by it years before date of accident—Questions as to ownership of wire and as to its care, control, supervision or maintenance—Whether wire, even if sold, still remained in charge or care of defendant in relation to deceased—Liability of company either under article 1053 C.C. or article 1054 C.C.—Jury trial—Whether interpretation of deed of sale question of law or question of fact.

The appellant's husband was engaged in painting a railway bridge, when, while preparing to move a plank upon which he had been sitting at a considerable height above the floor of the bridge, he came in contact with an electric wire carrying 2,200 volts and his death ensued immediately. Action was brought by the appellant, personally and as tutrix to her minor children, for $50,000 damages against the respondent company. At the trial by a judge with a jury, judgment was entered for $18,064. The jury, to the question whether the death had been caused by a thing under the control or care of the respondent company, answered: "Yes, due to the Company, the electric wire", and later the jury, after having answered in the affirmative that the death had been caused by the "fault" of the respondent company, added that the latter was "liable for negligence and carelessness in keeping its

*PRESENT:—Rinfret C.J. and Kerwin, Hudson and Rand J.J. and St. Jacques J. *ad hoc.*

wire too close to the bridge". The appellate court dismissed the action, holding that the respondent company did not own, or have under its care, the electric wire and that there was no fault on its part.

Held, Rand J. and St. Jacques J. *ad hoc* dissenting, that the appeal should be dismissed.—Upon the evidence and the proper construction of a deed of sale by the respondent company of its light and power system to another electric company, not only was it established that the respondent company, at the time of the accident, was neither the owner of the wire nor had it under its care, control or supervision, but that, on the contrary, the ownership was proved to have been transferred to that other company.—The respondent company, having disposed of the ownership of the wire and not having afterwards assumed or undertaken any supervision or control over it, cannot be held liable.

The interpretation of the provisions of the deed of sale is a question of law to be decided by the courts and not a question of fact within the province of the jury. Rand J. expressing no opinion and St. Jacques J. *ad hoc contra.*

Per Rand J. and St. Jacques J. *ad hoc* (dissenting):—The ownership of the wire must not necessarily be determined in this case: even if it was sold to another company, the right to maintain, in the sense of continuing it as it then was, remained in the respondent company. The latter then must be looked upon as a party to the continuing existence of the wire on the bridge in the position in which it was at the time of the fatality; it was thus in charge or care of the wire in relation to the deceased and is brought within the liability of article 1054 C.C.—Whether the death was caused by the wire or whether the deceased himself was negligent, are questions of fact to be found by the jury under proper direction from the Court. The directions given at the trial were not proper: they were to the effect that the respondent company was liable as a matter of law and this withdrew from the jury these essential questions of fact. There should be a new trial.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the trial judge, Surveyer J. with a jury, and dismissing the appellant's action for 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.

Auguste Lemieux K.C. and *Alexandre Taché K.C.* for the appellant.

John L. O'Brien K.C. and *A. J. Campbell* for the respondent.

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LESSARD v. HULL ELECTRIC COMPANY

Rinfret C.J.

The judgment of The Chief Justice and of Hudson J. was delivered by

THE CHIEF JUSTICE: Je partage entièrement l'opinion exprimée en cette affaire par Sa Seigneurie le Juge en Chef de la province de Québec, dans les notes qu'il a fournies lors du jugement rendu par la Cour du Banc du Roi (en Appel), et qui a été subséquemment soumis à la Cour Suprême du Canada.

Comme lui, je crois qu'il n'y a pas à examiner de questions autres que celle de savoir si, à l'époque de l'accident dont le mari et le père des appelants a été la malheureuse victime, l'intimée avait la garde du fil conduisant l'électricité qui a causé la mort de Joseph Emile Napoléon Marcoux.

Marcoux était occupé à peinturer le pont qui relie Ottawa à Hull et connu sous le nom de "Pont Interprovincial"; dans un mouvement qu'il fit en se déplaçant, il vint en contact avec le fil dont il s'agit et il fut électrocuté.

Sa veuve et ses enfants poursuivirent l'intimée et le jury rendit un verdict tenant l'intimée responsable de l'accident.

La réponse du jury à la question qui lui était posée si

la mort dudit Joseph Emile Napoléon Marcoux était due à ou avait été causée par aucune chose appartenant à la défenderesse, ou était sous sa garde, son contrôle, sa surveillance ou son entretien,

et, dans l'affirmative, lui demandant de dire quelle était cette chose, se lit comme suit:

R:—Oui, dûe à la Compagnie Hull Electric, le fil électrique.

Et, ayant répondu affirmativement à une autre question lui demandant de dire si la mort de Marcoux avait été causée par la faute, négligence, imprudence ou incurie de l'intimée ou de ses officiers, employés ou préposés, le jury précisa que l'intimée était

responsable pour négligence et imprévoyance en tenant leur fil "D" trop près du pont.

Il accorda à la veuve personnellement une somme de $10,000 et, aux enfants, des indemnités individuelles dont le total s'élève à $8,064.00.

Il ne faut pas, je le sais, analyser trop minutieusement les verdicts de jury en matière civile. Cette Cour l'a affirmé à maintes reprises; mais il faut tout de même en

dégager le sens afin de savoir si le verdict a pour effet de tenir légalement responsable celui que le jury a entendu viser.

Or, à mon humble avis, il résulte des réponses données par le jury, qu'il a tenu l'intimée responsable pour négligence et imprévoyance, en vertu de l'article 1053 du code civil, et non pas à raison des dommages causés par une chose qu'elle avait sous sa garde, en vertu de l'article 1054 C.C.

Le sens du verdict est manifestement que la mort de Marcoux a été causée par la

négligence et imprévoyance, en tenant leur fil "D" trop près du pont.

Il a bien dit que ce fil électrique appartenait à l'intimée et qu'elle en avait la garde, le contrôle, la surveillance ou l'entretien, mais il faut lier cette réponse avec celle où le jury précise la raison de la responsabilité pour la mort de Marcoux, et cette raison est clairement définie comme ayant été la négligence et l'imprévoyance en tenant son fil "D" trop près du pont. Il était évidemment nécessaire que le jury déclarât d'abord que, à son point de vue, ce fil appartenait à l'intimée ou qu'il était sous sa garde car, autrement, l'intimée n'eut pu être responsable "en tenant son fil "D" trop près du pont".

Pour tenir son fil "D" trop près du pont, il fallait nécessairement que l'intimée ou bien fut propriétaire du fil, ou bien l'ait eu sous sa garde au moment de l'accident.

Devant la Cour du Banc du Roi (en Appel), comme devant notre Cour, la discussion a évidemment dévié du véritable sens du verdict. Et si l'on en juge par les notes des membres de la Cour du Banc du Roi, ainsi que par l'argumentation devant nous, les appelants ont plutôt laissé dans l'ombre la question de la responsabilité, résultant de l'article 1053 C.C., pour s'arrêter plutôt à la responsabilité en vertu de l'article 1054 C.C.

Je me permets d'exprimer un doute sérieux sur la question de savoir si, à raison de la preuve faite devant lui, le jury pouvait réellement être justifiable de considérer comme une faute en soi, ou, pour employer ses propres expressions, "négligence et imprévoyance", la distance qui séparait le fil de l'un des portants du pont. L'accident a eu lieu le 5 juin 1941. Ce fil, en autant que le dossier

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le révèle, était là depuis au moins l'année 1915. J'éprouve beaucoup de difficultés à penser qu'il pouvait y avoir eu une faute ou une négligence dans le seul fait d'avoir placé le fil où il était.

Il me semble que le nombre d'années qui s'est écoulé depuis que le fil avait été posé est suffisant pour démontrer que la position qui lui avait été donnée ne pouvait en soi constituer une imprudence ou une imprévoyance.

Mais la réponse du jury ne tend pas à dire qu'il y a eu négligence au moment où le fil a été posé. Il dit bien que cette négligence ou cette imprudence aurait consisté dans le fait de tenir le fil trop près du pont ("en tenant leur fil "D" trop près du pont"). Il en résulte que, pour que le verdict puisse s'appuyer sur la preuve faite devant lui, il est nécessaire de trouver dans le dossier quelque chose qui établisse que c'était bien l'intimée qui "tenait" ce fil trop près du pont; et pour que l'intimée ait pu en agir ainsi, il fallait de toute nécessité qu'il fut prouvé que l'intimée était ou bien la propriétaire du fil, ou bien qu'elle l'ait eu sous sa garde, son contrôle, sa surveillance, ou encore qu'elle en ait eu l'entretien. C'est précisément, à mon avis, non seulement ce qui manque au dossier d'une façon absolue, mais c'est le contraire qui est prouvé.

Sur la question de propriété du fil, il faut absolument s'en rapporter aux documents écrits ou aux contrats qui ont été produits. C'est au moyen de l'interprétation de ces contrats que l'on peut arriver à décider qui, lors de l'accident, était propriétaire du fil. Il ne saurait être permis, sur ce point, de recourir à la preuve verbale, à moins que l'on arrive à la conclusion que les contrats comportent une telle ambiguïté qu'il faille absolument chercher à les éclaircir au moyen de témoignages.

Or, je dois dire que je n'éprouve aucune difficulté à interpréter les contrats. Cette question d'interprétation est une question de droit, et ce n'est pas au jury mais aux tribunaux qu'il appartenait de se prononcer là-dessus.

En l'espèce, de même que la majorité des juges de la Cour du Banc du Roi (en Appel), je crois qu'il faut s'en rapporter au contrat du 11 janvier 1928.

Il n'y a pas de doute que, jusqu'à cette date, l'intimée était propriétaire du fil "D". Il s'agit donc de savoir si,

lors de la vente de l'intimée à The Gatineau Electric Light Co. (Ltd.), le fil "D" est devenu la propriété de cette dernière compagnie.

Jusque là, l'intimée exploitait à la fois un service d'éclairage par l'électricité et un service de transport de passagers.

Le but de la vente de 1928 était de transférer à la Compagnie Gatineau le service d'éclairage avec tous ses accessoires, et de réserver à l'intimée le service de transport des passagers.

Dans ce contrat, l'on a appelé le service d'éclairage "electric lighting and distributing system", et l'on a désigné le service de transport sous le nom de "traction system".

Or, voici comment le contrat définit ce qui a été vendu à la compagnie Gatineau:

> All the electric lighting and distributing system of the city of Hull, municipalities of South Hull and East Hull, town of Aylmer and village of Deschenes, as it existed on the first day of June last, including poles, wires, transformers, service connections, meters and all other accessories used for purposes of domestic or municipal lighting apart from purposes connected with the traction system of the vendor * * *

Que trouve-t-on dans cette description? Tout d'abord, le mot "all" par lequel le paragraphe débute. C'est tout le système d'éclairage ("lighting and distributing system") qui est vendu. Mais, pour plus de précision, la description ajoute:

> * * * including poles, wires, transformers, service connections, meters and all other accessories used for purpose of domestic or municipal lighting * * *

Le mot "including" ne peut évidemment pas limiter le sens des mots "all the electric lighting and distributing system". Le contrat déclare que cela inclut les "poles, wires", etc., mais ce ne peut être que pour suivre les prescriptions de l'article 1021 du code civil:

> Lorsque les parties, pour écarter le doute si un cas particulier serait compris dans le contrat, ont fait des dispositions pour tel cas, les termes généraux du contrat ne sont pas pour cette raison restreints au seul cas ainsi exprimé.

Les mots par lequel le paragraphe 6 du contrat débute, "all the electric lighting and distributing system" conservent toute leur ampleur et ne sont en rien diminués par le fait que l'on indique en plus que cela comprend les "poles, wires, etc."

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Les termes généraux du contrat comprenaient déjà les fils qui faisaient partie du "lighting and distributing system". Le fait que l'on ajoute plus loin les "wires," etc., loin de restreindre le sens, vient au contraire le compléter, en autant que besoin est pour les fins de la présente cause, par l'addition du mot "wires".

Au moment même de la vente, le fil "D" servait à fournir l'éclairage au terminus de l'intimée à Ottawa.

En vendant à la Compagnie Gatineau les fils qui faisaient partie du système d'éclairage, l'intimée a donc vendu entre autres, le fil "D". Ce fil n'a jamais servi pour fins de transport; il n'a jamais été employé à ces fins et ne peut, sous aucun rapport, être compris comme faisant partie du "traction system".

Mais, comme pour y insister, les parties reviennent sur le sujet dans un paragraphe subséquent:

> It is the intention of the vendor to convey and of the purchaser to accept all the property moveable and immoveable, the rights, privileges, servitudes, franchises and any and all other properties owned by the vendor and used solely in connection with the business of domestic or municipal lighting or furnishing of power apart from traction purposes; and should it be hereafter discovered that any property, rights, privileges, servitudes, franchises or any other properties owned by the vendor and used for the purposes above indicated apart from traction purposes be hereafter vested in its name the vendor will on demand execute such other and further deeds, documents and assurances in writing as may be necessary to vest the same in the purchaser.

Si un doute avait subsisté à la lecture du paragraphe 6 du contrat—et pour ma part je n'en ai aucun—je ne vois pas comment on pourrait encore en avoir à la lecture de ce paragraphe où les parties ont pris la peine de spécifier d'abondance leur intention. Et, dans le paragraphe que je viens de citer, elles déclarent très clairement que cette intention est de transférer à la Compagnie Gatineau

> all the properties * * * owned by the vendor and used solely in connection with the business of domestic or municipal lighting or furnishing of power apart from traction purposes.

Même si les mots "domestic lighting" présentaient la moindre ambiguïté dans les circonstances, il reste cette précision supplémentaire que l'intimée transférait à la Compagnie Gatineau son titre de propriété, ses droits, privilèges, servitudes, franchises et autres, "furnishing of power apart from traction purposes", à savoir: tout ce qui servait à fournir le pouvoir pour toutes fins, excepté

celle destinée aux fins de transport. De toute évidence, cela comprend les fils qui servaient exclusivement à l'éclairage au terminus, et cela n'excluait que les fils qui transmettaient le pouvoir nécessaire pour les fins de transport.

Il m'est impossible de voir comment on pouvait encore avoir un doute sur le sujet.

Ce contrat établit donc que le fil "D" était depuis 1928 la propriété de la Compagnie Gatineau ou de son acheteur subséquent, la Gatineau Power Company, mais, en tous cas, n'était certainement pas la propriété de l'intimée.

Puis, comme le fait très justement remarquer le juge en chef de Québec, c'est d'ailleurs ainsi que, depuis 1928, l'intimée et la Gatineau Electric Light Company ont exécuté ce contrat. L'exécution par les parties sert également à aider à l'interprétation d'un contrat. Voir *Garneau* v. *Diotte* (1).

La preuve tout entière est à l'effet qu'à partir de la date de ce contrat, la Compagnie Gatineau s'est considérée comme propriétaire du fil "D" et l'intimée s'est comportée comme ne l'étant plus. Dès la venue en vigueur du contrat, la Compagnie Gatineau a assumé la garde, le contrôle, la surveillance et l'entretien du fil "D". Bien entendu, quand je mentionne ce fait, je veux parler de cette partie du fil "D" qui se trouve dans la cité de Hull jusqu'au point de rencontre à la ligne de démarcation entre la province de Québec et celle d'Ontario.

Non seulement il n'y a aucune preuve que l'intimée à partir de cette date de 1928 avait la garde ou l'entretien du fil "D" dans la cité susmentionnée, mais la preuve toute entière est à l'effet que cette garde, ce contrôle, cette surveillance et cet entretien ont été subséquemment maintenus par la Gatineau Electric Light Co. (Ltd.) et, plus tard, par son successeur, la Gatineau Power Company.

Il est impossible de trouver au dossier même une seule allusion à la garde de ce fil qui eût pu justifier le jury d'en venir à la conclusion que l'intimée, depuis 1928, avait ce fil sous sa garde. Et là il ne s'agit plus seulement de l'interprétation du contrat, mais il s'agit de faits prouvés par les témoins. Si le verdict du jury veut dire que l'inti-

(1) [1927] S.C.R. 261.

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mée avait la garde de ce fil, ce verdict ne peut tenir parce qu'il n'est basé sur absolument le moindre iota de preuve. Tous les témoins ont dit le contraire.

Il n'y a donc aucun fondement à la prétention que le fil "D" ou bien appartenait à l'intimée, ou bien était sous sa garde, son contrôle, sa surveillance ou son entretien. Il s'ensuit également que la réponse du jury à l'effet que l'intimée a "tenu" le fil "D" trop près du pont ne peut s'appuyer sur aucune preuve.

Je ne m'arrête pas un instant à l'objection soulevée par les appelants que le contrat du 12 août 1926 entre la Canadian Pacific Railway Company et l'intimée contenait une clause en vertu de laquelle cette dernière

will not assign or underlet the rights hereby granted without the consent of the Pacific Company in writing first had and obtained.

On remarque d'abord dans cette clause qu'il ne s'agit pas d'une prohibition absolue, mais simplement de la stipulation que, pour transférer ce contrat, l'intimée devait préalablement obtenir le consentement de la Compagnie du Pacifique. Cette compagnie n'était pas en cause et il n'y a donc eu aucune recherche au cours du procès pour s'informer du consentement que la compagnie a pu donner à la cession par l'intimée de ses droits à la Compagnie Gatineau. Je serais porté à dire que la Compagnie Gatineau, ayant exercé ces droits depuis 1928 jusqu'à la date de l'accident, soit une période de treize années, s'est crue parfaitement justifiée de penser que le consentement requis avait été donné. Si la cause s'était instruite entre l'intimée et la Compagnie du Pacifique, il y a toutes les chances du monde que les tribunaux en seraient venus à la conclusion qu'il y a eu au moins un consentement tacite et que la Compagnie du Pacifique eût pu difficilement prétendre que ce consentement n'existait pas, en arguant seulement de la prétention définitive qu'il n'avait pas été donné par écrit.

Mais la cession des droits par l'intimée à la Compagnie Gatineau était parfaitement légale et efficace sous tous les rapports, sauf à vérifier si le consentement requis avait été donné par la Compagnie du Pacifique.

Cette réserve était faite exclusivement dans l'intérêt de cette dernière compagnie. Aucun autre ne pouvait s'en prévaloir. C'est uniquement la Compagnie du Pacifique qui pouvait faire valoir cette absence de consentement à son égard. Elle n'intéresse absolument personne autre. Il n'appartenait certainement pas aux tribunaux de soulever cette question lorsque la Compagnie du Pacifique n'est pas partie en cause. Même à l'égard de cette dernière, il ne s'agirait là que d'un bris de contrat dont seule la Compagnie du Pacifique peut se prévaloir, et que les tribunaux peuvent apprécier uniquement dans une cause entre l'intimée et la Compagnie du Pacifique.

Pour le moment, le contrat entre l'intimée et la Compagnie de la Gatineau est en vigueur depuis 1928; personne n'en demande l'annulation.

Il reste le fait que ce contrat de 1928 a eu lieu, que la Compagnie Gatineau a pris possession de ce qui faisait l'objet de cette vente, y compris le fil "D" et les droits et franchises s'y référant, et que l'on n'est pas appelé, dans l'instance actuelle, à regarder au delà.

Comme conséquence de tout ce qui vient d'être dit, le contrat ou le document écrit établit au dossier sans conteste que ce n'était pas l'intimée qui était propriétaire, au moment de l'accident, du fil "D" et de la franchise y afférant, et que c'était de plus, même indépendamment de la question de propriété, la Compagnie Gatineau qui, en fait, avait la garde, le contrôle, la surveillance et l'entretien de ce fil.

Toute la preuve est à cet effet. Il n'y a pas l'ombre d'une preuve au contraire. Le verdict est donc évidemment contraire à la preuve qui a été faite, et le jury ne pouvait être justifié à rendre un verdict autre qu'en faveur de la partie intimée.

Dans les circonstances, d'après l'article 508, paragraphe 3, du Code de Procédure Civile, la Cour du Banc du Roi (en Appel) a été justifiée de rendre un jugement différent de celui qui a été rendu par le juge présidant au procès.

Peut-être avant de conclure dois-je ajouter que, du moment que la preuve établissait que la garde du fil "D" était, au moment de l'accident, à la charge de la Compagnie

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Gatineau et qu'elle était évidemment exercée par cette Compagnie, cela disposait de la solution de la cause en faveur de l'intimée, en vertu de l'article 1054 du Code Civil.

Il n'est pas nécessaire, en effet, de faire remarquer que l'article impose la responsabilité du fait des choses à celui qui en a la "garde", et, comme je l'ai dit il y a un instant, indépendamment de sa propriété. Sa responsabilité provient de la "garde" qu'il peut en avoir. Et si l'objet ou la chose était alors sous la "garde" d'un autre que le propriétaire, c'est celui qui a la "garde" qui est responsable à l'exclusion du propriétaire.

Le juge de première instance dans l'espèce actuelle, le dit lui-même dans son jugement formel.

> Au surplus, la responsabilité du fait d'une chose inanimée * * * retombe non pas sur le propriétaire comme tel, mais sur le gardien de la chose.

Et il cite Pandectes belges, Vo Responsabilité civile, n. 628, 1852; *Shawinigan Carbide Company* v. *Doucet* (1); Dalloz, 1900-2-289, note de M. Josserand à la p. 290.

Il semble inutile d'insister là-dessus lorsque le texte de l'article 1054 C.C. est si clair; mais ici même, dans cette Cour, nous avons à plusieurs reprises décidé la chose dans le même sens, et nous pourrions invoquer *Canada and Gulf Terminal Railway Co.* v. *Lévesque* (2) (qui d'ailleurs eut constitué un obstacle au succès des appelants sous plusieurs autres rapports, si nous n'en étions pas venus à la conclusion que ni la propriété ni la garde de la chose n'avait été établie à l'encontre de l'intimée); *Quebec Railway Light, Heat and Power Company Limited* v. *Vandry* (3); *Lacombe* v. *Power* (4); *McLean* v. *Pettigrew* (5), toutes des décisions qui lient cette Cour et qui ont tranché cette question définitivement en autant que cette Cour est concernée.

On pourrait profitablement consulter également un jugement très étudié re *La Sécurité Compagnie d'Assurances Générales du Canada* v. *Canadian Pacific Express* (6).

Je suis donc d'avis de confirmer le jugement dont est appel, avec dépens.

(1) (1909) 42 Can. S.C.R. 281, at 284.
(2) [1928] S.C.R. 340.
(3) [1920] A.C. 662.
(4) [1928] S.C.R. 409.
(5) [1945] S.C.R. 62.
(6) Q.R. [1946] S.C. 52.

KERWIN J.:—On July 5, 1941, Joseph Emile Napoléon Marcoux, as an employee of the Canadian Pacific Railway Company, was engaged in painting the Interprovincial Bridge between Hull and Ottawa. The painting had been commenced on the Quebec end of the bridge and Marcoux was still working within the limits of the city of Hull, when, while preparing to move a plank upon which he had been sitting at a considerable height above the floor of the bridge, he came in contact with an electric wire carrying 2,200 volts, and his death ensued immediately.

Under the appropriate statute, the Quebec Workmen's Compensation Board directed the Canadian Pacific Railway Company to pay a special sum of $100, and $125 towards its employee's funeral expenses. It also directed the employer to pay Parmelia Lessard, the widow of Marcoux, for herself and her eight minor children, the sum of $66.47 per month,—subject to the revision, in the future, of this monthly payment. The widow had already reserved her rights and those of her children to claim at common law from Hull Electric Company an additional sum which would constitute, with this compensation, an indemnification proportionate to the loss actually sustained. In pursuance of that reservation this action was thereupon brought by the widow personally and as tutrix to her minor children against Hull Electric Company, based upon articles 1053 and 1054 of the Quebec Civil Code.

The action was tried by Mr. Justice Surveyer with a jury and upon the latter's answers to questions put to them, judgment was entered against the Company for $10,000 for the widow personally and $8,064 in her quality as tutrix. In the Court of King's Bench, the three judges comprising the majority decided that the Company did not own or have under its care the electric wire in question and that there was no fault on its part, and for those reasons and without expressing any opinion upon the other matters raised, set aside the judgment and dismissed the action. Mr. Justice St. Germain concluded that there was evidence to permit the case to go to the jury but that because of errors in the trial judge's charge, there should be a new trial. The plaintiff now appeals.

Whatever may be the fact as to who built the Interprovincial Bridge, it appears from an agreement dated

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August 12, 1926, that the Canadian Pacific Railway Company granted to the respondent the right to use, for its electric railway, two lines of tracks on the bridge for east and west bound traffic, respectively, and the right to maintain the shelters, ticket office, waiting room, platforms and stairways at the respondent's terminal in Ottawa. The grantor was to maintain the rails but the grantee was to construct and maintain, among other things, the necessary trolley wires. The respondent agreed to pay $6,000 per annum for these privileges. We are concerned only with what has been called in the case the south side of the bridge, on which are situate the tracks running from Hull to Ottawa with a trolley wire (*b*) above them, carrying power for the electric cars, a wire (*a*) to the south of the trolley wire, for the purpose of furnishing power for lighting the bridge, and wires (*c*) and (*d*) to the north of the trolley wire. These wires, (*c*) and (*d*), furnished power to light the terminal. In the trolley wire was direct current while in (*c*) and (*d*) the current was alternating. It was the current in wire (*d*) that electrocuted Marcoux.

Notwithstanding the date of the agreement with the Canadian Pacific Railway, it is clear from the evidence that the respondent commenced to use the tracks and facilities as early as 1915 because in that year it strung across the bridge the two wires (*c*) and (*d*). At that time the respondent not only operated the trolley system but also produced and supplied electricity for domestic and municipal use and for power to consumers in the city of Hull and elsewhere. However, by transfer dated January 11, 1928, it conveyed to Gatineau Electric Light Company Limited a number of parcels of land, including that upon which was erected substation no. 4, situated at 70 Main St., Hull, but reserved

> as being used for purposes connected with the operation of its traction lines and not required for domestic or municipal lighting purposes certain generating equipment with accessories thereto

which were located in that substation. By clause 6 of this transfer of January 11, 1928, the respondent also conveyed

> All the electric lighting and distributing system of the city of Hull, municipalities of South Hull and East Hull, town of Aylmer and village of Deschenes, as it existed on the first day of June last, including poles, wires, transformers, service connections, meters and all other accessories used for purposes of domestic or municipal lighting apart from purposes connected with the traction system of the vendor.

It is agreed that the limits of the city of Hull extend to the boundary line between the provinces of Quebec and Ontario. By clause 7 it is stated:—

> It is the intention of the vendor to convey and of the purchaser to accept all the property moveable and immoveable, the rights, privileges, servitudes, franchises and any and all other properties owned by the vendor and used solely in connection with the business of domestic or municipal lighting or furnishing of power apart from traction purposes.

The Court of King's Bench concluded that, upon the proper construction of these provisions, the respondent thereby transferred the ownership of wires (*c*) and (*d*) within the limits of the city of Hull. The matter does not lend itself to extended discussion but upon a full consideration of all that has been said by counsel, I have had no difficulty in coming to the same conclusion. Any ambiguity in clause 6 is, in my opinion, made clear by the terms of clause 7 but, if there should still be any doubt about the matter, it is removed by the subsequent actions of both parties to the sale of January 11, 1928, or their successors. Mr. Gale, the respondent's manager, testified that from January 11, 1928, forward, the respondent attended to the repair and maintenance of wires (*c*) and (*d*) from the Interprovincial Boundary to the Ottawa terminal but that it exercised no supervision or control over them on the Quebec side. The Chief Engineer of Gatineau Power Company, whose position in the matter will be explained shortly, undertook, on behalf of his company, the supervision of wires (*c*) and (*d*) on the Quebec side. Mr. Gale further stated that these wires leave the Gatineau Power Company Substation, 70 Main street, Hull, and follow Main street, Hotel de Ville street, Laurier avenue and Youville street to the Ontario border, and that the respondent uses power from the Gatineau Power Company at 117 Main street as well as at the Ottawa terminal, in both of which places it is but a customer of the Gatineau Power Company.

The reference to the Gatineau Power Company is explained by another document dated April 6, 1931, by which Gatineau Electric Light Company Limited transferred to Gatineau Power Company its undertaking in the province of Quebec and its system for the transmission and

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distribution of electrical power or energy in that province, owned by it, comprising among other transmission and distribution lines:—

City of Hull.

Lines in the city of Hull, county of Hull, located as follows and including service extensions along their routes:

Laurier Avenue.

East side of Laurier ave. from Hotel de Ville street to Ste. Foye street.

* * *

Main street.

North side of Main street from Hotel de Ville street to Bridge street the said line being located in part upon and over lot number seven hundred and twenty-nine (729) of ward three on the Official Plan and in the Book of Reference of the city of Hull (According to the transfer from the Hull Electric Company to Gatineau Electric Light Company Limited, lot 729 is the lot upon which is erected substation 4).

* * *

Hotel de Ville street.

North side of Hotel de Ville street from Laurier avenue to Main street.

Youville street.

South side of Youville street from Laurier avenue to the Provincial Boundary on the Interprovincial Bridge between the cities of Hull and Ottawa.

This list of streets upon which the transfer from Gatineau Electric Light Company Limited to Gatineau Power Company states there are transmission and distribution lines agrees with Mr. Gale's evidence as to the location of wires (*c*) and (*d*) from substation 4 to the Ontario boundary.

It is argued that even if wires (*c*) and (*d*) at the date of the accident were not owned by the respondent, they were under the latter's care within the meaning of article 1054 of the Civil Code. It is said that they are continuous wires from Youville street across the bridge and to the respondent's terminal in Ottawa, and that their only purpose is to conduct electric power for the purpose of lighting the terminal. The fact that they are continuous does not prevent the ownership changing at the Interprovincial Boundary and to say that their only purpose is to furnish power to light the Ottawa terminal is correct only in this sense,—that from the time they reach the Quebec end of the bridge the only user of energy is the respondent at its terminal. It is further said that while the agreement with the Canadian Pacific Railway of August, 1926, does not refer to wires (*c*) and (*d*), once it is admitted

that they were erected on the bridge by the respondent, it should be taken that the Canadian Pacific Railway Company by the agreement of August 12, 1926, gave a licence to the respondent only; particularly in view of clause 4 of that agreement by which the respondent agrees that it will not assign or underlet the rights thereby granted without the consent in writing of the Canadian Pacific Railway Company; that it was shown that there was no agreement between the latter and Gatineau Power Company or Gatineau Electric Light Company Limited; and that the respondent has continued to pay the full amount of $6,000 per annum.

We are not concerned with the rights *inter se* of the Canadian Pacific Railway Company and the respondent, or of it and Gatineau Power Company. Whatever they may be, they cannot alter the fact that the ownership of wires (*c*) and (*d*) to the Provincial Boundary line had been transferred by the respondent and that since then it had not exercised any control or supervision over them and therefore it cannot be said that at the place at which the unfortunate accident occurred, the wires were under the respondent's care within the meaning of article 1054 C.C. Having disposed of the ownership and not having assumed or undertaken any supervision or control, the respondent cannot be held liable for any fault. There was therefore no case against the respondent to submit to the jury and the appeal should be dismissed with costs.

RAND J. (dissenting):—The husband of the appellant lost his life by electrocution while at work painting the Interprovincial Bridge between Ottawa and Hull. He was found to have come into contact with one of two wires carrying electricity of 2,200 voltage from a sub-station in Hull to the terminal of the respondent, Hull Electric Company, in Ottawa, and used only for lighting that terminal. The wires were fastened to brackets affixed to the bridge structure and the nearer to the side of the column or girder the deceased was painting had a clearance of about 15½ inches. They had been erected by the Hull Company in 1915 under permission from the Canadian Pacific Railway Company, the owner apparently of the bridge.

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In 1926 the Pacific Company granted the respondent a long term right to operate its tramway system over the bridge. There is no reference in the contract to any previous use of the bridge for that service, but admittedly it was a continuation of a use that had been going on for many years before. Nor is there any reference to the two lighting wires, and whether they were intended to be covered by it or to be continued under the original licence is not clear. It seems to have been assumed in both the lower courts that they were within the language of the 1926 agreement; but on the argument before us this was challenged by counsel for the respondent. He contended that the right to place the wires on the bridge was to be found in an agreement made in 1914 not placed in evidence, but mentioned in the 1926 document. However this may be, admittedly they were in place only by virtue of a licence from the Pacific Company and on the records of that company the licensee remained the Hull Company. In 1928 the latter sold to the Gatineau Light and Electric Company its light and power system for both domestic and public services, but reserved all plant and property used for or in connection with the traction or tramway purposes, and the controversy has been decided by the Court of King's Bench on the ground that this sale carried the two wires as far as the interprovincial boundary which is the middle of the Ottawa River.

I should have thought the language of the 1928 agreement:

> All the electric lighting and distributing system * * * as it existed on the 1st day of June last * * * used for purposes of domestic or municipal lighting apart from purposes connected with the traction system of the vendor

would mean domestic or municipal *vis à vis* the then owner, the Hull Company; both words look rather to services to third persons than to the parties themselves; and the use then made by the owner, the respondent, for its own purposes would not in that sense be domestic. It could be "domestic" only from the point of view of the purchaser after the system had been acquired. The later language

> used solely in connection with the business of domestic or municipal lighting or furnishing of power apart from traction purposes

seems to confirm that. Certainly "traction purposes" must include some lighting as that of the tramcars and con-

ceivably of right of way, and the lighting of terminals is in the same category. In a subsequent sale of the system to the Gatineau Power Company reference is made to lines on Youville street from Laurier avenue to the interprovincial boundary on the bridge, and this item is said by the respondent to designate the two wires in question. That may be so: but it is a contract between third parties and would not bind the respondent.

But I do not find it necessary to determine this question of title. The wires were on the bridge only under a licence granted the respondent. If they were sold to the Gatineau Electric, the right to maintain, in the sense of continuing them as they then were, remained in the Hull Company; and in relation to the Pacific Company and its employees the responsibility for that continued likewise with the respondent as if it remained the owner. The Gatineau Power cannot be heard to say that it is a trespasser on the bridge and it is not a trespasser only by the continued maintenance of the wires by the respondent as its own.

The respondent then must be looked upon as a party to the continuing existence of these wires on the bridge in the position in which they were at the time of the fatality. It was in charge or care of them in relation to the deceased, and is brought within the liability of article 1054 of the Civil Code if it is shown that the death was caused in a legal sense by the wires, unless it is able to avail itself of the exculpatory provision of the article.

It is said that we are governed by the judgment of this Court in *Canada and Gulf Terminal Railway Co.* v *Lévesque* (1), and that that rules out liability on the part of the respondent. This proceeds on the footing that the legal cause of death here was the electricity and not the wire and that only the person in control of the former could be said to be within article 1054 C.C. In that case, however, death was brought about by a sudden flow of excessive current. What was being supplied to the machine shop was a current of 110 volts, but what killed the employee was a current of 2,200 volts, and obviously it was in a causal sense the flow of current which effectively brought about the fatal result. The dissents of Duff J. (as he then was) and Lamont J. were on the ground that there was

(1) [1928] S.C.R. 340.

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evidence of negligence on the part of the employer in what should have been safe working conditions in the shop. Here the act of the respondent is in erecting and maintaining, through the continuance only of its sole authority to do so, a wire which is intended to be a channel for a fatal current in a place within reach of workmen engaged in their ordinary duties. The leave is to maintain on the bridge a live wire; it is the position in space that is governing, and this lies within the control of the licensee. That is not to say that the company either controlling the current or responsible *vis à vis* the Hull Company for the wires as its own property, including their position on the bridge, might not also in the circumstances be within the application of article 1054 C.C.

But whether the death was caused by the wire, or whether the deceased himself played a part in bringing it about, are questions of fact to be found by the jury under proper directions from the Court, and I am forced to agree with St. Germain J. of the Court of King's Bench that the directions given at the trial were not proper. They were to the effect that the respondent was liable as a matter of law. This withdrew from them these essential questions of fact. I am unable to treat the circumstances as admitting of only the conclusion of liability on the part of the respondent; it cannot in my opinion be said as a matter of law that, regardless of the circumstances, the wire was the sole cause of the death.

I am disposed to the view also that, having regard to the provisions of *The Workmen's Compensation Act*, the damages found are excessive, but as the case should go back for a re-trial of the issue of liability, no more need be said on that point.

I would, therefore, allow the appeal, and direct a new trial. The appellant should have her costs in this Court, the respondent costs in the appeal below, and the costs of the first trial should abide the result of the second.

ST. JACQUES J. *ad hoc* (dissenting):—On the 5th of June, 1941, Joseph Emile Napoléon Marcoux, plaintiff's husband, was working for the Canadian Pacific Railway at the painting of the Interprovincial Bridge between Hull and Ottawa, and during the course of his work, he came in contact with an electric wire carrying a load of 2,200 volts and was

instantly killed. He had then nine minor children to whom his wife was appointed tutrix. The accident having occurred on the part of the bridge which is in the province of Quebec, the family of the deceased had the benefit of the Quebec *Workmen's Compensation Act* and was granted by the Commission a certain sum for funeral expenses, plus a rent of $66.47 per month payable by the employer and susceptible to be revised according to the change of state of the wife and children. When she made her application to the Commission, the widow had reserved whatever rights she might have, for herself and her children, against the Hull Electric Company as a result of the death of her husband, and she instituted an action in the amount of $50,000, viz: $20,000 for her personally and $30,000 for her nine children.

She alleged that the death of Marcoux was due to his contact with electric wires belonging to defendant, or being under its control, which wires were then defective, in bad condition, not properly insulated and maintained for the carrying of electricity necessary for the exploitation of defendant's tramways.

The Company thus sued denied the facts alleged by plaintiff and specially pleaded that the accident causing the death of Marcoux was not due to its fault, negligence or imprudence, nor to anything of which it had the control.

Plaintiff having made the option of a trial before jury, the assignment of facts to be submitted to the jury was made by consent of both parties and a judgment rendered accordingly. As it was then apparent that the main issue was whether the wires having caused the death of Marcoux were under the control of Hull Electric Company the following questions among others were submitted to the jury and the answers were:

2nd question:

Quelle a été la cause de la mort de Joseph-Emile Marcoux?

Answer:

La cause de la mort de Joseph-Emile Marcoux est due au choc du fil "D" de la Cie Hull Electric.

5th question:

La mort dudit Joseph-Emile Marcoux est-elle due à ou a-t-elle été causée par aucune chose appartenant à la défenderesse ou étant sous la garde, le contrôle, la surveillance ou l'entretien de la défenderesse, et si oui, quelle est cette chose?

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Answer:
Oui, due à la Cie Hull Electric, le fil électrique.

6th question:
La mort dudit Marcoux a-t-elle été causée par la faute, négligence, imprudence ou incurie de la défenderesse ou de ses officiers, employés et préposés?

Answer:
Oui.

6a question:
Si vous répondez oui à la question précédente (no 6), dites en quoi la défenderesse est coupable de faute, négligence, imprudence ou incurie ou celle de ses officiers, employés et préposés.

Answer:
La réponse est que la Cie Hull Electric est responsable pour négligence et imprévoyance, en tenant leur fil "D" trop près du pont.

The answers to questions 9 and 10 concerning the damages were $10,000 for plaintiff personally and a total amount of $8,064 for eight children (one being now 21 years of age) to be divided among themselves, according to their age on a basis of $12.00 per month until they reach the age of 21.

Defendant's attorneys moved that the verdict be quashed and the action be dismissed or alternatively that a new trial be ordered, alleging that it appears clearly from the evidence that no jury could render such a verdict which is against the law. The presiding judge dismissed the motion; he granted plaintiff's demand and confirmed the verdict by a judgment based on the grounds that the electric wire, which was the cause of the death, had been installed and used by defendant until the sale made on the 11th of January, 1928, to Gatineau Electric Company and that the facts invoked by defendant to show a transfer of the property of the wire are of the province of the jury whose verdict should not be disturbed by the Court. As to the amount of damages, although the presiding judge declared that he would not have granted such an amount, he, however, confirmed the verdict.

This judgment was quashed by a majority of the judges of the Court of King's Bench dismissing the action, Francoeur J., taking no part in the judgment and St. Germain J., dissenting, being of the opinion that defendant still

had the control of the wire at the time of the accident, but ordering a new trial on the ground that the trial judge did not properly instruct the jury.

Plaintiff appeals from this judgment and contends that Hull Electric Company was properly condemned by the first court.

There is no doubt that the death of Marcoux was due to his contact with an electric wire running along the bridge for the purpose of lighting defendant's station at the Ottawa end of the bridge. The jury found that the wire was too close to the girder of the bridge; and there is satisfactory evidence to justify such a finding. The main issue is whether defendant still had the control of the wire when Marcoux was killed. It is proven, and in fact admitted, that the wire was installed by defendant as its property and was used, before 1928 and after, for the purpose of carrying electricity to the Ottawa station. The Company did not clearly allege it in its plea, but contends that, by the sale made to Gatineau Electric Company on the 11th of January, 1928, the wire was included among the things sold, and since then was the property of Gatineau Electric Company and under its control, and consequently the responsibility of the accident cannot rest upon defendant.

In my opinion, the control of the wire and its maintenance, as well before 1928 as after, is a pure question of fact which must be decided by the jury, properly instructed. The assignment of facts, to which no objections were made by defendant before and during the trial, contains the very question of the ownership and control of the wire which was the cause of the death of Marcoux. The issue rested upon the answer to be given to that question; the fyling of deeds of sale, as well as the hearing of witnesses, were for the purpose of proving who had the control of the wire. The deeds of sale invoked by defendant were read to and by the jury; the reading of such deeds to find whether the wire was included among the things sold is a question of fact and not one of law. If the juridical character of a deed is in issue, viz., whether it is a deed of sale, or a deed of donation, or a deed of hypothec, is a question of law, the solution of which belongs to legal minds; but such is not the case here. The jury as well as

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the judges are called upon to read the deeds solely to find out whether the wire was included among the things enumerated in the clauses reading as follows:

All the electric lighting and distributing system of the city of Hull, municipalities of South Hull and East Hull, town of Aylmer and village of Deschenes, as it existed on the first day of June last, including poles, wires, transformers, service connections, meters and all other accessories used for purposes of domestic or municipal lighting apart from purposes connected with the traction system of the vendor * * *

It is the intention of the vendor to convey and of the purchaser to accept all the property moveable and immoveable, the rights, privileges, servitudes, franchises and any and all other properties owned by the vendor and used *solely* in connection with the business of domestic or municipal lighting or furnishing of power *apart* from traction purposes and should it be hereafter discovered that any property, rights, privileges, servitudes, franchises or any other properties owned by the vendor and used for the purposes above indicated apart from traction purposes be hereafter found vested in its name the vendor will on demand execute such other and further deeds, documents and assurances in writing as may be necessary to vest the same in the purchaser.

The presiding judge deduced from the reading of the deeds, as well as from the parol evidence, that wire "D" was not sold to Gatineau Electric Company, but was retained by Hull Electric Company for purposes connected with the traction system. St. Germain J., in the Court of King's Bench, read the deed the same way and justified his conclusion by very elaborate reasons with which I agree and need not repeat here. I am not, however, disposed to render a judgment according to the verdict, first because I apprehend that the jury may have been confused by the charge of the judge, and also because the amount awarded appears to me grossly excessive, and out of proportion to the evidence.

Article 475 C.C.P. says that

the jury find the facts, but must be guided by the directions of the judge as regards the law.

The jury has to be clearly instructed on that point and I must say with all due deference that this has not been done in a satisfactory way in the present case. The respective provinces of judge and jury have not been clearly defined and confusion in the minds of the jury seems to have resulted from such misdirection. For instance, the judge says:

vis-à-vis la demanderesse, elle ne connaissait pas le propriétaire du fil; l'action me paraît bien fondée.

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And further:

Par conséquent, j'arrive à la conclusion qu'il y a du fait et du droit, et, tant que c'est du droit, comme je vous l'ai dit, vous êtes obligés de me suivre, c'est que vous ne pouvez pas refuser à la demanderesse d'avoir une action contre la Hull Electric Company.

The jury has not been left entirely free in its province of finding facts. This may explain that the answer to question 6a is not only a finding of fact, but really a judgment. The jury says that Hull Electric Company is *responsible* for its negligence and imprudence in keeping wire "D" too close to the bridge. Responsibility is the legal consequence of facts alleged and proven, and it belongs to the Court and not to the jury to deduce responsibility from the facts found.

Since dictating the above, I have had the advantage of reading Justice Rand's notes of judgment and for the additional reasons therein stated and to which I adhere, I would allow the appeal and direct a new trial; respondent should pay the costs in this court and also the costs of the first appeal; as to the costs of the first trial, they should follow the result of the second trial.

Appeal dismissed with costs

Solicitor for the appellant: *Auguste Lemieux.*

Solicitors for the respondent: *Brais & Campbell.*

DOMINION TELEGRAPH SECURITIES LIMITED ..... APPELLANT;

AND

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

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* May 29
* Oct. 1

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Revenue—Interest on bonds of company held by trustee of sinking fund to retire bonds—Income—Deductible expense—Redemption of bonds—Payment on account of capital—Income War Tax Act, section 6 (1) (b)—Whether "contingent" qualifies "sinking fund" in that section—Evidence—Admissibly—Hearsay—Statements made in course of duty by deceased party—Surrounding circumstances when construing instrument—Duty to be clearly established—Collateral matters—

*PRESENT:—Kerwin, Taschereau, Rand. Kellock and Estey JJ.

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Held: that, under its special terms, the contract, out of which the moneys arose which were claimed to be income, was a sale to the lessee of the reversion of plant and franchises of a telegraph undertaking and not a present sale of the undertaking involving a cancellation of the existing lease; that the supplementary arrangement, as between the vendor and the trustee for its bondholders to whom the bonds were issued in exchange for stock which they held as shareholders of the vendor, was that of a serial redemption; that the moneys assigned by the vendor to the trustee out of which interest and redemption payments were made, apart from a special sum, the nature of which was not in dispute, were the original continuing rents, and therefore gross income for the purposes of the *Income Tax Act*.

Per Kerwin and Rand JJ.:—The word "contingent" in the context of section 6 (1) (*b*) does not qualify the word "sinking fund" in that paragraph. Three distinct accounts are therein specified and "contingent account" is the description of one of them.

The appellant company tendered testimony of witnesses and sought through them to adduce in evidence statements made by the general manager of the Dominion Telegraph Company, who died before the trial, relative to negotiations conducted by him on behalf of the Company in support of its contention that the rentals were considered as capital payments to recoup the Company for the loss of its capital assets.

Per Kellock J.:—The contemporaneous written evidence does not support such a contention, and it is doubtful if the oral evidence, assuming it is admissible at all, goes that far. It is not necessary however, to decide that point as the documents in the case negative such a view of the actual settlement. While surrounding circumstances may be regarded for the purpose of construing an instrument, the true legal position arising upon the instrument so construed may not be ignored in favour of the supposed "substance."

Per Estey J.:—Statements made in the course of duty by a deceased party are admissible as an exception to the hearsay rule, but the duty must be clearly established and the statements must be made in the course of that duty and not in connection with collateral matters.

Judgment of the Exchequer Court of Canada ([1946] Ex. C.R. 338) aff.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J. (1), dismissing the appeal of the appellant company to that Court from the affirmation by the respondent of assessments under the *Income War Tax Act* upon income tax returns filed by the appellant company for the years 1926 to 1929 inclusively.

(1) [1946] Ex. C.R. 338;
[1946] 2 D.L.R. 417.

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

L. A. Landriau K.C. for the appellant.

F. P. Varcoe K.C., W. R. Jackett and *A. A. McGrory* for the respondent.

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

RAND J.: The contention of the appellant is that in 1925 when it became known that the telegraph system leased in 1878 by the Dominion Telegraph Company had in large measure lost its identity through changes in location and absorption in a larger system, an agreement was made by which the lease came to an end and the rights of the lessor under the lease as well as all its title to whatever property remained to it, were sold for a capital sum equal to the annual rents for the then unexpired term of the lease plus $116,640 at that time paid in cash. The former rents would in amount continue as capital instalments and the latter sum be put out at interest. Together these payments would represent to the Dominion Telegraph Company the plant, works and business which under the lease were to be kept intact and returned as a modern telegraph system. The continuation of the annual payments of $62,500 from 1925 to 1978 would amount to something over $3,000,000, and the sum in cash was calculated at compound interest to produce during the same period over a million dollars. No specific value was placed on the property, but the evidence generally and indefinitely treats it as two, three, four or more million dollars.

Now, that is a conceivable mode of dealing with a rather mixed up subject-matter; but if the parties intended the arrangement between them to be in that form it is unfortunate they did not so express it. The lease remained unaffected except the release of the covenants to keep the system in good working order and to deliver up the property in that condition when the lease terminated. And the consideration for the payment of $116,640 is dealt with in these words:

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Upon the expiration of the said lease on the 30th day of June, 1978, or upon its earlier termination as therein provided for, the Dominion Company and the Securities Company for the aforesaid sum of $116,640 hereby agree to transfer, quit claim and assign unto the Great Northwestern all of the Dominion Company's and the Securities Company's right, title and interest in and to all of the lines, telegraph system and properties conveyed by the said lease * * * provided however that the provision of the said lease with respect to the payment of rentals shall have been in all respects fully complied with.

And finally:

All future rents payable during the currency of the said indenture of lease and amounting to the sum of $62,500 per annum payable quarterly on the 1st days of January, April, July and October in each and every year during the currency of the said lease, shall be paid to the Securities Company which has acquired by purchase all the assets and goodwill of the Dominion Company subject to the terms and conditions of this agreement.

Moreover the appellant has shown the $62,500 on its tax return as income and a deduction of bond interest paid to the holders of the bonds has been allowed; and it is only in respect of the portion of the rents referrable to the bonds placed in the "sinking fund" so-called that the question of tax arises.

The "sinking fund" was provided by the form of the transaction as carried out between the shareholders of the Dominion Company and the Securities Company which was this: the latter, the purchaser, issued bonds for $1,000,000 carrying interest at 5½% per annum, which were distributed *pro rata* among the shareholders: the $116,640 was used in the first instance to buy in that value of those bonds and these were held by a trust company in the "sinking fund". The rent to the extent of $55,500 was paid quarterly to the trust company which disbursed the interest payable to the bondholders; but that portion representing interest on the bonds in the "sinking fund", in turn was used to redeem or buy in further bonds. The sum of $116,640 was more than necessary to bring about that redemption, and provision was made for the issue of 2,000 interest certificates likewise distributed among the shareholders to absorb the surplus. In the result, at the end of the lease all of the bonds would have been redeemed, the rents exhausted, the property divested, and the object of the Securities Company fulfilled.

It was an arrangement for a serial redemption of bonds, but that does not mean that the redemption moneys must be treated as capital; it is their character when and as received that determines their liability for income tax and not their subsequent application.

It is further contended that even on the other view the transfer of the moneys to the sinking fund, a fund here not "contingent", is outside of the provisions of section 6 (1) (*d*) which reads:

> Amounts transferred or credited to a reserve, contingent account or sinking fund, except such an amount for bad debts as the Minister may allow and except as otherwise provided in this Act;

and that the amounts are deductible from income. But the answer is twofold: there was no sinking fund properly so-called; and the word "contingent" in the context of the paragraph does not qualify "sinking fund"; three distinct accounts are specified and "contingent account" is the description of one of them.

The appeal should be dismissed with costs.

TASCHEREAU J.: I am of opinion that this appeal should be dismissed with costs.

KELLOCK J.: This is an appeal from the judgment of the Exchequer Court of Canada, O'Connor J., dated December 29, 1945, dismissing certain appeals by the appellant from assessments made under the provisions of the *Income War Tax Act* in respect of the years 1926 to 1929, inclusive. These assessments arose out of the following facts:

The appellant is the purchaser of the assets of Dominion Telegraph Company (which, for convenience, I shall refer to as the original company) under an agreement dated 12th January, 1925. It describes itself and the nature of its business in the income tax returns here in question as "owners of telegraph leases".

By an instrument dated 12th June, 1879, the original company demised to The American Union Telegraph Company, a New York corporation, "all the telegraph lines and the entire telegraphic system and plant" in Canada of that company for a term of ninety-nine years, commencing July 1, 1879, at a rental of $52,500 per annum,

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with provision for an increased rental in certain circumstances. The lease included a covenant on the part of the lessee to keep the lines, system and plant in good working order and to pay all costs of renewals and all expenses of working and carrying on the same, including municipal taxes. The lease contained a further covenant on the part of the lessee to yield up the demised premises at the expiration of the term in good working order and repair.

By a further instrument, dated July 11, 1881, the above named lessee assigned the lease, with the consent of the original company, to The Western Union Telegraph Company, with the provision that the assignee might sublet such part of the lines, system and property to another company, namely, the Great North Western Telegraph Company of Canada, as it might deem proper; in which event the Western Union was to pay an additional rental of $10,000 per annum.

This last mentioned indenture was followed on the 26th August, 1881, by a further instrument by which The Western Union sublet to the Great North Western all the lines, system and property acquired from the original company west of the province of New Brunswick, the rent being increased to $62,500.

During the year 1922, and subsequent years, negotiations took place between the original company, the other companies mentioned and the Canadian National Railways, which had acquired the assets of the Great North Western Company, and it is said that it was discovered by the officers of the original company that all the wires and poles of the demised system had been removed from their original position on public highways and absorbed into the systems of one or other of the lessee companies and that the municipal franchises had become forfeited. Ultimately a settlement was arrived at and it is the nature of this settlement which gives rise to the controversy between the parties.

To carry out the settlement an agreement dated 15th January, 1925, between the original company, The American Union, The Western Union, the Great North Western and the appellant was executed. This document acknowledges receipt by the original company of the sum of $116,640 and in consideration therefor that company and the appel-

lant released the other parties from all claims in respect of the covenants in the indenture of the 12th June, 1879, to keep the telegraph lines, system and plant in good working order and to yield them up in the same condition. The agreement also contains the following provisions:

3. Upon the expiration of the said lease on the 30th day of June, 1978, or upon its earlier termination as therein provided for, the Dominion Company and the Securities Company for the aforesaid sum of one hundred and sixteen thousand six hundred and forty dollars ($116,640) hereby agree to sell, transfer, quitclaim and assign unto the Great North Western all of the Dominion Company's and the Securities Company's right, title and interest in and to all of the lines, telegraph system and properties conveyed by the said lease existing and being west of the province of New Brunswick in the Dominion of Canada and elsewhere west of the province of New Brunswick and the Dominion Company and the Securities Company hereby agree to sell, transfer, quitclaim and assign unto the Western Union all the Dominion Company's and the Securities Company's right, title and interest in and to all of the other lines, telegraph system and properties conveyed by the said lease; provided, however, that the provision of the said lease with respect to the payment of rental shall have been in all respects fully complied with.

4. The indenture of lease hereunto annexed as schedule "A" hereto and all the covenants, provisos, conditions, powers, matters and things whatsoever contained therein shall enure to the benefit of and be binding upon the successors and assigns of each of the corporate parties hereto and shall continue in full force and effect save and except as hereby expressly amended.

5. All future rents payable during the whole of the currency of the said indenture of lease and amounting to the sum of sixty-two thousand five hundred dollars ($62,500) per annum payable quarter-yearly on the 1st days of January, April, July and October in each and every year during the currency of the said lease, shall be paid to the Securities Company which has acquired by purchase all the assets and good will of the Dominion Company subject to the terms and conditions of this agreement.

It is the contention of the appellant that not only the sum of $116,640 but the continued payment of the rent of $62,500 were capital, both together being the consideration for the settlement of the claims by the original company in respect of the demised telegraph system and property.

The appellant put in evidence the minutes of a special general meeting of shareholders of the original company held on the 2nd April, 1924, called to consider a resolution approving the settlement, passed on the previous 18th of February by the directors. The resolution itself was not put in evidence. At this meeting the shareholders approved the resolution and authorized the officers of the company to execute a formal agreement. This became the agree-

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ment of the 15th January, 1925. The minutes include a statement by Mr. Macrae, the secretary, to the shareholders explaining the negotiations. This includes a statement that the cash payment was arrived at on the basis of the then present value of the sum of $1,000,000 at the expiration of the term of the lease. As Mr. Macrae said

> "the sum of $1,000,000 was the goal because it was the value of the property when the lease was made and was also the amount of our stock. After still further discussions we were asked to name a figure and we offered to accept the sum of approximately $115,660, which, on a 4% basis instead of 5%, would realize $1,000,000 at the end of the term. The final exact figures will be adjusted by the actuaries of the Imperial Life and the Canada Life. This offer was accepted and passed by the board of the Canadian National Railways and the amount was approved by this board and a settlement authorized subject to the approval of the shareholders."

The $116,660 became $116,640.

Mr. Macrae does not refer at all to the continued payment of the rents but the president of the company, in his statement to the meeting, said:

> "The amount was arrived at as a sum which would, invested at 4% and interest compounded for the remainder of the term, produce a sum of not less than $1,000,000 which would pay to the shareholders the par value of their stock, $50 per share, *and in the meantime the rentals would continue to pay the dividends as heretofore.*"

The appellant tendered evidence of witnesses who testified to conversations with Mr. Macrae in support of its contention that the rentals were considered by those who negotiated the settlement as capital payments to recoup the company for the loss of its capital assets.

It is not argued as a matter of law that the lessees could, by destroying the demised telegraph system, put an end to their liability for the payment of rent. The argument is that by agreement the compensation for the lost assets was fixed at an immediate cash payment of $116,640 and instalment payments of $62,500 per annum, which, although formerly paid and received as rent, ceased to be such. I find no support in the contemporaneous written evidence for such a view and it is doubtful if the oral evidence, assuming it is admissible at all, goes that far. Certainly Mr. Hodgetts does not say so. It is not necessary however to decide this point as I think the documents negative such a view of the actual settlement. While surrounding circumstances may be regarded for the purpose of construing an

instrument, the true legal position arising upon the instrument so construed may not be ignored in favour of the supposed "substance"; *Inland Revenue Commissioners* v. *Westminster* (*Duke*) (1). No doubt the claims of the original company might have been settled in accord with what the appellant now contends. I do not think they were, but that the rent continued as rent and, accordingly, as revenue, and not capital. The agreement of January 12, 1925, is quite irrelevant in the determination of this question as it formed no part of the settlement. That agreement provided for the issue by the appellant, *pro rata*, to the shareholders of the original company of bonds of a par value of $1,000,000, to be secured by a mortgage of its assets to the Royal Trust Company, as well as certain "certificates of interest", the bonds and certificates ultimately to be retired by means of a "sinking fund" to be initiated by the "purchase" by the appellant of bonds of a par value of $109,000, using part of the $116,640 cash payment for that purpose. Provision was made for payment of the interest on the bonds by assigning to the trustee $55,000 out of the $62,500 annual rental. The bonds bore interest at 5½%. No dispute exists with respect to so much of the rentals as was required to pay the interest on any bonds other than the bonds held by this "sinking fund". It is the amounts claimed to have been paid as "interest" on these last mentioned bonds which are here in question.

In its argument the appellant says that:

> The appellant submits that on the evidence it is clearly established that what was to be received by the shareholders of the Company was $1,000,000, and, in addition, the recovery of rentals, dealt with below, and that, by the nature and character of the settlement, no part of the funds which were to represent $1,000,000 by a present settlement in 1924 can be held to be income subject to tax under the *Income War Tax Act* as an item of annual gain or profit to the appellant.

It may be said at once that no question arises on this appeal with respect to any taxation upon any

> part of the funds which were to represent $1,000,000 by a present settlement in 1924.

The fund which was to represent that particular $1,000,000 was the sum of $116,640. That was capital and was

(1) [1936] A.C. 1.

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not and is not taxed. The above contention serves only to confuse the issue. Quoting again from the appellant's factum:

> The appellant submits that on the evidence the nature or character of the transaction was that $1,000,000 capital, and the continued payment of rentals, was to be available to the shareholders of the appellant's predecessor, The Dominion Telegraph Company.
>
> The respondent in assessing annually accumulations of interest received in sinking fund on such of the bonds of the issue of $1,000,000 principal amount issued to shareholders of The Dominion Telegraph Company as are held in sinking funds from time to time, has wrongly treated as taxable income the portions of the said $1,000,000 represented by such accumulations.

It is apparent that the appellant is here confusing two separate things. The first is the $116,640 received on the basis of its being the present value in 1924 of $1,000,000 payable in 1978 on a 4% basis. The second thing is the rental. On the documents already referred to this was income and no part of it ceased to be income merely because the appellant employed it at 5½% (the bond rate) to pay interest on outstanding bonds of an issue created by it.

If, then, the rental was never capital but revenue, on what basis does it become exempt from income tax? The appellant itself in its returns showed the $62,500 as "Rents received from Canadian National Telegraphs". It is said this was merely bookkeeping. I do not think that a sufficient answer. It is next said that $55,000 out of the rents was assigned to the trustee to meet the interest on the bonds and that the bonds in the "sinking fund" were just as much outstanding as those in any other hands. I think that is not so. In my opinion the bonds, when acquired by the sinking fund, ceased to be outstanding obligations of the appellant and payment of "interest" was impossible. The acquisition was simply redemption and it is interesting to observe that this is the word used in the bond mortgage itself. We have been referred to no provision of the law by which revenue becomes exempt from taxation because used by the tax payer for redemption of an outstanding capital obligation.

I would dismiss the appeal.

ESTEY J.: The issue in this appeal arises out of an agreement dated the 15th day of January, 1925, and made between the parties to a lease dated the 12th day of June, 1879, for a period of 99 years. The appellant contends that the agreement was a settlement of all matters under the lease. That it effected a cancellation of the lease and the sums payable thereunder are damages payable in lieu of a capital asset and as such not subject to income tax. The respondent contends that the agreement was a settlement of certain covenants only, that otherwise the lease continued in full force and effect. That of the two sums payable thereunder that of $116,640 payable forthwith was a settlement of these covenants and for income tax purposes treated as capital, but the other, $62,500 payable in each year thereafter, remained a payment of rent and was income and as such, subject to certain deductions, was taxable under the *Income War Tax Act,* 1917 (1927, R.S.C., ch. 97). The returns in this appeal were filed for the years 1926 to 1929 inclusive. In the Exchequer Court of Canada, Mr. Justice O'Connor, sitting in appeal from the decision of the Minister of National Revenue, found in favour of the respondent and dismissed the appeal.

Under date of June 12, 1879, The Dominion Telegraph Company leased to The American Union Telegraph Company for 99 years "all the telegraph lines and the entire telegraphic system and plant" "for and in consideration of the rents and covenants and agreements" therein specified. The rent, at first $52,500, subsequently was raised to $62,500, and at all times material to this litigation, was at the latter figure. This lease contained a covenant that the lessee would throughout the term "keep said telegraph lines, system and plant in good working order", and at its termination surrender

> the said demised premises and property in good working order and repair, with an adequate supply of instruments and plant of the most improved character * * *

The American Union Telegraph Company assigned this lease to The Western Union Telegraph Company, which company assigned it to The Great North Western Telegraph Company and after the Canadian National Railway System

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was formed it became as of April 2, 1924, the property of that system and was known as Canadian National Telegraphs.

About this time the directors of The Dominion Telegraph Company discovered that, whereas the rent had been regularly paid by the successive lessees, they had not maintained the line as the lease provided but had made alterations and so far merged it into the larger system that it would now be difficult if not impossible to carry out either of the covenants, to maintain or to surrender at the termination of the lease.

Negotiations consequent upon this discovery led to an agreement in writing dated the 15th of January, 1925, to which The Dominion Telegraph Company, The American Union Telegraph Company, The Western Union Telegraph Company, The Great North Western Telegraph Company and Dominion Telegraph Securities, Limited, were all parties. (Although negotiations were concluded with the officials of the Canadian National Railways, they were not made a party to this agreement. It is, however, admitted that The Great North Western Telegraph Company was taken over by the Canadian National Railways.) This agreement contained an acknowledgment of "the due execution and validity" of the original lease and the successive assignments thereof. It then provided that in consideration of the payment of $116,640 The Dominion Telegraph Company and Dominion Telegraph Securities, Limited, released the other parties thereto from the covenants in the lease,

which are to the following effect:

Firstly, that the lessee in the said indenture of the 12th of June, 1879, should, during the demised term, keep the said telegraph lines, system and plant in good working order and should pay all costs of renewals thereof and all expenses of carrying on the same, and

Secondly, that on the last day of the said term, or on the sooner determination of the estate thereby granted, the lessee should peaceably and quietly leave, surrender and yield up unto the Dominion Company all and singular the said demised premises and property in good working order and repair with an adequate supply of instruments and plant of the most improved character then in use on telegraph lines in America.

It then provided that upon the termination of the lease the lessors would

for the aforesaid sum of one hundred and sixteen thousand six hundred and forty dollars ($116,640) * * * sell, transfer, quitclaim and assign unto the Great North Western

the property leased (except as to a territory not material to this litigation), and the paragraph concluded:

Provided, however, that the provision of the said lease with respect to the payment of rentals shall have been in all respects fully complied with.

This agreement also contained the following paragraph:

4. The indenture of lease hereunto annexed as schedule "A" hereto and all the covenants, provisos, conditions, powers, matters and things whatsoever contained therein shall enure to the benefit of and be binding upon the successors and assigns of each of the corporate parties hereto and shall continue in full force and effect save and except as hereby expressly amended.

In the result this agreement released the lessees and their assigns from any covenant to maintain and to surrender all the telegraph lines and the telegraph system and plant at the expiration of the lease but that otherwise this lease shall remain "in full force and effect."

The rent remained at $62,500 per annum. The Dominion Telegraph Company therefore under this agreement had at its disposal the sum of $116,640 in cash and an income of $62,500 per year up to 1978. It was decided to wind up The Dominion Telegraph Company and to form another company known as Dominion Telegraph Securities, Limited. The latter company was incorporated under the laws of the province of Ontario and by an agreement in writing dated the 12th day of January, 1925, it purchased the entire assets, subject to the liabilities, of The Dominion Telegraph Company.

The Dominion Telegraph Securities, Limited, then entered into two agreements with The Royal Trust Company under the terms of which fifty-three year 5½% mortgage bonds in the sum of $1,000,000 were issued, as well as certificates of interest valued at that time at the sum of $5.25. As collateral Dominion Telegraph Securities, Limited, assigned the rent under the aforementioned lease in the sum of $62,500, payable quarterly commencing with the instalment dated 30th of April, 1925. These bonds and certificates of interest were delivered to the individual shareholders of The Dominion Telegraph Company in exchange for their shares.

The $62,500 was applied as received in each year $55,000 to pay the interest on the $1,000,000 5½% fifty-three year mortgage bonds and the balance for operating expenses of

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Dominion Telegraph Securities, Limited. The $116,640 was expended $56,500 to buy a block of these bonds, and another sum of $52,500 to purchase another block of these bonds, and all of these bonds as purchased were delivered to The Trust Company to be placed in a sinking fund. They were not to be then cancelled but were merely to be marked "Not negotiable, property of the sinking fund". The balance of the $116,640 was used as expenses. In every year interest was paid out of the $62,500 to The Royal Trust Company on these bonds in the sinking fund and as this interest was received it was expended in purchasing further of the outstanding bonds from the bondholders. These bonds as purchased were in each year placed in the sinking fund and marked "Not negotiable, property of the sinking fund".

The $56,500 capitalized at 5½% would realize at the end of the fifty-three year period $1,000,000. In fact the trustee in the first year received interest at the rate of 5½% upon the two amounts of $56,500 and $52,500 with which to purchase further bonds. It follows from this procedure that they would have in each successive year a larger amount with which to purchase additional bonds and at some time prior to the termination of the fifty-three year period all the bonds would be purchased, while the $62,500 per year would be collected up to the expiration of the lease in 1978. The trustee would have, therefore, a fund not required to redeem the bonds. This fact was realized at the outset and led to the issue by The Royal Trust Company, as trustee, of the certificates of interest.

These certificates of interest were provided for by a second agreement dated the 2nd day of February, 1925. Under that agreement these certificates entitled

> the holder thereof to an interest in a fund which shall be in the possession of the trustee on the second day of February, 1978.

At the date of their issue they had a value of $5.25 which under this plan would increase in each year. A schedule attached to the certificate indicated from year to year its value, which in February 1978 would be $93.12.

These certificates were not transferable but could only be surrendered for cancellation with an assignment thereof.

After all the outstanding bonds have been purchased and placed in the sinking fund, but not before the 2nd of February, 1965, the trustee

shall proceed to redeem certificates at the value thereof as indicated by the schedule endorsed upon the said certificates.

But unlike the bonds, as purchased these certificates

shall forthwith after payment therefor by the trustee be cancelled by the trustee * * *

In filing its income tax return in each year the appellant disclosed the $62,500 as income and claimed as a deductible expense the $55,000. The taxing authorities varied this by allowing only those amounts of interest paid to the holders (other than the trustee) of the bonds, or in other words disallowing the amounts of $55,000 paid to the trustee in each year as interest on the bonds in the sinking fund.

The appellant submits that the agreement dated the 15th day of January, 1925, was in fact a settlement of all matters under the lease and in effect terminated the lease and the rights of the parties were thereafter determined only by that agreement of January 15, 1925. That it was made because the lessees had not carried out their covenants to maintain and would not be in a position to surrender the property leased at the expiration of the term. That the lessees were not in a position to pay a lump sum in an amount which the lessors would accept as compensation and therefore it was agreed that they would pay in cash the sum of $116,640 and the sum of $62,500 annually to the time when the lease would expire. That as a settlement these amounts were in their nature and character damages paid for the loss of a capital asset and should therefore be treated as capital and ought not to be subject to income tax.

The outstanding share capital of The Dominion Telegraph Company was $1,000,000 and the $116,640 capitalized at 4% would at the end of 53 years yield $1,000,000.

In support of its contention the appellant tenders an extract from the minute book of The Dominion Telegraph

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Company under date of April 2, 1924. This minute indicates the negotiations leading up to the settlement and includes the following:

He (the president) stated that the directors had then instructed Mr. Macrae to negotiate with the other lessees, the Great North Western Telegraph Company, now the Canadian National Telegraphs, and that the negotiations had been successful, and an offer had recently been made by the Great North Western Company to pay the sum of $115,660 for a release by this Company of the covenants in the lease above mentioned. The amount was arrived at as a sum which would, invested at 4%, and interest compounded for the remainder of the term, produce the sum of not less than $1,000,000, which would pay to the shareholders the par value of their stock, $50 per share, and in the meantime the rentals would continue to pay the dividends as heretofore.

Further on in the minutes the following appears:

After still further discussions, we were asked to name a figure and we offered to accept the sum of approximately $115,660, which on a 4% basis instead of a 5% would realize $1,000,000 at the end of the term.

The final exact figures will be adjusted by the actuaries of the Imperial Life and the Canada Life. This offer was accepted and passed by the board of the Canadian National Railways, and the amount was approved by this board, and the settlement authorized, subject to the approval of the shareholders.

* * *

We ask you to confirm the resolution passed by the board of directors and authorize the release of the covenants mentioned.

The sum of $115,660 mentioned in these minutes when adjusted by the actuaries was fixed at $116,640.

The words "for a release by this company of the covenants in the lease above mentioned" in the foregoing minutes refer to the covenants in the lease to maintain and repair. They are the only covenants mentioned prior thereto in the minutes and indeed throughout the minutes. It will be further observed that "the rentals would continue to pay the dividends as heretofore". That they were effecting a settlement for a breach of the two covenants to maintain and surrender the telegraph lines, system and plant is emphasized in these minutes by the last paragraph above quoted:

We ask you to confirm * * * and authorize the release of the covenants mentioned.

The negotiations on behalf of the Dominion Telegraph Company were conducted by the late Mr. H. H. Macrae, secretary-treasurer and general manager of that company. A few years later Mr. Macrae died. The appellant called

two witnesses and sought through them to adduce in evidence statements made by the late Mr. Macrae relative to these negotiations to establish "the reason for and the extent of the settlement arrived at" and

the full facts explaining the nature and character of the settlement with Canadian National Railways.

That the statements made to the witnesses by the late Mr. Macrae were hearsay was not contested but it was contended that these statements were made in the course of duty to the witnesses by the late Mr. Macrae and therefore admissible in evidence. So far as the first witness is concerned, he was not associated with the company nor with Mr. Macrae at the times material and no evidence of any duty on the part of the late Mr. Macrae to make the statements to this witness was established. The other witness was a solicitor who was consulted by the late Mr. Macrae and who deposed as follows:

Q. Did you take any instructions from Mr. Macrae?

A. Yes, he gave me all my instructions.

Q. Instructions in relation to what?

A. He informed me what the settlement was with the Canadian National Railways and he consulted me as to the method of making a distribution of the proceeds of that settlement among the shareholders of Dominion Telegraph Company. I carried out those instructions.

Q. And those instructions were given to you when?

A. In 1924 and 1925.

Q. Approximately at the time of the settlement?

A. About the time of the settlement and before the money was paid over by the Canadian National Railways to Dominion Telegraph Company.

It will be observed that the solicitor was consulted after the settlement with Canadian National Railways and then as to the method of making a distribution of the proceeds of that settlement.

That statements made in the course of duty by a deceased party are admissible as an exception to the hearsay rule is clear, but the duty must be clearly established and the statements made in the course of that duty. In this instance any statements made by the late Mr. Macrae as to the negotiations and reason for the settlement would not be part of the instructions given to the solicitor with respect to the disposition of the proceeds but would only be collateral thereto and under the authorities not admissible.

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Then it is said, if not a statement against interest, the letter is admissible as a memorandum made in the course of business and in the discharge of a duty to Barker's principals. But the rule as to the admission of such evidence is confined strictly to the entry of the particular thing which it is the duty of the person to do, and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing.

Blackburn J., *Smith* v. *Blakey* (1). *O'Connor* v. *Dunn* (2).

Then does it come within another exception, which is an entry made by a deceased person of something in the discharge of his duty? * * * the principle has never been questioned in any case, and it is this, that it must be an entry, not of something that was said, not of something that was learned, not of something that was ascertained, by the person making the entry, but an entry of a business transaction done by him or to him, and of which he makes a contemporaneous entry. For nothing else was it admissible, and it was received only because it was the person's duty to make that entry at the time when the transaction took place. The exception is entirely confined to that.

James L. J., *Polini* v. *Gray,* (3).

Quoted with approval by Bowen L. J. in *Lyell* v. *Kennedy* (4). See also *Regina* v. *Buckley* (5) and Phipson on Evidence, 8th ed., 282.

The express language of the agreement dated January 15, 1925, which relieved the lessees and their assigns from their obligations to maintain and to surrender "all the telegraph lines and the entire telegraphic system and plant"; that the sale and transfer of the leased property would take place only at the termination of the lease and then only:

Provided, however, that the provision of the said lease with respect to the payment of rentals shall have been in all respects fully complied with.

that in all other respects the lease should continue in full force and effect; the extract from the minutes; and the practice of the Dominion Telegraph Securities, Limited, in preparing their income tax returns in each year disclosing the $62,500 as income all clearly indicate that apart from the release of the two covenants the lease continued in full force and effect. The $62,500 was at all times rent and under the circumstances of this case income. As to the

(1) (1867) L.R. 2 Q.B. 326 at 332.
(2) (1877) 2 O.A.R. 247.
(3) (1879) L.R. 12 Ch. D. 411, at 426.
(4) (1887) 56 L.T.R. 647, at 657.
(5) (1873) 13 Cox's C.C. 293

$116,640, it has been accepted as capital by the Minister of National Revenue and therefore there is no contest with respect to this item.

The principal issue upon this appeal is the disallowance by the taxing authorities as a deductible expense that portion of the $55,000 received by the trustee as interest on the bonds in the sinking fund. As and when received in each year this amount was utilized to purchase additional bonds which were then placed in the sinking fund and stamped "Not negotiable, property of the sinking fund". There is no provision for their ultimate cancellation but under the terms of the agreement they remain in the sinking fund.

Once so purchased and placed, these bonds are in reality paid and under this plan the amounts that would otherwise have been paid out as interest on these bonds are used to buy further bonds of this issue and thereby reduce the outstanding capital obligation of the Dominion Telegraph Securities, Limited. The agreements specifically provide for this, and further, when in the course of time these bonds have all been purchased, then this income shall be used to redeem the certificates of interest. In all the years material to the issues here to be determined, the amount of 5½% upon the bonds in the sinking fund was applied to purchase additional bonds. It was a "payment on account of capital" and therefore not deductible under the provisions of section 6 (1) (*b*) of the *Income War Tax Act.*

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent: *A. A. McGrory.*

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*Nov. 12, 13
*Dec. 20

CANADIAN NATIONAL RAILWAYS COMPANY (DEFENDANT) ..... APPELLANT;

AND

ANNIE L. MACEACHERN AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Railway—Negligence—Motor vehicle—Collision at double track level crossing—One train just passed on one track—Second train travelling in opposite direction—Engine bell ringing, and wig-wag light and bell operating—Failure by engineer to sound whistle—Municipal by-law prohibiting train whistle at crossings unless necessary to prevent accident—Railway Act, R.S.C. 1927, c. 170, s. 308.

The driver of a motor vehicle, following another motor vehicle across the tracks at a double track level railway crossing, after a train had just passed on one of the tracks, was struck by an oncoming train travelling on the far track in the opposite direction. There was an automatic flagman or wig-wag which was in operation at all relevant times, with its bell ringing and its light burning. The whistle of the engine was not sounded but its bell was being rung continuously.—A municipal by-law, approved by the Board of Transport Commissioners under the provisions of section 308 of the *Railway Act,* prohibited the sounding of train whistles within the city limits unless there was reasonable cause for belief that it was necessary in order to prevent an accident.—The driver of the motor vehicle and two of the passengers sued the railway company for damages. The finding of the jury was that, "in view of the conditions prevailing at the crossing," the engineer was negligent in failing to sound the engine whistle, presumably on the ground that the first train might have caused noise sufficient to drown out the signal bell, that it might have obscured the wig-wag and that there was likelihood that motor vehicles would be waiting to cross. The trial judge maintained the action. The appellate court affirmed that judgment as to the two passengers now respondents, but held that the driver of the motor vehicle could not recover.

Held, Hudson J. dissenting, that the appeal should be allowed and the respondent's action dismissed. There was no evidence upon which the jury could base their finding that the engineer had reasonable cause for belief, at the eighty rods mark before reaching the level crossing (s. 308 *Railway Act*), that it was necessary for him to sound the engine whistle in order to avoid an accident. The engineer, and the trial judge so found, could not reasonably have foreseen the accident, the train was proceeding in the normal cause of its operation, the engine bell was ringing, the wig-wag was operating and its bell was ringing. Under these circumstances, a jury properly instructed could not have found the appellant railway guilty of any negligence.

*PRESENT:—Kerwin, Hudson, Taschereau, Kellock and Estey JJ.

Per Kerwin and Estey JJ.:—The municipal by-law would fail of its evident purpose, if it were to be held that when two trains are approaching each other at or near a level crossing the engineer of each must always sound the whistle eighty rods from the crossing. Circumstances, however, might arise where it would be incumbent at common law upon the engineer to sound the whistle, but no such case has been made out in the present instance.

Per Taschereau and Kellock JJ.:—The obligation to sound the whistle imposed by section 308 of the *Railway Act,* by itself, is an absolute obligation independent of the particular circumstances which may in fact exist. The municipal by-law substitutes for that an obligation not to sound the whistle at all unless from the particular circumstances observable at the time when the statutory warning should otherwise be given a prudent man would consider that in order to prevent an accident the prohibition should be disregarded and the warning given. Neither the statute nor the by-law have anything to do with any duty at common law which may rest upon the appellant at all points upon its railway.

Judgment of the Supreme Court of Nova Scotia *in banco* (19 M.P.R. 65) reversed.

APPEAL from the judgment of the Supreme Court of Nova Scotia *in banco* (1), affirming in part the judgment of the trial judge, Doull J. after trial with jury, which had maintained an action for damages for injuries sustained by the driver of a motor vehicle and two of the passengers in a collision at a railway level crossing.

D. L. McCarthy K.C. and *W. H. Jost* for the appellant.

R. S. MacLelland K.C. for the respondent.

The judgment of Kerwin and Estey JJ. was delivered by

KERWIN J.:—This is an appeal by Canadian National Railways Company from a judgment of the Supreme Court of Nova Scotia *in banco,* affirming the judgment entered at the trial upon the findings of the jury. The respondents, Annie I. MacEachern and Catherine Christine MacEachern, together with four other people, were passengers in an automobile owned and driven by Archibald A. MacAulay who, at about 8.30 p.m. on September 18, 1943, had been proceeding westerly on Townsend street, in the city of Sydney, in the province of Nova Scotia. Two pairs of tracks of the appellant company cross Townsend street

(1) (1946) 19 M.P.R. 65;
59 Can. Ry. Cas. 180.

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in what is generally a north and south direction and the distance between the inner rails of each pair is 9·5 feet. At the southwest corner of the crossing is an automatic flagman or wig-wag which was in operation at all relevant times, with the bell ringing and light burning. As MacAulay's automobile approached the crossing, a train of the Sydney and Louisburg Railway, consisting of twenty-three coal cars, was moving in a northerly direction over the crossing on the east tracks and MacAulay brought his car to a stop thirty or forty feet from the tracks and immediately behind another automobile. Upon the last car of the Sydney and Louisburg train clearing the crossing, the driver of this other automobile and MacAulay put their cars in motion and proceeded over the crossing. MacAulay failed to notice a train of the appellant travelling south on the west track, consisting of an engine and caboose. The whistle on that engine was not sounded but its bell was being rung continuously. This train struck MacAulay's car, the two respondents were severely injured, and the automobile damaged, while MacAulay and the four other passengers were not injured. An action was brought by MacAulay and the two respondents against the appellant at the trial of which the main question was as to the speed of the appellant's train.

Before turning to the questions submitted to the jury and their answers thereto, a reference should be made to section 308 of the *Railway Act*, R.S.C. 1927, chapter 170:—

308. When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway.

2. Where a municipal by-law of a city or town prohibits such sounding of the whistle or such ringing of the bell in respect of any such crossing or crossings within the limits of such city or town, such by-law shall, if approved by an order of the Board, to the extent of such prohibition relieve the company and its employees from the duty imposed by this section.

Pursuant to subsection 2, by-law 35 was enacted by the Council of the city of Sydney, reading as follows:—

1. It is prohibited to sound any engine whistle in respect to the following highway crossings within the limits of the city of Sydney, namely —Kings Road, Bentinck St., George St., Brookland St., Townsend St., Prince St., and the Canadian National Railways and Prince St., and the Sydney & Louisburg Railway.

2. The said prohibition shall not apply when there is reasonable cause for belief that it is necessary to sound an engine whistle in order to prevent an accident.

3. This by-law shall come into effect if and when approved by an order of the Board of Transport Commissioners for Canada.

This by-law was duly approved by the Board of Transport Commissioners for Canada, which is the Board referred to in subsection 2 of section 308 of the Act and was in force at the time of the accident.

It will be observed that subsection 1 of section 308 of the Act provides for the sounding of the engine whistle at least 80 rods before reaching a highway crossing at rail level, and that the authority under subsection 2 is for a by-law to prohibit *such* sounding, and it is therefore to that sounding that the prohibition in clause 1 of the by-law applies,—although it does not apply

when there is reasonable cause for belief that it is necessary to sound an engine whistle in order to prevent an accident.

A complaint was made that this by-law was not referred to by the appellant in its pleading but it was put in as an exhibit and the trial proceeded without objection. On the other hand, I assume that the pleadings of the plaintiffs in the action are sufficient to raise the issue as to whether there was reasonable cause for belief that it was necessary to sound the engine whistle.

The questions submitted to the jury and their answers are as follows:—

1. Was there any negligence on the part of the defendant, or its servants, which caused or contributed to the property damage sustained by the plaintiff, Archibald A. MacAulay; or the bodily injuries suffered by Annie I. MacEachren and Catherine Christine MacEachren?

Answer yes or no.

"Yes."

2. If so, in what did such negligence consist? Answer as fully as you can.

"Part 2 city of Sydney ordinance relating to the sounding of engine whistle at a crossing states as follows, quote—the said prohibition shall not apply if there is reasonable cause for belief that it is necessary to sound an engine whistle in order to prevent an accident. In view of the conditions prevailing at the crossing on the night of the accident the jury are agreed that the whistle should have been sounded. This was not done."

3. Was there any negligence on the part of the plaintiff, Archibald A. MacAulay, which caused or contributed to the accident? Answer yes or no.

"No."

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Question 4, asking in what the negligence of MacAulay consisted, was, of course, not answered, and question 5, dealing with the damages need not be considered.

The trial judge, after quoting the answer to question 2, proceeded as follows:—

> This creates a rather peculiar situation as there had been no argument before the jury in regard to the sounding of an engine whistle and there had been no instruction as to negligence of that kind. The pleadings, however, set out the failure to sound a whistle as one of the items of negligence and clearly if there is any evidence to support the finding it may very well be a proper ground. As there will no doubt be an appeal, I am dealing with the subject in only a general way. It is quite clear that the engineer of the engine which collided with the car in which the plaintiffs were driving could not reasonably have foreseen the accident which happened but it is not an unreasonable argument that the fact that there were two trains going in opposite directions on separate tracks and that there were clearly cars waiting to pass on both sides of the railway, might very well have raised reasonable apprehension of an accident and might have made it necessary in the exercise of prudence to sound a whistle. At any rate I am signing the order for judgment and no doubt the matter can be dealt with more fully by a higher court

The appeal by the present appellant against the judgment in favour of MacAulay was allowed as the court *in banco* decided that the finding that MacAulay had not been negligent was perverse and not supported by the evidence. As to the present respondents, the court *in banco* considered it clear that the jury believed that there was ground for the belief that the sounding of the whistle was necessary to prevent an accident and that they thought the sounding of the whistle would have been an effective warning. The reasons for judgment of the Chief Justice of Nova Scotia on behalf of the court continues:—

> The sharp sound of a whistle would no doubt have been heard amid the din caused by the cars. Defendant's engineer must have known that he was approaching a busy crossing; that vehicles were standing at the time on the western side of the track waiting for the opportunity to pass; and he might reasonably expect vehicles to be waiting on the eastern side of the track as well. I think there is evidence to support the answer of the jury finding the defendant guilty of negligence, and I am not prepared to set aside their verdict in their answers to questions numbers 1 and 2.

I am unable to agree with this conclusion. The appellant's train was proceeding in the normal course of its operation and the wig-wag was operating, and if it were to be held that when two trains are approaching each other at or near the crossing the engineer of each must always

sound the whistle 80 rods from the crossing, the by-law would fail of its evident purpose. The trial judge was satisfied that the engineer of the appellant's train could not reasonably have foreseen this particular accident and, despite the fact that the engineer might have anticipated that traffic was waiting to cross from both directions, I can find no evidence upon which the jury could base their finding that he had reasonable cause for belief that it was necessary to sound the whistle at least 80 rods before reaching the crossing in order to prevent any accident. On the proper construction of the by-law, that is what the finding amounts to. This is not to say that circumstances might not arise where it would be incumbent at common law upon the engineer to sound the whistle but no such case is made out.

As was also pointed out by the trial judge, the jury's answer to question 2 is all the more remarkable as no such point as is there mentioned had been argued by counsel and no instruction upon the point had been given them. The dispute at the trial was as to the speed of the appellant's train but in the absence of a finding by the jury that the speed of the appellant's train was illegal or excessive, that question must be disregarded.

The appeal should be allowed and the respondents' action dismissed with costs throughout. There was an appeal by MacAulay from the judgment of the court *in banco* dismissing his claim for damages to his automobile but at the argument this appeal was abandoned and it should, therefore, be dismissed without costs.

HUDSON J. (dissenting): This action was brought for damages in respect of injuries sustained as a consequence of the motor car in which the plaintiffs were driving being struck by an engine of the defendant company.

The accident took place in Sydney, N.S. where a busy city street crosses two parallel tracks of the defendant's railway. The plaintiffs alleged that the defendant's engine and following cars were travelling at an execessive rate of speed, and also that there was no sufficient or effective bell and whistle warning given to the plaintiffs by the "said outgoing freight train".

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Hudson J.

The jury found first, that the damage and injury sustained by the plaintiffs was due to the negligence of the defendant or its servants, and secondly, that such negligence consisted in:

City of Sydney ordinance relating to the sounding of engine whistle at a crossing states as follows, quote—the said prohibition shall not apply if there is reasonable cause for belief that it is necessary to sound an engine whistle in order to prevent an accident. In view of the conditions prevailing at the crossing on the night of the accident the jury are agreed that the whistle should have been sounded. This was not done.

There was no finding as to speed.

Following these answers, on motion for judgment the learned trial judge after quoting the second answer says:

This creates a rather peculiar situation as there had been no argument before the jury in regard to the sounding of an engine whistle and there had been no instruction as to negligence of that kind. The pleadings, however, set out the failure to sound a whistle as one of the items of negligence and clearly if there is any evidence to support the finding it may very well be a proper ground. As there will no doubt be an appeal, I am dealing with the subject in only a general way. It is quite clear that the engineer of the engine which collided with the car in which the plaintiffs were driving could not reasonably have foreseen the accident which happened but it is not an unreasonable argument that the fact that there were two trains going in opposite directions on separate tracks and that there were clearly cars waiting to pass on both sides of the railway, might very well have raised reasonable apprehension of an accident and might have made it necessary in the exercise of prudence to sound a whistle.

Judgment was entered for the plaintiffs accordingly.

On appeal, Chief Justice Chisholm, in giving the unanimous opinion of the court, said:

I shall first deal with the contention that the defendant was negligent. The by-law of the city of Sydney was approved by the proper authority, namely the Board of Transport Commissioners, and must be taken as an effective direction as to the use of a train whistle at crossings within the city of Sydney. The question then narrows down to this—did the defendant observe its requirements? If the city ordinance absolutely forbade the use of the whistle at the crossing, then the defendant was not guilty of negligence in its failure to make use of its whistle. In express words, however, the prohibition is not to apply if there is reasonable cause for belief that the sounding of the whistle is necessary to prevent an accident. Then arises the question whether there was reasonable cause for such belief. It is clear that the jury believed that there was ground for such belief, and that they thought the sounding of the whistle would have been an effective warning. The sharp sound of a whistle would no doubt have been heard amid the din caused by the cars. Defendant's engineer must have known that he was approaching a busy crossing; that vehicles were standing at the time on the western side of the track waiting for the opportunity to pass; and he might reasonably expect

vehicles to be waiting on the eastern side of the track as well. I think there is evidence to support the answer of the jury finding the defendant guilty of negligence, and I am not prepared to set aside their verdict in their answers to questions number 1 and 2.

The learned judges of appeal, however, were of the opinion that the male plaintiff, MacAulay, was not entitled to succeed and allowed the appeal in so far as his claim was concerned.

After perusal of the evidence, I am not prepared to say that the two courts below were clearly wrong in their conclusion. Two parallel tracks crossing a busy street thoroughfare obviously create great dangers for those using the highway. Provision was made by order of the Board of Transport Commissioners which, no doubt, was deemed adequate protection in the case of normal operations.

The jury's answers indicated that, in their opinion, at the time of the accident, the conditions prevailing demanded something more. This was a fact which they had a right to decide. See Salmond on Torts, 10th Ed. at p. 438:

> What amounts to reasonable care depends entirely on the circumstances of the particular case as known to the defendant whose conduct is the subject of inquiry. Whether in those circumstances, as so known to him, he used due care—whether he acted as a reasonably prudent man—is a mere question of fact as to which no legal rules can be laid down.

(See *Commissioners of Taxation* v. *English, Scottish and Australian Bank Limited* (1).

As Chief Justice Chisholm pointed out:

> The sharp sound of a whistle would no doubt have been heard amid the din caused by the cars.

This might very easily have saved these people from this very unfortunate accident.

I think there was concurrence in the courts below in respect of the essential facts.

I would dismiss the appeal with costs and also dismiss the cross-appeal of MacAulay without costs.

The judgment of Taschereau and Kellock JJ. was delivered by

KELLOCK J.:—This is an appeal from the judgment of the Supreme Court of Nova Scotia, *in banco,* dated the 19th January, 1946, affirming the judgment at trial in favour

(1) [1920] A.C. 683, at 689.

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of the respondents other than the respondent MacAulay, upon the verdict of a jury and allowing the appeal with respect to the last named respondent as to whom the action was dismissed.

The action was brought to recover damages arising out of a collision which took place about 8.30 p.m., on September 18, 1943, between an automobile, owned and operated by the respondent MacAulay, in which the other respondents and others were passengers, and a freight train of the appellant on Townsend street where it crosses at grade level a double line of tracks of the Canadian Government Railways in the city of Sydney. Townsend street, which also carries a street railway, runs east and west. As the respondent's car, travelling west, approached the easterly tracks, another train, consisting of some twenty-three empty coal cars, was moving northerly over the crossing. The automobile accordingly stopped, it is said, some thirty feet from the easterly tracks immediately behind another automobile. There was other traffic similarly stopped on the west side of the crossing. MacAulay says that when the last car of the coal train had left the crossing by some fifty feet, having looked up and down the track without seeing anything, the automobile in front of him moved ahead and he started up and proceeded to cross. He had just succeeded in placing his car in the centre of the westerly tracks when he was struck by the freight train which was proceeding southerly. Although the train crew endeavoured to stop the train as soon as they observed him their efforts were without avail. It is for the damages resulting from this occurrence that the action was brought.

The crossing was protected by a wig-wag, having a light and an automatic bell, placed on the westerly side of the two sets of tracks on the southerly side of Townsend street. Although the wig-wag was operating neither MacAulay nor any of the other occupants of the automobile saw its light nor heard its bell, nor did any of them hear the bell of the train which struck their car, although it had been in continuous operation for eighty rods as required by statute. All said they did not either hear or see this train until it was upon them, the reasons given being the noise made by the coal train in passing over the crossing and that the approaching train was obscured by the coal cars.

It was also said that the headlight on the approaching engine was not noticed as the crossing was brightly lit up by the lights of the automobiles and a light on a post.

The evidence of the appellant's train crew established that the bell on the freight engine had been sounded continuously as required by the statute and that this was the only signal given by that train. No evidence was given by any of the respondents' witnesses as to any lack of warning by either bell or whistle of the approaching engine beyond the statements made by all the occupants of the MacAulay car that they heard nothing. A by-law of the city of Sydney, hereinafter referred to, was put in by counsel for the appellant no doubt in view of the above evidence and allegations in the statement of claim that effective bell and whistle warnings had not been given. No reference was made in the address of either counsel to failure to blow the whistle nor did the learned trial judge refer to the subject in his charge.

The verdict of the jury was in the following terms:

1. Was there any negligence on the part of the defendant, or its servants, which caused or contributed to the property damage sustained by the plaintiff, Archibald A. MacAulay; or the bodily injuries suffered by Annie L. MacEachren and Catherine Christine MacEachren? Answer yes or no.

"Yes".

2. If so, in what did such negligence consist? Answer as fully as you can.

"Part 2 city of Sydney ordinance relating to the sounding of engine whistle at a crossing states as follows, quote—the said prohibition shall not apply if there is reasonable cause for belief that it is necessary to sound an engine whistle in order to prevent an accident. In view of the conditions prevailing at the crossing on the night of the accident the jury are agreed that the whistle should have been sounded. This was not done."

3. Was there any negligence on the part of the plaintiff, Archibald A. MacAulay, which caused or contributed to the accident? Answer yes or no.

"No".

4. If you answer the 3rd question "yes" then in what did such negligence consist? Answer as fully as you can.

Effect was given to this verdict by the learned trial judge who said in the course of his reasons:

It is quite clear that the engineer of the engine which collided with the car in which the plaintiffs were driving could not reasonably have foreseen the accident which happened but it is not an unreasonable argument that the fact that there were two trains going in opposite

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directions on separate tracks and that there were clearly cars waiting to pass on both sides of the railway, might very well have raised reasonable apprehension of an accident and might have made it necessary in the exercise of prudence to sound a whistle.

In giving judgment on the appeal on behalf of the full Court the Chief Justice said:

> The by-law of the city of Sydney was approved by the proper authority, namely, the Board of Transport Commissioners, and must be taken as an effective direction as to the use of a train whistle at crossings within the city of Sydney. The question then narrows down to this—did the defendant observe its requirements? If the city ordinance absolutely forbade the use of the whistle at the crossing, then the defendant was not guilty of negligence in its failure to make use of its whistle. In express words, however, the prohibition is not to apply if there is reasonable cause for belief that the sounding of the whistle is necessary to prevent an accident. Then arises the question whether there was reasonable cause for such belief. It is clear that the jury believed that there was ground for such belief, and that they thought the sounding of the whistle would have been an effective warning. The sharp sound of a whistle would no doubt have been heard amid the din caused by the cars. Defendant's engineer must have known that he was approaching a busy crossing; that vehicles were standing at the time on the western side of the track waiting for the opportunity to pass; and he might reasonably expect vehicles to be waiting on the eastern side of the track as well. I think that is evidence to support the answer of the jury finding the defendant guilty of negligence and I am not prepared to set aside their verdict in their answers to questions number 1 and 2.

The Court held, however, that the finding of the jury with respect to the alleged negligence of the respondent MacAulay was perverse and his action was dismissed. This respondent cross-appealed with respect to the dismissal but the cross-appeal was abandoned before us.

The by-law mentioned above was approved by an order of the Board of Transport Commissioners, dated 1st November, 1941, pursuant to the provisions of section 308 of the *Railway Act* and reads as follows:

> 1. It is prohibited to sound any engine whistle in respect to the following highway crossing within the limits of the city of Sydney, namely: Kings Road, Bentick Street, George Street, Brookland Street, Townsend Street, Prince Street and the Canadian National Railways and Prince Street and the Sydney & Louisburg Railway.
>
> 2. The said prohibition shall not apply when there is reasonable cause for belief that it is necessary to sound an engine whistle in order to prevent an accident.
>
> 3. This by-law shall come into effect if and when approved by an order of the Board of Transport Commissioners for Canada.

By section 308 of the statute, R.S.C. 1927, ch. 170, provision is made for the sounding of the whistle when a

train is approaching a highway crossing at rail level, the whistle to be sounded "at least eighty rods before reaching such crossing". Subsection 2 provides that:

> Where a municipal by-law * * * prohibits *such* sounding of the whistle * * * in respect of any such crossing or crossings * * * such by-law shall, if approved by an order of the board, to the extent of such prohibition relieve the company and its employees *from the duty imposed by this section.*

The duty imposed by the section is to sound the whistle "at least eighty rods before reaching such crossing" and it is only "*such* sounding" which may be affected by any by-law passed under the authority of the section. The point therefore at which the engineer had to determine whether or not the statutory signal should be given was at the eighty rod mark. The question which arises is as to whether or not on the evening in question and under the circumstances then existing there was reasonable cause presented to the engineer of the freight engine at that point which should have actuated him to sound his whistle in the belief that it was "necessary" in order to prevent an accident. In my opinion there is no evidence upon which an affirmative finding could be made upon that question.

There is no evidence even to show in the first place that when the freight engine was at the whistling post one-quarter mile from the crossing, it could be there observed that the two trains, one proceeding at the rate of ten miles per hour, and the other at the rate of approximately three miles per hour, were in such positions relative to each other that it should have been realized that the last car of the coal train would pass over the crossing before the freight reached it and thus open up the crossing so as to permit an incautious person to attempt to cross; or in the second place, that the coal train would not pass over the crossing sufficiently prior to the other train reaching it that the approach of the latter would be easily observed from both sides of the crossing. I see nothing in the evidence which, at the whistling post, should have created in the minds of any of the train crew a reasonable belief that it was "necessary" to sound the whistle in order to prevent an accident. The engine was moving slowly, its bell was ringing and there were no conditions in existence which would obscure its approach from anyone who cared to

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look before stepping into its path. All of this was known to the train crew, who also knew that the crossing was protected by the wig-wag. In my opinion something more had to be observable than was in fact observable at the whistling post in order to raise the duty with which the by-law deals.

The obligation to sound the whistle imposed by section 308, by itself, is an absolute obligation independent of the particular circumstances which may in fact exist. The by-law substitutes for that an obligation not to sound the whistle at all unless from the particular circumstances observable at the time when the statutory warning should otherwise be given a prudent man would consider that in order to prevent an accident the prohibition should be disregarded and the warning given. Neither the statute nor the by-law have anything to do with any duty at common law which may rest upon the appellant at all points upon its railway. Counsel for the respondents opened his argument with the statement that

> Our whole case is based upon the omission of the statutory duty to sound the whistle.

For the reasons given, the evidence, in my opinion does not enable any such finding to be made.

Notwithstanding the argument with which respondents' counsel opened, he found himself in reality arguing that there had been a breach of duty at common law resting upon the appellant in failing to whistle when, as the freight engine was a short distance from the crossing it became, or should have become, apparent that the coal train would leave the crossing clear before the freight engine entered upon it and that the engine crew should have anticipated that some person might attempt to cross in disregard of the wig-wag, having failed to see or hear the freight by reason of the coal train and its attendant noise.

The first difficulty with such an argument in my opinion is that if the jury intended to find in favour of the respondents with respect to such a breach of duty they have not so framed their verdict. They have, on the contrary, founded themselves on the by-law which is limited in its

application to quite a different place. If the jury intended to decide that a breach of a common law duty occurred in the vicinity of the crossing itself, as the respondent now disregard the reference in the verdict to the by-law. For myself, I think that brings us into the realm of conjecture as to whether or not the jury would have so found if they had not had present to their minds the terms of the by-law at all. Even if such a construction could properly be put upon the verdict the evidence in my opinion does not support it.

What was the situation as it presented itself to the train crew of the freight train as it neared the crossing? What is the evidence? The train was travelling not faster than ten miles an hour. The coal train was moving over the crossing at about three miles per hour. The crossing was well lighted. The complaint in fact is that there was too much light. The engine-bell was ringing. The wig-wag light was operating and its bell was ringing. The approaching engine was itself clearly visible to anyone approaching the tracks before he entered upon those tracks unless such a person rushed from behind the coal train immediately it passed without waiting for it to clear the crossing by any appreciable distance so as to permit a view. The respondent driver said that the last car of the coal train had cleared the crossing by some fifty feet before he started to move his car and it must have proceeded some distance beyond that while he traversed the forty odd feet intervening between the point where he had stopped and the westerly set of tracks. There is no question that the freight engine was in plain view for anyone who cared to look before entering its path. It is quite true that the wig-wag continues to operate for some time after a receding train has left the crossing as well as for an approaching train, but in my view that is insufficient to cast upon the appellant in the circumstances here present a duty to anticipate that some person will be reckless enough to cross in reliance upon a belief that the wig-wag was connected only with a train which had passed and not with one which was approaching. The sufficiency of the protecting installations at the crossing was a matter for the

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Board of Transport Commissioners: *Grand Trunk Railway Co. of Canada* v. *MacKay* (1). Something more than the possibility that the crossing signal would be disregarded by persons at the crossing was required to impose upon the crew of the approaching train the obligation to blow the whistle. I think, therefore, that there was nothing to require the appellant's servants to do other than they did.

In my opinion the duty resting upon the appellant in the circumstances of the case at bar cannot be put higher against the railway than as expressed by Riddell, J. in *City of London* v. *Grand Trunk Railway Company,* (2). there must be knowledge that the danger is imminent; not simply knowledge that the danger is possible.

The circumstances present in *Grand Trunk Railway Company of Canada* v. *Hainer,* (3), were very different. There was evidence in that case of wind, flurries of snow and smoke and dust from the passing freight which enabled the jury to find that the approaching express train, admittedly moving at an excessive speed, would have its headlight obscured during the approximately two seconds between the time when the one train passed and the deceased entered upon the tracks of the approaching freight. While in the case at bar there was evidence that the noise of the coal train may very well have drowned out the approach of the freight, the night was clear and there is no suggestion of smoke or dust from the coal train having any tendency to obscure the freight.

In my opinion there was no evidence upon which the jury, properly instructed, could have found the appellant guilty of any negligence in the circumstances. In truth the jury were not instructed at all with regard to the alleged negligence upon which the respondents now rely as no such question was even suggested at the trial.

While it is no doubt always possible that some person will, like these respondents, rush across in the face of a waving wig-wag on the assumption that there is no other train than the one which has passed, I think it would be to impose too heavy a burden upon the operators of a railway

(1) (1903) 34 Can. S.C.R. 81.
(2) (1914) 32 O.L.R. 642, at 664.
(3) (1905) 36 Can. S.C.R. 180.

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to say that it is negligence to have abstained from blowing the whistle (in the absence of something more than existed in the case at bar.)

I would allow the appeal and dismiss the action both with costs if demanded. I would dismiss the cross-appeal without costs.

Appeal allowed with costs.

Solicitor for the appellant: *John MacNeil.*

Solicitor for the respondents: *R. S. MacLelland.*

STERLING ROYALTIES LIMITED.....APPELLANT;

AND

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

1946

*Oct. 29
*Dec. 20

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Revenue—Costs of drilling oil well—Income on production—Assessment—Deductions for development cost and depletion—Method of ascertaining allowances—Discretion of the Minister of National Revenue—Income War Tax Act, R.S.C. 1927, c. 97, s. 5 (a).

The appellant company, in the course of its business, drilled and operated an oil well in Alberta, which proved productive. In its income tax return for 1934, a loss was shown of $17.25 in the operations for that year. However, an assessment was made on a taxable income of $8,584.25, which assessment was affirmed by the Minister of National Revenue. The appellant company contended that no proper or sufficient amount was allowed for depreciation in respect of costs of development, that is, the drilling of the well. The amount allowed in the assessment by the taxing authorities was a proportionate amount fixed with reference to the value of production in the taxation year. The decision of the Minister was affirmed by the Exchequer Court of Canada. On appeal to this Court,

Held that the discretion of the Minister of National Revenue was not exercised in a manner contrary to the provisions of the *Income War Tax Act* (s. 5 (a)) nor can the method of ascertaining the allowances, used in this case, be termed unjust and unfair. The appeal must be dismissed.

*PRESENT:—Kerwin, Hudson, Taschereau, Rand and Estey JJ.

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APPEAL from the judgment of the Exchequer Court of Canada, Maclean J., dismissing the appeal of the appellant company to that Court from the affirmation by the respondent of the assessment under the *Income War Tax Act* on an income tax return for the fiscal year 1934.

H. S. Patterson K.C. for the appellant.

H. W. Riley and *A. A. McGrory* for the respondent.

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

HUDSON J.:—This is an appeal from a judgment of the late President Maclean of the Exchequer Court of Canada dismissing an appeal to that court from the respondent's affirmation of an assessment under the *Income War Tax Act*.

The appellant in the course of its business drilled an oil well which proved productive. In their income tax return for 1934 a loss was shown of $17.25 in the operations for that year. However, an assessment was made on a taxable income of $8,584.25 and on appeal this was confirmed by the Minister.

The appellant gave notice of dissatisfaction on a number of grounds but these have been reduced to a claim that no proper or sufficient amount was allowed for depreciation in respect of costs of development, that is, the drilling of the well.

The amount allowed in the assessment was a proportionate amount fixed with reference to the value of production in the taxation year in question, whereas the company claimed that the amount allowed should have been governed by the cost of development.

This and incidental questions were fully discussed in the court below and I am in entire agreement with the views expressed in the judgment of the learned trial judge in the case of *National Petroleum Corporation* v. *The Minister of National Revenue* (1) adopted by him in the present case. I will quote the final paragraph of that judgment:

> But I do not think it can be said, in all the circumstances of the case, that the discretion of the Minister was exercised arbitrarily or haphazardly, or contrary to the provisions of the act, or contrary to well established

(1) [1942] Ex. C.R. 102.

practice, or upon what can be said to be obviously unsound principles, or that the allowances made can fairly be termed unreasonable, unjust or unfair. The points in issue seem to have been the subject of careful consideration by the taxing authorities, in respect of matters about which there may well be a variety of opinions. The fact that in the assessment of the appellant for 1939, and since upon actual costs, over a period of years, and not upon gross income or net income, does not impugn the validity of the discretion exercised by the Minister in 1938 and earlier years, and I do not think such an argument is a tenable one. The Minister having exercised his discretion in the manner I have already described, and having allowed deductions for depreciation and development, and also for depletion or exhaustion, that I think is the end of the matter, and I do not think I can usefully add anything further. I have not been satisfied that the assessment in question should be disturbed. My conclusion therefore is that the appeal must be dismissed and with costs.

For this reason I think the appeal should be dismissed with costs.

The judgment of Rand and Estey JJ. was delivered by

RAND J.:—The question raised in this appeal is whether the Minister of National Revenue has validly exercised a discretion in his award to the appellant of what are called development and depletion allowances in respect of the sinking and operation of an oil well in the Turner Valley field of Alberta. The section of the *Income War Tax Act*, R.S.C. 1927, chapter 97 by which provision is made for such allowances is as follows:

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

(*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in determining the income derived from mining and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair; and in the case of leases of mines, oil and gas wells and timber limits, the lessor and the lessee shall be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree, the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

It is objected that the mode of ascertaining the allowance is so unrelated to any accounting basis appropriate to these two items that it is fundamentally wrong and outside the scope of discretion with which the section invests the Minister.

The method used was embodied in an empirical formula. The base figure was the gross income less the amount of royalties payable to superior lessors of the land. The

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combined allowance was then fixed at 25% of the sum so ascertained. That in turn was distributed between the two items in the following manner: the amount for depletion was fixed at 25% of the net income less the allowance for development, but since the net income, at that stage, consisted of the taxable income plus the combined allowance, the amount for depletion was one-third of the taxable income. Now as the taxable income had already been ascertained, the allowance for depletion could at once be calculated, and a deduction of this sum from the total allowance gave that for development and completed the distribution. It will be seen that the relation between the two items will vary as the taxable income, itself dependent on operating expenses, fluctuates; if, for instance, there were no such expenses, the taxable income would be the net income less the allowance, but since the latter is one-quarter of the gross income, the taxable income would be three-quarters of the gross, one-third of which would exhaust the allowance, and thereby attribute the whole of it to depletion. Conversely, if the expenses of operation eliminated the taxable income by reducing the net to the amount of the allowance, depletion would disappear and the total attributed to the development costs.

It is conceded that in certain situations a depletion allowance could be related to net income, but it is said that the conditions of the particular resource here are such as to exclude that as a proper basis of calculation; and it is contended that in the circumstances both of these items, in order to have any accounting foundation, must be directly related, as to development, to the actual outlay, and as to depletion, to some estimate of total resource value.

But treating the distribution within the fixed combined allowance to be material, the method adopted has not been shown to be without foundation in accounting principle. From what appears, it is quite impossible to say that over a wide field of this kind of production the allowance will not in the end work out fairly and justly. Certainly no attempt was made to establish that it will not do that. One basis may, in a mathematical aspect, appear to be more scientific, more exact, than another: but it was not said and cannot be said categorically that the use of this practical formula will not fairly serve the

purpose to be aimed at in administering this feature of the tax act: dealing justly with and promoting enterprise in the development of this kind of natural resource. Assuming then that the exercise of discretion is open to examination on the ground taken, I am unable to say that the Minister's action here was not within the compass of the section, and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Patterson, Hobbs & Patterson.*

Solicitor for the respondent: *C. Fraser Elliott.*

IN RE FRED BROWN

1946
*Nov. 18
*Dec. 20

Habeas corpus—Criminal law—Accused sentenced to one year's imprisonment—Notice of appeal by Crown—Accused served sentence and released from gaol before hearing of appeal—Appellate court increasing sentence—Accused re-arrested and incarcerated—Whether illegally detained—Sections 1013, 1015, 1078 and 1079 Cr. C.

The petitioner pleaded guilty to three charges under section 436 Cr. C. and was sentenced to one year's imprisonment on each charge, to run concurrently and, in addition, he was fined $5,000 upon each charge. The petitioner paid the fines and served the additional sentence of one year. Notices of appeal against the sentence were given by the Attorneys General for Canada and for Ontario, but the appeal was not heard until after the petitioner's release from imprisonment. The appellate court ordered that the sentence be increased on each of the charges for a further term of one year to run concurrently. The petitioner was re-arrested and incarcerated. The petitioner then moved, before the Chief Justice of this Court, for the issue of a writ of *habeas corpus,* claiming that he was detained illegally as there was no longer jurisdiction in the appellate court to increase the sentence imposed on him in view of the provisions of sections 1078 and 1079 Cr. C. Counsel for the petitioner contended that, the sentence having been served, this had "the like effect and consequences as a pardon under the great seal" and that the petitioner was "released from all further or other criminal proceedings for the same cause". The application was dismissed by the Chief Justice of this Court and the applicant appealed to the Full Court from that decision.

Held, affirming the judgment of the Chief Justice of this Court ([1946] S.C.R. 532), that the appeal should be dismissed.

*Present: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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Sections 1078 and 1079 Cr. C. must be read in connection with the right of appeal against sentence conferred by section 1013 (*c*) Cr. C. and with the power of a court of appeal under section 1015 Cr. C. to consider the fitness of the sentence appealed against and increase the punishment imposed by that sentence within the limits of the punishment prescribed by law for the offence of which the offender has been convicted. So read, a judgment of a court of appeal, increasing the punishment imposed by a trial court, has the same force and effect as if the latter had imposed it (subsection 2 of section 1015 Cr. C.). The "punishment endured", mentioned in section 1078 Cr. C., must refer to the punishment finally adjudged by the courts having jurisdiction.

Comments on a statement contained in the opinion of the then Chief Justice of this Court (Sir Lyman P. Duff), speaking for the Court, *in re Royal Prerogative of Mercy upon Deportation Proceedings* ([1933] S.C.R. 269, at 274).

APPEAL from the judgment of the Chief Justice of this Court (1), refusing an application by the petitioner for the issue of a writ of *habeas corpus* for the purpose of an inquiry into the cause of commitment of the applicant.

S. A. Hayden K.C. and *J. W. Blain* for the appellant.

J. J. Robinette K.C. for the Attorney General for Canada.

W. B. Common K.C. for the Attorney General for Ontario.

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

KERWIN J.:—This is an appeal from the judgment of the Chief Justice of this Court (1) refusing to issue a writ of *habeas corpus ad subjiciendum* for the purpose of an inquiry into the cause of commitment of the applicant. Assuming that we have jurisdiction, the appeal fails.

The applicant pleaded guilty to three charges under section 436 of the Criminal Code as enacted by chapter 30, section 8 of the statutes of 1939. He was sentenced by the presiding magistrate to one year's imprisonment on each charge, to run concurrently, and in addition thereto he was fined five thousand dollars upon each charge. He paid the fines and served one year in prison from which he was thereupon released. Notices of appeal against the sentence had been given by the Attorney General for Canada and

(1) [1946] S.C.R. 532.

by the Attorney General for Ontario within the time limited by the rules, and leave to appeal from the sentence had been duly obtained but, for reasons with which the applicant does not quarrel, the appeal was not heard by the Court of Appeal for Ontario until after the applicant's release from imprisonment. Because of this fact, it is argued that the Court of Appeal had no jurisdiction in view of the provisions of sections 1078 and 1079 of the Criminal Code, which read as follows:

1078 (1). 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.

2. Nothing in this section contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other offence.

1079. When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, if any, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice in any case in which such justice may discharge such person, he shall be released from all further or other criminal proceedings for the same cause.

These sections must be read in connection with the right of appeal against sentence conferred by section 1013 of the Criminal Code; the power of the court of appeal under section 1015 Cr. C. to consider the fitness of the sentence appealed against and increase the punishment imposed by that sentence within the limits of the punishment prescribed by law for the offence of which the offender has been convicted; and particularly subsection 2 of section 1015 Cr. C.:

2. A judgment whereby the court of appeal so diminishes, increases or modifies the punishment of an offender shall have the same force and effect as if it were a sentence passed by the trial court.

So read, the judgment of the Court of Appeal, increasing the punishment imposed by the magistrate upon the applicant, has the same force and effect as if the latter had imposed it. The "punishment adjudged", referred to in section 1078 Cr. C., must refer to the punishment ultimately adjudged on the appeal.

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Nothing in any of the cases referred to by Mr. Hayden bears precisely upon the point, and the statement in the opinion of Sir Lyman Duff, speaking on behalf of the Court *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* (1)

> 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

must be read in connection with the matter there under discussion, and "original sentence" is not confined to the sentence as in the present case of the convicting magistrate but to the ultimate disposition of the matter in accordance with the right of appeal given by the other sections of the Criminal Code.

The appeal is dismissed.

The judgment of Taschereau and Estey JJ. was delivered by

TASCHEREAU J.:—On the 22nd of September, 1944, the appellant, on a plea of guilty, was convicted at Toronto by Magistrate R. J. Browne on the following charges:

1. During the years 1941, 1942 and 1943, at Toronto in the said county and province, and elsewhere within the jurisdiction of this honourable court, unlawfully knowingly cause to be sold and delivered by Canada Comforter Company Limited to His Majesty in the right of his Government of Canada defective air stores, to wit, mattresses, contrary to section 436 of the Criminal Code as amended by 1939, chapter 30, section 8.

2. During the years 1941, 1942 and 1943, at Toronto in the county of York and province of Ontario, and elsewhere within the jurisdiction of this honourable court unlawfully knowingly cause to be sold and delivered by Canada Comforter Company Limited to His Majesty in the right of his Government of Canada defective military stores, to wit, mattresses contrary to section 436 of the Criminal Code, as amended by 1939, chapter 30, section 8.

3. During the years 1941, 1942 and 1943, at Toronto in the county of York and province of Ontario and elsewhere within the jurisdiction of this honourable court unlawfully knowingly cause to be sold and delivered by Canada Comforter Company Limited to His Majesty in the right of his Government of Canada defective naval stores, to wit, mattresses contrary to section 436 of the Criminal Code as amended by 1939, chapter 30, section 8.

(1) ([1933] S.C.R. 269, at 274.

Brown was sentenced to one year's imprisonment on each charge to run concurrently, and he was also fined $5,000 on each charge, or in default of payment of each fine two years' imprisonment, the imprisonment in default of the payment of the fine to run consecutively. The appellant paid the fines amounting to $15,000 and served the term of imprisonment imposed on him, being released from confinement in the month of July, 1945. In the meantime, in October, 1944, the Attorney General for Canada and the Attorney General for Ontario appealed to the Court of Appeal for Ontario, from the sentence imposed by Magistrate Browne. The appeal was not heard until May 1946, by which time Brown had then served the term of imprisonment imposed on him, and had been released from gaol.

On May 10, 1946, the Court of Appeal for Ontario ordered that the sentence of one year on each of the three charges be varied, and increased it on each of the said charges by a further term of one year. As a consequence of this judgment, the appellant was re-arrested, and is now confined in the Kingston Penitentiary, to serve the increased sentence.

In June 1946, counsel for the accused made an application to the Chief Justice of Canada, for a writ of *habeas corpus* under the provisions of section 57 of the *Supreme Court Act*. This application was dismissed, and the accused now appeals to the full Court from the decision of the Chief Justice of Canada (1), pursuant to section 57 (2) of the *Supreme Court Act*.

It is submitted by the appellant that the Court of Appeal for Ontario had no jurisdiction to increase, or otherwise deal with the sentence imposed on him, in view of the provisions of sections 1078 (1) and 1079 of the Criminal Code.

These sections provide as follows:

1078. (1). 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

(1) [1946] S.C.R. 532.

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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.

1079. When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, if any, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice in any case in which such justice may discharge such person, he shall be released from all further or other criminal proceedings for the same cause.

It is argued that the Court of Appeal for Ontario was without jurisdiction to hear the appeal of the Crown against the sentence imposed after the convicted man had served the imprisonment adjudged against him, and had been released from prison. It is further said that the imprisonment adjudged having been served and the equivalent of a pardon under the great seal having thereby been obtained under section 1078 (1) of the Criminal Code, the attempt to proceed with the appeal in these circumstances was barred by section 1079 of the Criminal Code.

The appeal by the Attorney General for Canada and of the Attorney General of Ontario was made pursuant to section 1013 (2) of the Criminal Code, which says:

1013 (2). Appeal against sentence.—A person convicted on indictment, or the Attorney General, or the counsel for the Crown in the trial, may, with leave of the Court of Appeal or a judge thereof, appeal to that Court against the sentence passed by the trial court, unless that sentence is one fixed by law.

Section 1015 (2) of the Criminal Code reads:

1015 (2). Effect of judgment.—A judgment whereby the court of appeal so diminishes, increases or modifies the punishment of an offender shall have the same force and effect as if it were a sentence passed by the trial court.

These two sections must of course be read in conjunction with sections 1078 and 1079 Cr. C. It is clear that where an offender has "endured the punishment adjudged", the imprisonment or payment of the fine has the same effect "as a pardon under the great seal", and that he cannot be prosecuted a second time for the same cause. But the "punishment endured" must be the one which is *finally adjudged* by the courts having jurisdiction. Section 1015

(2) Cr. C. can leave no possible doubt, and when a judgment of a court of appeal increases a punishment, it has the same effect as if given by a trial court. It is when the rights provided in section 1013 (2) Cr. C. have been exhausted or have not been taken advantage of, that it can be said that the punishment is finally determined. And it is consequently only when this punishment ordered by the court of appeal has been satisfied that it has the effect of a pardon under the great seal.

Any other interpretation given to these sections would defeat the right given to the Crown to appeal against the pronouncement of too light sentences, for, if an offender is sentenced to one day in gaol and serves his punishment, the Crown would be barred from appealing against such a sentence, unless the appeal is lodged, argued and determined within that period of time.

Dealing with these sections, Chief Justice Rowell said in *Rex* v. *Jarvis* Sr. (1):

> Sections 1078-9 should receive if possible a construction which would not deprive either the Crown or the accused of the right of appeal given by the Code. This would be achieved by construing them as being subject to the right of appeal. If these sections can be so construed it removes the difficulty as to the power of the Court to grant a new trial in the case of an appeal where the fine has been paid or the punishment endured, and—though not without grave doubts—I have reached the conclusion they should be so construed.

And in *Rex* v. *Kirkham*, (2) Martin J.A. said:

> Upon a careful consideration of the question, which is one of importance, no other conclusion is, to my mind, open than that s. 1079 does not come into operation until the question of what is the proper term of imprisonment to be "suffered" has been finally decided by the proper tribunal for that purpose, and therefore I should exercise the jurisdiction conferred upon me by said s. 1013 (2) by granting the motion.

Mr. Hayden has relied upon the following passage in Sir Lyman Duff's reasons in *re: Royal Prerogative of Mercy upon Deportation Proceedings* (3):

> 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.

I do not think that the appellant can find any comfort in this citation. The words "original sentence" were not used for the purpose of conveying the idea that a judgment

(1) (1937) 68 C.C.C. 188, at 197.
(2) (1935) 64 C.C.C. 255, at 257.
(3) [1933] S.C.R. 269, at 274.

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of a court of appeal, varying a sentence of a trial court, is not the "original sentence", but merely to emphasize that the words "punishment adjudged", found in section 1078 of the Criminal Code, is the punishment imposed by the courts, and not the punishment as reduced by an act of the royal clemency.

I am clearly of opinion that this appeal fails and should be dismissed.

Appeal dismissed.

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*Nov. 19, 20

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DONALD MacDONALD .....APPELLANT

AND

HIS MAJESTY THE KING .....RESPONDENT

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Evidence—Charge to jury—General principles—Misdirection—Accomplice—Corroboration—Reading of extract of opinion given by a member of appellate court in a previous appeal—Substantive wrong or miscarriage of justice.

The presence of the accused in his apartment with the perpetrators of a crime shortly after its commission, and the improbability of his evidence as to what occurred at that meeting, is capable of affording corroboration of the evidence of accomplices implicating him when considered in the light of all the evidence.

While the reading of an extract from the reasons of one of the Judges of the Court of Appeal on an appeal by the accused from his conviction at a previous trial is to be deprecated, this did not, under the circumstances, result in a miscarriage of justice.

APPEAL from the judgment of the Court of Appeal for Ontario dismissing (Laidlaw J. dissenting) the appellant's appeal from his conviction, on a trial before the General Sessions of the Peace at Toronto, Shea J., on a charge of armed robbery and kidnapping.

Vera Parsons (Miss) K.C. for the appellant.

W. B. Common, K.C. and *W. C. Bowman* for the respondent.

*Present:—Kerwin, Hudson, Taschereau, Rand and Kellock JJ.

The judgment of Kerwin, Hudson and Taschereau J.J. was delivered by

TASCHEREAU, J.:—On the 31st of October, 1944, the appellant was convicted for armed robbery, robbery, forcible restraining and imprisonment of one George Butcher, and, on the 7th of May, 1945, the Court of Appeal for Ontario (1) quashed this conviction and ordered a new trial.

The new trial took place before His Honour Judge Shea and a jury on the 19th of October, 1945, and on the 25th of October of the same year, after having been found guilty, he was sentenced to a term of fifteen years imprisonment in the Penitentiary at Kingston.

At the first trial, the appellant had been charged with and tried together with Benedetto Zanelli, Samuel Mancuso, Edwin MacDonald and William M. Baskett. Zanelli was also charged with the offence of receiving stolen goods. The appellant, Mancuso, Edwin MacDonald and Baskett were found guilty of armed robbery and imprisoning Butcher, but Zanelli was found guilty only of receiving stolen goods. The appellant and Mancuso appealed their convictions and sentences, and, while Mancuso's appeal was dismissed, the appellant's conviction was quashed and a new trial ordered. Having been convicted again at the second trial, MacDonald appealed, but the conviction was confirmed, the Honourable Mr. Justice Laidlaw dissenting on questions of law.

The facts are that on the 13th of December, 1943, a truck, containing liquor valued at many thousands of dollars, was seized in the city of Toronto by several men, one of whom was armed with an automatic pistol. The driver of the truck, named Butcher, was forcibly confined in an automobile, and the truck and its contents were taken to a barn on the premises of one Shorting, who operated a riding school known as The Lazy L. Ranch.

The evidence reveals that, on the 10th day of December, 1943, Mancuso (subsequently convicted of the armed robbery and unlawfully imprisoning the said Butcher), in company with one Zanelli (subsequently convicted of receiving the liquor), appeared at the riding school and

(1) (1945) 84 C.C.C. 177; [1945] 3 D.L.R. 764; [1945] O.W.N. 430.

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arranged with Shorting to rent his barn for storage of "a few cases of Christmas liquor". Wilkinson, who was an employee of Shorting and working at the school with him, was given $5.00 by Mancuso for "shaking some hay" over the liquor. Shorting himself received $20.00 for the use of his barn.

In the evening of the 12th of December, Zanelli telephoned Shorting to be at the barn at five o'clock the next morning. Following these instructions, Shorting and Wilkinson went to the barn and were met there by Zanelli. Shortly thereafter, an automobile containing four or five men arrived and also the truck containing six hundred cases of liquor which were unloaded. Later the same day, Shorting, through one Moberly, notified the Toronto police that the truck and liquor were at his barn. After having taken possession of the truck and liquor, the police visited the appellant's apartment in Toronto at one p.m. the same day, and there found Mancuso, Edwin MacDonald, Baskett (all subsequently convicted of the armed robbery and unlawful imprisoning). The appellant, Kay Donavan, a man by the name of Applebaum, a whiskey salesman, and another man by the name of Taylor, who is a known bootlegger, were also present. At the appellant's trial, Shorting and Wilkinson identified the appellant as being one of the men assisting in the unloading. Shorting also stated that one other man, while doing the unloading, referred to the appellant as "Mickey", which was his nickname.

The appellant's defence was an alibi, and in giving evidence in his own defence, he swore that the stolen liquor was never mentioned in his apartment, where all the men who had committed the crime a few hours before gathered at one p.m. on the 13th of December.

In his dissenting judgment in the Court of Appeal, Mr. Justice Laidlaw adopted the view that the learned trial judge erred in law in instructing the jury, that, if they found Shorting or Wilkinson to be accomplices, they might find corroboration of their testimony, as to appellant's presence at the barn, in the fact and circumstances of the meeting at the appellant's apartment, and from the fact also that the appellant's denial that the stolen liquor was

discussed was implausible. The second ground of dissent of Mr. Justice Laidlaw, is that counsel for the Crown improperly read to the jury, observations made by the Honourable Mr. Justice McRuer (now C. J. H. C.) in his judgment on the previous appeal, on the credibility of the witness Shorting.

The crimes for which the appellant was charged are not crimes for which, under section 1002 of the Criminal Code, corroboration is essential. However, if Shorting and Wilkinson were found to be accomplices in the perpetration of the crimes with which the appellant is charged, it was imperative to give the jury the usual warning that it was possible to convict without the evidence of Shorting and Wilkinson being corroborated but that it was dangerous to do so.

In his address to the jury, His Honour Judge Shea who presided at the trial said:

> It is important for you to decide that, because I have to instruct you as a matter of law that it is always dangerous to convict on the uncorroborated evidence of an accomplice, though it is your legal province to do so. Please note the word "uncorroborated"; it means unstrengthened or unconfirmed. If you have the evidence of an accomplice, and in addition you have something independent of that evidence, which strengthens or confirms it, you have corroboration. But I must tell you here, also, that the evidence of one accomplice cannot be taken in corroboration of the evidence of another. It has to be additional evidence to that given by either one of them. It need not be direct evidence that the accused committed the crime. The evidence in corroboration must be independent evidence which affects the accused, and connecting or tending to connect him in some material circumstances.

The learned trial judge also explained to the jury what was an accomplice, its legal meaning, and gave various definitions. He said:

> I will read you one or two of these definitions: "An accomplice is one who knowingly * * * and in a common intent with the principal offender, unites in the completion of a crime." Or, to determine if a witness is an accomplice, ask this question: "Could the witness have been indicted under the wide provisions of the Code for the offence for which the person has been convicted or is being tried?" And other definition: "An accomplice is a party to the crime himself, who assists in or is a partner of the crime." One more: "Every person who knowingly, deliberately co-operates with or assists or even encourages another in the completion of a crime is an accomplice."

The questions were, therefore: Could it be said that Shorting and Wilkinson were accomplices in the robbery

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of the liquor and of the imprisoning of Butcher? And if so was the proper direction given to the jury, by the trial judge, as to corroboration?

The definition of an accomplice is a question of law, and the determination of all the elements that are necessary to constitute corroboration is similarly a question for the trial judge. The trial judge must direct the jury as to what are the essential requirements to make a person an accomplice, and as to what is necessary to give a probative value to corroborative evidence, and it is also his duty to instruct them as to the legal evidence that must be adduced to establish complicity and corroboration. But the weighing of the facts revealed by the evidence, as to whether a person is an accomplice or not, and the question as to whether "corroborative inferences should be drawn from the evidence", are both within the exclusive province of the jury. *The King* v. *Christie,* (1); *Hubin* v. *The King,* (2); *Vigeant* v. *The King,* (3).

Corroboration must be found in some other legal evidence which tends to implicate the accused. This other evidence may of course be direct or circumstantial, oral or by writing or otherwise, as long as it leads to the reasonable belief that the statement of the accomplice is true, and does not let it stand alone. This additional evidence must be independent, that is to say, it must be free from any acts or words attributable to the witness for whom corroboration is sought, otherwise this witness would be a party to his own corroboration. (*The King* v. *Christie,* (4); *Hubin* v. *The King,* (2)). Likewise, an accomplice cannot be corroborated by another accomplice, and it is further an essential ingredient of corroboration that it should tend to show not only that a crime has been committed, but that it has been committed by the accused.

Of course, corroboration must not be so meagre that it should create a mere possibility that the accused has committed the crime for which he is charged; it should be strong enough to sufficiently impress the mind of the jury not with the probability of a conjecture, but with the probability of the truth of a fact put in evidence. It need not be conclusive, but it will be sufficient if it is pre-

(1) [1914] A.C. 545, at 568.
(2) [1927] S.C.R. 442, at 444.
(3) [1930] S.C.R. 396, at 399.
(4) [1914] A.C. 545, at 557.

sumptive, provided that the facts independently proven, and from which inferences are drawn, are consistent in tending to show the guilt of the accused, and are inconsistent with any other rational conclusion that the accused is the guilty person.

With deference, I am of opinion that the trial judge has properly instructed the jury as to the law and as to their duties, and that his charge is not impeachable.

The Court of Appeal for Ontario, in hearing the first appeal in Rex. v. MacDonald and Rex. v. Mancuso, came to the conclusion that a new trial in the case of MacDonald should be granted, because the learned trial judge had warned the jury that Shorting might be considered as an accomplice, but did not give the same warning as to Wilkinson. The Court properly said that the warning should have been given as to both witnesses, because the question as to whether they were accomplices or not was a question to be decided by the jury after the proper instructions had been given to them.

But in the present case, the situation is entirely different. The learned trial judge, after having given the proper legal definition of an accomplice, left it to the jury to determine if in fact Shorting and Wilkinson were accomplices. He then went on to explain that, if they were found to be accomplices, it was dangerous to convict the appellant on the uncorroborated evidence of Shorting and Wilkinson. He explained the legal meaning of corroboration; told all that was essential to give a legal probative value to corroborative evidence which must be of independent nature; he pointed out that something outside the evidence of the witness must be found which strengthens or confirms it; he said that the evidence of one accomplice cannot be accepted as corroboration of the evidence of another, that it need not be direct evidence, but that it may be circumstantial, as long as it connects or tends to connect the accused with the charge against him in some material circumstance. He also explained that if the jury found that they might decide that Shorting was an accomplice and Wilkinson was not, in that event, the evidence of the witness whom the jury found not to be an accomplice, could be taken as corroboration of the evidence of the other.

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These directions given by the trial judge are in harmony, I think, with what has been said in numerous well known cases, which have definitely established the rules that are to be followed in this country.

As early as in 1855 and even before, it was decided in *Regina* v. *Stubbs* (1), that the rule that a jury should not convict on the unsupported evidence of an accomplice is a rule of practice only, and not a rule of law, and that a judge should advise the jury to acquit unless the testimony of the accomplice be corroborated, not only as to the circumstances of the offence, but also as to the participation in it by the accused, and that where there are several prisoners, and the accomplice is not confirmed as to all, the jury should be directed to acquit the prisoners as to whom he is not confirmed; but it was held that this rule being a rule of practice only, if a jury choose to act on the unconfirmed testimony of the accomplice, the conviction cannot be quashed as bad in law.

Later, *in re Baskerville,* (2) the Court of Criminal Appeal in England decided at page 87:

> There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. See *Rex* v. *Atwood* (3). But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence: *Reg.* v. *Stubbs* (1); *In re Meunier,* (4).

At page 91 in the same case, it is said:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by statute. The language of the statute, "implicating the accused," compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corrobora-

(1) (1852-1856) 1 Dears. C.C. 555.
(2) (1916) 12 Cr. App. R. 81, at 87; [1916] 2 K.B. 658, at 663.
(3) (1787) 1 Leach 464.
(4) [1894] 2 Q.B. 415.

tion, except to say that corroborative evidence is evidence which shews or tends to shew that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *Reg.* v. *Birkett* (1).

Reference may also be made to the *Beebe* case (2); *Gouin* v. *The King* (3); *Hubin* v. *The King* (4); *Vigeant* v. *The King* (5).

The jury had, therefore, several alternatives. They could reach the conclusion that Shorting and Wilkinson were not accomplices, and convict on their uncorroborated evidence. It was open to them to believe that Wilkinson and Shorting were in no way connected with the robbery and with the imprisoning of Butcher, and that although they both might have violated the provincial liquor laws of Ontario, or might be a party to the receiving of the stolen goods, they were not implicated in the armed robbery and kidnapping. The offence of receiving stolen goods is a different offence from the one for which the appellant was charged. It has been said that under common law, the receipt of stolen goods did not constitute the receiver an accessory to the theft, but was a distinct misdemeanour punishable by fine and imprisonment. (Archibald's Criminal Pleadings Evidence and Practice, 28th edition, p. 1463).

In *Rex* v. *Dumont* (6), Mr. Justice Hodgins said:

I cannot regard the widow as an accomplice. The test is: could she have been indicted under the wide provisions of our Code for the offence for which the prisoner has been convicted? If she could, then any spectator of a crime might find himself described as an accomplice, for here she only saw the first blow struck and later witnessed the carrying out of her husband.

The Court of Appeal for Ontario in *Rex* v. *Zocanno and Burleigh* (7) said:

On a charge of breaking and entering, a witness who was found in possession of some of the stolen property, and who subsequently became an accomplice of the accused in other crimes in connection with the disposition of some of the stolen property, is not an accomplice in respect of the crime charged.

(1) (1837) 8 C. & P. 732.
(2) (1925) 19 Cr. App. R. 22, at 25.
(3) [1926] S.C.R. 539.
(4) [1927] S.C.R. 442.
(5) [1930] S.C.R. 396, at 399.
(6) (1921) 37 C.C.C. 166, at 176.
(7) (1944) 82 C.C.C. 71.

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It is quite unnecessary to examine the soundness of these decisions. But the only ground, upon which they could possibly be challenged, is that the possession of recently stolen goods is evidence upon which a jury may convict of theft, but this possession creates a mere presumption, and here, there is ample evidence to justify a jury to say that the presumption has been rebutted. (*Rex* v. *Watson* (1); *Baker* v. *The King* (2).

The jury could also take the view that Shorting or Wilkinson was an accomplice, and that the other was not. Then, they could properly find the corroboration of one witness in the testimony of the other.

Another course the jury could follow was that, even if both were accomplices, they could convict without corroboration, having been on that point properly instructed by the trial judge. They knew that this was a dangerous practice to follow, but it was within their province to do so and to believe Shorting and Wilkinson.

Lastly, if they did rely on corroboration in view of the warning given by the judge, because they believed Shorting and Wilkinson to be accomplices, they had independent circumstantial evidence which was of an incriminating nature. The presence of the appellant with the perpetrators of the crime in his own apartment, and his association with them, a few hours after the robbery, was a circumstance from which the jury could reasonably draw the inference, that Shorting and Wilkinson were speaking the truth when they swore that MacDonald was in the barn helping to unload the stolen liquor. It was also for them to believe that MacDonald would not have been present at that meeting if he was not linked in some material way with the others who have been found guilty.

Another most extraordinary circumstance is that, when heard as a witness in his own defence, MacDonald swore that all these people gathered in his apartment after the robbery, the unloading of the stolen liquor and the imprisonment of Butcher, did not mention among themselves the stolen liquor. This statement could be regarded as implausible by the jury, and as not being an expression of the truth. The jury saw and heard MacDonald, and

(1) [1943] 2 D.L.R. 44. (2) (1930) 54 C.C.C. 353.

from his demeanour, and from what they had the right to believe as being an absence of reasonableness, they could draw their own conclusions.

The behaviour of a witness as well as his contradictory or untrue statements are questions of fact from which a jury may properly infer corroboration.

In *The King* v. *Christie*, (1) Lord Moulton said:

> The evidential value of the occurrence depends entirely on the behaviour of the prisoner, for the fact that some one makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him. The only evidence for or against him is his behaviour in response to the charge, but I can see no justification for laying down as a rule of law that any particular form of response, whether of a positive or negative character, is such that it cannot in some circumstances have an evidential value. I am, therefore, of opinion that there is no rule of law that evidence cannot be given of the accused being charged with the offence and of his behaviour on hearing such charge where that behaviour amounts to a denial of his guilt.

In *Mash* v. *Darley*, (2) Kennedy L. J. said:

> I also agree that there may be cases in which language, whether used in a Court of justice or outside a Court of justice, may be considered as having the effect of corroboration, although there is nothing like an express admission. There may be such cases.

Under the circumstances of this case, I think that the jury could properly conclude that the meeting in MacDonald's apartment after the robbery, with the others who were since convicted, and his denial of any reference to the stolen liquor, were facts from which the jury, if they chose, could find elements of corroboration of Shorting's and Wilkinson's evidence. In view of the evidence adduced, these circumstances could be found consistent with appellant's guilt and inconsistent with any other rational conclusion.

The second ground raised by the appellant is that counsel for the Crown, in his address to the jury, read a part of the reasons for judgment of Mr. Justice McRuer, in the first appeal. Mr. Justice McRuer had said:

> The evidence of Shorting, it was argued, ought not to have been received while the charge of receiving was pending against him. I cannot agree with this contention. Nor do I think there was any impropriety in presenting the evidence of Shorting under the circumstances. Crown Counsel has a duty to offer to the Court such evidence as is available bearing on the charge in question. In many cases it is not only necessary but the duty of the Crown Counsel to call witnesses of low repute

(1) [1914] A.C. 545, at 560. (2) [1914] 3 K.B. 1226, at 1234.

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and against whom a charge may be pending. In the case of appeal it would have been quite impractical to have proceeded against Shorting on the charge of receiving until the accused had been tried on the principal charge.

It is argued that the reading of this extract was improper and amounted to a mistrial, because it dealt with the credibility of Shorting as a witness, which was a vital issue of the trial. It is submitted that anything Mr. Justice McRuer said was not the opinion of the Court, and that if such extracts were read, the different opinions of other judges on the same point should also have been communicated to the jury.

The question would be different, if in fact Mr. Justice McRuer had said anything that would tend to create a favourable impression as to Shorting's credibility; but I find nothing of that kind in that part of the judgment that was read to the jury. Obviously, Miss Parsons, counsel for the appellant, had attacked the propriety of calling Shorting as a witness and it was owing only to the position in which the Crown had found itself at the time of the first trial that Mr. Justice McRuer referred. I am unable to find anything in these remarks that can be interpreted as praising Shorting's credibility. The indirect reference to Shorting, who was the Crown's main incriminating witness against the appellant, as a man of "low repute and against whom a charge may be pending" is surely not a vindication of his credibility as a witness. I am far from agreeing with the proposition that the Crown should call in all circumstances a person as a witness while a criminal charge is outstanding against him, or with the propriety of Crown counsel reading the judgment of a judge who had taken part in the hearing of the previous appeal, but the reading of what Mr. Justice McRuer had said involves no miscarriage of justice.

The appeal should be dismissed.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.—The first ground of challenge to the conviction was the direction of the trial judge that the meeting in the apartment of the accused within four or five hours of the unloading of the liquor in the barn could be taken

as corroboration of the evidence given by Shorting. There were present at that time Mancuso, Baskett and Edwin MacDonald, who were afterwards convicted of the robbery, two admitted bootleggers and the accused, himself a gambler and a bootlegger. Edwin MacDonald is a brother of the accused and Baskett is married to a step-sister of a woman who lives with the accused. The car in which the truck-driver was kidnapped was owned by the father-in-law of Baskett. It is not clear just how long they had been together before the detective arrived, shortly after one o'clock. When he entered, Baskett, Edwin MacDonald and a bootlegger, Taylor, were in the bedroom just off the living room, with MacDonald lying on the bed; in the living room were Mancuso, the bootlegger Applebaum, and the accused, talking to Applebaum. He was described as being under the influence of liquor, with an appearance of having been up all night. On the stand, he gave reasons for the presence of the different persons in his home and denied that the liquor had been mentioned. These explanations and this denial, in the setting in which they were offered, could have been accepted only by very credulous persons.

It is argued that the presence of these men, characterized by the circumstances indicated, was as consistent with innocence as with guilt; that either the gathering was mere coincidence or that the thieves might have made use of the apartment to arrange for disposing of the liquor without any previous knowledge on the part of the accused. Considering all of the evidence bearing upon it, including an adverse inference from disbelief in the improbable testimony of the accused, I am unable to treat the incident as being neutral in its probative effect; that the jury could find a balance of probability tending to connect him with the robbery seems to me to be perfectly clear; and no more is necessary, *Thomas* v. *Jones* (1). The direction was, therefore, well founded, and on this ground the appeal must fail.

Then in his address, the Crown Prosecutor introduced a quotation from the judgment of McRuer J. A. in the appeal from the first conviction, which dealt with the pro-

(1) [1921] 1 K.B. 22.

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priety of offering Shorting as a witness when there was a charge pending against him which had been the subject of twelve adjournments, in these words:

> Now, fortunately, in this very case one of the Justices of Appeal made some comments on the propriety of the crown acting as they did with regard to Shorting. The evidence of Shorting, it was argued, "ought not to have been received while the charge of receiving was pending against him. I cannot agree with this contention." This is what the Justice said: I was there. "nor do I think there was any impropriety in presenting the evidence of Shorting under the circumstances. Crown Counsel has a duty to offer to the Court such evidence as is available bearing on the charge in question. In many cases it is not only necessary but the duty of the Crown is to call witnesses of low repute and against whom a charge may be pending. In the case in appeal it would have been quite impractical to have proceeded against Shorting on the charge of receiving until the accused had been tried on the principal charge."

Evidence of these and subsequent adjournments was introduced at the second trial and we are told, and it is not questioned, that, in her address, Miss Parsons stressed rigorously the importance of Shorting's evidence and the possible effect upon him of those circumstances followed by the withdrawal of the preliminary proceeding against him in 1945, a few weeks before the second trial.

There is no doubt the quotation ought not to have been made; it was wholly irrelevant to the matters before the jury; and if I could bring myself to the view that it might have influenced them in making up their minds on the credibility of Shorting, I would not hesitate to hold with Laidlaw J. A. that it was an impropriety to be cured only by a new trial. But when the language is carefully examined in the background of the suggestions of counsel, its application to Shorting is really derogatory; it is simply a statement by a judge of what should be obvious to an ordinary juryman; and I do not think its effect can be taken to have been more than to bring forcibly to their minds the fact that in criminal prosecutions of the order in question the Crown more often than not is compelled by the necessities of the case to offer witnesses with character or reputation possessing little to commend them to belief. This ground fails then likewise.

The appeal should therefore be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Horkins, Graham & Parsons.*

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

DAVID TASS ..... APPELLANT; 1946

AND *Nov. 26, 27 *Dec. 20

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Evidence—Admissibility of—Admissions made by accused as witness on preliminary hearing of charge against another—No objection made to questions as incriminating—No claim for protection under section 5 of the Canada Evidence Act—Right of Crown to use admissions on trial of accused—Canada Evidence Act, R.S.C. 1927, c. 59.

The appellant was convicted on charges of having used a noxious fluid and instruments to procure an abortion. The facts of the case are the following: One Ford was charged with manslaughter in connection with the death of the woman in question. The appellant appeared as a witness for the Crown at the preliminary inquiry. In the course of his evidence, given without raising any objection nor claim for protection under section 5 of the *Canada Evidence Act*, the appellant made certain admissions which the Crown later put in evidence against him at his own trial. The appellant appealed to the Court of Appeal on the ground of improper admission in evidence of these admissions; but the conviction was affirmed by a majority of that Court.

Held: That the deposition of the appellant was properly admitted and the appeal should be dismissed.—If a person testifying does not claim the protection provided for by section 5 of the *Canada Evidence Act*, the evidence so given may be used against him at his own subsequent trial.

Judgment of the Court of Appeal ([1946] 2 W.W.R. 97) affirmed.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming a conviction, on a trial before Donovan J. and a jury, on charges of offences relating to procuring an abortion.

Harry Walsh for the appellant.

C. W. Tupper for the respondent.

The judgment of Kerwin and Taschereau JJ. was delivered by

KERWIN J.—The accused, Dr. David Tass, appeals from the judgment of the Court of Appeal for Manitoba dismissing his appeal from a conviction on charges that he

*Present:—Kerwin, Taschereau, Rand, Kellock and Estey J.J.

(1) [1946] 2 W.W.R. 97; (1946) 1 Criminal Reports (Canada) 378; 86 C.C.C. 97; [1946] 3 D.L.R. 804.

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did on or about October 22, 1944, unlawfully administer to Agnès Ladéroute, a woman, with intent to procure a miscarriage of the said Agnès Ladéroute, a noxious thing, to wit, a mixture of water, soap and lysol, and that he, on the same day, unlawfully used instruments on Agnès Ladéroute, a woman, with intent to procure a miscarriage of the said Agnès Ladéroute. The appeal is based upon two grounds of dissent in law of Mr. Justice Dysart although other matters of dissent are mentioned in the latter's judgment. As I have come to the conclusion that the appeal fails on the first ground, I do not say anything as to the second because Mr. Walsh quite properly agreed that, in that event, it would be unnecessary to do so.

Agnès Ladéroute died October 23, 1944. An inquest was held and subsequently one Edward J. Ford was charged with manslaughter in connection with the woman's death and the preliminary inquiry in connection with that charge was held before a police magistrate on November 23, 1944. Tass was subpoenaed to appear as a witness at that inquiry. He attended and was sworn and gave evidence without raising any objection to answering any question upon the ground that his answer might tend to criminate him, as he was entitled to do by subsection 2 of section 5 of the *Canada Evidence Act*. After testifying that he had been called to Ford's house to attend the woman and that he found her dead, he was asked as to what he found in the room and as to any previous knowledge he had of the woman or of her condition. He admitted that he knew she was pregnant, that he drove her in his automobile to a point about one and one-half city blocks from Ford's house and that he knew Ford would conduct an abortion as he "felt he had done them before." From these admissions and others in his testimony at the preliminary inquiry, it is plain that, if the examination was admissible, the jury was entitled to find him guilty.

I disagree with the view of the dissenting judge below that this evidence of Tass was not relevant to the charge against Ford. It was suggested that an arrangement had been made between certain members of the police force and Crown counsel to put Tass in the witness box at Ford's preliminary inquiry in order to secure from Tass an admis-

sion of his guilt. It was even suggested that the magistrate had been a party to this arrangement. I find no evidence that any of the named parties had entered into such an arrangement or that it had been decided to arrest and prosecute Tass before the preliminary inquiry into the charge against Ford, and the matter is therefore left with Tass as a witness in a proceeding under oath admitting his guilt of the crimes now charged against him and that he did not claim the protection provided for by the *Canada Evidence Act*. Under these circumstances the decision in *Regina* v. *Coote* (1) is conclusive.

It is true that at the time of that decision there was no such provision as subsection 2 of section 5 of the *Canada Evidence Act*. That Act removes a safeguard a person had at common law to refuse to answer any questions that might criminate him. He is now obliged to do so but such evidence may not be used against him if he claims the protection of the Act. It has been pointed out in several cases such as *Rex* v. *Clark* (2), *Re Ginsberg* (3), and *Rex* v. *Barnes* (4) that the protection now afforded may not be as wide as that under the common law and objections have been raised from time to time as to the possibility of the evidence acquired under the Act being used to build up a case against a person who may be subsequently charged with an offence. However that may be, the matter seems quite clear that if the person testifying does not claim the exemption, the evidence so given may be later used against him, and this notwithstanding the fact that he may not known of his rights; *Regina* case (1).

The appeal should be dismissed.

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

KELLOCK J.—This is an appeal from the judgment of the Court of Appeal of Manitoba affirming (Dysart J. *ad hoc* dissenting) the conviction of the appellant before Donovan J. and a jury on the 11th day of May, 1945, in respect of two counts in an indictment, namely, attempt to procure a miscarriage and use of instruments to procure a miscarriage.

(1) (1873) L.R. 4 P.C. 599.
(2) (1902) 3 O.L.R. 176.
(3) (1917) 40 O.L.R. 136.
(4) (1921) 49 O.L.R. 374.

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In view of the opinion which I have formed with respect to the appeal it is necessary to mention only one ground of dissent. The appellant had given evidence upon a preliminary inquiry with respect to charges then pending against one Ford, arising out of the same facts out of which the appellant was himself later charged and part of this evidence was admitted against the appellant at his trial. Dysart J. was of opinion that this evidence was inadmissible. His view may be summarized as follows: that the evidence was irrelevant to the matter with which the preliminary inquiry was concerned, namely, the pending charges against Ford; that counsel for the prosecution had conducted the part of the examination objected to from an improper motive, viz: merely to obtain the admissions for use against the witness himself and that the magistrate was a party to this scheme; that the appellant had ceased properly to be a witness at all and his failure to avail himself of the provisions of section 5 of the *Canada Evidence Act,* R.S.C., c. 59 was immaterial and did not render his answers subsequently admissible against him.

In the course of his reasons the learned judge stated that the evidence in question had been

> extracted from a man who was so strongly suspected of complicity in Ford's crime that the authorities had decided to arrest and prosecute him.

However, counsel for the appellant before us quite frankly admitted that this view of the learned judge was not supported by the evidence.

When the evidence objected to is examined its relevancy is not, in my opinion, open to objection. It is shown that there was a common design between the appellant and Ford with respect to the matter in question and the principle referred to in *Koufis* v. *The King,* (1) is applicable. The examination of the appellant was therefore proper and accordingly there is no foundation for the allegation as to any ulterior motive on the part of either the Crown Attorney or the magistrate. Being properly before the magistrate it was for the appellant to invoke the provisions of section 5 of the *Canada Evidence Act.* Not having done so his evidence is properly admissible against him. It is not therefore necessary to consider whether the examination objected to would have been other than

(1) [1941] S.C.R. 481, at 488.

admissible against Tass if it could have been established that it was irrelevant to the pending charge against Ford. *Rex* v. *Sloggett*, (1); *Rex* v. *Graham*, (2); *The King* v. *Van Meter*, (3) may be referred to.

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As to the other ground of dissent which was argued before us, counsel for the appellant took the position that if he could not support the first ground of dissent it was unnecessary for us to deal with the second.

I would dismiss the appeal.

Appeal dismissed.

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*Nov. 13, 14
*Dec. 20

BETWEEN:

DOMINION ATLANTIC RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

HALIFAX AND SOUTH WESTERN RAILWAY COMPANY (PLAINTIFF).. } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Railway—Limitation of action—Lease of railway siding with reservation of user—Lease or licence—Adverse possession—Statute of Limitations—Owner conveying siding—Whether "lessee" acquired prescriptive title—Easement by prescription.

Respondent's predecessors in title in 1918 demised to appellant certain lands on which there was a railway siding, for the term of one year, reserving to the lessors the use of the siding in common with the lessees. Appellant continued to use the siding in common with respondent after the expiration of the term but rent was paid during the term only. In 1930 the respondent acquired title to the said lands and in 1945 brought action for a declaration of title free from any right or interest on the part of appellant. Appellant contended that, by reason of the lease, the exclusive right of occupation of the land upon which the siding was situate became vested in the appellant during the term of the demise and that, because of the continued use of the siding by appellant, the title of the respondent had become extinguished by reason of the *Statute of Limitations*. The judgment of the trial judge in favour of the respondent was affirmed by the appellate court.

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*Present: Kerwin, Hudson, Taschereau, Kellock and Estey JJ.

(1) (1856) Dears. Cr. App. 656.
(2) (1915) 24 C.C.C. 54.
(3) (1906) 11 C.C.C. 207.

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DOMINION ATLANTIC RY. CO. v. HALIFAX AND SOUTH WESTERN RY. CO.

Held, affirming the judgment appealed from (19 M.P.R. 22), that the appellant had not established any prescriptive title under the *Statute of Limitations*. The appellant was not, since the expiration of the term, in exclusive possession nor were the respondent and its predecessors in title during that period ever out of possession.

APPEAL from the judgment of the Supreme Court of Nova Scotia *in banco,* (1), affirming the judgment of the trial judge, Hall J. (2) and maintaining an action by the respondent railway for a declaration that it was the owner of a portion of a railway siding and entitled to possession thereof.

C. B. Smith K.C. for the appellant.

J. E. Rutledge K.C. and *W. H. Jost* for the respondent.

The judgment of the Court was delivered by

KELLOCK J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia *in banco,* dated 12th January, 1946, dismissing an appeal from the judgment at trial in favour of the respondent in an action brought against the appellant, and others, for possession of certain lands in the town of Yarmouth on which there is a railway siding. In defence of the action the appellant relies upon the *Statute of Limitations.*

The paper title is admittedly in the respondent by virtue of a grant made in 1930. By an indenture of the 1st March, 1918, the respondent's predecessors in title (the Bakers) demised and leased to the appellant for the term of one year at a rental of $5.00

> the ground with track thereon and the necessary land for loading and unloading facilities and situate on property of the said parties of the first part * * * running from said Water street in a south westwardly direction three hundred and fifty feet with the necessary roadway permitting exit and egress from and to said spur. Reserving, however, the right of the said parties of the first part, their agents, employees and lessees to use said siding and track in common with said party of the second part.

The rent was paid on the 12th April, 1918, but no subsequent rent was ever paid. Some 140 feet only of this siding is the subject matter in dispute.

(1) (1946) 19 M.P.R. 22, at 37; 59 Can. Ry. and Transp. Cases 11, at 22.
(2) (1945) 19 M.P.R. 22; 59 Can. Ry. and Transp. Cases 11.

The learned trial judge found that by 1918 the siding had been kept in shape

> primarily for the purpose of enabling cars to be unloaded at the Baker's coal and wood sheds

and that it continued so to be used. The trial judge also found:

> I am of the opinion that from 1911 to the date of the lease only cars for the Bakers had been placed on the siding. Under the terms of the lease the Railway could place cars there for third parties to unload, paying one dollar per year to the Bakers for such privilege and could also place on it cars carrying freight and material belonging to the Railway without payment of an unloading charge. There is no evidence that the Railway Company placed cars there for its own use during the one year term or at any time since.

There was also some evidence that from time to time the appellant placed a car on the siding for the convenience of a man by the name of Allen. This was done most infrequently and was found by the trial judge to be a permissive occupation and not a continuous using as of right. These findings of the trial judge were affirmed by the full court.

Appellant takes the position that it is unnecessary to decide whether the indenture of 1918 is a lease or a licence. Appellant says that on the expiration of the term provided for by the document appellant became a trespasser upon the lands, but that by reason of the terms of the indenture the exclusive right of occupation of the land upon which the siding was situate was vested in appellant during the one year term with the result that, to quote the factum:

> respondent's predecessors in title could not have occupied or used the land on which the siding is situate for agricultural, building or other purposes which would have interfered with the free and uninterrupted operation of trains by the appellant.

Counsel contends that because the use of the siding by both parties has remained the same since the expiration of the term, the title of the respondent has become extinguished by reason of the operation of the *Statute of Limitations*.

In *Lord Advocate* v. *Lord Lovat* (1) the following from the judgment of Lord O'Hagan is cited with approval by Lord Macnaghten in *Johnston* v. *O'Neill* (2):

> As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts, implying possession in one case, may be wholly inadequate to prove it in another. The character and

(1) (1880) 5 App. Cas. 273, at 288. (2) [1911] A.C. 552, at 583.

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Kellock J.

value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests—all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession.

In *Leigh* v. *Jack* (1), Bramwell L.J. said:

* * * in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it * * *

The appellant has not, since the expiration of the term, had exclusive possession. The respondent and its predecessors in title were never out of possession but continued to use the lands and the siding upon it as they intended to use it.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent: *J. E. Rutledge.*

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*Nov. 4, 5
*Dec. 20

SERGE CALMUSKY AND ANOTHER (PLAINTIFFS) ..... APPELLANTS;

AND

EVA KARALOFF (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contract—Vendor and purchaser—Sale of homestead by aged father to son—Action to set aside agreement—Fraud and undue influence—Fiduciary relationship—Whether onus of establishing validity on son—Whether inadequacy of consideration sufficient to disturb the agreement.

In an action brought to set aside, on grounds of fraud and undue influence, an agreement for the sale of a homestead made by an aged father in good health and in possession of all his faculties to his grown-up son (since deceased), these facts do not constitute a fiduciary relationship between the parties whereby the courts will presume "confidence put and influence exerted" by the son, nor was any evidence adduced

*Present:—Kerwin, Hudson, Rand, Kellock and Estey JJ.

(1) (1879) L.R. 5 Exch. Div. 264, at 273.

of such "confidence put and influence exerted" that would place the burden upon the respondent (the widow and administratrix *at litem* of the son) to prove the agreement was made by the father voluntarily and with an understanding of its nature and effect. The appellants, administrators of the father's estate, are not entitled to the benefit of this presumption arising from the relation of parties. The onus of proof remained upon them. *Krys* v. *Krys* ([1929] S.C.R. 153) and *McKay* v. *Clow* ([1941] S.C.R. 643) distinguished.

Under the circumstances of this case, relative to the question of consideration of the contract, while the courts will inquire as to whether advantage is taken or influence exerted, yet when it is found that neither of these exist and that the parties were equally in possession of all the facts, mere inadequacy of consideration or that it was an improvident agreement will not suffice to disturb the contract.

Judgment of the Court of Appeal, dismissing the appellant's action ([1946] 2 W.W.R. 32) affirmed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge, Taylor J. and dismissing the appellant's action to set aside an agreement for the sale of a homestead by an aged father to his son on grounds of fraud and undue influence.

G. H. Yule K.C. for the appellants.

J. E. MacDermid K.C. for the respondent.

The judgment of Kerwin, Hudson, Kellock and Estey JJ. was delivered by

ESTEY J.—The appellants, executors of the late Sam W. Karaloff, ask in this action that an agreement for sale, dated the 3rd day of November, 1934, between the late Sam W. Karaloff and his son, the late John S. Karaloff, be set aside on the ground that the latter had fraudulently and by the exercise of undue influence induced his father to make the said agreement. Plaintiffs also ask the defendant, Eva Karaloff, the widow of the late John S. Karaloff and executrix of his estate, to account for the crops grown upon the said lands and assets that came into her hands, the property of or for the late Sam W. Karaloff.

Sam W. Karaloff died January 2, 1938; John S. Karaloff died December 10, 1943, and Polly Karaloff, the wife of the late Sam W. Karaloff, died August 10, 1944.

(1) [1946] 2 W.W.R. 32; [1946] 2 D.L.R. 513.

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CALMUSKY v. KARALOFF

Estey J.

The learned trial judge found in favour of the plaintiffs (appellants), and his judgment was reversed by unanimous decision of the Court of Appeal in Saskatchewan.

The late Sam W. Karaloff and his wife, the late Polly Karaloff, resided for years on the quarter section in question (North-West Quarter of Section Sixteen (16) in Township Forty-Four (44), in Range Five (5), West of the Third Meridian). They had a family of eight. One of their sons, John, had farmed in the same district. He lost his farm and went to British Columbia, where at times he worked and at other times was on relief. In 1930 the appellant, Serge Calmusky, at the request of his father-in-law, the late Sam W. Karaloff, wrote John asking him to return home. John did so and worked upon the farm with his father, then a man of about 70 years of age.

The agreement in question was executed on the 3rd of November, 1934, between the late Sam W. Karaloff and his son, the late John S. Karaloff. Under this agreement John purchased from his father the above described quarter section (N.W. 16-44-5-W-3), together with all livestock and machinery thereon

> for the price of one-fourth of share of wheat grown on the land above till my death or till the death of my wife, Polly.

The purchaser agreed to pay the balance ($70) owing on a cream separator, all the taxes, of which there was a small amount in arrears, and not to ask wages for his services since he returned in 1930. It also contained the two following clauses.

> The Vendor and his wife shall have full right to reside in the buildings on this said land till their respective deaths. I revoke all my former Wills or Agreements made by me prior to the date of this agreement.

This agreement was prepared in the office of one Anton Kryzanowski, a notary public and justice of the peace in the nearby village of Blaine Lake. He deposed that the parties came to his office and both of them instructed him as to the contents of the agreement; that as he was a Ukranian he had an interpreter present who spoke Russian, the language of both Sam W. Karaloff and his wife, Polly. This interpreter also signed as a witness. After the agreement was executed by the parties and witnessed by John Molchanoff, Wasyl Hrycuik and Anton Kryzanowski, the

latter, who was acquainted with the parties and had done business for the late Sam W. Karaloff, retained both copies in his possession.

The requirements of *The Homesteads Act,* 1930, R.S.S., c. 82, designed for the protection of the wife, were complied with in this case, not on the 3rd day of November, 1934, when the agreement was executed by the husband, but over nine months later on the 8th day of August, 1935, when the late Polly Karaloff attended at the office of Mr. J. J. Coflin, a justice of the peace in Blaine Lake, and signed the agreement:

> And I, Polly Karaloff, wife of the above-named Sam W. Karaloff, do hereby declare that I have executed these presents for the purpose of relinquishing all my rights to the said homestead in favour of John S. Karaloff the within-named purchaser.
>
> Witness — her — Polly X mark Karaloff
>
> J. J. Coflin

Mr. Coflin discussed the matters relative to this agreement through an interpreter and after examining Mrs. Karaloff, as required by *The Homesteads Act,* he completed the following certificate which is endorsed upon the agreement:

> Certificate under *"The Homesteads Act, 1920"*
>
> I, Jay J. Coflin, a Justice of the Peace in and for the province of Saskatchewan and residing at the village of Blaine Lake therein, do certify:
>
> That I have examined Polly Karaloff, wife of Sam W. Karaloff, the owner and vendor named in the within indenture, separate and apart from her husband, and she acknowledges to me that she signed the same of her own free will and consent and without any compulsion on the part of her husband and for the purpose of relinquishing her rights in the homestead in favour of John S. Karaloff, the purchaser named in the within indenture, and further that she was aware of what her rights in the said homestead were.
>
> And I further certify that I am not disqualified under section 3 of *The Homesteads Act* from taking the above acknowledgment.
>
> Dated the 8th day of August, 1935.
>
> J. J. Coflin J.P.

The revocation of "all my former Wills or Agreements" in the above quoted provision of the agreement has reference to a document dated February 22, 1932. On that date the late Sam W. Karaloff executed a document written by Alexander Nazaroff, a local school teacher, and witnessed by Alexander Nazaroff and Fred Derkachenko. It provided that at his death his son John Karaloff should "remain the sole owner of all my property movable and

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immovable", and then followed a description of the above quarter section, his livestock and machinery. It provided that he and his wife, so long as either might so live, would be joint managers with John S. Karaloff, and that the farm should be managed in the best interests of all, including "the future wife of John S. Karaloff". It further provided that

> John is to take care of me and my wife during the whole period kindly, politely and generously during our old age in sickness and in other adversities.

It further provided for certain specific gifts to other members of the family. John had not been paid for his services since his return in 1930, and it contained a provision that if Sam W. Karaloff should at any time sell the farm that he would pay John $2,500.

The fact of its execution nor the competency of Sam W. Karaloff to do so is not questioned, nor is there any suggestion of fraud or undue influence with respect to this document.

John S. Karaloff married the respondent, Eva Karaloff, on October 12, 1932.

Under date of September 24, 1934, the said John S. Karaloff purchased from his brother, Alexander S. Karaloff, 80 acres of land, being the South Half of the South-West Quarter of Section 21, in Township Forty-Four (44), in Range Five (5), West of the Third Meridian, for $1,000, payable $125 in cash, $75 on the 24th of October, 1935, and the balance by crop payments.

It is the same quarter section (N.W. 16-44-5-W-3), the livestock and farming equipment which constituted the subject matter of both the document of February 22, 1932, and the agreement for sale in question. Under the former they were all managers and all worked for the "common benefit" with the added provision that

> John is to take care of me and my wife during the whole period kindly, politely and generously during our old age in sickness and in other adversities.

All of these parties, the father, mother and their son John, had died prior to the trial and therefore no explanation is given as to why this second agreement was made.

The agreement for sale dated November 3, 1934, was made between a father about 74 years of age, in good health, active and in posession of all his faculties, and one of his sons about 44 years of age. These facts do not constitute a fiduciary relationship between the parties, nor was any evidence adduced of "confidence put and influence exerted" by the son that would place the burden upon the respondent to prove the agreement was made voluntarily and with an understanding of its nature and effect. The contention of the appellants that they were entitled to the benefit of this presumption cannot be maintained. The onus of proof remained upon them. *Wallis* v. *Andrews,* (1); *In re Coomber,* (2); *Axeworthy* v. *Staples,* (3).

In cases where a fiduciary relation does not subsist between the parties, the Court will not, as it does where a fiduciary relation subsists, presume confidence put and influence exerted: the confidence and the influence must in such cases be proved extrinsically, but when they are proved extrinsically the rules of equity are just as applicable in the one case as in the other. Kerr on Fraud and Mistake 6th ed., p. 197.

The case of *Krys* v. *Krys,* (4) relied upon by the appellants, is distinguishable in that there the learned trial judge found "the son agreed to act as trustee for the father." In that relationship there is the presumption of "confidence put and influence exerted". Then, too, in the case of *McKay* v. *Clow,* (5) a deed of conveyance and an agreement were executed by "an enfeebled old man" who, though he requested it, was denied the privilege of obtaining legal advice, and who was threatened that if he did not sign the agreement he would be left in a helpless condition. In addition there was evidence of disagreement and domination extending over a period of time. It was upon evidence of this character that the Court placed the onus upon the transferees.

There is no finding of the learned trial judge that John was a trustee for his father, nor is there any evidence upon which such a finding could be made as in *Krys* v. *Krys,* (4) and there is no evidence of such weakness on the part of the father, nor such evidence of domination and threats on the part of the son as were present in *McKay* v. *Clow* (5).

(1) (1869) 16 Gr. Ch. 624.
(2) [1911] 1 Ch. 723.
(3) (1924) 26 O.W.N. 219.
(4) [1929] S.C.R. 153.
(5) [1941] S.C.R. 643.

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Chief Justice Martin, on behalf of the Court of Appeal, appropriately summarized the position up to the conclusion of the agreement:

> What took place between the parties prior to the execution of the agreement for sale does not appear. There is no evidence that the execution of the agreement was obtained by fraud, undue influence or duress on the part of John at or prior to the time when the parties respectively signed the agreement or that he took advantage of their illiteracy. The fact that Polly Karaloff executed the agreement nine months after her husband's execution of it indicates that the agreement was not entered into without due consideration. The father was at the time 75 years of age, almost three years older than when he executed the will of February 22, 1932, which provided for joint management of the farm and it may well be that a reason for the second agreement was that he desired to be relieved from any responsibility and to place the entire management in the hands of his son. Moreover, if John at the time was engaged in a scheme to take advantage of his father as suggested he might have had him execute a transfer of the land, which no doubt in his opinion at least would have made his position more secure.

A witness, who was councillor for the municipality for a period of ten years from 1931, deposed that John and his father were at the municipal office on a Saturday late in 1934 when the father stated that he had sold his land to John and to collect the taxes from him. When the secretary-treasurer stated there were some arrears owing, John said he would take care of them. That was in accord with the terms of the agreement.

The appellants stressed the importance of certain incidents in 1937. It appears that after the making of the agreement there was no reference thereto until that year. The father retained his health until some time in 1937 and he and John worked together on the farm.

On the 6th of July, 1937, the appellant, George S. Karaloff, who farmed about a quarter of a mile from his brother John and his father, took the latter into Saskatoon for medical attention and while there his father executed his will. Under its provisions he gave 1/3 of his real and personal estate to his wife, 2/9 to John and 4/9 to be divided between his other seven children.

Within a week or two of that trip into Saskatoon on July 6, 1937, George and his father called at Kryzanowski's office where the agreement in question had remained. George deposed that he there read the agreement to his

father who became very angry, made serious accusations against Kryzanowski and said that he meant "different kind of papers."

The statements made by the deceased, Sam W. Karaloff, in this conversation were admitted in evidence by the learned trial judge but rejected in the Court of Appeal. Counsel for the appellants submitted the statements were admissible upon the authority of *Shanklin* v. *Smith,* (1). In that case in the Courts below the statements were not admitted as evidence of the facts asserted but only evidence as to the deceased's state of mind. An appeal to this Court was dismissed (2), but the reception of this evidence was not discussed. Nor is it necessary to decide the question of its admissibility here because even if the statements of Sam W. Karaloff are admitted on this limited basis as in *Shanklin* v. *Smith,* (1) they do no more than evidence his state of mind in 1937 and perhaps provide a basis for an inference of his state of mind in 1934. The lapse of time as well as the age and illness of Sam W. Karaloff, and the circumstances under which they were made, make it very doubtful if any inference, the weight of which would be so negligible, ought to be drawn therefrom.

At Kryzanowski's office the conversation was concluded, as George deposed, when his father became so excited and angry that George was "afraid that he might collapse". As a consequence he took him home. At home, George deposed, the father became involved in a heated conversation with John with respect to this agreement when he accused John of fooling him and used language vile and abusive and said that he was going to call in the elders. The latter was explained to be a Russian custom for settling difficulties.

This conversation was admitted in evidence as statements made in the presence of John. As such they are admissible but constitute evidence against John only in so far as he by words or conduct adopted or admitted them: Phipson, 8th Ed., 240; *Rex* v. *Christie,* (3) *Chapdelaine* v. *The King,* (4). No evidence is given as to John's

(1) (1932) 5 M.P.R. 204.
(2) [1933] S.C.R. 340.
(3) [1914] A.C. 545.
(4) [1935] S.C.R. 53.

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conduct and there is no finding with regard thereto. All that the evidence discloses is that when the statements were made John, apparently addressing George, said ". . . you find out, that is finished, it is my land". Under these circumstances his not refuting the alleged statements does not constitute an admission, and therefore, as Chief Justice Martin stated, this conversation:

> * * * has no probative force in an inquiry which must be directed to ascertain the circumstances under which the agreement of November 3, 1934, was executed.

This conversation at John's home was also concluded, as George deposed, because he was concerned lest his father should "collapse again", and as a consequence he took him outside to his car. However, George left his father at John's home and the evidence discloses no further conversations between John and his father with regard to this matter. There his father remained, as provided in the contract, apart from the time he was in the hospital, until he died in January, 1938. Thereafter the mother remained with John until she went to live with her daughter in April, 1943. If John were not giving his father a fair share of the crop, it would seem rather unlikely that he would employ George to thresh for him in 1935 and 1936, and thereby provide George with complete information with respect to the wheat crop. Then after the alleged disclosures of 1937 and the death of his father, when his mother was entitled to the same one-quarter share of the crop, it would seem even more unlikely that he would employ the appellant, his brother-in-law Serge Calmusky, to thresh for him in 1938, 1939, 1940 and at least in part in 1942. There does not appear to be any disputes or discussions with regard to the division of the crop upon any of these occasions. Indeed, apart from a short conversation between Serge Calmusky and John, when they were upon friendly terms, when Serge made some inquiry of John about the deal between himself and his father and John replied: "It is too late, no use to talk", after which Serge Calmusky stated: "Well, I didn't do anything", and the delivery of a letter written on behalf of the appellants to the auctioneer in October, 1943, claiming the proceeds of personal property which was being sold by Mrs. Karaloff

after John had enlisted in the Armed Services, nothing was done with regard to the matter until this action was started in 1945.

The conduct of the parties after July, 1937, does not support the contention of the appellants. Apart from the fact that the mother and father continued to reside with John, as contemplated by the contract, neither of the appellants, George who lived about a quarter of a mile and Serge about one and a half miles distant, took any steps or made any effort to have the agreement altered or rescinded, or on the other hand to insure that the parents got their share under the agreement, although throughout their evidence they suggest that the father and mother were not receiving what was called for by the agreement.

After the father died in January, 1938, the mother was still entitled to a quarter of the crop under the agreement, and still no effort was made to have the agreement altered or rescinded. In his will the father had named George Karaloff and Serge Calmusky as his executors. They made no effort to have the will proved until John had consulted a solicitor who took steps with regard to the appointment of an administrator. Then the appellants made application for Letters Probate, which were issued on September 2, 1943. Steps to bring this action were not taken until August, 1944, and the writ was not issued until April, 1945. Laches is not pleaded but that does not prevent their conduct being examined in relation to the allegations of fraud and undue influence.

The appellants contended that the consideration was inadequate, basing their contention in the main on the fact that one-quarter of the crop was to be delivered in each year to his parents. There was further consideration: John had received no wages for his work during the preceding four years and was not now to receive any; the parents had the right to live in the home and to enjoy their own furniture; John was to pay the balance owing on the cream separator and the arrears of taxes. In 1934 farm values were very low and speculative; in fact the evidence indicates there was no sale for farm lands at that time. The father apparently wanted John to remain upon the farm, no doubt with a view to him and his wife being cared for

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as their ages advanced. They had shared everything in the house since 1930 and the evidence is that they continued to do so. Under such circumstances, while the courts will inquire as to whether advantage is taken or influence exerted, yet when it is found that neither of these exist and that the parties were equally in possession of all the facts, mere inadequacy of consideration is not a ground for disturbing the contract.

The judgment of the Court of Appeal dismissing the appellants' action should be affirmed and this appeal dismissed with costs payable by the appellants personally.

RAND J.—I agree with the conclusions reached by my brother Estey, whose reasons I have had the privilege of reading, and I have only a word to add.

Whether or not the statement of the father said by the son, George, to have been made on the occasion of the visit to Kryzanowski's office was admissible, and I do not mean to imply any doubt of the soundness of the holding in the Court of Appeal, in substance it was repeated to the son, John, and its effect on that occasion can properly be taken into consideration. It is significant that notwithstanding this scene, the father continued to live with John until his death five months later. It is significant, too, that the father left the document with the notary, that he did not "call in the elders" of the community, the practice of this Russian group, nor did he take any other step to confirm what is said to have been his repudiation. Although at that time he was suffering from a heart ailment, he was clearly a man of strong spirit and temper, and it would be inexplicable on the facts before us if in a matter carrying such importance to people of this class he should have meekly or fatalistically abstained from undoing such a fraud. The only plausible inference would be that reflection either had recalled what he had forgotten or had brought him rather to a confirmation of what had been done.

The evidence does not enable us to gather the instigation of the making of the will in July, 1943, or his visit to the notary's office in August; nor do we know what he thought or claimed the document was intended to be. His execution of it is undoubted and the acknowledgment

by his wife many months afterwards and his notification to the assessors are corroborating circumstances of the strongest sort.

The only ground arguable is fraud, but an allegation of fraud against a deceased in a situation such as that presented to us is to be received with suspicion, and here that suspicion has not been relieved. The trial judge was mistaken in treating the 80 acres as being involved in the dealings of John with his father; the agreement of September 24, 1934, for this land is between John and his brother Alex. He was evidently influenced also by what he considered the unreliability of the witness Derkachenko, but a close examination of the latter's evidence makes it clear that he misapprehended several of the answers given and on this misconception rejected the testimony as a whole.

The appeal should therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Makaroff & Bates.*

Solicitors for the respondent: *Ferguson, MacDermid & MacDermid.*

CEMCO ELECTRICAL MANUFACTURING COMPANY LIMITED (DEFENDANT) ..... APPELLANT;

AND

PETER VAN SNELLENBERG JR. (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Master and servant—Contract of employment—Wrongful dismissal—Principal of mitigation of damages—True test applicable—Commission on sales—Charge of commission on sales tax—Whether honest mistake—Whether cause of dismissal—Contract "not to be performed within year"—Performance possible within year—Section 4 of the B.C. Statute of Frauds—National Selective Service Civilian Regulations—Notice of separation—Companies Act, R.S.B.C., 1936, c. 42, s. 98(1)(c).

*Present: Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

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In an action by the respondent for wrongful dismissal, the facts were that he was engaged by the appellant company as accountant and as salesman for its products, subject to the direction of the managing director, on terms of salary and commission. The respondent on many occasions had charged commissions on sales tax; and this was alleged *inter alia* as a cause for dismissal.

Held: Rand J. dissenting, that there is no evidence to substantiate the appellant company's charge that the respondent was either fraudulent or incompetent. Charging by the respondent of commissions on sales tax and some other items, even if the respondent himself did not claim that he was entitled to do so, was, particularly considering the extent of the business of the appellant, due to an honest mistake on his part.

Per Rand J. (dissenting): Respondent was a highly placed employee with corresponding competence and responsibility in whom complete trust in relation to the accounts, including his own remuneration, was placed; and once, in such circumstances, an objective act of misconduct appeared, an inference arose from it which should be met by the person shown to be at fault. This feature of the case has not been satisfactorily dealt with in the courts below. A re-trial of the issue of misconduct in relation to the taking of commission on taxes and a re-assessment of damages should be had.

In a claim at common law for damages for wrongful dismissal, when the right of the employer has been proved, the amount of damages is amenable to mitigation. The true test is not whether it was reasonable for the employee to refrain from seeking employment, but whether the employee took all reasonable steps to mitigate the loss consequent on the breach. In this case, the appellant company having broken the contract, the respondent was not entitled to consider it as still subsisting.

In the same claim for wrongful dismissal put upon the allegation that such dismissal did not comply with the National Selective Service Civilian Regulations, the trial judge found that the appellant company did not comply with the regulations but that the respondent himself did not use due diligence in trying to get employment and that once he knew he could not secure a new position without a notice of separation, due diligence would involve the making of some attempt on his part to secure it. The respondent did not appeal from that judgment and the issue must, therefore, be taken as settled.

The contention of the appellant, that any agreement as to alterations in the written contract was one which was required to be in writing because of the respondent's covenant not to divulge trade secrets during the continuance of his employment and after its termination, and that the contract was thus within the British Columbia Statute of Frauds as one not performable within a year, cannot be upheld. A contract is not one that is "not to be performed within the space of one year from the making thereof", within the meaning of section 4 of the statute, if all the obligations of the employee under the contract could have been carried out by him within the term of one year from its date; since the respondent might have died within the year, such covenant was one which might have been performed within the year.

As a result, the respondent is entitled to damages, as there was no basis for his dismissal and should recover the sum of $14,500 awarded him by the trial judge, less such amount as he could have earned between the date of his dismissal and the date marking the end of a contract year (had he obtained his notice of separation) by securing employment in some other remunerative position that may have been opened to him; and a new trial should be had, restricted to ascertaining such amount.—Rand J. dissenting.

APPEAL from the judgment of the majority of the Court of Appeal for British Columbia (1), reversing a judgment of the trial judge, Wilson J., which had maintained an action for damages for wrongful dismissal, and ordering a new trial as to guarantee of damages.

Alfred Bull K.C. for the appellant.

C. K. Guild K.C. for the respondent.

The judgment of the Chief Justice and of Kerwin, Hudson and Estey J.J. was delivered by

KERWIN, J.:—The appellant, Cemco Electrical Manufacturing Company Limited, is the defendant in an action brought by Peter Van Snellenberg, Junior, for the amount claimed to be due him under an agreement between the parties and for damages for wrongful dismissal. The terms of the original agreement are set forth in the following statement contained in the reasons for judgment of the trial judge:

The plaintiff herein was employed by the defendant on May 1, 1934, by a written contract, executed under seal by the defendant company to carry out the following duties:

(1) To continue (as he had been) in responsible charge of the office and accounts of the Company.

(2) To assume the capacity and perform the duties of salesman of and for the Company with respect to certain products specified in paragraph 1 of the contract, and also any other goods, etc., which the Company might specify in writing to the employee to sell for or on behalf of the Company under the terms of the agreement.

The plaintiff's remuneration was fixed by the contract as follows:

1. Salary: $20.00 per week.

2. Overriding commission: 1 per cent of all gross sales made by the defendant in excess of $3,000 in any one month.

3. Specific commissions: 10 per cent on sales of goods specified in paragraph 1 of the contract.

(1) (1945) 61 B.C.R. 507; [1945] 3 W.W.R. 369; [1946] 1 D.L.R. 105.

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In paragraph 3 of the contract the plaintiff contracted *inter alia* to faithfully, honestly and diligently serve the defendant in the capacities of salesman, supervisor of office work and accounting department and secretary-treasurer, and to at all times obey, observe and carry out the lawful directions of the Company's managing director with respect to his duties.

Paragraph 13 of the contract provided, *inter alia,* that the plaintiff should have no authority to extend the time for payment of any account.

Paragraph 20 read as follows:

"20. This agreement shall be in force for the period of one year from the date hereof at the end of which period it is contemplated that the same shall be revised and/or continued if, and as may then be, mutually agreed upon by and between the parties hereto; provided, however, that in the event of the employee being guilty of any act or omission in contravention of the terms, covenants or conditions herein contained the Company may at any time terminate this agreement with or without notice."

As the trial judge further points out, the plaintiff was continuously employed by the defendant from the date of this agreement to September 23, 1943, but at no time did the parties specifically agree, as contemplated by paragraph 20 to continue the contract. The Company's business grew steadily from 1934 and expanded greatly with war orders from the autumn of 1939, and with this expansion occurred an enormous increase in the plaintiff's commission earnings and in his duties. By a letter of September 23, 1943, the defendant purported to cancel the agreement because, as alleged in another letter of the same date, the plaintiff had failed to comply with the instructions of Mr. Darnbrough, the managing director, to take no more orders for the Company's products without his approval. By its statement of defence, the Company gave as additional reasons for its dismissal of the plaintiff: (1) that the plaintiff had, in contravention of paragraph 13 of the agreement, extended the time for payment of an account due the Company; (2) that the plaintiff had credited to his account and collected from the defendant commissions to the extent of $7,231.22 to which he was not entitled. The defendant counter-claimed for $1,718.61 which it alleged to be the net balance owing to it after crediting admitted amounts for commission and salary.

By an amendment to his claim, the plaintiff alleged certain verbal alterations in the written contract which he said had been agreed to by Mr. Darnbrough, notwithstanding the terms of paragraph (1) of the agreement by which

the plaintiff was to act as salesman for the Company with respect to certain specified equipment, accessories, goods and merchandise

and also any other goods, equipment and merchandise which the Company may specify in writing to the employee to sell for and on behalf of the Company under the terms of this agreement.

The Company contended that the agreement was one which was required to be in writing by virtue of the provisions of section 4 of the British Columbia Statute of Frauds, not so much because the plaintiff was "on and from the date hereof" to assume and carry out his duties but because of the provisions of paragraph 12 of the agreement:—

12. The employee shall not during the continuance of his employment, nor after its determination, by any means, without the consent in writing of the Company, divulge to any person not a director of the Company any trade secret, method of manufacture or special information employed in or conducive to the business of the Company, and which may come to his knowledge in the course of or by reason of his employment.

The trial judge and the Court of Appeal were right in holding that, as the plaintiff might have died before May 5, 1935, all his obligations under the contract could have been carried out within the term of one year from its date, and the statute did not apply. The earlier decisions upon this point are all the one way but, if the later case of *Reeve* v. *Jennings* (1) decides anything to the contrary, it should not be followed. For the reasons stated by the trial judge, there was ample consideration for the variations and additions to the written agreement.

The appellant relied upon the following provision of the British Columbia *Companies Act*, R.S.B.C. 1936, chapter 42:

98. (1) Contracts on behalf of a Company may be made as follows, that is to say:

* * *

(*c*) Any contract which if made between private persons would by law be valid although made by parol only and not reduced into writing, may be made by parol on behalf of the Company by any person acting under its authority, express or implied and may in the same manner be varied or discharged.

While there was no express authority to Mr. Darnbrough, such authority should under the circumstances be implied.

The trial judge has found, and the Court of Appeal has agreed with him, (*a*) that the variations and additions to the agreement alleged by the plaintiff were in fact

(1) [1910] 2 K.B. 522.

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made; (*b*) that the plaintiff had Mr. Darnbrough's approval, specific or general, to the taking of more orders, and (*c*) that the plaintiff did not extend the time for payment of an account due the Company. Not only has Mr. Bull failed to convince me that these conclusions are wrong, but I am satisfied, on the evidence, that they are the proper findings. The effect of the charging by the plaintiff in his accounts of commissions on sales tax presents more difficulty. The trial judge found he was not entitled to these commissions and the plaintiff did not appeal from that judgment. The trial judge is not quite accurate when he says that the plaintiff did not charge commissions on sales tax when it appeared as a separate item on invoices since the Company, before the Court of Appeal and in its factum in this Court, has indicated eight instances where commission was charged on invoices showing sales tax. It is true the total of these items, extending over four years, is only $6.08, and counsel for the plaintiff stated that after a careful search he was able to find only two other items totalling 26c., but the smallness of the amounts would not necessarily determine the matter. However, taking everything into consideration, I am satisfied that while not endorsing all that appears in the reasons for judgment of the members of the Courts below, they have reached the proper conclusion that there is no evidence to substantiate the Company's charge that the plaintiff was either fraudulent or incompetent. His charging of commissions on sales tax and on delivery charges and on the various other items referred to by counsel where the plaintiff himself does not now claim that he was entitled to do so under the terms of the original agreement or any variations thereof was, particularly considering the extent of the business being carried on by the Company, due to an honest mistake on his part.

The result is that there being no basis for the Company's dismissal of the plaintiff, he is entitled to damages and it is on this point that a difference of opinion exists between the trial judge and the majority of the Court of Appeal. The plaintiff's claim was put at common law and upon the allegation that his dismissal did not comply with the National Selective Service Civilian Regulations. As to the

latter, the trial judge found that the Company did not comply with the regulations, but that the plaintiff himself did not use due diligence in trying to get employment and that once he knew he could not secure a new position without a notice of separation, due diligence would involve the making of some attempt on his part to secure it. The plaintiff did not appeal from this judgment and the issue must, therefore, be taken as settled. As to the claim at common law, the majority of the judges in the Court of Appeal, taking that finding as a starting point, were unable to see why the same reasoning should not apply to the common law branch of the action. Mr. Justice O'Halloran considered that the test was whether it was reasonable for the plaintiff to refrain from seeking employment. The true test, however, is whether the plaintiff took all reasonable steps to mitigate the loss consequent on the breach: *British Westinghouse Electric Co.* v. *Underground Electric Railways Co.* (1). The Company having broken the contract, the plaintiff was not entitled to consider it as still subsisting. In fact he did not do this because he made approaches to at least two other companies from which nothing resulted because he had not received a notice of separation under the Regulations.

The plaintiff, therefore, is not entitled as of right to the $14,500 awarded him by the trial judge but, notwithstanding Mr. Bull's contention that the plaintiff is not entitled to damages to the end of a contract year, that is down to April 30, 1944, reasonable notice upon which the agreement between the parties, with its various additions, could be determined would be about seven months. Mr. Bull contended that the plaintiff was entitled on the evidence to nominal damages only and that he should not be granted the privilege of a new trial. The Court of Appeal, however, in its discretion decided otherwise and it is impossible to say that it proceeded upon any wrong principle. In fact, under all the circumstances, it appears to be an eminently proper case in which the plaintiff should be given the opportunity afforded by that Court's formal order. The result is that that order should stand by which the plaintiff recovers from the defendant as damages for unlawful dismissal, the sum of $14,500 less such amount as the plaintiff

(1) [1912] A.C. 673.

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could have earned between the date of his dismissal, namely, the 23rd September, 1943, and the 30th April, 1944 (had he obtained his notice of separation) by obtaining employment in the most remunerative of the positions open to him for employment in the Electrical Panel Manufacturing Company or the Canadian General Electric Company, or any company carrying on the same class of business as either of these companies, in or around Vancouver, and that a new trial be had, restricted to ascertaining such amount.

The appeal should be dismissed with costs and the cross-appeal without costs.

RAND J. (dissenting):—I agree with the Court of Appeal that there should be a new assessment of damages. The principle of mitigation is a necessary corollary of the basis of damages, namely, that they have arisen in a legal sense from a violation of a right. Underlying this is the assumption that a person must concern himself with his own interest if he would seek from the law the vindication of his civil engagements. In a contract of employment, the remuneration is either for work done or for the commitment to work. Upon a dismissal which is a repudiation of the obligation to accept the one or the other, as the remedy of specific performance is not available, the employee's capacity to work is now released to him to be used as he sees fit. He may decide to waste it or he may demand that the employer make good its full utility. In that event, he must act reasonably in seeking to employ it as he would or might have had the particular engagement not been made. It is the loss of earnings resulting from a denial of a right to use or commit his working capacity profitably that is the substance of his claim, and as he must prove his damages, it must appear that they arose from the breach of contract.

The failure of the employer to give a notice of separation from employment in the form prescribed under the National Selective Service Civil Regulations and that of the employee to demand one and to take every reasonable step to bring the discharge within the administration of those Regulations, do not affect the application of that principle. If

the employee acquiesces in a failure in formality on the employer's part, and abstains from availing himself of rights which the Regulations give him, he must, in a court to which he resorts, face the rules of law applicable to the claim which he makes. Both he and his employer may expose themselves to penalties under the Regulations by what they do, but I see no reason why either, if he sees fit, may not waive administrative remedial benefits imposed upon the contract.

But a more difficult question is presented, which is whether the act of the respondent in taking commission on the amount of sales tax was a breach of his contract justifying dismissal or whether it was done through oversight or in the belief that the terms of his employment allowed it.

The respondent, in addition to his capacity as special salesman, was in complete charge of the accounts. He himself made up the statements of his commission, prepared the cheques and placed all before the manager. But this material would not indicate or raise any question of tax or commission on it and from its acceptance by the manager no inference can be drawn of knowledge or notice on the part of the company of what was being done. This highly confidential relation between the company and the respondent called for the utmost good faith on his part, and once that was betrayed, the trust which was at the foundation of the employment was at an end.

The trial judge says:

> I think his action in charging commission on sales tax was an honest error. This is, I think, deducible from the fact that he did not charge commission on sales tax where the customer's invoice showed sales tax as a separate item, but only in cases where the invoices incorporated the sales tax in the sale price. It must be said that this was a serious error, and one which deprived the company of a substantial amount of money. However, when eminent counsel seriously argues that commission is payable on sales tax, perhaps the mistake of a layman who has the same impression must not be regarded too seriously, not at any rate as proof of want of honesty or diligence.

On that I would make these observations. It was not a fact that commission was not charged on sales tax in cases where the tax was shown as a separate item on the invoice. There were a number of instances of that sort. But how from such a circumstance a deduction can be made

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that the respondent considered himself entitled to charge "commission on sales" is not clear to me. This may mean "honest error" in thinking that he had a right to charge commission where the sales tax and the price of the goods were combined in one sum; but on what in the evidence or proceedings can that be based? Certainly not the fact that in other respects his testimony was accepted. And what is clear is that by "honest error" is not meant oversight from hurried work in a multitude of items.

In the Court of Appeal, the point is dealt with by Robertson J.A. in these words:

> Considering the volume of business which the appellant was doing during the years 1940-43, it is easy to see that small mistakes would occur in figuring the respondent's commission. In view of this fact and the cases to which I shall later refer, I am of the opinion the learned judge's findings should not be disturbed.

Now, as I have remarked, this ground of oversight is not that of the trial judge. The cases to which reference is made deal with the onus on the person alleging fraud, and it is stated that it would be necessary to prove that the plaintiff knew that he was not entitled to a commission on the sales tax. The authority given for this is *Rex* v. *Harcourt* (1); but proof of a criminal mind either as to its nature or the weight of evidence furnishes no guidance for such an issue as we have here. The question is that of a fundamental breach of contract, and considering the confidence reposed in the respondent, a lack of belief on his part that he was entitled to commission on the sales tax would, in the circumstances, make his act such a breach.

Smith J.A., with whom, on this point, O'Halloran J.A. agreed, puts the matter thus:

> There can be no doubt that such commissions were so charged and paid; and the learned judge has so found. But he has also found that the plaintiff honestly thought that he was entitled to charge them, and that he did not do so fraudulently or in such a manner as would furnish grounds for dismissal.

Then, after referring to the fact that the trial judge was in error in stating that the sales tax was charged only in cases where the invoice showed tax and price in a lump sum, he goes on:

(1) (1929) 64 O.L.R. 566.

I think it plain from the evidence that the plaintiff thought himself justified in law in making these commission charges on sales tax (regardless of whether the items of sales tax were or were not shown separately in the invoice) and that it was not until judgment was handed down that his mistake was made clear to him * * * It is no doubt true that the plaintiff was never expressly asked, and therefore never expressly said, that his mistake was an honest one. But does this matter when the whole argument of his counsel was that he was entitled in law to make these charges?

But it would be dangerous to allow such an argument to supply a defect of evidence going to the good faith of one in the position of the respondent.

Now it is not disputed that the respondent was not entitled to commission on the amount of the sales taxes, and Mr. Bull contends that the taking of it, in the absence of any explanatory evidence, requires us to draw the conclusion of bad faith. No questions on the actual knowledge or belief of the respondent were asked on either side, and Mr. Guild's answer is that the party alleging fraud must prove it. Of course fraud or bad faith must be proved; but here was a highly placed employee with corresponding competence and responsibility in whom complete trust in relation to the accounts, including his own remuneration, was placed; and once, in such circumstances, the objective act of misconduct appears, I should think an inference arises from it which should be met by the person shown to be at fault.

The dealing with this feature of the controversy in the courts below has not, in my opinion, been satisfactory, and it also should be referred back.

I would, therefore, allow the appeal, and direct a re-trial of the issue of misconduct in relation to the taking of commission on taxes, and a re-assessment of damages. The appellant should have his costs in this Court, but all other costs should remain as they now stand. The cross-appeal should be dismissed without costs.

Appeal dismissed with costs.

Cross-appeal dismissed without costs.

Solicitors for the appellant: *Walsh, Bull, Houser, Tupper, Ray & Carroll.*

Solicitor for the respondent: *Ian A. Shaw.*

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*May 17, 20, 21
*Oct. 22

THE EXECUTORS OF THE WILL OF THE HONOURABLE PATRICK BURNS, DECEASED, AND OTHERS.... } APPELLANTS;

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, and amendments—Question whether certain income is taxable in hands of executors of estate—"Charitable institution" (s. 4(e))—Whether exemption applicable—"Income accruing to the credit of the taxpayer" (s. 11(1)) —"Income accumulating in trust for the benefit of unascertained persons" (s. (11(2))—"Benefit"—"Person" (s. 2(h))—"Income received by an estate or trust and capitalized" (s. 11 (4)(a))—Adequacy of language to make charging provision operative.

The question was whether certain income received by the executors of a will was taxable in their hands under the *Income War Tax Act* (R.S.C. 1927, c. 97, and amendments).

In the will, the testator gave to his executors and trustees (called his "trustees") the residue of his estate upon trust, to convert, invest, to carry out certain provisions, including gifts of annual payments for life, and to invest the surplus of the annual income as part of the capital of the trust estate; he directed his trustees to appropriate sufficient of the trust estate to insure an annual income therefrom sufficient for payment of annuities outstanding and to hold the trust estate, including accumulations and additions by deaths of annuitants or otherwise, and to pay annually to certain nephews and nieces 60 per cent of the net annual income; and to invest the surplus of such annual income as part of the capital of the trust estate; and, by clause 36, upon the death of the last annuitant or the death of the testator's son's widow, whichever should last happen, the trustees were to hold the trust estate, with all accumulations and additions, upon trust to distribute 67 per cent thereof to certain individuals and to pay and convey the residue (33%) unto the Royal Trust Company "for the creation and establishment of a trust to be known as the Burns Memorial Trust", which it was to administer, and the net annual income therefrom it was to distribute annually in equal shares among The Father Lacombe Home at Midnapore, the Branch of the Salvation Army having its headquarters at Calgary, and three other objects which, after the testator's death, were settled, by schemes approved by an order of court, to be: a fund to be administered by the City of Calgary for the benefit of poor, indigent and neglected children; a fund to be administered for the benefit of widows and orphans of members of the Police Force (in one case) and of the Fire Brigade (in the other case) of Calgary.

*Present: Rinfret C. J. and Kerwin, Hudson, Rand and Estey JJ.

The testator died in 1937. Annuitants and said widow were alive in the years now in question. In each of the years 1938, 1939, 1940 and 1941, of the total net income of the estate, 60 per cent thereof was paid to said nephews and nieces and the remaining 40 per cent was transferred by book entry by the executors from the estate income account into the estate capital account; the executors made no segregation or allocation of said 40 per cent of the net income as between the individuals entitled ultimately to 67 per cent thereof under said clause 36 of the will and the Royal Trust Company to which was to be paid and conveyed eventually the remaining 33 per cent thereof under said clause 36. The question was whether said 33 per cent of 40 per cent of the net income of the estate in each of the years 1938, 1939, 1940 and 1941 was subject to income tax.

Held (varying the judgment of Cameron D.J. in the Exchequer Court, [1946] Ex. C.R. 229): The income in question was taxable in the hands of the executors except two-fifths of the income (the proportion from which the Father Lacombe Home and the Salvation Army are ultimately to receive the income) for the years 1938 and 1939. (Rand and Estey JJ. dissented in part, holding that no part of the income in question was taxable except the income (the whole of it) for the year 1941.)

Per the Chief Justice, Kerwin and Hudson JJ. (the majority of the court): Assuming that the five beneficiaries of the trust to be administered by the Royal Trust Company are charitable institutions within s. 4(*e*) of the Act, that does not give a right of exemption from taxation in respect to the income now in question, as that income is not the income of any of them; they are not to receive it at any time but only the income on the capitalized sums from said company; the income now in question is not income to them at all within the scope of the Act, particularly s. 3, and is not "income accruing to the credit of the taxpayer" within s. 11(1). As to the Burns Memorial Trust, that is merely the name for a fund to be administered by said company; and said company is only a trustee; the income in question does not belong to it beneficially and it is not a charitable organization.

As to the Father Lacombe Home and the Salvation Army, the income in question is not "accumulating in trust for the benefit of unascertained persons" within s. 11(2) of the Act. Those conducting the work of said institutions are bodies corporate and politic, included in "person" as defined by s. 2(*h*) of the Act, and they are ascertained; they are not trustees in any sense; each organization uses its funds generally to help the poor and afflicted but the income in question is accumulating in trust for their benefit (to the extent of their shares) and not for those under their care.

As to the three other institutions which are to receive shares of the income from the Burns Memorial Trust, the income in question is "accumulating in trust for the benefit of unascertained persons" within said s. 11(2); those three institutions are merely trustees to apply the gifts for the benefit of other persons, who are "unascertained"; while the income in question is not income of such last-mentioned persons, it is income accumulating in trust for their benefit, since they are entitled to a share of the income thereon.

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As to the years 1940 and 1941, s. 11(4)(*a*), as enacted in 1940, c. 34, "income received by an estate or trust and capitalized shall be taxable in the hands of the executors * * *" applies. It is a true charging provision, not requiring the aid of s. 11(4)(*c*) enacted in 1941 (c. 18), which was added *ex abundanti cautela*. (Respondent did not contend for application of the former s. 11(4) as it stood in 1938 and 1939.)

In the result, two-fifths of the income in question (the proportion from which the Father Lacombe Home and the Salvation Army are ultimately entitled to the interest thereon) for the years 1938 and 1939 (only) is free from taxation.

Per Rand J. (dissenting in part): Under the direction in the will to accumulate and capitalize the portion of the net income intended for the five charities and, at the time provided, to pay over the whole of the capital, including the added increments, to the trustees of the Burns Memorial Trust to hold in perpetuity and to distribute the annual income, the accumulations never belong to nor come into possession of the charities; they represent solely the growth of the capital which ultimately becomes the principal from which the income benefits to the charities arise. Therefore the accumulations are not income of charitable institutions within s. 4(*e*) of the Act; nor are they "income accruing to the credit of the taxpayer" within s. 11(1). And they are not "income accumulating in trust for the benefit of" unascertained persons, etc., within s. 11(2); the benefit contemplated by s. 11(2) is that the accumulation, when completed, passes in its entirety to the persons entitled; and while, in the present case, in a sense the accumulations are for the "benefit" of the charities in the future increased income from increased capital, the word cannot be extended to that indirect and remote advantage. S. 11(4) seems to be designed to meet precisely the present case, that of capitalization of accumulating income; but the charging language thereof, as applicable prior to 1941, was inadequate for operation of the provision; but the addition of s. 11(4)(*c*) in 1941 made adequate the charging language and thus s. 11(4) was effective to make taxable in the hands of the executors so much of the income in question as was received by them in 1941.

Per Estey J. (dissenting in part): Neither the Royal Trust Company nor the "Burns Memorial Trust" is a charitable institution within the meaning of s. 4(*e*) of the Act. Moreover, even if the "Burns Memorial Trust" could be said to be an "institution", yet the income as income is never paid to or received by it; that trust is not created until the residue of the testator's estate is distributed in the future, when the fund will be paid as capital, not as income, to said company to create the "Burns Memorial Trust". On the same basis, that as the income in question is never received as income by any of the five beneficiaries, it cannot be said that it is the income of them. Nor is it "income accruing to the credit of the taxpayer" within s. 11(1); as income it is never paid or intended to be paid to the Royal Trust Company, the "Burns Memorial Trust" or the five beneficiaries; it is year by year added to and made part of the testator's trust estate and at time of distribution it is to be paid to said company as capital to be used to create the fund from which the beneficiaries will receive the only income

receivable by them. On similar considerations (and bearing in mind the definition of "income" in s. 3(1)), the income in question is not "income accumulating in trust for the benefit of unascertained persons or of persons with contingent interests" within s. 11(2) (*Minister of National Revenue* v. *Trusts and Guarantee Co.*, [1940] A.C. 138, distinguished). S. 11 (4)(*a*) of the Act ("Income received by an estate or trust and capitalized shall be taxable in the hands of the executors", etc.) as enacted in 1940 lacked words essential to the imposition of a tax; but under said s. 11(4)(*a*) along with s. 11(4)(*c*) (enacted in and applicable to 1941), the executors were liable for tax for 1941.

APPEAL from the judgment of His Honour Judge Cameron, Deputy Judge of the Exchequer Court of Canada (1), dismissing an appeal from the decision of the Minister of National Revenue affirming the assessments made upon the appellants, the executors of the will of the Honourable Patrick Burns, late of Calgary, Alberta, deceased, for income tax under the *Income War Tax Act* (R.S.C. 1927, c. 97, and amendments thereto) in respect of the years 1938, 1939, 1940 and 1941. Other parties were added as appellants in the Exchequer Court, namely, the Royal Trust Company (named in the will of the said deceased as Trustee for Burns Memorial Trust), the Father Lacombe Home at Midnapore, the Governing Council of the Salvation Army Canada West, and the respective Trustees of three funds to be administered for benefits provided for in the will of the said deceased.

The material facts and questions in issue sufficiently appear in the reasons for judgment in this Court now reported and in the reasons for judgment in the Exchequer Court (above cited), and are indicated in the above headnote.

G. H. Steer, K.C. and *E. J. Chambers, K.C.* for the appellants.

H. W. Riley and *J. G. McEntyre* for the respondent.

The judgment of the Chief Justice and Kerwin and Hudson JJ. (the majority of the Court) was delivered by

KERWIN, J.—The executors of the will of the Honourable Patrick Burns and other parties added in the Exchequer Court appeal from a judgment of that Court dismissing

(1) [1946] Ex. C.R. 229; [1946] 4 D.L.R. 12; [1946] C.T.C. 13.

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an appeal from the decision of the Minister of National Revenue, confirming the assessments to income tax made upon the executors in respect of the years 1938, 1939, 1940 and 1941, under the provisions of the *Income War Tax Act*. The testator died February 24, 1937, having made his last will and testament and a codicil thereto, probate of which was duly granted. It is unnecessary to refer to the codicil or to set forth all the provisions of the will or the agreements made with the widow of the testator's son. Suffice it to say that, taken in conjunction with certain orders made by the Courts of the Province of Alberta where the testator was domiciled, the Executors, in the events that have transpired, were directed to act as follows, and proceeded accordingly in the administration of the large estate left by the deceased.

After payment of specific legacies, the executors, referred to as "my Trustees", were to hold the balance of the estate, referred to as "my Trust Estate", in trust to pay certain annuities and (paragraph 35)

> to appropriate sufficient of the same or of the investments thereof to insure an annual income therefrom sufficient to pay and discharge the Annuities then outstanding and hereinbefore given and bequeathed by this my Will, and to hold "my Trust Estate," including the accumulations thereof and the additions thereto by reason of the deaths of Annuitants or otherwise until the death of the last of the Annuitants to whom I have bequeathed Annuities by this my Will or the death of the widow of my said son, Patrick Thomas Michael Burns, whichever shall last happen and * * * upon further trust to pay:

named nephews and nieces a total of 60 per cent of the net annual income. Upon the death of the last of the annuitants or of the son's widow, the trustees were (paragraph 36) to stand possessed of " 'my Trust Estate' with all accumulations thereof and additions thereto and the whole thereof to hold upon further trust to distribute" 67 per cent thereof among named nephews and nieces

> AND UPON THE FURTHER TRUST to pay and convey the rest, residue and remainder of "my Trust Estate" unto The Royal Trust Company for the creation and establishment of a Trust to be known as the "Burns Memorial Trust" to be administered by it as Trustee at its office in the City of Calgary, in the Province of Alberta, and the net annual income therefrom to pay and distribute annually in equal shares thereof amongst the following:

(1) The Father Lacombe Home at Midnapore in the Province of Alberta.

(2) The Branch of the Salvation Army, having its headquarters at the City of Calgary, in the Province of Alberta.

(3) The Children's Shelter carried on under the auspices of the said City of Calgary * * *

(4) To the Fund established for the benefit of Widows and Orphans of Members of the Police Force of the City of Calgary * * *

(5) To the Fund established for the benefit of Widows and Orphans of Members of the Fire Brigade of the City of Calgary, * * *

The residue to be conveyed to the Royal Trust Company for the purposes mentioned thus represents 33 per cent of 40 per cent of the income of "my Trust Estate".

In each of the years 1938 to 1941 inclusive, the annuities and the sums due the widow of the testator's son under the agreements with her were paid and 60 per cent of the total net income of the estate was paid to the nephews and nieces entitled thereto, and the remaining 40 per cent of the net income was transferred by book entry by the trustees from the Estate Income Account into the Estate Capital Account. The trustees made no segregation or allocation of this 40 per cent of the net income as between the individuals entitled ultimately to 67 per cent thereof under paragraph 36 and the Royal Trust Company to which is to be paid and conveyed eventually the remaining 33 per cent.

The trustees filed income tax returns for each of the years 1938 to 1941 inclusive, but the Department disallowed for each year a certain sum claimed by the trustees as deductible from the taxable income. Each deduction represented 33 per cent of 40 per cent of the net income of the estate for that year. These amounts are claimed as proper deductions by the estate and by the added parties, who are the Royal Trust Company, the Lacombe Home, the Governing Council of the Salvation Army Canada West, and the trustees of the three Calgary funds. The basis of the claim is that even if these amounts are taxable under certain provisions of the *Income War Tax Act* (which is denied), they have accrued to the credit

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of an ascertained beneficiary or ascertained beneficiaries which are charitable institutions and are, therefore, exempt under section 4(*e*) of the Act:

> (*e*) The income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce, no part of the income of which inures to the personal profit of, or is paid or payable to any proprietor thereof or shareholder therein;

It should be stated that by an order of the Supreme Court of Alberta, dated December 11, 1939, the gifts of income to the Lacombe Home, the Salvation Army, the Children's Shelter, the Fund established for the benefit of Widows and Orphans of Members of the Police Force of the City of Calgary, and the Fund established for the benefit of the Widows and Orphans of Members of the Fire Brigade of the City of Calgary were declared to be good and valid charitable bequests. By the same order, after reciting that it appeared that there was no institution existing in Calgary known and administered as a Children's Shelter or carried on under the auspices of the City, that no fund had been established for the benefit of widows and orphans of Members of the Police Force of the said City, and that no fund had been established for the benefit of the widows and orphans of Members of the Fire Brigade of the said City, schemes were approved for the setting-up and administration of funds for "The Trustees for Poor, Indigent and Neglected Children of the City of Calgary", "The Trustees for Widows and Orphans of the Police Force of the City of Calgary" and "The Trustees for Widows and Orphans of the Fire Brigade of the City of Calgary", and provision was made in each scheme for the appointment of trustees for the several purposes.

According to the evidence, the Lacombe Home is conducted as part of the charitable work carried on by Les Soeurs de Charité de la Providence, and the work of the Salvation Army in Calgary falls under the jurisdiction of the Governing Council of the Salvation Army Canada West. They are religious or charitable organizations and, for the purposes of this present discussion, I will assume that the other three funds mentioned in the will and for

which trustees were set-up by the schemes approved by the order are also charitable organizations within the meaning of section 4(*e*) of the Act as expounded by the Privy Council in the *Birtwistle* case, *Minister of National Revenue* v. *Trusts and Guarantee Co.* (1). The difficulty in the appellants' way in seeking exemption under this clause is that the income in question is not the income of any of these bodies. They are not to receive it at any time from any one, but only the income on the capitalized sums from the Royal Trust Company. It is not income to them at all within the scope of the Act, particularly section 3, and is not "income accruing to the credit of the taxpayer" within subsection 1 of section 11:

> The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.

Mr. Steer argued that, as by paragraph 35 of the will the trustees were to "appropriate" sufficient of "my Trust Estate" to insure an annual income sufficient to pay the annuities, it should be taken in equity as having been done, leaving the balance of the annual income to be divided 60 per cent and 40 per cent; and that, therefore, the 40 per cent was vested,—as to 67 per cent thereof in the named beneficiaries, and as to 33 per cent in the five bodies mentioned above or, in the alternative, in the Burns Memorial Trust. As to the five bodies, the mere fact of charities being entitled to income does not give them the right to demand payment of the corpus, *Halifax School for the Blind* v. *Chipman* (2). As to the Burns Memorial Trust, I agree with the trial judge that it is merely a name for a fund to be administered by the Royal Trust Company and that Company is nothing more than a trustee as was the Council of Colne in the *Birtwistle* case (3). The income in question does not belong to it beneficially and, like the Council of Colne, it is not a charitable organization.

The claim for exemption therefore fails, but it is still necessary for the respondent to show that the estate is

(1) [1940] A.C. 138.
(2) [1937] S.C.R. 196.
(3) [1940] A.C. 138.

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taxable in respect of the income in question. He seeks, first of all, to hold the trustees taxable under subsection 2 of section 11:

> Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of a person other than a corporation; provided that he shall not be entitled to the exemptions provided by paragraphs (*c*), (*d*), (*e*) and (*i*) of subsection one of section five of this Act, and provided further that should more than one such trust be created, substantially all the assets of which are received from one person (whether or not administered by the same or different trustees) and be so conditioned as to fall in ultimately in favour of one beneficiary, class or group of beneficiaries, then the income of the several trusts shall be taxed as one trust in the hands of such one of the trustees as the Minister may determine.

on the ground that the income is "accumulating in trust for the benefit of unascertained persons." In the *Birtwistle* case (1), the Privy Council held

> the subsection applies in every case where income is being accumulated in trust for the benefit of unascertained persons whether those persons will or will not ultimately take a vested interest in such income, and whether they will or will not ever become entitled to specific portions of it. In the present case the accumulated interest in the hands of the respondents as trustees will in the year 1948 have to be handed over to the Municipal Council of Colne as trustees in trust to be applied for the benefit of the aged and deserving poor of that town. Such aged and deserving poor are without any question persons, and equally without question they are unascertained. The case, therefore, seems to fall within the very words of the subsection.

The trial judge was of opinion that the Lacombe Home and the Salvation Army were "unascertained persons", but I am unable to agree. Les Soeurs de Charité de la Providence and the Salvation Army are bodies corporate and politic, as mentioned in section 2(*h*) of the Act:

> (*h*) "person" includes any body corporate and politic and any association or other body, and the heirs, executors, administrators and curators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;

and they are ascertained. I quite agree that the interposition of trustees between executors and ultimate beneficiaries cannot avoid the liability to taxation under subsection 2 of section 11, as this was distinctly held in the *Birtwistle* case (1), but the Lacombe Home and the Salvation Army are not trustees in any sense. Each organi-

(1) [1940] A.C. 138.

zation uses its funds generally to help the poor and afflicted, but the income under discussion is accumulating in trust for their benefit and not for the ones under their care. It is true that in the *Birtwistle* case (1), the accumulated income was to be handed over by the Trust and Guarantee Company to the Municipal Council to be used by the latter for the benefit of aged and deserving poor of Colne, while here the Royal Trust Company is to hand over merely a share of the income on the income in dispute to the two bodies. The income is still accumulated in trust for their benefit to the extent of their shares.

I agree, however, that the income is accumulating in trust for the benefit of unascertained persons so far as the gifts of income thereon to the other three funds are concerned. The trustees of each of these funds are merely trustees to apply the gifts, according to the approved schemes, for the benefit of (*a*) poor, indigent and neglected children, (*b*) widows and orphans of members of the Calgary Police Force, (*c*) widows and orphans of members of the Calgary Fire Brigade. Such trusts fall clearly within the decision in the *Birtwistle* case (1), and the judgment of this Court in *Cosman's Trustees* v. *Minister of National Revenue* (2). While it is not their income, it is income accumulating in trust for their benefit, since they are entitled to a share of the income thereon.

The respondent then contents that subsection 4 of section 11 applies to the income for 1940 and 1941. From 1934 to 1940 this subsection read:

> Dividends received by an estate or trust and capitalized shall be taxable income of the estate or trust.

Counsel for the respondent, before the trial judge and before this Court, did not attempt to succeed on this point for the years 1938 and 1939 under this wording of the subsection, so that we are free from the responsibility of construing it and of considering whether, to the extent that dividends may have entered into the income of "my Trust Estate", part of the 33 per cent of 40 per cent of the income for the years 1938 and 1939 are taxable. However, by chapter 34 of the 1940 Statutes, the above subsection 4 was repealed and the following enacted in lieu

(1) [1940] A.C. 138. (2) [1941] 3 D.L.R. 224.

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thereof and made applicable to income of the 1940 taxation period and fiscal periods ending therein and to all subsequent periods:

4. (*a*) Income received by an estate or trust and capitalized shall be taxable in the hands of the executors or trustees, or other like persons acting in a fiduciary capacity.

(*b*) Income earned during the life of any person shall, when received after the death of such person by his executors, trustees or other like persons acting in a fiduciary capacity, be taxable in the hands of such fiduciary.

Mr. Steer contended that this was not a true charging subsection, as no provision was made as to the appropriate rates of taxation, and he pointed out that it was only in 1941, by section 19 of chapter 18, that paragraph (*c*) was added:

(*c*) Income taxable under the provisions of this subsection shall be taxed as if such income were the income of a person other than a corporation, provided that no deduction shall be allowed in respect of the exemptions provided by paragraphs (*c*), (*d*), (*e*), (*ee*) and (*i*) of subsection one of section five of this Act.

In my view this clause was added *ex abundanti cautela*. In *Holden* v. *Minister of National Revenue* (1), the Privy Council decided that subsection 2 of section 11 as it then stood was a valid charging provision. It is true that the words "as if such income were the income of an unmarried person" appeared therein, but I have no doubt that no other conclusion would be arrived at under the present wording of that subsection, "as if such income were the income of a person other than a corporation", since their Lordships had no difficulty in deciding as they did, although there was nothing to indicate that the unmarried person was to be a person who was not a householder and without dependents. Clause (*a*) of subsection 4 being a true charging provision, its terms are too clear to admit of any doubt that where, as here, income is received by an estate and capitalized, it is taxable in the hands of the trustees.

It is contended in the respondent's factum, but was not argued, that the definition of "person" in section 2(*h*) is wide enough to include executors and trustees and that, therefore, income accumulating in trust in the hands of trustees and capitalized can be taxed under section 9. This argument misconceives the meaning of section 2(*h*) and

(1) [1933] A.C. 526.

the whole tenor of the Act. "Person" is stated to include the heirs, executors, administrators and curators or other legal representatives of such person, but this has no bearing upon the question of taxation of *post mortem* income accumulated in trust by executors, administrators, or other legal representatives, including trustees. If such income is not caught by section 11, it is not covered.

The income for the years 1940 and 1941, from which the Lacombe Home and the Salvation Army would receive two-fifths of the income thereof in due course is, therefore, covered by subsection 4 of section 11, leaving only two-fifths of the income for the years 1938 and 1939 from which these institutions are ultimately to receive the income, free from taxation. The appellants have succeeded in part. They should receive one-half of their costs of the appeal to this Court and there should be no costs in the Exchequer Court.

RAND J.—The controlling fact in this controversy is the direction to accumulate and to capitalize until the death of the annuitants the portion of the net income intended for the five charities. At that time, the whole of the capital, including the added increments, is to be paid over to the trustee of the Burns Memorial Fund to hold in perpetuity and to distribute the annual income among those entitled. Under that provision, the accumulations never belong to nor come into the possession of the charities: they represent solely the growth of the capital which ultimately becomes the principal from which the income benefits to the charities arise.

For that reason I think it impossible to say that the accumulations are the income of charitable institutions, and they are not then within the exemption of section 4(*e*) of the *Income War Tax Act*. Likewise, they are not income "accruing to the credit of the taxpayer whether received by him or not during such taxation period" within section 11(1).

In support of this view of "income" to the ultimate beneficiary, the decision of Rowlatt J. in *Inland Revenue Commissioners* v. *Blackwell* (1) was cited; but Mr. Steer

(1) [1924] 2 K.B. 351.

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pointed out that the Court of Appeal, in dealing with this case (1), expressly abstained from passing on the rule laid down; and that in *Inland Revenue Commissioners* v. *Pakenham* (2), Rowlatt J. expresses doubts that his former view was sound. But there is an essential difference between the factual basis of the *Blackwell* decision and that here. There, the accumulated income would go ultimately to a beneficiary; and it was held that even if the interest of the son was vested, a postponement during minority of payment over would prevent the accumulations from being his "income". Here, as I have stated, the beneficiaries never become entitled to receive the annual increments in any form, and the purpose of accumulation is to capitalize them for a subsequent enjoyment of income from them only.

Are they "income accumulating for the benefit of" unascertained persons or of persons with contingent interests within section 11(2)? The plain meaning of that language is, I think, that the accumulation, when completed, passes in its entirety to the persons entitled: and that transmission is the benefit contemplated. Here in a sense the accumulations are for the "benefit" of the charities in the future increased income from increased capital. But the word cannot, in my opinion, be extended to that indirect and remote advantage. If it were, the subsection would be duplicated, in respect of capitalization of income for unascertained persons or for contingent interests, by subsection 4 unless it is said, as I think it impossible to say, that subsection 4 does not apply to capitalization when such persons or interests are involved. It would seem, moreover, to be contradictory to say that these annual increments are not income either under 4(*e*) or 11(1) because they never reach the beneficiaries and yet to treat their accumulation as "income" of the same beneficiaries under 11(2). To do that would be to distinguished between "income of" a beneficiary and "income accumulating for the benefit of" a beneficiary. They are not, therefore, "for the benefit of" these charities whatever may be the latter's interest in them.

(1) [1926] 1 K.B. 389 at 392. (2) [1927] 1 K.B. 594.

There remains subsection 4, and this seems to me to be designed to meet precisely the case we have here, that of capitalization of accumulating income. Subsections 1 and 2 of the section distribute the cases of income to ascertained or unascertained persons with vested or contingent interests, which at some stage passes to them as income; subsection 4 deals with the capitalization of income regardless of its ultimate destination.

The difficulty, however, facing the respondent is that of the adequacy of the charging language. Paragraph (*a*) was enacted in 1940 and paragraph (*c*) only in 1941, and the question is whether under (*a*) alone the charge is sufficiently provided. The paragraph is as follows:

> Income received by an estate or trust and capitalized shall be taxable in the hands of the executors or trustees, or other like persons acting in a fiduciary capacity.

On what basis is that taxation to be calculated? Is an "estate or trust" to be a person or a corporation, and in either case what, if any, exemptions are to be allowed? Subsection 2 cannot be resorted to because it deals with different subject matter and conditions, to which it is limited, and there is no other section that can be called in aid. In the presence in the Act of several scales of taxation, how can we find in that initial provision a guide to the measure of charge which the legislation intends? I think the provision incomplete, it is *casus omissus,* and, for the years in question up to and including 1940, inoperative. For the year 1941, however, it is applicable to the income in question. I would, therefore, allow the appeal and reduce the assessments of income for 1938, 1939 and 1940 by the amounts so accumulated respectively. The 1941 assessment on these items should be made under subsection 4 of section 11. The appellant should recover three-quarters of the costs in both courts.

ESTEY J.—The appellants are the executors of the will of the Honourable Patrick Burns, who died February 24, 1937. Their contention is that the Minister of National Revenue was in error in disallowing certain deductions (on the basis that the items of income deducted were non-taxable) made by them in the income tax returns filed in

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this estate for the years 1938, 1939, 1940 and 1941. The Minister's disallowance was upheld in the Exchequer Court.

After directing certain specific devises and bequests the will provides for the conversion into money of the residue from which funeral, testamentary and other specified expenses should be paid, and then

my Trustees shall stand possessed of the balance of the said rest, residue and remainder * * * with the income and accumulations thereof herein referred to as "my Trust Estate" upon further trust to invest * * * and out of the net annual income therefrom and from all parts of "my Trust Estate", to pay annually

certain annuities. After payment of these annuities, the will provides

and to invest the surplus (if any) of such annual income in the names of my Trustees as part of the capital of "my Trust Estate" at compound interest.

The will then directs

my Trustees to hold "my Trust Estate" and to appropriate sufficient of the same or of the investments thereof to insure an annual income therefrom sufficient to pay and discharge the Annuities * * * and to hold "my Trust Estate", including the accumulations thereof and the additions thereto by reason of the deaths of Annuitants or otherwise until the death of the last of the Annuitants to whom I have bequeathed Annuities by this my Will or the death of the widow of my said son * * * whichever shall last happen,

and during that period to pay from the net annual income to specified nephews and nieces 60 per cent of that income and

to invest the surplus, if any, of such annual income in the names of my Trustees as part of the capital of "my Trust Estate" at compound interest.

This surplus is the 40 per cent "of the net income of the estate" referred to in para. 9 (hereinafter quoted) of the Agreed Statement of Facts.

The will then provides that the residue of "my Trust Estate" shall be distributed "upon the death of the last of the annuitants to whom I have bequeathed annuities in this my will or the death of the widow of my said son, whichever last shall happen". This distribution shall be upon the basis of 67 per cent to specified beneficiaries, and 33 per cent thereof shall be paid and conveyed

unto The Royal Trust Company for the creation and establishment of a Trust to be known as the "Burns Memorial Trust" to be administered

by it as Trustee at its office in the City of Calgary, in the Province of Alberta, and the net annual income therefrom to pay and distribute annually in equal shares thereof amongst the following:

(1) The Father Lacombe Home at Midnapore in the Province of Alberta.

(2) The Branch of the Salvation Army, having its headquarters at the City of Calgary, in the Province of Alberta.

(3) The Children's Shelter carried on under the auspices of the said City of Calgary, towards which I have bequeathed Fifty (50) 4% non-voting, non-cumulative, redeemable Preference Shares in the Capital Stock of Burns Foundation (Limited) by this my Will.

(4) To the Fund established for the benefit of Widows and Orphans of Members of the Police Force of the City of Calgary, towards which I have bequeathed Fifty (50) 4% non-voting, non-cumulative, redeemable Preference Shares in the Capital Stock of Burns Foundation (Limited) by this my Will.

(5) To the Fund established for the benefit of Widows and Orphans of Members of the Fire Brigade of the City of Calgary, towards which I have bequeathed Fifty (50) 4% non-voting, non-cumulative, redeemable Preference Shares in the Capital Stock of Burns Foundation (Limited) by this my Will,

In each year after all payments were made there was a surplus of income which has been invested in compliance with the terms of the will "in the names of my Trustees as part of the capital of 'my Trust Estate' at compound interest". The surplus invested as capital has in each year increased the corpus of "my Trust Estate" to be divided 67 per cent and 33 per cent as above indicated.

At the hearing before the Exchequer Court the parties filed an agreed statement of facts, para. 9 of which reads as follows:

9. That the taxable income submitted by the Appellant, the taxable income as assessed by the Department, and the amount disallowed by the Department during the years 1938 to 1941 inclusive, are as follows:

	Taxable Income Per Department	Per Estate	Amount Disallowed by Income Tax Department
1938	$10,597 94	$ 9,199 01	$1,398 93
1939	11,656 57	7,809 90	3,846 67
1940	20,096 97	14,382 57	5,714 40
1941	26,775 24	18,118 03	8,657 21
	$69,126 72	$49,509 51	$19,617 21

The amounts disallowed by the Income Tax Department represent 33 per cent of 40 per cent of the net income of the estate. These amounts are claimed as proper deductions by the estate on the ground

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that they have accrued to the credit of an ascertained beneficiary or ascertained beneficiaries which are charitable institutions. This view is not accepted by the Income Tax Department.

The issue here to be determined: is 33 per cent of the income realized from the investment of 40 per cent of the income—being the surplus after paying in each year 60 per cent thereof to the nephews and nieces—subject to income tax?

It is agreed that in each of the years 1938 to 1941 inclusive, 60 per cent of the net income was paid out to the specified nieces and nephews and the executors, by book entry, transferred the remaining 40 per cent from the estate income account into the estate capital account. The executors made no segregation or allocation of the net income from the said 40 per cent as between the individuals entitled to 67 per cent thereof and the parties entitled to the remaining 33 per cent thereof.

The appellants' contention is that income derived from the 33 per cent is not taxable because (*a*) the "Burns Memorial Trust" is a charitable institution and as such not taxable within the meaning of section 4(*e*), or alternatively, the income accrued to the credit of the Royal Trust Company, or in the alternative to the five named ascertained beneficiaries, or in the further alternative, to the Salvation Army and Lacombe Home, which are ascertained beneficiaries, and therefore, under section 11(1) the individual beneficiaries and not the executors are taxable with respect thereto.

The Crown on the other hand contends that neither section 4(*e*) nor 11(1) apply because the income in question was received by the executors and used by them to make certain payments and invest the surplus as part of the capital of "my Trust Estate". At the time of distribution 33 per cent of the residue of "my Trust Estate" will be paid over to the Royal Trust Company not as income but as capital. The Royal Trust Company will receive it as capital and hold it in trust and pay the income therefrom to the specified charities. In other words, that neither the Royal Trust Company as trustee nor any of the beneficiaries will ever receive any portion of the amounts in question as income and therefore they cannot

be taxed nor be granted an exemption with respect to income which they never received. Further, that the trustees are liable under section 11(2) in that the beneficiaries are unascertained and if not, then they are liable under section 9.

Section 4(*e*) of the *Income War Tax Act* reads:

> 4. The following incomes shall not be liable to taxation hereunder:
> (*e*) The income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce, no part of the income of which inures to the personal profit of, or is paid or payable to any proprietor thereof or shareholder therein;

The money is paid to the Royal Trust Company for the creation and establishment of a Trust to be known as the "Burns Memorial Trust" to be administered by it as Trustee at its office in the City of Calgary, in the Province of Alberta, and the net annual income therefrom to pay and distribute annually in equal shares thereof amongst the five specified beneficiaries. It is not, nor could it be successfully, contended that the Royal Trust Company is a charitable institution within the meaning of section 4(*e*), but it is contended that the "Burns Memorial Trust" is a charitable institution.

An order made and issued out of the Supreme Court of Alberta under date of December 11, 1939, declared all of these gifts "good and valid charitable bequests". Such a declaration, however, does not conclude the issue. In order to be exempt under section 4(*e*), it must be "the income of any * * * charitable * * * institution". A somewhat similar question was dealt with in *Minister of National Revenue* v. *Trusts and Guarantee Co.* (1) where, speaking on behalf of the Privy Council, Lord Romer, at p. 149, stated:

> That it is a charitable trust no one can doubt. But their Lordships are unable to agree that it is a charitable institution such as is contemplated by s. 4(*e*) of the Act. It is by no means easy to give a definition of the word "institution" that will cover every use of it. Its meaning must always depend upon the context in which it is found. It seems plain, for instance, from the context in which it is found in the sub-section in question that the word is intended to connote something more than a mere trust. Had the Dominion Legislature intended to exempt from taxation the income of every charitable trust, nothing would have been easier than to say so. In view of the language that has in fact been used, it seems to their Lordships that the charitable institutions exempted are those which are institutions in the sense in which boards of trade and chambers of commerce are institutions, such,

(1) [1940] A.C. 138.

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for example, as a charity organization society, or a society for the prevention of cruelty to children. The trust with which the present appeal is concerned is an ordinary trust for charity. It can only be regarded as a charitable institution within the meaning of the sub-section if every such trust is to be so regarded, and this, in their Lordships' opinion, is impossible. An ordinary trust for charity is, indeed, only a charitable institution in the sense that a farm is an agricultural institution. It is not in that sense that the word institution is used in the sub-section.

The appellants submit the discussion of the word "institution" in *Mayor of Manchester* v. *McAdam* (1), where, at p. 511, Lord Macnaghten, after pointing out that "institution" is "a little difficult to define", continues:

> It is the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle.

They contended that the testator had two purposes in mind, (1) to benefit the five named beneficiaries and (2) to perpetuate the name of the benefactor. They contend that the phrase "Burns Memorial Trust" gives to the trust "the perpetual memorial idea", and this provides what Lord Romer requires by his words "something more than a mere trust" and therefore the "Burns Memorial Trust" is a charitable institution. This phrase perpetuates the name of the benefactor in association with this trust, but does not make it a perpetual charitable trust. If the words "to be known as the 'Burns Memorial Trust'" are deleted from para. 36 of the will, which provides for this trust, neither the permanency of the trust, the management and disposition thereof, nor the position of the beneficiaries would be in any way affected. It is a perpetual charitable trust upon the construction of the will quite apart from these words under the authority of *The Halifax School for the Blind* v. *Lewis Chipman* (2).

Further, all the work in connection with this fund is to be performed by the Royal Trust Company as trustee. That company receives from the trustees the fund "for the creation and establishment of a Trust to be known as the 'Burns Memorial Trust' to be administered by it as Trustee" and "to pay and distribute annually" the income amongst the five beneficiaries. It is a perpetual charitable trust fund, the income from which is used for charitable

(1) [1896] A.C. 500. (2) [1937] S.C.R. 196.

purposes through the medium of the five beneficiaries. There is nothing to be performed in connection with this trust by the "Burns Memorial Trust", nor is there a body or entity which could be described as an institution styled the "Burns Memorial Trust".

Under both of the foregoing discussions of the word "institution" there is contemplated a body or entity functioning to attain some charitable purpose. Moreover, the will creating this perpetual charitable trust not only does not contemplate that the "Burns Memorial Trust" will be such an institution, but specifically states that the trust is to be "known as the 'Burns Memoral Trust' ".

Indeed, from all its relevant provisions, the will indicates that the testator, in using this phrase, intended to give to the trust a name that would embody a memoir of its founder. In its legal significance it is but the name of the trust, and I am therefore in agreement with the conclusion of the learned Judge of the Exchequer Court that these words are "a name attached to a fund" and that under this will the "Burns Memorial Trust" is not an institution as contended by the appellants.

The appellants further submit that the situation here created is identical with that which would have existed had the testator provided for the creation of a "Burns Memorial Corporation" or a "Burns Memorial Trust Corporation" with general charitable objects and then have directed that this money should be paid to that Corporation for charitable purposes. If a corporation so constituted could, upon an examination of its nature and purpose, be held a charitable institution, the conclusion suggested by the appellant might follow. That would be a situation entirely different from that which here obtains where a capital sum of money is given to a corporation that is not a charitable institution to create and administer a trust fund to be known as the "Burns Memorial Trust".

Moreover, and quite apart from the foregoing, because this income is received and applied by the executors as above indicated, even if the "Burns Memorial Trust" could be construed as an institution, there still remains the fact that the income as income is never paid to or received by the "Burns Memorial Trust". That trust will not be

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created until the residue of "my Trust Estate" is distributed some time in the future. At that time the fund will be paid as capital, not as income, to the Royal Trust Company to create the trust known as the "Burns Memorial Trust". It therefore cannot be construed as "the income of any * * * charitable * * * institution" within the meaning of section 4(e) and is not entitled to the benefit of the exemption therein provided for.

On the same basis, that as income it is never received by any of the beneficiaries, the appellants' submission that the income is that of the five named beneficiaries cannot be supported.

Then with respect to the appellants' contention that the executors are not taxable because the income here is "income accruing to the credit of the taxpayer whether received by him or not during such taxation period":

> 11. (1) The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.

It is not contended that the income is year by year received by the Royal Trust Company or the "Burns Memorial Trust" or the five beneficiaries, but that it is "income accruing to the credit of" either the Royal Trust Company or the "Burns Memorial Trust" or the five beneficiaries within the meaning of section 11(1).

In order to come within the terms of this section it must be "income accruing to the credit of the taxpayer". As income it is never paid, nor is it intended that it should ever be paid, to the Royal Trust Company, the "Burns Memorial Trust" or the five beneficiaries. It is year by year added to and made part of "my Trust Estate" and at the time of distribution thereof it is paid to the Royal Trust Company as capital to be retained and used by it to create a perpetual trust fund ("Burns Memorial Trust"). It is only after the creation of this trust fund that the beneficiaries will receive income which this capital fund will earn and that is the only income that, under the terms of the will, these beneficiaries will receive. A somewhat similar provision came before the Privy Council

in *St. Lucia Usines and Estates Co.* v. *St. Lucia (Colonial Treasurer)* (1), where Lord Wrenbury at p. 512, speaking on behalf of the Privy Council, stated:

> The words "income arising or accruing" are not equivalent to the words "Debts arising or accruing". To give them that meaning is to ignore the word "income". The words mean "money arising or accruing by way of income". There must be a coming in to satisfy the word "income". This is a sense which is assisted or confirmed by the word "received" in the proviso at the end of s. 4, sub-section 1.

Their Lordships pointed out that "it does not follow that income is confined to that which the taxpayer actually receives", and illustrated this statement by reference to deduction of income at the source and as it is arrived at by business men and others in the preparation of their balance sheets and profit and loss accounts.

Moreover, the view expressed by Lord Wrenbury in the *St. Lucia* case (1) appears particularly applicable because of the definition of "income" in section 3 (1) of the *Income War Tax Act:*

> 3. (1) For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from * * *

This definition makes it clear that the income must be "directly or indirectly received", and with respect to cases coming under section 11(1) it is there provided "whether received by him or not during such taxation period". This is further emphasized by Mr. Justice Newcombe in *In re McLeod* v. *The Minister of Customs and Excise* (2):

> If the income be accruing to the credit of an ascertained person who is the beneficiary of an estate or trust, the taxation of it is provided for by the first sentence of the section; but, whatever may be the meaning of "taxpayer" in the context, income which by the terms of the trust he may never receive cannot be said to be accruing to his credit, and therefore such income is not that of the testator's children or grandchildren within the intent of that clause.

This income is never received by any of the foregoing beneficiaries within the meaning of section 11(1) and cannot therefore be "income accruing to the credit" of any of them under that section.

(1) [1924] A.C. 508. (2) [1926] S.C.R. 457, at 470.

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The first of the respondent's contentions is that this income is received by the trustee and is "accumulating in trust for the benefit of unascertained persons" and therefore the appellants are taxable under section 11(2).

> 11. (2) Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of a person other than a corporation; * * *

The express provisions of section 3(1) defining "income" for the purpose of this Act are clearly applicable to both subsections (1) and (2) of section 11, more particularly as there is no effort to otherwise define that word in section 11. In 11(2) it is the income "accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests" that is dealt with. Therefore, the income which is here accumulating must some time be "directly or indirectly received" as income in order to come within the definition of section 3(1). Without repeating the considerations already mentioned, it is abundantly clear that no part of the trust fund, or specifically that part of it that the respondent seeks to tax, is income that will ever be received as such by the beneficiaries who it is now contended are unascertained persons. It will never reach them as either income or capital. It will be added to "my Trust Estate", a part of which will be the capital of the perpetual charitable trust provided for and only a share of the income from that trust will the beneficiaries ultimately receive.

That the funds we are here concerned with will create a perpetual charitable trust, the principal of which will remain always intact and only the income therefrom will ever be received by a beneficiary, distinguishes this case from *Minister of National Revenue* v. *Trusts and Guarantee Co.* (1), where Lord Romer, speaking on behalf of the Privy Council, stated at p. 148:

> In the present case the accumulated interest in the hands of the respondents as trustees will in the year 1948 have to be handed over to the municipal council of Colne as trustees in trust to be applied for the benefit of the aged and deserving poor of that town. Such aged and deserving poor are without any question persons, and equally without question they are unascertained.

(1) [1940] A.C. 138.

In that case the income was "accumulating in trust for the benefit of unascertained persons" and at a specified time was "to be applied for the benefit of the aged and deserving poor". Ultimately these unascertained persons received the income there in question and that is a requisite if income as defined in 3(1) is to be taxed under section 11(2). Under the Burns will, as already pointed out, the income sought to be taxed will never be "directly or indirectly received" by any person or persons unascertained or otherwise. It cannot, therefore, be taxed under section 11(2).

In 1940, Parliament amended section 11 by repealing subsection 4(*a*) and inserting a new 4(*a*) reading as follows:

> 11. (4) (*a*) Income received by an estate or trust and capitalized shall be taxable in the hands of the executors or trustees, or other like persons acting in a fiduciary capacity.

Section 11 is a charging section: *Holden* v. *Minister of National Revenue* (1). When in section 11(2) Parliament imposed a new tax it specified the rate. The tax there imposed was upon "income accumulating in trust for the benefit of * * *", while section 11(4) (*a*) deals with "income received by an estate or trust and capitalized", which is different in character and may be quite different in result. Nor do I find any words which indicate an intention either that the rate specified in 11(2) be made applicable to both subsections, or to adopt any other rate specified in the statute. Without a rate or determinable amount there can be no impost. A tax is defined as "an impost; a tribute imposed on the subject": Wharton's Law Lexicon, 14th Ed., 978. Therefore in the enactment of this subsection 4(*a*) a factor essential to the imposition of a tax is omitted and the result is that no tax is imposed.

Parliament in the following year, 1940-41, S. C., c. 18, s. 19, added section 11(4) (*c*):

> (*c*) Income taxable under the provisions of this subsection shall be taxed as if such income were the income of a person other than a corporation, provided that no deduction shall be allowed in respect of the exemptions provided by paragraphs (*c*), (*d*), (*e*), (*ee*) and (*i*) of subsection one of section five of this Act.

(1) [1933] A.C. 526.

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and by section 32 of the same Act this provision was made applicable to the income of the 1941 taxation period:

32. Sections one, two, four, five, six, seven, nine, ten, eleven, twelve, seventeen, nineteen, twenty, twenty-one, twenty-four, twenty-five and twenty-six of this Act shall be applicable to income of the 1941 taxation period and fiscal periods ending therein and of all subsequent periods.

It therefore follows that with respect to the 1941 period the executors are under section 11(4)(*a*) and (*c*) liable for the tax with respect to the income here in question.

The respondent's second contention is that, quite apart from the provisions of section 11(2), the appellants are liable under the provisions of section 9 for all of the years in issue. Section 9 in part reads:

9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person * * *

The word "person" is defined in section 2(*h*):

2. (*h*) "person" includes any body corporate and politic and any association or other body, and the heirs, executors, administrators and curators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;

Sections 9 and 11 are both charging sections and the language used indicates that under these sections Parliament imposes a tax upon entirely different persons. Section 9(1) provides for the assessing, levying and paying upon income during the preceding year of every person other than a corporation or joint stock company, and 9(2) deals with the corporation and the joint stock company. The income tax is here imposed upon the person, corporation or joint stock company *per se* even though that tax may be assessed, levied and collected from their "heirs, executors, administrators and curators or other legal representatives".

Section 11 charges an income with respect to that earned by the estate or trust and imposes the tax upon either the party administering the estate or trust, or the beneficiary. The amendment of 1940-41 was a further step in the attainment of that end and provided for a tax not previously imposed.

Under the provisions of these sections it follows that prior to the amendment of section 11, when in 1940-41 the above quoted section 11(4) (*c*) was passed, no tax was

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imposed upon the trustees with respect to the income here in question. In the result the amounts here in question were not taxable in the years 1938, 1939 and 1940 and therefore were improperly disallowed by the Crown, while in 1941, because of the enactment of 11(4)(*c*), the amount in that year was taxable and the deduction properly disallowed.

The judgment appealed from should be so varied and the appellants should have three-fourths of their costs throughout.

Appeal allowed in part; two-fifths of the income in question, being that proportion from which the Lacombe Home and the Salvation Army are ultimately entitled to the interest thereon, are declared free of income tax for the years 1938 and 1939. Appellants to receive one-half of the costs of their appeal to this Court. No costs in the Exchequer Court.

Solicitors for the appellant Executors: *Hannah, Nolan, Chambers, Might & Saucier.*

Solicitor for added appellants: *G. H. Steer.*

Solicitor for the respondent: *W. S. Fisher.*

D. R. FRASER AND COMPANY LIMITED ..... } APPELLANT;

AND

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

1946
*Apr. 23, 25

1947
*Feb. 4

affirmed 1948 2 WW 1119
affirmed 1949 AC 25

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income—Lumbering business—Claim for allowance for exhaustion of timber limits—Discretion of the Minister of National Revenue—Income War Tax Act, R.S.C. 1927, c. 97, s. 5(1)(a), as amended by 1940 (Dom.) 2nd session, c. 34, s. 10.

The appellant company carries on a lumbering business in Alberta and, when making its income tax return for 1941, claimed an allowance for exhaustion of three timber limits, for which licences had been granted by the province. The appellant's claim was disallowed by the Minister of National Revenue; and the Exchequer Court of Canada affirmed the Minister's decision.

*Present at hearing of the appeal: Kerwin, Hudson, Taschereau, Rand and Estey JJ. Hudson J. died before the delivery of the judgment.

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Section 5 (1)(*a*) of the *Income War Tax Act*, as amended in 1940, provides that "the Minister in determining the income derived from * * * timber limits may make such an allowance for the exhaustion of the * * * timber limits as he may deem just and fair * * *"; while, in the Revised Statutes, paragraph (*a*), contained the words "shall make" instead of "may make."

Held: The appellant company has no statutory right to the allowance claimed by it under section 5(1)(*a*).—That section gives the Minister a discretion not merely as to the amount but also as to whether any allowance for exhaustion should be made. Moreover, it is significant that Parliament, by the amendment in 1940, changed the imperative word "shall" as contained in the Revised Statutes to the permissive word "may". *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* [1940] A.C. 127, ref.

Judgment of the Exchequer Court of Canada ([1946] Ex. C.R. 211) affirmed.

APPEAL from the judgment of the Exchequer Court of Canada (1), affirming the decision of the Minister of National Revenue disallowing a claim by the appellant company for an allowance for exhaustion of timber limits.

S. Bruce Smith K.C. for the appellant.

G. W. Auxier and *J. G. McEntyre* for the respondent.

The judgment of Kerwin and Taschereau JJ. was delivered by

KERWIN J.:—The appellant in this appeal against a decision of the Exchequer Court of Canada, D. R. Fraser and Company Limited, complains that the Minister of National Revenue has made no allowance for the exhaustion of its timber limits in connection with its income tax for the year 1941 and bases its claim to such allowance upon section 5, subsection 1(*a*) of the *Income War Tax Act*, R.S.C. 1927, chapter 97, which since the amendment by section 10 of chapter 34 of the Second Session of 1940 reads as follows:

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

(*a*) The Minister, in determining the income derived from mining and from oil and gas wells and timber limits, may make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair, and in the case of leases of mines, oil and gas wells and timber limits the lessor and lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive;

(1) [1946] Ex.C.R. 211; [1946] 2 D.L.R. 107.

In the Revised Statutes, paragraph (*a*) read as follows:

(*a*) Such reasonable amount as the Minister, in his discretion may allow for depreciation, and the Minister in determining the income derived from mining and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair;

The effect of this clause as to depreciation was considered by the Judicial Committee in *Pioneer Laundry and Dry Cleaners Limited* v. *Minister of National Revenue* (1), but immediately after this decision, the part relating to depreciation was removed from paragraph (*a*) and inserted in section 6 where it is provided that a deduction shall not be allowed in respect of

(*n*) depreciation except such amount as the Minister in his discretion may allow, etc. * * *

We are not concerned in this appeal with depreciation but with exhaustion and it is significant that Parliament, by the amendment in 1940, instead of the provision in the original clause that the Minister *shall* make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair, enacted that he *may* make such an allowance. I cannot read the change otherwise than as giving the Minister a discretion not merely as to the amount but also as to whether any allowance for exhaustion should be made.

In the present case it has been determined by the Minister through his deputy that no such allowance should be made and the Court is not free, even if it so desired, to make one. The appellant complains that allowances have been made in the cases of mines, oil and gas wells, for all saw-logs scaled in the area generally described as west of the Cascade Range of mountains or all saw-logs scaled that go to the salt water of the Pacific, or commonly referred to as the coastal logging area, and also in the case of pulp companies. I have no doubt that the Minister is not required to make an allowance for all classes and the fact that it was thought advisable to provide for allowances in the two last named categories does not give the Court jurisdiction to replace the exercise of the Minister's discretiton with its own. On the face of it

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many reasons might be advanced for treating mines and gas and oil wells differently from timber limits where there is a natural growth of the trees that are not felled.

In this view of the matter it is unnecessary to consider the arguments that were advanced as to whether the appellant who now holds licences from the province of Alberta is a lessee. The reasons for judgment of the Judicial Committee in *Minister of National Revenue* v. *Wright's Canadian Ropes Limited* (1) are now at hand, but there is nothing in them that is of assistance in determining the present appeal which should be dismissed with costs.

RAND J.:—The appellant carries on a lumbering business in the province of Alberta. It holds three agreements with the Government of the province, granting the right to cut lumber of certain dimensions on described areas of land. The company is vested with the right of possession of the lands, subject to reservations which, in my opinion, do not affect the substance of that possession; title to the timber passes upon severance, and the company is entitled to any trees severed by third persons and the value of those growing on portions of the limits withdrawn and put to other uses. Various directive powers are retained by the province designed to enable the Government to bring about the most efficient utilization of the timber. The term is one year, but subject to the fulfilment of its conditions, the agreements are renewable from year to year while the quantity remains commercially valuable, indefinitely as to two and until 1950 as to the third.

A great deal of discussion took place before Cameron J. as well as this Court as to the precise interest created by the agreement. But the specific rights and powers granted seem to me to be sufficient to enable us to deal with it in relation to the questions raised. Although title to the timber passes only on severance, and apart from possession, with the limitation of tree dimensions in cutting and the periods over which the rights extend, it is, I think, impossible to say that the appellant has not some interest in the growth of the trees and so in the land. The income of the company is clearly derived from

(1) [1947] 1 D.L.R. 721.

"timber limits", but whether the relation to the Crown is that of lessor and lessee is not an essential feature of the controversy.

That question is whether the company has a right to an allowance for exhaustion or depletion under section 5(1) (*a*) of the *Income War Tax Act*:

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

(*a*) The Minister in determining the income derived from mining and from oil and gas wells and timber limits may make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair, and in the case of leases of mines, oil and gas wells and timber limits the lessor and lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive;

The decision or allowance, under this language, is distributive not only as to the general groups enumerated, but also to classes within the group. In dealing with enterprise of such dimensions, the right or administrative power created can only mean that Parliament had in mind a flexible applicability; any other intention must have been indicated by language of specific limitation.

The Crown's position is, first, that the grant of an allowance lies entirely within the discretion of the Minister, and alternatively, that deductions sufficient to satisfy any right given by the statute have already been claimed and allowed in income returns submitted.

I think it necessary, at the outset, to clarify the conception of what is intended by the paragraph. The company in its business, acquires timber limits for the purpose of their operation, terminating in the sale of milled lumber. It does not purchase either the land or the standing timber outright, but it holds an interest through the agreements mentioned. For that, as to two of the berths, it has paid, first, what is known as the price of the berth, a sum generally competitive, for the grant of the interest; then, what are called "timber dues", in this case a charge of so much on each 1,000 feet board measure of the lumber produced; and finally, ground rent, taxes, fire rates, etc. The third was acquired under competitive bidding of dues payable, plus the last items. For the operation itself, there are the disbursements for mills, plant, roadways, bridges, wages and other usual expenses.

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Accounting principle which allocates outlays to capital and operation, conceives capital in two forms, fixed and working or circulating. So far as fixed assets may be partially consumed or worn out during the operation, the principle of depreciation applies and excludes that element of capital from net income; obsolescence similarly takes care of wastage in operating value. Ordinary working capital is kept intact by return from gross income. There remains what may be called consumable or wasting capital.

Here the distinction between capital and assets becomes material. Capital is essentially the funds brought together for the purpose of setting the enterprise under way; but in dealing with depreciation, depletion or obsolescence, the attention is directed primarily to the asset or property by which it is represented. In relation to these elements of accounting, however, the asset must be regarded in terms of its capital value. Normally that value is cost and is conceived as distributed throughout the property; and for depletion we must look to the property in the aspect of that value unless by the terms of the statute or by the discretion of the Minister some other basis is prescribed or allowed.

In the present case, admittedly the company has recovered by way of deductions from its income all of the outlay, capital and operating, which it has put into the business. What is contended is that it has a valuable asset in the standing timber; that the capital employed in the operations and allowed was deductible as expense necessary to earning the income; and that the right to depletion is in respect of the remaining asset over and above any capital investment.

The express language of the statute throws little light on what is intended. Section 6 (1), paragraphs (*a*) and (*b*) are as follows:

> 6. (1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;
>
> (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act;

The implication of (*a*) seems to be that all disbursements or expenses "wholly, exclusively and necessarily"

laid out or expended to earn the income are deductible items; and (*b*) appears to deal only with fixed capital assets; and it is not wholly clear whether the deductions in this case were claimed or allowed under 6 (*a*) or 5 (1) (*a*).

Under accounting theory, depreciation and obsolescence in fixed assets may, perhaps, be looked upon as value used up "wholly, exclusively and necessarily" in the earning of the income and so expenses to be taken into the account; but they are not mathematically measurable and resort is necessary to such standards as will approximate the averages in experience. For that reason, allowances for these two items must be brought within some judgment and hence we have them removed from the general field of expense and made subject to the Minister's determination.

A further complexity arises in enterprise in which investment takes not only the ordinary and commercial risks, but also risks of physical speculation. Large sums of money are spent in sinking mining pits and building plants or drilling oil or gas wells; but the recoverable quantities of these substances are in fact largely unknown. Virtually the total funds of a company may be committed exclusively to a venture of uncertain production and length of life. On what basis can there be assurance of the recovery of outlay in such case "wholly, exclusively and necessarily" made before a net gain can be said to have been reached? It is this desideratum that the allowance for exhaustion is, I think, intended to supply. It calls for judgment of experience; and considering the unknown factors in the complication of actual operations in the mining industry, and the different accounting methods or measures by which the object in view might be attained, any award made by the Minister "as just and fair" on that broad basis of fact would be unchallengeable.

We have thus three items of necessary expense, depreciation, obsolescence and exhaustion placed in the discretionary judgment of the Minister; and with the general operating expense, they constitute the debit to be made against gross income before profit is reached. But just

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as clearly, if they are in fact included as general expense, they cannot be duplicated under these special deductions.

Now, Parliament might have in mind the extension of such an allowance beyond capital value as a means of stimulating enterprise in these fields; that for the risk of investing $100,000 in a gold mine, in addition to the provision of return of the investment, and as a bonus to the industry, a measure of further exemption from taxation in the net profit should be made. This would place on the Minister the duty of administering the Act for a purpose foreign to its main object. No doubt the economic health of these particular industries is sensitive to a tax on income; but having regard to the purpose and structure of the Act, the allowance to be given is not, in my opinion, intended to conflict with the principle of taxation of the net gains. If that were not so, I should expect to see the statutory language clear and precise.

The evidence on discovery of Mr. Elliot, representing the respondent, particularly where he indicates the considerations presented to the Department by the mining interests, does not support the appellant's contention. What these interests were seeking was security against the failure of an operation to return the funds committed to its hazard, but that has nothing to do theoretically with the making of allowances out of what is otherwise admittedly net income.

It is, therefore, sufficient to say that whatever the effect of depletion allowance may, in particular cases, be, it nevertheless is designed only to enable the Minister broadly in time, factors and basis, to afford assurance of the recovery of investment committed to the risk undertaken. But what is to be the basis of returnable value? For instance, cost may be inapplicable to property demised: special considerations might affect it in mining ventures, and, as in the United States, place it either at the fair market value at the time of discovery, or a value ultimately ascertained by a percentage of gross return. But, apart from the latter, where there has in fact been a return of basic value or investment, the warrant for

allowance has been removed. If here the measure, under the statute, is to be taken to be cost, then without more the case for the appellant disappears.

Even conceding an absolute right to an allowance, it is necessarily bound by the limitation of value spread evenly over the asset as a whole; and since the statute does not prescribe the basis, the Minister must be free in any case to adopt one reasonably designed to carry out the purpose intended. On this assumption, I take the word "may" to include a discretion in that choice; and that the basis of actual capital investment may be used by him in any case is, I think, beyond doubt. Ordinarily the increments of return would attach to every unit of asset and value, but here the whole has been recovered by relation to part only of the asset.

It is objected that in a case of logging operations in British Columbia, an allowance for exhaustion was made and it is urged that the statute implies an equality of treatment to all operators which has here been denied. But the evidence falls far short of establishing a similarity of conditions sufficient to raise the question of equality; and as the lumber industry as a whole is not a single unit for discretionary treatment, no foundation for the complaint has been laid.

The appeal should, therefore, be dismissed with costs.

ESTEY J.:—This is an appeal from a judgment in the Exchequer Court of Canada affirming the Minister's decision refusing an allowance for exhaustion of timber limits in the appellant's 1941 income tax assessment.

The appellant carries on the business of logging and general milling in the province of Alberta. In the 1941 tax year it cut timber upon three timber limits under licences from the Government of Alberta and numbered respectively 1161, 1727 and 6722. The appellant has been a licensee of timber limit no. 1161 since 1904, and of no. 1727 since 1912, at first in association with others but in the year 1941 and for years prior thereto it was the sole licensee. In 1940 the appellant became the licensee of timber limit no. 6722. These licences are from year to year with a right in the licensee, upon compliance with the conditions specified, to renew from year to year (now

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by 1939 S. A., c. 10, s. 49 (*e*) not renewable after the tenth year). These licences give to the licensee exclusive possession of the premises and the property in timber as and when cut.

In 1941 the appellant claimed as a deduction in determining its income tax an allowance for the exhaustion of these timber limits under section 5(1) (*a*) of the *Income War Tax Act*, 1927 R.S.C., c. 97, which the Minister disallowed. Section 5 (1) (*a*) reads as follows:

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

(*a*) The Minister in determining the income derived from mining and from oil and gas wells and timber limits may make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair, and in the case of leases of mines, oil and gas wells and timber limits the lessor and lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

The Minister affirmed his disallowance as follows:

The Honourable the Minister of National Revenue having duly considered the facts as set forth in the notice of appeal, and matters thereto relating, hereby affirms the said assessment on the ground that the taxpayer is not entitled to an allowance under the provisions of subsection (*a*) of section 5 of the *Income War Tax Act* for the exhaustion of timber limits owned by the Crown in right of the province of Alberta on which the taxpayer has been licensed to cut timber. Therefore on these and related grounds and by reason of other provisions of the *Income War Tax Act* and *Excess Profits Tax Act* the said assessment is affirmed.

At the trial the Crown set up a further reason for this disallowance by amending its defence as follows:

17. That in the years prior to the taxation year 1941 the Minister has allowed to the Appellant amounts for exhaustion which have enabled the Appellant to recover, free of income tax, its entire cost of any timber licences or permits held by it, and in making the said allowances the Minister has exercised the discretionary power vested in him by the provisions of section 5 1 (*a*) of the *Income War Tax Act*.

The learned trial judge found as follows:

As I have found, the appellant is not the owner of the timber being exhausted, and has no depletable interest therein. In addition, it has already benefited by deductions from its income over a period of years of all costs which could possibly be called capital costs (as well as all costs of operation) and, therefore, by such deductions, has been allowed to keep its capital investment intact. And while, apparently, the appellant had never previously claimed these deductions as depletion under

section 5 (1) (*a*), but rather by way of depreciation or as disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, they were in fact allowed. The result was that the appellant was eventually able to write off its full capital investment.

The appellant does not dispute these findings of fact but submits that under section 6 (*a*) it was entitled to deduct the costs of acquiring timber as disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income. Further, that the allowance for the exhaustion of timber limits under section 5 (1) (*a*) is an allowance unrelated to costs or to the nature of its holdings in the land; that under this section if the income is derived from timber limits, then in the determination of the assessment an exhaustion allowance must be made. This it suggests is supported in the view that lumbering is an extractive industry, short-lived and hazardous both from an economic and operating point of view and therefore:

> * * * Parliament, probably because of these hazardous conditions and the short life of the ordinary extractive industry made this extra allowance for exhaustion over and above and completely unrelated to cost of the product or substance and the land from which it is extracted.

The record in this case justifies the conclusion that Parliament had in mind some such considerations and concluded that the ordinary methods of determining depreciation (which prior to the amendment was in the same section) and other appropriate allowances were not always adequate to deal with the investments in a business subject to such risks as lumber, but it must not be overlooked that section 5 is dealing with exemptions and deductions, and there is no suggestion that the allowance is to be treated as other than a deduction or an exemption.

The language of the section supports the appellant's contention that its interest in the land as lessee, licensee or otherwise (except in cases of leases where provision is made for apportionment) is not the material consideration but rather that its income is derived from timber limits which is here admitted.

The appellant's contention then is that when its income is derived as it is here in 1941 from timber limits it has a

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statutory right to an exhaustion allowance under section 5 (1) (*a*), or as its counsel otherwise states his contention:

> * * * the Minister had an administrative duty of a quasi judicial character to make a reasonable allowance for the exhaustion of timber limits to those who derive their income from timber limits.

This submission is made upon the authority of the Privy Council decision in *Pioneer Laundry & Dry Cleaners Limited* v. *Minister of National Revenue* (1), where Lord Thankerton stated at p. 136:

> The taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on whcih the assessment in dispute is based. The Minister has a duty to fix a reasonable amount in respect of that allowance * * *

That decision was made under section 5 (1) (*a*) prior to the amendment thereof in 1940. The section prior to that amendment read:

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:
>
> (*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in determining the income derived from mining and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair; * * *

As amended by 1940 Dom., c. 34, s. 10, the section reads in part as follows:

> 10. Paragraph (*a*) of subsection one of section five of the said Act, as amended by section four of chapter twelve of the statutes of 1928, is repealed and the following substituted therefor:
>
> (*a*) The Minister, in determining the income derived from mining and from oil and gas wells and timber limits may make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair, . . .

This 1940 amendment deleted the provision relative to depreciation from this section and as amended placed it in section 6 (*n*). That part with respect to timber limits was left in section 5 (1) (*a*) but the word "shall", where it appears before the phrase "make such an allowance", was changed to "may". The section, therefore, as it now reads gives to the taxpayer no statutory right to an allowance as it did with respect to a reasonable amount (with reference to depreciation), but leaves the question of "an allowance for the exhaustion" to be dealt with by the Minister. The Minister first decides whether he may make "such an allowance" for the exhaustion of the timber

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limits, and if he so decides, then he must fix an amount that "he may deem just and fair". The effect of this amendment is that the Minister may, not that he must, make such an allowance and therefore there is no absolute statutory right to an exhaustion allowance. The fact that the permissive word "may" is used would justify this conclusion under section 37 (24) of the *Interpretation Act*, 1927 R.S.C., c. 1, but in this instance it is emphasized by the fact that Parliament changed the imperative word "shall" to the permissive "may". *Conger* v. *Kennedy*, (1); *Corporation of the City of Ottawa* v. *Hunter*, (2).

It was suggested that the concluding words of section 5 (1) (*a*) "his determination shall be conclusive" meant that the Minister's determination should be final. It would appear rather that these words relate only to a disagreement which may arise between the lessor and the lessee, in which case the Minister makes the apportionment and "his determination shall be conclusive". It does not refer back to the earlier part of the section dealing with the granting or refusing of an allowance.

The nature and character of the duties imposed upon the Minister under this section 5 (1) (*a*) would appear to be unchanged by the amendment. They remain, as stated by Lord Thankerton in *Pioneer Laundry & Dry Cleaners Limited* v. *Minister of National Revenue* (3):

> * * * so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpayer; but it is equally clear that the Court would not interfere with the decision, unless, as Davis J. states, "It was manifestly against sound and fundamental principles."

If, therefore, granting as the respondent contends, the Minister now has a discretion to make or refuse an allowance, the question still remains, did he in exercising that discretion violate sound and fundamental principles?

The amended statement of defence set out that the Minister in determining the assessment for income tax in the year 1941 refused an exhaustion allowance because the appellant had, by virtue of previous allowances, been allowed free of income tax its entire cost of any timber licences or permits. In the exercise of his discretion the

(1) (1896) 26 Can. S.C.R. 397, at 404.
(2) (1900) 31 Can. S.C.R. 7, at 10.
(3) [1940] A.C. 127, at 136.

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Minister therefore decided that no further exhaustion allowance should be made in 1941. Counsel for the respondent contended that these allowances prior to 1941 could not have been made under any of the provisions of section 6 but only under those of section 5 (1) (*a*). The learned trial judge intimated that these allowances were claimed under section 6 but in fact, and this is not disputed, these amounts were allowed, and as the learned judge found:

> * * * it has already benefited by deductions from its income over a period of years of all costs which could possibly be called capital costs (as well as all costs of operation) and, therefore, by such deductions, has been allowed to keep its capital investment intact.

It seems that even if these allowances were made under section 6, it is nevertheless open to the Minister in the exercise of his discretion to conclude, after giving to the parties every opportunity to present their views (which he did in this case), that in a given case the taxpayer has received so much by way of either depreciation or exhaustion allowances that no further exhaustion allowance should be made. Certainly the record here indicates that there is at least this relation between depreciation and exhaustion that they are both deductions or allowances with respect to capital investments and that in exercising his discretion with respect to an exhaustion allowance the Minister may take into consideration all allowances already made in relation thereto. As previously intimated, it is the hazardous nature of the industry that makes these determinations so difficult and therefore the whole matter is left in the discretion of the Minister. The statute therefore under section 5 (1) (*a*) imposes no obligation upon the Minister to make an exhaustion allowance and it would seem that in arriving at his decision he may take into account any facts or circumstances certainly related to the capital investment in order to arrive at his decision.

This exhaustion allowance being a matter entirely in the discretion of the Minister, and he having arrived at his conclusions as above indicated, I am not prepared to say that he violated any sound and fundamental principles.

The other or alternative basis suggested in the Minister's affirmation of the disallowance, that he had refused the allowance because the appellant was not the owner of the timber limits, raises questions of an entirely different character with regard to which in exercising his discretion it is not necessary to here determine.

In the course of argument it was suggested that the Minister in refusing the exhaustion allowance in 1941 acted in an arbitrary if not a discriminatory manner. In support of this it was pointed out that he had made such allowances in other extractive industries, such as coal mines and the mines of precious metals and even to lumber interests in the Cascades. It is surely a notorious fact that conditions with respect to both mining and lumbering vary materially in different parts of Canada. This fact, together with the difficulty in determining what the allowance should be in any given case, no doubt caused Parliament to leave the problem to be dealt with by the Minister and in a way that he could exercise his discretion either with respect to different extractive industries, to geographical divisions or individual cases. The fact that those engaged in the lumbering industry in the Cascades area or in any other area are treated on a basis different from those operating in Alberta or some other part does not in any way suggest discrimination but merely corroborates what has been established in this case, that the great differences with respect to the operation of the industry in different parts are such as may justify a variation in the allowances, and in the absence of evidence to the contrary it cannot be concluded that the decisions arrived at are either arbitrary or discriminatory.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Smith, Clement, Parlee & Whittaker.*

Solicitor for the respondent: *W. S. Fisher.*

Applied,

1946
*Oct. 7
1947
*Feb. 4

HIS MAJESTY THE KING ..... APPELLANT;

AND

GERMAIN BENDER (SUPPLIANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Workmen's Compensation—Negligence—Employee of the Crown (Dom.) awarded compensation, in accordance with provisions of Government Employees Compensation Act (R.S.C. 1927, c. 30, as amended in 1931, c. 9), by Workmen's Compensation Commission of Province of Quebec for injuries suffered in Quebec—Right of employee further to claim damages against the Crown under s. 19(c) of Exchequer Court Act (R.S.C. 1927, c. 34)—Whether such right affected by provisions of Workmen's Compensation Act of Quebec—Whether doctrine of election applies.

An employee of the Crown (Dom.) who has, under the *Government Employees Compensation Act* (R.S.C. 1927, c. 30, as amended in 1931, c. 9), claimed and received compensation for personal injuries by accident arising out of and in the course of his employment is not thereby barred from pursuing a claim for damages against the Crown for such injuries under s. 19(c) of the *Exchequer Court Act* (R.S.C. 1927, c. 34).

The said enactments are not repugnant to each other; they deal with two entirely different matters; s. 19(c) of the *Exchequer Court Act* applies only where negligence is shown, while the *Government Employees Compensation Act* applies whether or not negligence on anyone's part is proved; the right thereunder arises, not out of tort, but out of the workman's statutory contract.

In the present case, the accident occurred in the province of Quebec, and, in accordance with provisions of said *Government Employees Compensation Act*, compensation was awarded by the Workmen's Compensation Commission of Quebec. S. 15 of the Quebec *Workmen's Compensation Act* (R.S.Q. 1941, c. 160) enacts in effect that the only recourse of a workman against his employer by reason of accident to him by reason of or in the course of his work for such employer is for compensation under that Act.

Held: Said s. 15 of said Quebec Act is not (nor is s. 13(1) of that Act nor art. 1056(a) of the *Civil Code*) made applicable by the provisions of s. 3(1) of said *Government Employees Compensation Act*. What was determined by the Quebec Commission was the amount of compensation the right to which was given by said s. 3(1) of said Dominion Act, and not the resulting effects upon other rights against the Crown given by a different Dominion Act. Said s. 15 of the Quebec Act is not incorporated in the *Government Employees Compensation Act*. (*Per* Kellock J.: While it is true that the "liability" is to be determined under provincial law, yet once the case is brought within the class where liability exists, the reference to the provincial

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

Act is exhausted and such a provision as that in said s. 15 is not made applicable). Cases affirming the proposition that the law of the province in which an accident occurred is applicable in determining the Crown's liability under s. 19(*c*) of the *Exchequer Court Act* have no application in determining whether a claim made and allowed under the *Government Employees Compensation Act* deprives a claimant of his remedy under the *Exchequer Court Act*. The two enactments deal with entirely different matters and separate and distinct rights are conferred.

An alternative contention by the Crown that, assuming that claims under both Acts existed, the claimant was put to his election, and, having claimed and received compensation under one Act, he had waived any right he might have under the other, was rejected. While there was but the one injury, the causes of action were different and the doctrine of election did not apply.

Judgment in the Exchequer Court, [1946] Ex. C.R. 529, on a question of law, affirmed.

APPEAL by the Crown from the judgment of Thorson J., President of the Exchequer Court of Canada (1), holding, on a question of law argued before trial of the action, that an employee of the Crown, who has, under the *Government Employees Compensation Act,* R.S.C. 1927, c. 30 (as amended in 1931, c. 9), claimed and received compensation for injuries arising out of and in the course of his employment is not thereby barred from pursuing his claim for damages for such injuries under s. 19(*c*) of the *Exchequer Court Act.*

The suppliant was employed in the province of Quebec by the Inspection Board of the United Kingdom and Canada, the employees of which were, by Order in Council, brought under the provisions of the said *Government Employees Compensation Act.* The accident causing the injuries occurred on June 7, 1941, in the province of Quebec, and the suppliant was awarded compensation, in accordance with provisions of the said *Government Employees Compensation Act* by the Workmen's Compensation Commission of the Province of Quebec. In the present action the suppliant claimed damages against the Crown (under s. 19(*c*) of the *Exchequer Court Act*), alleging that his injuries were the result of negligence of officers or servants of the Crown.

(1) [1946] Ex. C.R. 529; [1947] 1 D.L.R. 343.

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The present question of law was, in effect, whether, assuming the acts or omissions alleged in the petition of right to be established, a petition of right lay.

L. A. Pouliot, K.C. and *C. Stein* for the appellant.

Fernand Choquette, K.C. for the respondent.

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

KERWIN J.—In this appeal from a judgment of the Exchequer Court answering affirmatively a question of law set down for disposition before the trial of the action, it is necessary to notice what that question of law was and the amendments made in the Exchequer Court to it and to the petition of right. But first, for a proper understanding of the matter, the substance of the allegations in the petition of right which, of course, must be taken as established, should be set forth.

While in the employment of the Inspection Board of the United Kingdom and Canada, the suppliant was injured on June 7, 1941, in the Province of Quebec. Paragraphs 3 and 13 of the petition of right originally read as follows:

3. Que votre requérant se trouvait ainsi à l'emploi tant du Conseil d'Inspection du Royaume-Uni et du Canada (Inspection Board of the United Kingdom and Canada) que du Ministère des Munitions et Approvisionnements (Munitions and Supply Department) et du Gouvernement de Sa Majesté pour le Canada;

13. Que cette compensation est dérisoire en comparaison des dommages subis par votre requérant qui a ainsi perdu son avenir et son intégrité physique, "alors qu'il était au service de Sa Majesté et de la Défense Nationale de son pays:"

On the argument of the question of law in the Exchequer Court, the petition of right was amended by striking out paragraph 3, and that part of paragraph 13 which appears in quotation marks. Paragraph 9 also was amended by inserting the words "serviteurs ou employés" in lieu of the word "préposés" in the following sentence: "Que cet accident est attribuable à la négligence grossière et inexcusable des préposés de Sa Majesté". It results from these amendments that what is alleged is that the suppliant was employed by the Inpection Board and, while in its employment, was injured through the negligence of the

servants or employees of His Majesty,—the claim being made under section 19(*c*) of the *Exchequer Court Act* as amended in 1938:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

(*c*) 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.

Although it is not alleged that the suppliant claimed compensation through the Quebec Workmen's Compensation Board, there is an award by the latter, dated June 17, 1942, granting the suppliant a monthly sum of $54.16 and another award, dated July 21, 1943, granting him an additional monthly sum of $15.00 down to May 7, 1944. On the other hand, the allegation by the suppliant in his petition of right is merely that he had received $50.00 per month with an additional sum of $30.00 to pay for the services of a nurse. As a matter of fact it was only by Order of the Governor General in Council, P.C. 37/1038, dated February 9, 1942, that the provisions of the *Government Employees Compensation Act,* R.S.C. 1927, chap. 30, as amended, was made to apply to each of certain persons (including the suppliant) "who has been, is now, or may hereafter be employed by the Inspection Board during the period of their employment in Canada to the same extent and in like manner as if each such person was an 'employee' as defined in the said Act". It was further provided by the Order in Council that, as to such persons, it should be deemed to have come into force and operation as and from November 6, 1940. It will be recalled that the suppliant was injured on June 7, 1941. While the petition of right was filed May 23, 1942, that is before either of the two awards made by the Quebec Board, it alleges that the $50.00 per month and the sum of $30.00 were paid through the intervention of the Quebec Board.

We were told that in the Exchequer Court the point was argued as to whether the claim advanced is against a different party to the suppliant's employer,—a distinction being drawn between the Inspection Board and His Majesty the King. However, in the reasons for judgment, after directing that the question of law be amended by striking

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out the references therein to Exhibits D-3, D-4 and D-5 and adding the necessary reference to Exhibit D-3*a*, and identifying the compensation received by reference to Exhibits D-6 and D-7, it is stated:

> In effect, the question of law is whether the suppliant, having claimed and received compensation for his injuries under the *Government Employees Compensation Act,* R.S.C. 1927, chap. 30, as amended in 1931, can have any claim for damages for such injuries under section 19(*c*) of the *Exchequer Court Act,* R.S.C. 1927, chap. 34, as amended in 1938.

Furthermore, in the formal order it is recited that the action came on before the Court "on the argument on the question of law as to whether the suppliant, an employee of the Crown, who has claimed and received compensation," etc.

Under these circumstances, it should be assumed for the purpose of this appeal, but for that purpose only, that the suppliant was an employee of the Crown and that he claimed and received compensation under the *Government Employees Compensation Act.* In that situation it has been decided in the Exchequer Court that, notwithstanding the latter circumstance, a petition of right for damages lies under section 19(*c*) of the *Exchequer Court Act.* With that conclusion I agree.

Subsection 1 of section 3 of the *Government Employees Compensation Act,* R.S.C. 1927, chapter 30, as amended by chapter 9 of the 1931 Statutes, reads as follows:

> 3(1). An employee who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of an employee whose death results from such an accident, shall, notwithstanding the nature or class of such employment, be entitled to receive compensation at the same rate as is provided for an employee, or a dependent of a deceased employee, of a person other than His Majesty under the law of the province in which the accident occurred for determining compensation in cases of employees other than of His Majesty, and the liability for and the amount of such compensation shall be determined subject to the above provisions under such law, and in the same manner and by the same board, officers or authority as that established by such law for determining compensation in cases of employees other than of His Majesty, or by such other board, officers or authority, or by such court as the Governor in Council shall from time to time direct: Provided that the benefits of this Act shall apply to an employee on the Government railways who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of such an employee whose death results from such an accident, to such an extent and such an extent only as the Workmen's Compensation Act of the

province in which the accident occurred would apply to a person in the employ of a railway company or the dependents of such persons under like circumstances.

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As we have seen, by virtue of the provisions of Order in Council P.C. 37/1038, dated February 9, 1942, this subsection applied to the suppliant because he had been employed by the Inspection Board. Assuming as I do that he claimed and received compensation under the *Government Employees Compensation Act,* it must also be taken as established that he had been caused personal injury by accident arising out of and in the course of his employment. The payment of such compensation is not dependent upon the injury having been caused by negligence. The *Government Employees Compensation Act* was first enacted in 1918 by chapter 15, at which time the forerunner of paragraph (*c*) of section 19 of the *Exchequer Court Act* (as enacted by chap. 33 of the 1917 Statutes) read as follows:

(*c*) 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.

The amendment made in 1938 to the *Exchequer Court Act* struck out the words at the end "upon any public work".

It cannot be ascertained from the petition of right whether the negligence of the Crown's servants or employees complained of occurred while they were upon any public work, nor does it appear whether these officers or servants were members of the naval, military or air forces of His Majesty in right of Canada so as to fall within section 50A of the *Exchequer Court Act* as enacted in 1943 by chapter 25. It can make no difference, however, whether the applicable provision of the *Exchequer Court Act* be taken to have been enacted before or after the first *Government Employees Compensation Act* of 1918. At whatever stage the two enactments are compared, it is clear that they are dealing with two entirely different matters, since the *Exchequer Court Act* applies only where negligence is shown, while the *Government Employees Compensation Act* applies whether negligence on any one's part is proved or not.

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The appellant contends that since section 3 of the *Government Employees Compensation Act* provides that the suppliant is thereby

> entitled to receive compensation at the same rate as is provided * * * under the law of the province in which the accident occurred * * * and the liability for and the amount of such compensation shall be determined subject to the above provisions under such law,

sections 13(1) and 15 of the Quebec *Workmen's Compensation Act,* R.S.Q. 1941, chapter 160, and Article 1056(*a*) of the Quebec *Civil Code* are made applicable. These enactments read as follows:

Quebec *Workmen's Compensation Act:*

> 13(1). No action before any court of justice shall lie for the recovery of the compensation whether it is payable by the employer individually or out of the accident fund, but all claims for compensation payable by the employer or out of the accident fund shall be heard and determined exclusively by the Commission, whose decision shall be final.
>
> 15. Accidents happening on or after the 1st of September, 1931, shall be governed by the provisions of this act and the compensation under this act shall be in lieu of all rights, recourses and rights of action, of any nature whatsoever, of the workman, of the members of his family, or his dependents against the employer of such workman by reason of any such accident happening to him on or after the said 1st day of September, 1931, by reason of or in the course of his work for such employer, and no action in respect thereof shall lie in any court of justice.

Article 1056(*a*) of the Quebec *Civil Code*:

> No recourse provided for under the provisions of this chapter shall lie, in the case of an accident contemplated by the *Workmen's Compensation Act,* 1931, except to the extent permitted by such Act.

The article of the Code does not advance the matter beyond the situation under the Quebec *Workmen's Compensation Act,* but it is alleged that section 15 of the latter does not deal with a consequential matter but determines the essential nature of the compensation payable under that Act and the liability imposed thereby. On the basis of that argument, it is contended that the decision of this Court in *Ching* v. *Canadian Pacific Railway Company* (1) is not applicable. It was there decided that an employee of the Dominion, having received compensation under the *Government Employees Compensation Act* through the intervention of the Alberta Workmen's Compensation Board, could still claim damages against a third party, whose employees had negligently caused the injury complained of.

(1) [1943] S.C.R. 451.

It is pointed out at page 458 that the important words of subsection 1 of section 3 of the Dominion Act are "and the liability for and the amount of such compensation shall be determined * * * in the same manner and by the same board" and it is stated that

> it is the liability of the Dominion Government to pay and the amount of the compensation, the right to which is given earlier in the section, which are to be determined; not the resulting effects upon collateral rights against third parties.

In the present case, where, for the purpose of the present appeal, the right claimed is against the same party, it should also be held that what was determined by the Quebec Workmen's Compensation Board was the amount of the compensation the right to which is given earlier in subsection 1 of section 3 of the *Government Employees Compensation Act,* and not the resulting effects upon other rights against the Crown given by a different Dominion statute. Section 15 of the Quebec Act is not incorporated in the Dominion *Government Employees Compensation Act.*

Such cases as *Ryder* v. *The King* (1), *The King* v. *Armstrong* (2), and *The King* v. *DesRosiers* (3), affirming the proposition that the law of the province in which an accident occurred is applicable in determining the Crown's liability under section 19(*c*) of the *Exchequer Court Act,* have no application in determining whether a claim made and allowed under the *Government Employees Compensation Act* deprives a claimant of his remedy under the *Exchequer Court Act.* The two enactments are dealing with entirely different matters since, as Viscount Haldane pointed out in connection with the British Columbia *Workmen's Compensation Act* in *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (4), the right under the Compensation Act arises, not out of tort, but out of the workman's statutory contract. Separate and distinct rights are conferred and the present claim is not barred.

An alternative submission by the appellant was that, assuming that claims under both Acts did exist, the suppliant was put to his election, and having claimed and received compensation under one Act, he had waived any

(1) (1905) 36 Can. S.C.R. 462.
(2) (1908) 40 Can. S.C.R. 229.
(3) (1908) 41 Can. S.C.R. 71.
(4) [1920] A.C. 184 at 191.

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right he might have under the other. However, while there is but the one injury, the causes of action are different and the doctrine of election does not apply.

The appeal should be dismissed with costs and without prejudice to the right of the suppliant to contend that he was employed by a party other than the Crown.

KELLOCK J.—This is an appeal from a judgment or order of the Exchequer Court, dated 2nd August, 1946, determining a question of law which, shortly stated, may be said to be whether or not the respondent is entitled to maintain this action for damages for personal injuries under section 19(*c*) of the *Exchequer Court Act,* in view of the fact that he has been awarded, and is in receipt of compensation in respect of these injuries under the *Government Employees Compensation Act,* R.S.C., ch. 30, as amended by 21-22 Geo. V., ch. 9.

The Petition of Right which, for the purpose of the above question, must be taken as admitted, alleges that the respondent was on the 7th June, 1941, in the employ of the Inspection Board of the United Kingdom and of Canada and that on that date he sustained the injuries complained of through the negligence of servants of the appellant. It is further alleged that in respect of these injuries the respondent was awarded certain compensation by the Workmen's Compensation Board of the Province of Quebec, payable in instalments, but that such payments were entirely inadequate to compensate the respondent. It appears from the award of the Board that the respondent was totally and permanently disabled as a result of the injury complained of. The question of law came before the learned President of the Exchequer Court, who held that the award and payment of compensation did not disentitle the respondent to maintain the action.

In support of the appeal it is argued in the first place that payment of compensation under the *Government Employees Compensation Act* in respect of an accident in the Province of Quebec is in lieu of all rights, recourse and rights of action of any nature whatsoever against His Majesty by reason of the accident in respect of which compensation was paid. This contention is based upon the

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view that section 15 of the *Workmen's Compensation Act* of Quebec, being Ch. 160, R.S. 1941, which is to the above effect, is made applicable in the circumstances by the provisions of section 3 of the Dominion Act. The relevant portions of section 3 as enacted by the amending statute of 1931 are as follows:

> 3. (1) An employee who is caused personal injury by accident arising out of and in the course of his employment * * * shall, notwithstanding the nature or class of such employment, be entitled to receive compensation at the same rate as is provided for an employee * * * of a person other than His Majesty under the law of the province in which the accident occurred for determining compensation in cases of employees other than of His Majesty, and the liability for and the amount of such compensation shall be determined subject to the above provisions under such law, and in the same manner and by the same board, officers or authority as that established by such law for determining compensation in cases of employees other than of His Majesty * * *

"Employee", as defined in section 2, includes persons in the service of His Majesty who are paid a direct wage or salary by or on behalf of His Majesty, with certain exceptions not applicable in the case at bar. Some discussion arose during the argument as to whether or not the respondent was in fact a servant of His Majesty, but as the question of law was dealt with below upon the basis that he was, the appeal should be similarly dealt with, leaving it open to the parties to raise the question at the trial if such question is otherwise open.

As provided by section 3, an employee of His Majesty suffering injury by accident is entitled to receive compensation at the same rate as an employee of a person other than His Majesty would be entitled to receive under the law of the province in which the accident occurred (in the case at bar, in the province of Quebec); and the Workmen's Compensation Board of the province is to determine the liability for, and the amount of such compensation. Such determination is to be made under the provincial law in the same manner as is established by such law for the determination of cases of employees other than of His Majesty. The phrase "subject to the above provisions" in subsection (1) of section 3 refers to the condition laid down

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in the early part of the subsection, that the personal injury must be injury by accident arising out of and in the course of the employment.

Section 15 of the provincial Act provides that the compensation "under this Act" is to be in lieu of all other rights of action of the workman against his employer, but I see nothing in the Dominion Act which incorporates or makes this provision of the provincial Act applicable to a claim for compensation arising under the terms of the Dominion Act. It is true that the "liability" is to be determined under provincial law. No doubt, if an employer other than His Majesty would have no liability to pay compensation, *e.g.*, "where the injury is attributable solely to the serious and wilful misconduct of the workman" (section 3(1)(*b*)), neither would the Crown in similar circumstances be liable to pay compensation to its employee. But once the case is brought within the class where liability exists, the reference to the provincial Act is exhausted and such a provision as that in section 15 is not made applicable. While the decision of this Court in *Ching* v. *Canadian Pacific Railway Company* (1) does not specifically cover the question arising in the present case, the principle of that decision is in accord with the view above expressed. At page 458 Rand J., in delivering the judgment of the Court, said: "It is the liability of the Dominion Government to pay and the amount of the compensation, the right to which is given earlier in the section", which are to be found by reference to provincial legislation "unencumbered by a referential incorporation of provisions of the provincial Act dealing with consequential matters".

Subsection 1 of section 13 of the provincial Act is also appealed to by appellant but, in my opinion, that section has no application. The present proceeding is not an action for the recovery of compensation within the meaning of that subsection. Much the same may be said of section 1056(*a*) of the *Civil Code*.

Appellant contends further that under section 19(*c*) of the *Exchequer Court Act* the result contended for is attained and that the law of Quebec which is to be applied in

(1) [1943] S.C.R. 451.

determining the liability of the Crown includes all provisions of provincial legislation which would provide a defence to a private employer with respect to a claim for compensation under the provisions of the provincial Act. *Ryder* v. *The King* (1) and similar authorities are cited. This argument is not, in my opinion, well founded. While it is true that by the law of Quebec a workman entitled to "workmen's compensation" is not, because of the provisions of the provincial legislation already discussed, entitled to any other remedy against his employer, the respondent here is not affected. He is not entitled to "workmen's compensation" under the provincial law but under the Dominion statute and, for the reasons already given, the provisions of the provincial legislation which would bar a workman claiming compensation thereunder do not apply.

It is further argued that the *Government Employees Compensation Act* is a special Act covering *pro tanto* the same ground as the provisions of the general Act, *i.e.*, section 19(*c*), and, as Parliament cannot have intended that a person injured should be compensated twice, the provisions of the special statute derogate from those of the general. In the first place it is to be observed that an affirmative statute does not repeal an earlier affirmative statute unless the statutes are repugnant to each other: *Foster's Case* (2), approved in *Garnett* v. *Bradley* (3). In *West Ham Churchwardens* v. *Fourth City Mutual Building Society* (4), A.L. Smith, J. said:

> The test of whether there has been a repeal by implication by subsequent legislation is this: Are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together?

In the case at bar the statutes are not so repugnant.

It may well be that it is not the necessary result of the concurrent operation of the two statutes that, in a case such as the present, the respondent will be paid twice in respect of the same injury. In *Workmen's Compensation Board* v. *Canadian Pacific Railway Co.* (5), which arose under the provisions of the *Workmen's Compensation Act* of British Columbia, it was held that the right to com-

(1) (1905) 36 Can. S.C.R. 462.
(2) 11 Co.R. 56.
(3) (1878) 3 App. Cas., 944.
(4) [1892] 1 Q.B., 654 at 658.
(5) [1920] A.C. 184.

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pensation under the statute was the result of a statutory condition of the contract of employment providing for a scheme of insurance. See also *Trim* v. *Kelly* (1), per Lord Haldane, L.C., at 675-6. If this insurance here in question is to be regarded as an indemnity against loss of wages and other expense which the injured workman incurs by reason of his injury, it may be that the appellant, being at one and the same time the tort-feaser and the person liable to pay the compensation, may be entitled to have the benefit of the compensation paid in case of any damages for which it may be liable. If the compensation is not to be regarded as in the nature of an indemnity, then on the principle of such cases as *Bradburn* v. *Great Western Railway* (2); *Dalby* v. *India, etc., Co.* (3); *Millard* v. *Toronto R. W. Co.* (4); *Tubb* v. *Lief* (5), the respondent will be entitled to compensation and damages. It is not necessary to decide the point on this appeal. I mention this aspect only in connection with the argument that if both statutes stand it will follow as of course that the respondent will recover both the compensation and also damages in full.

It is finally contended on behalf of the Crown that the respondent is obliged to elect as between his right to compensation and the present action and, having claimed compensation, is bound by his choice. In support of this contention, appellant refers to *Wright* v. *London General Omnibus Company* (6). I do not think this case has any application to the case at bar. In *Wright's* case the matter was governed by the particular statute there in question, where the remedies open to the plaintiff were expressly stated to be in the alternative. The other authorities to which appellant refers are also not in point. Election is defined in Wharton's Law Lexicon, 12 Ed., page 317, as: "the obligation imposed upon a person to choose between two inconsistent or alternative rights or claims." I see nothing in the legislation here in question casting any obligation upon the respondent to choose as between his right to compensation arising out of his contract with his employer and the right under a statute giving him in common with all other persons injured by the negligence of a

(1) [1914] A.C. 667.
(2) (1874) L.R. 10, Ex. 1.
(3) (1854) 15 C.B. 365.
(4) (1914) 31 O.L.R. 526.
(5) [1932] 3 W.W.R. 245.
(6) (1877) 2 Q.B.D. 271.

servant of the Crown a right of action to recover the damages sustained by reason of such negligence; *Campbell* v. *Bowes* (1); *Zimmerman* v. *Harding* (2). The fact that the Crown happens to be the employer and also the wrong-doer does not affect the question.

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I would dismiss the appeal with costs.

Appeal dismissed with costs (without prejudice to right of suppliant to contend that he was employed by a party other than the Crown).

Solicitor for the appellant: *F. P. Varcoe.*

Solicitor for the respondent: *F. Choquette.*

1946
*Oct. 23
1947
*Feb. 4

HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Damages—Remoteness—Employee awarded compensation payable by employer under Workmen's Compensation Act for injury in course of employment caused by negligence of third party—Employer suing third party to recover amount of compensation.

C was a switchman in the employ of the National Harbours Board which is, by statute, an agent of the Crown in the right of the Dominion of Canada. While riding, in performance of his duties, on the foot board on the front of an engine on the Board's terminal railway in Vancouver, British Columbia, he was injured by being struck by a gate negligently left by respondent's servants open and projecting on to said railway. Under provisions of *The National Harbours Board Act* (Dom., 1936, c. 42) and the *Government Employees Compensation Act* (R.S.C. 1927, c. 30, and amendments), C, when so injured became entitled to receive compensation from the Crown, to be determined under provisions of the latter Act, and in accordance

*Present: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

(1) (1914) 32 O.L.R. 270 at 280. (2) (1913) 227 U.S. 489 at 493.

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with such provisions he was awarded sums by the Workmen's Compensation Board of British Columbia. For the sums so awarded, which were paid or set aside for payment by the Crown (through said Compensation Board) to C, the Crown sued respondent.

Held: The Crown's action failed on the ground of remoteness; in law, its payment to C under its statutory obligation was not a loss suffered as a direct consequence of respondent's negligence. Also the Crown could not recover in this case on the basis of an action *per quod servitium amisit*, as neither the action as framed nor evidence in the case supported a claim on that basis. (Appeal from judgment in the Exchequer Court, [1946] Ex. C.R. 375, dismissed.)

APPEAL by the Attorney-General of Canada from the judgment of the Honourable Mr. Justice Sidney Smith, Deputy Judge of the Exchequer Court of Canada (1) dismissing the action brought by His Majesty the King on the information of the Attorney General of Canada against the present respondent in which the Crown claimed the sum of $13,839.07, being the amount which the Workmen's Compensation Board of British Columbia, in accordance with provisions of *The National Harbours Board Act* (Dom., 1936, c. 42) and the *Government Employees Compensation Act* (R.S.C. 1927, c. 30, and amendments thereto), determined to be the amount of compensation to which one, Christian, a switchman in the employ of the National Harbours Board (which is, by statute, an agent of the Crown in the right of the Dominion of Canada), became entitled because of injury suffered by him while acting in the course of his employment. The injury was caused when the said Christian, while riding upon the foot board on the front of an engine on the National Harbour Board's terminal railway at Vancouver, British Columbia, was struck by a gate which, as found by the trial Judge, was left negligently by the respondent's servants ajar and projecting over the said railway. The trial Judge's dismissal of the action was on grounds as follows:

> What is here sought is the recovery of monies which by an Act of the Dominion Parliament, the Crown is made liable to pay to its injured servant * * * such an action will not lie. The compensation cannot be regarded as legal damages, for it is not the proximate and direct result of the act complained of * * * The liability of the Crown (Dominion) to pay the compensation arises from an independent intervening cause, namely, an Act of the Dominion Parliament, which lies

(1) [1946] Ex. C.R. 375; [1946] 2 D.L.R. 158.

wholly outside the common law of the province * * * The compensation in question is compensation to an injured servant, payable by the Crown, and is in no sense compensation in the form of damages to the Crown for the loss to His Majesty of a servant's services. Nor is it claimed as such.

F. A. Sheppard, K.C. and *W. R. Jackett* for the appellant.

C. F. H. Carson, K.C. and *D. I. McNeill, K.C.* for the respondent.

KERWIN, J.—On January 15, 1942, Hubert William Christian, a switchman in the employ of the National Harbours Board, while engaged in the performance of his duties on the National Harbours Board Terminal Railway main line in the Province of British Columbia was injured as a result of the negligence of the servants of the Canadian Pacific Railway Company. By *The National Harbours Board Act, 1936,* chapter 42, the Board was created a body corporate and politic and declared to be the agent of His Majesty in His right of the Dominion of Canada. By subsection 2 of section 4, the *Government Employees Compensation Act,* R.S.C. 1927, chapter 30, is made to apply to the employees of the Board, and by the latter Act, as amended by chapter 9 of the 1931 Statutes, an employee who is caused personal injury by accident arising out of and in the course of his employment is entitled to receive compensation at the same rate as is provided for an employee of a person other than His Majesty under the law of the province in which the accident occurred for determining compensation in cases of employees other than of His Majesty. In accordance with these provisions, Christian was awarded by the British Columbia Workmen's Compensation Board the sum of $959.76 compensation for lost time, $523.50 for medical aid, the sum of $150 in cash and, for permanent disability, $49.98 per month for life. The first three amounts were paid by the Board and also the monthly sum from October 20, 1942, to the 30th of September, 1945, which was the last month before the trial on October 16, 1945. This monthly sum will continue during Christian's lifetime. Under the procedure adopted by the Board and the Dominion Government, a certain

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sum of money is kept on hand with the Board, and it is out of this sum that the first three items were paid.

By information, in the Exchequer Court, the plaintiff claimed from the respondent the total of these three items (the second of which was stated to be at the time the information was filed $511.20 but which, by the date of the trial, had been increased to $523.50). The plaintiff also claimed the sum of $12,218.11 which was the amount considered by the Board to be necessary to be set aside to pay the monthly pension for life to a man of Christian's age, thirty-seven. It does not appear whether that particular sum was placed on deposit by the Dominion Government with the Board or whether merely sufficient funds were in their hands to include such a figure. In any event the pension would cease upon Christian's death.

The argument on behalf of the appellant before this Court covered a wide field, including a contention that the plaintiff would at common law have a right to bring an action *per quod servitium amisit*. This is not such an action. It is not alleged that the plaintiff lost Christian's services. On the contrary, in paragraph 7 of the information it is stated that:

> By virtue of the said Government Employees Compensation Act the Plaintiff was obliged to compensate the said Christian for the said injury in an amount to be determined by the Workmen's Compensation Board of the Province of British Columbia and the said Board did determine the compensation to be paid to the said Christian in respect of his said injury at the sum of $13,839.07 * * *;

and in paragraph 8:

> That the said accident to the said Christian, the injury received by him and the damage sustained by the Plaintiff by reason of the obligation so imposed on the Plaintiff to make payment of the aforesaid compensation, were caused solely by the negligence of the Defendant * * *

Furthermore, it appears from Christian's testimony that at the date of the trial he was employed as a telephone operator with the National Harbours Board and there is no evidence as to what extent the Harbours Board lost his services. It is therefore unnecessary to consider what would happen in an action brought on that basis.

Nor was the claim put on any alleged right that the plaintiff might have under or by virtue of the British Columbia *Workmen's Compensation Act* as an employer

whose employee had been injured through the negligence of a third party. If it had been, the question of the jurisdiction of the Exchequer Court to hear the action might have been raised. Even on the basis of the action as actually framed, the respondent suggested in its factum a doubt as to that Court's jurisdiction but before us counsel declined to set up or argue such a point and nothing, therefore, is said upon it.

Reliance was placed by the appellant upon the decision of the Court of Appeal in England in *Re Polemis and Furness, Withy and Co.* (1), and on Lord Russell of Killowen's statement in *Hay (or Bourhill)* v. *Young* (2):

> In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man.

Opinions in the House of Lords in the latter case differed and no doubt there will be cases when it will be necessary to consider the effect of both decisions, but this is not one of them. More to the point is the unanimous judgment of the House of Lords in *Liesbosch (Owners of)* v. *Edison (Owners of)* (3), delivered by Lord Wright. It was there held that in assessing the amount of damages payable by the owners of the steamer *Edison* as solely to blame for the loss of the plaintiff's dredger, the *Liesbosch,* any special loss or extra expense due to the financial position of the parties could not be considered because, as it is put at page 460, "the appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort." It is true that the cause referred to was an antecedent cause, but in the *Hay* case (4), Lord Wright, speaking for himself alone and referring to the *Polemis* case (5), after stating that the second point therein decided, not for the first time but merely reiterated, that the question of liability is anterior to the question of the measure of the consequences which go with the liability, proceeded: "It must be understood to be limited, however, to 'direct' consequences to the

(1) [1921] 3 K.B. 560.
(2) [1943] A.C. 92 at 101.
(3) [1933] A.C. 449.
(4) [1943] A.C. 92, at 110.
(5) [1921] 3 K.B. 560, 571.

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particular interest of the plaintiff which is affected. *Liesbosch (Owners)* v. *Edison (Owners)* (1) illustrates this limitation."

In the present case, if the plaintiff's property had suffered damage as a result of the negligence of the respondent's employees, the plaintiff would undoubtedly have a good cause of action but Christian was not the property of the plaintiff. The payment by the plaintiff in accordance with the *Government Employees Compensation Act* is not a "direct" consequence to the particular interest of the plaintiff which is affected but is too remote.

The appeal should be dismissed with costs.

TASCHEREAU, J.—This is an appeal from the judgment of the Honourable Mr. Justice Sidney Smith, sitting as a judge of the Exchequer Court of Canada, dismissing with costs the appellant's action in damages.

The appellant was the owner of a terminal railway, known as the National Harbours Board Terminal Railway, running east and west and parallel to a spur track leading into the British Columbia Sugar Refinery, in the City of Vancouver, in the Province of British Columbia. On the 15th of January, 1942, one Hubert William Christian, who was riding upon the foot board on the front of the engine, and who was an employee of the Railway, was the victim of a serious accident while in the performance of his duties. As a result of this mishap, one of his legs had to be amputated. The accident was caused by a heavy iron gate, owned by the respondent, which hung from a hinged post immediately north of the terminal railway. Swinging clockwise, it hit Christian who was in front of the engine.

Christian was a servant of the Terminal Railway, and, by virtue of *The National Harbours Board Act*, the *Government Employees Compensation Act* is made applicable to the employees of this railway. Under the provisions of that statute, employees employed by His Majesty the King, and who receive injuries arising out of and in the course of their employment, are entitled to a compensation determined by the provincial Workmen's Compensation Board,

(1) [1933] A.C. 449.

and the amount of that award is to be paid out of the Consolidated Revenue Fund. The relevant part of the *Government Employees Compensation Act* reads as follows:

An employee who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of an employee whose death results from such an accident, shall, notwithstanding the nature or class of such employment, be entitled to receive compensation at the same rate as is provided for an employee, or a dependent of a deceased employee, of a person other than His Majesty under the law of the province in which the accident occurred for determining compensation in cases of employees other than of His Majesty, and the liability for and the amount of such compensation shall be determined subject to the above provisions under such law, and in the same manner and by the same board, officers or authority as that established by such law for determining compensation in cases of employees other than of His Majesty, or by such other board, officers or authority, or by such court as the Governor in Council shall from time to time direct: Provided that the benefits of this Act shall apply to an employee on the Government railways who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of such an employee whose death results from such an accident, to such an extent, and such an extent only, as the Workmen's Compensation Act of the province in which the accident occurred would apply to a person in the employ of a railway company or the dependents of such persons under like circumstances.

As a result of the injury which he suffered, Christian was paid by His Majesty the King, the present appellant, a compensation in the following amounts:

Payments on account of total temporary disability, Jan. 15 to Oct. 20, 1942		$ 959.76
Medical aid payments		511.20
Pension award for partial permanent disability:		
Lump sum	$ 150.00	
Capitalized pension per month ($49.98) for life..	12,218.11	
		12,368.11
Total		$13,839.07

His Majesty the King on the information of the Attorney General of Canada brought action to recover this amount from the Canadian Pacific Railway, but the claim was dismissed in the Exchequer Court. It is alleged that the accident of which Christian was the victim was caused by the negligence of the Company respondent, and it is not disputed that such negligence was the determining cause of the accident. It is also admitted that if Christian had sued the respondent Company for damages, he could

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have recovered on the ground that his injury was the direct result of the negligence of an employee of the respondent.

It is further conceded by the respondent that His Majesty the King, in his capacity of employer, would have a right of action at common law against the respondent, if the servant was so injured as to be unable to perform his service for the appellant. The gist of such an action by the appellant would not then be the injury to the servant but the *loss of service* to the employer. The right of His Majesty the King to institute a *per quod servitium amisit* action under the circumstances of the case, could not be successfully denied.

But the present action is not an action *per quod*. The loss of services has not been pleaded, and the case has not been fought on that basis. There is no claim that the appellant's servant has been so injured as to incapacitate him from performing his service for the appellant. Paragraph 7 of the information filed by the Attorney General is quite unambiguous:

> 7. That the said Christian was an employee in the service of the Plaintiff and was paid a direct wage or salary or on behalf of the Plaintiff and was thereby an employee within the meaning of the Government Employees Compensation Act 1927, R.S.C. Cap. 30 as amended by 1931 S.C. Cap. 9, or alternatively was an employee of the National Harbours Board and therefore deemed an employee of the Plaintiff as defined by the Government Employees Compensation Act by reason of the National Harbours Board Act, 1936, S.C. Cap. 42, Sec. 4, S.S. 2, and the said Christian was caused personal injury by accident arising out of and in the course of his employment. By virtue of the said Government Employees Compensation Act the Plaintiff was obliged to compensate the said Christian for the said injury in an amount to be determined by the Workmen's Compensation Board of the Province of British Columbia and the said Board did determine the compensation to be paid to the said Christian in respect of his said injury at the sum of $13,839.07, computed as follows: [itemized amounts].

It is because the plaintiff compensated his employee Christian, as he was bound to do under the *Government Employees Compensation Act,* that the present Information has been filed. It is to recoup himself for the disbursements made in the discharge of a statutory obligation, that the appellant seeks to recover from the respondent.

The question would be trifling if the amounts paid to Christian by the appellant had been compassionate allow-

ances or pensions, left to the discretion of the employer. The claim for such amounts against the author of the injury would unquestionably fail. But the right to compensation given to the victim of an accident is an accessory to his contract of employment. As the Privy Council said in *Workmen's Compensation Board* v. *C.P.R.* (1), this right "arises, not out of tort, but out of the Workman's Statutory contract". It is a benefit conferred on the employee as a result of his employment. In the case at bar, Christian had a right to claim compensation, and the appellant had the obligation to pay.

When the House of Lords dealt with the *Amerika* case (2) their Lordships had to consider facts which were different from those which give rise to the present controversy, but the law which was applied is, I think, relevant.

One of His Majesty's submarines was run into and sunk by a steamship, and the crew were drowned. The Commissioners for executing the Office of Lord High Admiral of the United Kingdom took action against the owners of the ship, and claimed as an item of damage the capitalized amount of the pensions payable by them to the relatives of the deceased men. It was held that the claim failed, and one of the grounds for dismissing it was that the pensions were voluntary payments in the nature of compassionate allowances. Lord Parker of Waddington said at page 42:

> These pensions and allowances are granted under statutory authority, but it does not appear that their grant formed any part of the contract between the Admiralty and the seamen whose lives have been lost through the respondents' negligence. They are, it seems, compassionate pensions and allowances only, which, from a legal standpoint, the Admiralty might have granted or withheld at its discretion. Under these circumstances they cannot constitute an item of damage.

And Lord Sumner, at page 60, also said:

> In the present case the sums claimed were paid to widows and other dependants of the drowned men under Admiralty Regulations (pars. 1974 A1 and 2011A), which expressly declare that these are compassionate payments, and granted of grace and not of right, both in kind and in degree. True that in such cases they are always made, and most properly made, but none the less the money claimed was lost to the Exchequer directly because the Crown through its officers was pleased to pay it.

(1) [1920] A.C. 184 at 191.
(2) *Admiralty Commissioners* v. *Owners of Steamship Amerika* [1917] A.C. 38.

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In the *Amerika* case, as it appears by the above citations, the payments made to the relatives of the victims were voluntary, while in the present instance they were the effect of a binding statutory contract. But I do not think that this distinction can influence the final outcome of this case.

In the same speech already referred to, Lord Parker also said, at page 42:

> But further, even if the pensions and allowances in question were granted pursuant to contracts between the Admiralty and the deceased seamen, I should still be of opinion that they could not properly constitute an item of damage for loss of service.

And dealing with the same point, Lord Sumner expressed his views as follows, at page 61:

> Had the present action been brought upon a contract it might well be the case that these payments would have been within the contemplation of the contracting parties, but they are not the natural consequences of the tort which is sued for. Nor would it have assisted the appellants' case if they could have established that the making of these compassionate allowances by the Crown was in the nature of *a contractual obligation.* In any case the contract would have been a contract with the deceased man, and the damages must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment. Just as the damages recoverable by an injured man cannot be reduced by the fact that he has effected and recovered upon an accident policy (*Bradburn* v. *Great Western Ry. Co.* (1)), and those recovered under Lord Campbell's Act are not affected by the fact that his life was insured, so conversely a master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive and a pension to his widow when he is dead. The appeal is enterprising and has been of considerable interest, but I think it fails.

The action of the Admiralty against the *Amerika* was not an action *per quod,* although it was argued as if it were. It was an action to recover the amounts of pensions voluntarily paid to relatives of the victims. But it seems that the language used by their Lordships is clear enough to allow us to conclude that even if these pensions had been paid under a statutory obligation, as in our case, the claim of the Admiralty to recoup itself would fail on the ground of remoteness.

Damages, in order to be recoverable, must be the direct consequences of the fault of the offending party. When the prejudice complained of does not normally flow from

(1) (1874) L.R. 10 Ex. 1.

the act of the tort feasor, or as Pollock (The law of Torts, 13th Ed., pp. 31-32) says, "when some new factor intervenes which is unconnected with the original culpable act or default," liability ceases.

In the present case, the amounts claimed cannot in my view be regarded as damages in the true legal sense. The obligation imposed upon the employer to compensate his injured employee, does not naturally arise from the act of the respondent. The loss sustained by the appellant is attributable to an independent cause, intervening between the tortious act and its logical consequences. It is this new intermediate cause which is the source of the appellant's obligation. It may be that the negligence of the respondent was the occasion which set in motion the *Government Employees Compensation Act,* but, as Lord Sumner said in the *Amerika* case (1), the accident was the *"causa sine qua non"*, but it was not the *"causa causans"* of the damages which the plaintiff now seeks to recover.

The appeal should, I think, be dismissed with costs.

RAND, J.—The Crown puts its claim on four grounds: first, that the act of leaving the gate overhanging the harbour property was a trespass, and workmen's compensation to the injured employee was consequential damage; next, that injury to an employee and the statutory obligation on the Crown to pay compensation must be taken to be within the contemplation of probable consequences of the tortious act and so to create a duty direct to the Crown; the third is a general proposition that if the consequences of a wrongful act of A toward B give rise to damage to C through an obligation in law toward B, a right arises in C to reimbursement from the wrongdoer; and the last is the right of a master to recover for injury to the servant by what is known as a *per quod* action.

I think the first two must be rejected on the principle of remoteness both as to liability and damages. The consequences of an act by reason of which a duty of care arises are a chain of occurrences reasonably and probably

(1) [1917] A.C. 38.

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flowing from the act, affecting general interests, and uniform in scope toward all persons; special interests issuing from legal relations are in general outside of that range; *Cattle* v. *Stockton Waterworks Co.* (1). This exclusion would not be affected by the fact that here the liability to pay compensation arises from a statute; the relation of employer and employee is special, and the inclusion of the injured person within the contemplation of probabilities arises from his right to be on the land, not his being employed by the owner; *a fortiori,* the resulting statutory obligation is beyond that scope; and these considerations exclude any direct duty on the part of the Pacific Company toward the Crown based on negligence.

The object of damages is to repair a person to the extent to which the economy of his life has been prejudiced by the negligent act, but the difficulty lies in the inherent limitations to which an ascertainment of them is subject. Theoretically it involves a prevision in all its vicissitudes of the life with and without the injury. But the estimation becomes rapidly one of conjecture as we pass beyond immediate effects; and in the language used by Blackburn J. in *Cattle* v. *Stockton Waterworks, supra,* at p. 457, quoting Coleridge J. in *Lumley* v. *Gye* (2),

> Courts of justice should not "allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts."

As results of the trespass, then, the damages claimed come thus under the ban of remoteness.

The proposition set forth in the third ground is closely related to that of the second. The difference lies in the exclusion of contemplated consequence in the former and its inclusion in the latter. The former is therefore of an absolute nature.

But it is a proposition for which we have been furnished with no authority. As formulated, it was, in my opinion, rejected by the House of Lords in *Simpson* v. *Thomson* (3), where at p. 289, Lord Penzance uses these words:

(1) (1875) L.R. 10 Q.B. 453.
(2) (1853) 2 E. & B. 216, at 252; 22 L.J. (Q.B.) 463, at 479.
(3) (1877) 3 App. Cas. 279.

> But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person to the serious loss of the manager. Can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel.

and I see no difference in principle between an interest arising by contract and one by statute, where the latter in substance merely adds a beneficial condition to the contract.

It was sought to be supported by the case of *McFee* v. *Joss* (1). There the owner of an automobile was by statute under an absolute liability for damage wrongfully caused by the automobile in the hands of a person whom he had permitted to use it. There were, therefore, two distinct rights in the injured person arising out of the same act and covering the same area of damages; there was also a contractual relation between the owner and the wrongdoer in circumstances that would imply an indemnity toward the owner; and, as between the two rights, on equitable principles that against the wrongdoer was primary. But the scope of liability here is quite different between the corresponding rights: the whole of the damage is recoverable from the tort-feasor, but only a portion by way of compensation; there is no implied indemnity, because—a fact sufficient here—the parties are strangers to each other; in the former case the statutory liability made the tortious act of the wrongdoer that of the owner, but the obligation under the Compensation Act arises from injury to the employee, the particular act which brings it about is not attributed to the employer and the liability exists whether that act is tortious or innocent: *McMillan* v. *Canadian Northern Ry. Co.* (2).

There remains the rule by which a master recovers for injuries inflicted upon his servant. As it has been many times remarked, this right is an anomalous survival from

(1) (1925) 56 O.L.R. 578. (2) [1923] A.C. 120, at 124.

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social conditions in which the servants belonged to the household and their relation to the master was more of the nature of status than contractual. But with the evolution of individualism the economic and remedial position of the employee has long since changed and as it is to-day as ample to protect his interests as those of the employer. Such an anachronism should, therefore, be held to the precise limits within which it has been established.

What are those limits? I think it clear that they are confined to the value to the master of the services actually lost, and to those incidental outlays such as medical and hospital expenses made by him which naturally follow from personal injury; but they do not include pain and suffering or the impairment of earning capacity.

Now it will be seen that to a considerable extent these items are common to the damages recoverable by the servant. In the ordinary case, where wages are paid as work is done, a direct consequence is the loss of earnings; but in that case, the only interest of the master would be the sum by which the service was in fact of a greater value than he was paying for it. That would be the maximum recoverable, and both parties apparently could maintain actions accordingly. It might be that the master has remunerated the servant in advance, and in such a case his recovery would exhaust that particular item: *Osborn* v. *Gillett* (1), per Bramwell B.:

> [The master] sustained damage which may be real and substantial from the valuable character of the service, prepayment of the wages, or otherwise.

Then it is altogether probable that the master's recovery of expenses for necessary care arose from the fact that out of the relationship they would ordinarily be borne by him. The same rule was applied to the parent in relation to his child and the husband to his wife. In those cases, although in the former the right to recover calls for the fiction of service, the husband or father is under a legal or a moral duty toward the physical well-being of wife and child, and, apart from exceptional cases, it is by him that the expenses are incurred. But in the general conditions of modern employment, that is not so. This personal interest of the employee has become dissociated from the

(1) (1873) L.R. 8 Ex. 88.

employment relationship; his credit supports the services rendered; and he only can include the cost of them in his damages.

Now the compensation provided under the *Government Employees Compensation Act*, R.S.C. 1927, c. 30, neither extends to the whole field of recovery by the servant against the wrongdoer nor does it necessarily exhaust the damages in the particular items of loss to which it is related; but the master's recovery for compensation paid might result in subjecting the third person to greater damages than the total at common law. Since the compensation is partial or at least is not specifically related to the basis of the claim of the servant, the rule proposed would result merely in a distribution of the liability of the guilty person, multiplying actions and complicating the quantum recoverable.

The payments to the injured workman under the Dominion Act, for medical and hospital expenses are of moneys provided to reimburse the employee; "an employee * * * shall * * * be entitled to receive compensation" including such benefits; and they may, as in many cases they do, form only a portion of the actual expenses to which he may be put or which he may voluntarily incur; if they happen to be paid direct by the Crown to the physician or hospital, they are so dealt with as an administrative convenience and security; and in an action by the employee against the wrongdoer, their payment by the Crown would be excluded from consideration; *Bradburn* v. *Great Western Ry. Co.* (1).

Then the compensation for disability may be looked upon as insurance, either indemnity or accident: *McMillan* v. *C. N. Ry. supra* (2); or as an incident of remuneration attributed to past services, with or without a continuing engagement to work; but however viewed, its effect is the same, and in an action by the employee against the wrongdoer, the payment would be unavailable in reduction of damages. On the other hand, it could not be recovered direct from the wrongdoer by the employer as insurer; *London Assur. Co.* v. *Sainsbury* (3).

But neither can it represent damage to the employer from loss of service. The question is, what follows as a

(1) (1874) L.R. 10 Ex. 1.
(2) [1923] A.C. 120.
(3) (1783) 3 Dougl. 246; 99 E.R. 636.

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direct and natural result of that loss? The damage might be absolute or the service be fully supplied by new help, and in each case ordinary measures would be applied. But compensation arises from special terms of employment; it is not referable to nor is it a consequence of the loss of service.

This conclusion follows dicta in the case of *Admiralty Commissioners* v. *S.S. Amerika* (1) in which the facts were quite similar. One of His Majesty's warships was run down and sunk by a vessel, against the owners of which the Admiralty brought action. Among the items of damage were pensions paid to the dependents of naval ratings lost. Although the House of Lords held the pensions to be voluntary payments and therefore not recoverable under legal damages, both Lord Parker and Lord Sumner went further and expressed the view that even had these been obligatory upon the Government, the result would have been the same; their language is significant and I quote it:

Lord Parker:

> But further, even if the pensions and allowances in question were granted pursuant to contracts between the Admiralty and the deceased seamen, I should still be of opinion that they could not properly constitute an item of damage for loss of service. They would in this case constitute deferred payment for services already rendered, and have no possible connection with the future services of which the Admiralty had been deprived.

Lord Sumner:

> Just as the damages recoverable by an injured man cannot be reduced by the fact that he has effected and recovered upon an accident policy—*Bradburn* v. *Great Western Ry. Co.* (2)—and those recovered under Lord Campbell's Act are not affected by the fact that his life was insured; so, conversely, a master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive, and a pension to his widow when he is dead.

The master then does not recover because those payments have not, in a legal sense, been caused by the wrong against the servant; the wrong is the occasion of their being made; the cause is the contract; and special terms of the contract are irrelevant to damages for loss of service. The disability benefits are paid out of accumulations, actual or constructive; the damages remain the direct loss to the employer consequent upon the deprivation of service.

(1) 86 L.J. P.D. & A. 58; [1917] A.C. 38.
(2) (1874) 44 L.J. Ex. 9; L.R. 10 Ex. 1.

The case of *Bradford Corporation* v. *Webster* (1) was pressed on us. There a municipal corporation brought action for injuries caused to a police officer and the damages allowed were based on the increased amount of pension and the acceleration of its payment resulting from the injury. Lawrence J. considered the dicta quoted, but declined to follow them; but for the reasons given, I must hold that such damages cannot be recovered in an action of this nature.

One of the objects of the many forms of insurance by way of compensation, pensions, etc., of these days is to ease the burden on the individual of consequences attendant upon the increasing hazards of complex social and industrial activities. But it would tend to reverse that policy to extend the established liability of the individual for the benefit of these collective interests. Liability is necessary for the essential standards of social conduct, but any enlargement of the field which in general rule our legal experience has mapped out should come from the legislature and not the courts.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.—Appellant put its case before us first upon the basis of an action *per quod servitium amisit*. The question is as to whether or not there is any evidence upon which damages of the kind recoverable in such an action may be assessed. In so far as the claim is confined to lost services, damages are to be assessed upon the value of those services to the master; *Bradford Corp.* v. *Webster* (2); *Admiralty Commissioners* v. *S.S. Amerika* (3). In *Osborn* v. *Gillett* (4) Bramwell B. said:

* * * the plaintiff lost her services and sustained damage which may be real and substantial from the valuable character of the service, prepayment of the wages, or otherwise.

What is claimed in this action is:

(*a*) Payments on account of total temporary disability, January 15 to October 20, 1942—$959.76;

(*b*) Medical aid payments—$511.20;

(*c*) Pension award for partial permanent disability:
Lump sum—$150.
Capitalized pension per month ($49.98), *for life*—$12,218.11.

(1) (1920) 89 L.J.K.B. 455.
(2) [1920] 2 K.B. 135, per A. T. Lawrence, J., at 145.
(3) [1917] A.C. 38, per Lord Sumner at p. 61.
(4) (1873) L.R. 8 Ex. 88, at 93.

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All of these items of alleged damage find their basis in those parts of the *Workmen's Compensation Act* of British Columbia, R.S.B.C. 1936, cap. 312, which may be said to be incorporated by reference into the *Government Employees Compensation Act*, R.S.C. 1927, cap. 30. Items (*a*) and (*c*) are governed by sections 21 and 20, respectively, of the former statute, which provide as to (*a*) for payment to the injured workman during temporary total disability of an amount equal to two-thirds of his average earnings, and as to (*c*) an amount equal to two-thirds of the difference between his average earnings before the accident and the average amount which he earns or is able to earn after the accident, or the amount payable may be based upon the nature and degree of the injury having regard to the workman's fitness to continue in the employment in which he was injured or to adapt himself to some other suitable employment or business. As to (*b*), this is based upon section 23, which provides for certain medical, hospital and other aid. It is to be remembered that the above benefits are to be considered as being called for under a statutory contract between the workman and the appellant; *Workmen's Compensation Board* v. *C. P. R.* (1).

In Clerk and Lindsell on Torts, 9th Ed., 249, the authors state:

> In the case of an ordinary servant the master may recover not merely the actual damage sustained up to the time of action brought, but also in respect of the future service which he is likely to lose. It would seem, however, that he ought to be limited to the period for which he has a binding contract of service. Any further damage founded on a speculation that the service would continue beyond the agreed time would be too remote.

In my opinion, the authorities bear out the text. In the *Amerika* case (2), Lord Sumner said, at p. 55:

> If the contract of service had already determined before the wrongful act had any disabling effect upon the capacity to serve, as might be the case when a wrongful act is done to a servant who is under notice, I take it likewise that the action would not lie. It is the loss of service which is the gist of the action, and loss of service depends upon a right to the service, and that depends on the contract between the master and the servant.

In *Hodsoll* v. *Stallbrass* (3), the plaintiffs' apprentice, who was serving under articles for a term which had

(1) [1920] A.C. 184.
(2) [1917] A.C. 38.
(3) (1839) 9 C. & P. 63.

still some time to run, was injured by the defendant's dog and was permanently disabled so that the plaintiffs lost the benefit of his services for the remainder of the term. It was held that the plaintiffs might recover for the loss of service up to the end of the apprenticeship.

In *Martinez* v. *Gerber* (1), the action was for loss of service through injury to a traveller of the plaintiffs' as a result of which it was alleged the plaintiffs had to hire another traveller to whom they were obliged to pay £200 for expenses and wages. A verdict was returned for £63 damages, and upon a motion in arrest of judgment the verdict was sustained. While it did not appear for how long the injured servant was engaged, the declaration stated that he was at the date of the injury "and from thence hitherto had continued and still was" the plaintiffs' servant. Tindal C. J., at p. 91, said:

> The declaration alleges that Goss was, and *still is*, the plaintiffs' servant, which is sufficient. There was no necessity to state that he was hired at any wages or salary.

In a note added by the reporter it is stated:

> The damage would be the same whether the services of the disabled servant were gratuitous or paid for, supposing the masters to be obliged to hire another, or to do the work themselves, or to leave it undone. The allegation that *Goss was and still is* the plaintiffs' servant, shows that whilst paying Gassiot, they were *entitled* to the services of Goss.

While the plaintiffs were obliged to pay Gassiot, the substituted servant, £200, they recovered only £63, the value placed by the jury upon the services of Goss of which the master was deprived.

These authorities show, therefore, that in order to recover in an action of this kind, the master must have been entitled to future services of the servant. It is the value of those services lost, which may be recovered. The quantum is for the jury upon all the evidence.

I cannot find it alleged or proved in the case at bar that the appellant was entitled to any future service subsequent to the injury of its servant, Christian. For that reason alone there appears to be no basis upon which it is possible to assess any damages under heads (*a*) and (*c*) of the claim.

(1) (1841) 3 M. & G. 88.

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As to (*b*) the claim is based upon the class of case of which *Dixon* v. *Bell* (1) is an example. There Lord Ellenborough directed the jury that the plaintiff might recover in this form of action the amount of a surgeon's bill for attending his son which he had paid but not for physician's fees for which he was not liable.

Turning to section 23 of the provincial statute, it appears that the term "medical aid" covers "such medical, surgical, hospital and other treatment, transportation, nursing, medicines, crutches and apparatus, including artificial members, as it may deem reasonably necessary at the time of the injury, and *thereafter during the disability* to cure and relieve from the effects of the injury" as well as a subsistence allowance during treatment away from home.

Such expenditures may well cover a much wider field than would be recoverable at common law, particularly in the case, e.g., of a servant under notice or having a short term remaining under his contract of employment. Under the statute, however, even though injured during the last hour of his employment, a servant would be entitled to the above benefits provided by section 23 as well as to the other items covered by the other sections. I do not think that a claim for "medical aid payments $511.20" without more, can be said, in the circumstances of the present case, to be within the category of medical expense recoverable in this particular type of common law action.

It may be, although for the reason just stated it is not necessary to decide the question, that the only relevancy of such a claim in this type of action is that the value of the right on the part of the servant to such a benefit should, together with the value of his right to the other items of compensation included in (*a*) and (*c*) above, be considered as part of the servant's remuneration, and hence as evidence of the value of his services to the master, rather than that the actual amounts paid should themselves constitute recoverable damages. Wages paid to the injured servant and, if a substitute is hired, to such substitute, may well be of some evidentiary value, although not conclusive, in an inquiry as to the *value* of the services

(1) (1816) 1 Starkie, 287.

of the injured servant which are lost to the master. From this standpoint what is stated by Lord Sumner in the *Amerika* case (1) at p. 61:

> A master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive and a pension to his widow when he is dead.

and by Lord Parker, at p. 42:

> But further, even if the pensions and allowances in question were granted pursuant to contracts between the Admiralty and the deceased seamen, I should still be of opinion that they could not properly constitute an item of damage for loss of service. They would in this case constitute deferred payment for services already rendered, and have no possible connection with the future services of which the Admiralty had been deprived.

may be consistent with what is stated by Lawrence J. in *Webster's* case (2) at pp. 144-5:

> A pension may, no doubt, be properly regarded as payment for past services, but that fact does not exclude it from consideration in estimating the value of the services lost. But for the injuries the services of the constable would have been as valuable after the date of the injuries as they had been before that time. The cost of the services to the plaintiff Corporation was pay, plus the plaintiffs' contribution to the pension fund. No ground has been suggested for holding that the services were not worth that which was paid for them. If this be so the services which were lost were worth pay, plus right to pension.

Appellant next rests its case upon the submission that, the gate in question being in such close proximity to appellant's railway, it must necessarily have been foreseen that negligence in failing to fasten the gate would probably cause damage to appellant, which imposed a duty toward the latter, the breach of which entitled it to damages. *Bourhill (or Hay)* v. *Young* (3); *M'Alister (or Donoghue)* v. *Stevenson* (4), and *In re Polemis and Furness, Withy & Co.* (5) are cited.

In whatever circumstances these authorities may be applicable, they are not, in my opinion, relevant here. Merely because appellant has been obliged to pay under a contract between itself and Christian does not render such payment an item of damage for which the person whose

(1) [1917] A.C. 38.
(2) [1920] 2 K.B. 135.
(3) [1943] A.C. 92.
(4) [1932] A.C. 562.
(5) [1921] 3 K.B. 560.

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wrongful act injured Christian is liable; *Simpson* v. *Thomson* (1), per Lord Penzance at 289-290. The decision in *Mowbray* v. *Merryweather* (2), to which appellant also refers, was a case of breach of contract.

It is also contended that the appellant's claim may be supported upon trespass to its property, the gate having been allowed to project over it, and *Gregory* v. *Piper* (3) is cited. Assuming the trespass, the above case is no authority for the proposition that the amount here claimed may be recovered as damages in trespass. I think the claim fails for remoteness on this ground also.

As to the argument founded upon the decision in *McFee* v. *Joss* (4), the principle applied in the case is stated by Ferguson, J.A., at p. 584, as follows:

> Everyone is responsible for his own negligence, and if another is, by a judgment of a court, compelled to pay damages which ought to have been paid by the wrongdoer, such damages may be recovered from the wrongdoer.

In that case a person injured by the negligence of the defendant Joss in the operation of an automobile belonging to the plaintiff recovered judgment against the plaintiff by reason of a statutory liability resting upon the latter as owner. It was held that as the plaintiff had been compelled to pay damages which the defendant ought to have paid, the latter must indemnify the former.

In the case at bar no liability rested upon appellant in respect of the tort of the respondent. The appellant's liability arises by reason of a contract between appellant and Christian, but no relationship exists between appellant and respondent and no right to indemnity as between them arises.

I would dismiss the appeal with costs.

ESTEY, J.—The appellant, the Crown in the right of the Dominion, operates a railway known as the National Harbours Board Terminal Railway in Vancouver, B.C. An employee of this Terminal Railway, H. W. Christian, while acting in the course of his employment, was injured because of the negligence of the agents and servants of the respondent Canadian Pacific Railway Company.

(1) (1877) 3 App. Cas. 279.
(2) [1895] 2 Q.B. 640.
(3) (1829) 3 B. & C. 591.
(4) (1925) 56 O.L.R. 578.

Under the provisions of *The National Harbours Board Act*, 1936 S.C., c. 42, and the *Government Employees Compensation Act*, R.S.C. 1927, c. 30, and amendments thereto, Christian when injured became entitled to receive, and has received in part, compensation from the Crown as determined under the provisions of the *Government Employees Compensation Act*. It is the amount of this compensation as so determined that the Crown in this action seeks to recover from the respondent railway.

The learned trial judge in the Exchequer Court dismissed the plaintiff's action on the basis that:

> The compensation cannot be regarded as legal damages for it is not the proximate and direct result of the act complained of (Halsbury, vol. 10, page 103, para. 130; *The Amerika* (1) at pp. 53 and 61). The liability of the Crown (Dominion) to pay the compensation arises from an independent intervening cause, namely, an act of the Dominion Parliament, which lies wholly outside the common law of the Province. (*The Circe* (2)). The compensation in question is compensation to an injured servant, payable by the Crown, and is in no sense compensation in the form of damages to the Crown for the loss to His Majesty of a servant's services. Nor is it claimed as such.

Upon this appeal counsel for the appellant submitted four different bases upon which he contended this judgment should be reversed:

One: That the Crown as owner of the Terminal Railway premises has a cause of action for the recovery of any damages resulting from the negligent swinging of the gate over its premises. The appellant's and respondent's railways are so situated at this point that a gate or swinging bar operated and controlled by the respondent was negligently left in such a condition on the early morning of January 15, 1942, that it extended over and upon appellant's tracks, as a result of which Christian, in the course of his employment riding upon the front of appellant's engine, was injured. Counsel supported this contention by cases in which actions were brought for injury through trespass: *Gregory* v. *Piper* (3); *Pickering* v. *Rudd* (4); and for personal injury resulting from property left in a dangerous position, *Reid* v. *Linnell* (5). The appellant's action is rather different. Its position is that its employee, Christian,

(1) [1917] A.C. 38.
(2) [1906] P. 1.
(3) (1829) 9 B. & C. 591.
(4) (1815) 171 E.R. 400.
(5) [1923] S.C.R. 594.

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suffered an injury "by accident arising out of and in the course of his employment", because of which he was entitled to and has been awarded compensation under the *Government Employees Compensation Act,* R.S.C. 1927, c. 30, and amendments thereto. It is for the amount of this compensation that the Crown as appellant claims from the respondent. In order to succeed upon this basis it must be established that the payment of this compensation is a direct consequence of respondent's negligent conduct. The issue is therefore, is this compensation a direct or a remote consequence?

As to the rights or claims that Christian personally as the injured party may have against the respondent we are not concerned. The only issue here is whether the compensation awarded under the provisions of the statute and payable by the Crown to Christian, in the absence of any provision in that statute for subrogation or similar provision, may be recovered from the respondent in an action of this type. It is a statutory obligation and seems rather an unrelated consequence, or in the language of Lord Wright in *Liesbosch (Owners of)* v. *Edison (Owners of)* (1), "a separate and concurrent cause, extraneous to and distinct in character from the tort" of the respondent. The compensation payable under this obligation may be looked upon as Lord Wright regarded the impecuniosity of the party suffering the loss in the case just cited as either "too remote" or as "an independent cause, though its operative effect was conditioned" upon the employee suffering the injury.

The observations of Lord Sumner in *Admiralty Commissioners* v. *S.S. Amerika* (2) support this view.

Two: The second basis is upon much the same ground except that counsel suggests the existence of the statutory obligation was a foreseeable consequence. That injury to some person was a foreseeable consequence is not the point. One must go further and conclude that under the circumstances of this case a reasonable man would have foreseen that the employer was under a statutory obliga-

(1) [1933] A.C. 449 at 460. (2) [1917] A.C. 38 at 61.

tion to provide compensation to its servant in the event of injury from his negligence. The case of *Hay or Bourhill* v. *Young* (1) was cited by the appellant. That case is concerned with foreseeability as a factor in determining liability of the negligent party toward one who suffered personal injury at or near the scene of the accident. That, upon its facts, is quite a different case. No case was cited which supports the appellant's contention and the comments already made under the first submission, that the damage was either too remote or resulting from an independent cause, are applicable to this submission.

Three: That whenever the defendant by negligence imposes an obligation on a third party that third party has an action to recover the damages resulting therefrom. In support of this contention is cited *McFee* v. *Joss* (2). There McFee, the owner of an automobile, rented it to Joss who in driving same negligently collided with a car driven by Watson. Watson recovered damages from McFee under the statute by virtue of the fact that he was the owner of the car. Then McFee recovered judgment against Joss for the amounts he had paid to Watson on the basis that he was entitled to be indemnified by Joss. In that case there was a contract between McFee and Joss and therefore a basis for indemnity. Mr. Justice Ferguson, in writing the judgment of the Appellate Court, quoted a statement of Lord Wrenbury in delivering the opinion of the Privy Council in *Eastern Shipping Co. Ltd.* v. *Quah Beng Kee* (3):

> A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other.

In this case there is neither a contract nor any relation between the appellant and respondent upon which under the authorities an indemnity might be based.

Other cases are cited, such as *Bradford Corp.* v. *Webster* (4), where the actions are by the master for loss of services. The appellant also cites cases where parents have recovered

(1) [1943] A.C. 92, at 101.
(2) (1925) 56 O.L.R. 578.
(3) [1924] A.C. 177, at 182.
(4) (1920) 89 L.J.K.B. 455.

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for expenses incurred on behalf of his (or her) injured infant. One of these is *Hall* v. *Hollander* (1). There the father did not recover in his action for loss of services because the infant was incapable of performing services and he had incurred no expense. It is the dictum of Bayley J. that is stressed:

> In this case, too, it was proved that the father did not necessarily incur any expense; if he had done so I am not prepared to say that he could not have recovered upon a declaration describing, as the cause of action, the obligation of the father to incur that expense.

This dictum has often been quoted and it has been suggested that where the infant resides at home the rendering of services will be presumed. Such observations have reference to the relationship of parent and child and do not assist in the determination of this general submission, particularly in an action so pleaded and conducted at trial as this one.

In the absence of any of the above suggested bases the appellant cannot succeed under this submission.

Four: The fourth ground is that the action *per quod servitium amisit* is sufficiently broad and inclusive to permit of the appellant's recovery in this case. The essential difficulty is that the pleadings make no reference to nor is there evidence adduced which would support a claim for loss of services. Then the damages asked are not on the basis of loss of services but rather "the damage sustained by the plaintiff by reason of the obligation so imposed on the plaintiff to make payment of the aforesaid compensation". The claim is therefore confined to the payments made because of the statutory obligation and has no relation to any loss of services which may have been suffered by the appellant as master on account of its employee being injured through the negligence of respondent's servants and agents. The action as framed is on a basis entirely different from that of loss of services.

It therefore follows that the appellant cannot succeed upon this basis, and, as already intimated, there does not appear to be any basis upon which the appellant can recover from the respondent.

(1) (1825) 4 B. & C., 660; 107 E.R. 1206.

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A question as to the jurisdiction of the Exchequer Court to hear this action was raised. It was not pressed but rather we were asked to deal with the case upon its merits. The question of jurisdiction has not, therefore, been discussed.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. P. Varcoe.*

Solicitor for the respondent: *J. A. Wright.*

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*Feb. 5, 6
*Feb. 11

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Accused convicted of murder—New trial ordered by appellate court—Misdirection—Wrongful admission of statements by accused—Alleged conflict of decisions on latter ground—Accused still entitled to new trial on ground of misdirection—Section 1025, Cr. C.

The respondent, convicted of murder, appealed to the Court of Appeal, which, by an unanimous judgment, granted a new trial on two grounds: misdirection by the trial judge and statements by the respondent, while in custody, wrongly admitted in evidence. On a petition by the Crown for leave to appeal to this Court under section 1925 Cr. C.

Held that the application should be refused.—Even if the Crown had shown that the judgment to be appealed from, on the question of admissibility of the alleged confessions, conflicted with the judgment of any other court of appeal, and this Court came to the conclusion that the Court of Appeal were wrong, the respondent would still be entitled to a new trial on the ground of misdirection by the trial judge, on which point no conflict had been shown. *Ouvrard* v. *Quebec Paper Box Co. Ltd.* ([1945] S.C.R. 1) approved.

*Present:—Mr. Justice Taschereau in Chambers.

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MOTION by the Crown, before the Honourable Mr. Justice Taschereau in Chambers, for leave to appeal to this Court under section 1025 Cr. C. from the judgment of the Court of Appeal for Ontario granting a new trial to the respondent (1).

W. B. Common K.C. and *C. R. Magone K.C.* for the motion.

J. J. Robinette K.C. contra.

TASCHEREAU J.:—The respondent was convicted of murder and sentenced to hang, at the Assizes at Hamilton on the 16th of October, 1946.

She appealed to the Court of Appeal of Ontario, and a new trial was granted on two grounds, (1) that the learned trial judge made errors of non-direction and misdirection in his charge to the jury and (2) that certain statements alleged to have been made by the respondent to police officers, while in custody, had been wrongly admitted in evidence against her.

The judgment of the Court of Appeal of Ontario having been unanimous (1), the Crown now asks for leave to appeal to the Supreme Court of Canada under section 1025 of the Criminal Code. It is of course necessary, before I grant leave, that I should be satisfied that the judgment of the Court of Appeal conflicts with the judgment of any other court of appeal in a like case. If such a conflict cannot be found, it is not within my jurisdiction to grant such a leave.

Counsel for the appellant have cited many judgments and endeavoured to show that the ruling of the Court of Appeal on the admissibility of the confessions, conflicts with the views adopted by other courts of appeal. No judgments of other courts of appeal have been cited that would conflict with the Court of Appeal of Ontario, on the point that there was non-direction and misdirection by the trial judge, in his charge to the jury.

I am of opinion that this application must be refused.

By the unanimous judgment of the Court of Appeal the respondent has obtained a new trial on two grounds. Even

(1) [1947] O.R. 105; [1947] 2 D.L.R. 213.

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if a conflict could be found on the question of the admissibility of confessions, and this Court came to the conclusion that the Court of Appeal were wrong, the respondent would still be entitled to a new trial on the ground of misdirection. In any event, the appeal of the Crown is bound to be dismissed, and it is not the function of this Court to give advisory opinions on matters which cannot affect the final outcome of the appeal.

Even if I had any doubts on the matter, they would be cleared by the recent decision of this Court in the case of *Ouvrard* v. *Quebec Paper Box Co. Ltd.* (1) where, speaking for the Court, my Lord the Chief Justice said:

> The appellant, in view of the fact that there has been no dissent and that no conflict is alleged, is unable to ask this Court to reverse the judgment of the court of appeal on this fundamental question, and it means, therefore, that, even assuming there is a conflict on the other points raised in the appeal and even if he should succeed in getting this Court to reverse the judgment of the court of appeal on these other points, the respondent would, nevertheless, remain acquitted. The appeal would be devoid of any possible practical result and the Court would be asked only to pass upon an academic question.

The application is dismissed.

Leave to appeal refused.

IN THE MATTER OF A REFERENCE AS TO THE INTERPRETATION OF THE JURY ACT OF ALBERTA.

1946

*Oct. 22

1947

*Feb. 4

Statute law—Juror—Qualification of—Liability to serve as—Age limits—Section 3 of The Jury Act, R.S.A. 1922, c. 74 (now R.S.A. 1942, c. 130).

Section 3 of *The Jury Act* of Alberta provides that "* * * any inhabitant of the province of Alberta over twenty-five and under sixty years of age * * * shall be liable to serve as a juror in all civil and criminal cases tried by a jury * * *".

Held that persons outside of the age limits prescribed in section 3 are neither qualified nor liable to serve as jurors.—*The Jury Act*, in that respect, must be taken to be a code intended to embody the law of the constitution of the jury and section 3 by a necessary implication prescribes the qualification of jurors in substitution for that previously existing. *Mulcahy* v. *The Queen* (L.R. 3 H.L. 306) dist.

*Present at the hearing of the appeal:—Kerwin, Hudson, Taschereau, Rand, Kellock and Estey J.J.—Hudson J. died before delivery of the judgment.

(1) [1945] S.C.R. 1, at 9.

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REFERENCE AS TO THE INTERPRETATION OF THE JURY ACT OF THE PROVINCE OF ALBERTA

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), on a Reference to the Court as to the interpretation of *The Jury Act* of that province, and more specially of section 3 of that Act.

H. J. Wilson, K.C. for the Attorney General of Alberta.

John J. Connolly, appointed by the Attorney General of Alberta.

The judgment of Kerwin, Taschereau, Rand, Kellock and Estey J.J. was delivered by

RAND J.:—This reference raises a question of interpretation of *The Jury Act* of Alberta, R.S.A. 1922, c. 74. The precise issue is whether persons under 25 and over 60 years of age are competent to serve as jurors, although not bound to do so.

Section 3 of the Act is the controlling provision and, under the heading "Liability to serve as juror", is in these words:

> 3. Subject to the exemptions and disqualifications hereinafter mentioned, any inhabitant of the province of Alberta over twenty-five and under sixty years of age, being a natural born or naturalized subject of His Majesty, shall be liable to serve as a juror in all civil and criminal cases tried by a jury in the judicial district or sub-judicial district in which he or she resides.

Prior to the enactment of chapter 74 the matter was governed by the *Northwest Territories Act,* section 71 of which was as follows:

> 71. Persons required as jurors for a trial shall be summoned by a judge from among such male persons as he thinks suitable in that behalf; and the jury required on such trial shall be called from among the persons so summoned as such jurors and shall be sworn by the judge who presides at the trial.

By the general rule at common law, disregarding special cases where aliens were concerned, all male natural born subjects over the age of 21 years, (*liberi*) *probi et legales homines,* (Comyn, Challenge A3) were qualified to act as jurors subject to exemptions and challenges. It will be seen, therefore, that section 3 makes an important change by extending the class liable to include women. What, then, are the qualifications of a woman, and where are they to be found? Only in section 3 is there any

(1) [1946] 2 W.W.R. 271.

language from which they may be inferred, the language imposing the conditions of liability; the characteristics prescribed for that, including the ages mentioned, must, therefore, be the qualifications for the additional class. If that is so and as all men and women liable are designated by the word "inhabitant", how can the implication necessary to women be withheld from application to men? Mr. Wilson sought support from the *Sex Disqualification (Removal) Act* passed by the province in 1930, but that can be of no assistance in the interpretation of an enactment of 1921.

The statute contains a number of references to qualification, disqualification and liability for service, and that the distinction between these terms was in the mind of the draughtsman is obvious. For instance: Section 5: *"shall be compelled to serve"*. Section 6: *"qualified to serve"*. Section 7: *"compelled to serve"* * * * *"qualified persons"*. Section 8: "a separate list * * * of persons *liable to be returned as jurors"*. Section 4: "shall be exempt from *being returned and from serving"*. Section 14, form A: "List of persons *liable to be returned and to serve as jurors"*. Section 15: *"qualification of the jurors"*. Section 17: *"qualification, exemption and disqualification"*. Section 35: *"qualification, exemption or disqualification"*.

These provisions make it clear that the persons to be returned on the sheriff's list are those only who are liable to serve as jurors. The names of persons outside of the prescribed ages should never appear on the list, and it is only persons properly listed who are to be summoned. But it is argued that the judgment in *Mulcahy* v. *The Queen* (1), concludes the question. As is generally the case, however, where the question is on a statute, that decision is not *in pari materia*. In *Mulcahy* (1) the statute, it is true, directed the sheriff to return only the names of those qualified by the Act, but the qualification prescribed for persons between the ages of 21 and 60 was a property qualification which modified the existing law in that respect, and the affirmative provision was that all persons between the ages mentioned so qualified should be liable to jury service. This was treated as implying that persons over 60 years of age, qualified as to property, presumably

(1) (1868) L.R. 3 H.L. 306.

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REFERENCE AS TO THE INTERPRETATION OF THE JURY ACT OF THE PROVINCE OF ALBERTA

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by existing law, would be entitled to claim exemption, in contrast to being liable, but not be subject to challenge. It was the distinction between exemption and disqualification. Here, the terms of qualification are those of the conditions of liability, while there each was dealt with separately.

The exemption which is suggested for persons between 21 and 25 years of age and over 60 is an implied personal privilege by reason of age alone. Such a privilege was unknown at common law or even under the Statute of Westminster 2, 13 Edw. 1, c. 38; and any reason why there should be attributed to the legislature as an implication from doubtful language the intention to deem a man of 24 years of age to be qualified as a juror, but to sit only if he pleases while his neighbour of 25 should be bound to that duty, has not been made evident to me.

I take the Act in these respects to be a code intended to embody the law of the constitution of the jury; that section 3 by a necessary implication prescribes the qualification of jurors in substitution for that previously existing; and that persons outside of the prescribed age limits are neither qualified nor liable.

I would, therefore, dismiss the appeal without costs.

Appeal dismissed without costs.

1947

*Mar. 17
*Mar. 18

MARIO FURLAN ..... APPELLANT;

AND

THE CITY OF MONTREAL AND OTHERS ..... RESPONDENTS.

ON PROPOSED APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL

Appeal—Jurisdiction—Motion for leave to appeal—"Highest court of final resort"—Whether appeal to this Court from provincial court of original jurisdiction, when no further appeal from that court—Sections 36, 37(3) Supreme Court Act.

No appeal lies to this Court "except from the highest court of final resort having jurisdiction in (a) province", according to the plain wording of subsection 3 of section 37 of the *Supreme Court Act.*

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

Provisions of section 36 of the Act do not contemplate, as contended by the appellant, that an appeal would lie to this Court from a provincial court of original jurisdiction, on the ground that, for the purposes of a particular proceeding, there is no further appeal from that court.

Under section 36, it is immaterial whether "the highest court of final resort" has appellate or original jurisdiction, or both: in either event there is to be no appeal except from such highest court and not merely from a court which may be the court of last resort in any particular proceeding.

James Bay Railway Co. v. Armstrong ([1909] A.C. 624) foll.

International Metal Industries Ltd. v. *City of Toronto* ([1939] S.C.R. 271) aff.

MOTION for leave to appeal to this Court from the judgment of the Superior Court for the district of Montreal, in the province of Quebec, Gibsone J., quashing a writ of *certiorari* issued against the respondents and affirming a judgment of a Recorder of the city of Montreal, which found the appellant guilty of violating a by-law of that city.

W. G. How for the motion.

A. Berthiaume K.C. contra.

THE COURT:—This is a motion for leave to appeal to this Court from the judgment of the Superior Court of Montreal. Leave to appeal has already been refused by the Court of King's Bench, Appeal Side. It is argued on behalf of the applicant that notwithstanding that no right of appeal to the Court of King's Bench exists from the judgment of the Superior Court, nonetheless this court may grant leave.

The Supreme Court of Canada is a statutory court with limited jurisdiction and if it has authority to grant the leave sought, such authority must be found within the terms of the statute. By Geo. VI, c. 42, the Act was amended and the following is now section 37, subsection 3;

Save as provided by this section, but subject to section forty-four, no appeal shall lie to the Supreme Court except from the highest court of final resort having jurisdiction in the province in which the proceedings were originally instituted.

It is not suggested by the applicant that the present motion comes within the terms of section 37 itself and it is admitted that section 44 has no application. Accordingly, by the plain words of the remainder of the subsection there

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is no appeal except from the "highest court of final resort having jurisdiction in the province". It is plain from subsection 2 of the section that the "highest court of final resort" having jurisdiction in the province is, in the province of Quebec, the Court of King's Bench, Appeal Side. Accordingly this court is prohibited from exercising any appellate jurisdiction in an appeal which does not come from the Court of King's Bench, Appeal Side.

It is contended on behalf of the applicant that it is contemplated by section 36 that an appeal lies from a provincial court of original jurisdiction where, for the purposes of the particular proceeding in question, there is no further appeal. Even if there were any ambiguity in the language of that section (and we think there is not) such ambiguity would be resolved by the express language of section 37, subsection 3. In our opinion all that section 36 does is to make it immaterial whether "the highest court of final resort" has appellate or original jurisdiction, or both. In either event there is to be no appeal except from such highest court and not merely from a court which may be the court of last resort in any particular proceeding.

The question of the jurisdiction of this court in a matter such as this has already been determined adversely to the applicant's contention by the Privy Council in *James Bay Railway Company* v. *Armstrong* (1). Their Lordships in dealing with a similar argument there said:

> Now, unquestionably, the Court of Appeal in Ontario is the highest court of last resort having jurisdiction in the province. The High Court is not. It was argued that in this particular case the High Court becomes "the highest court of last resort" when no appeal lies from it to the Court of Appeal, and it is placed by statute for the purpose in hand on an equal footing with the Court of Appeal. But their Lordships think that that result cannot be attained without unduly straining the words of the statute, and that, except in certain specified cases within which the present case does not come, an appeal to the Supreme Court lies only from the Court of Appeal.

Since the amendment of the *Supreme Court Act* in 1937, already referred to, this court has decided the same point in a similar sense in *International Metal Industries Limited* v. *The Corporation of the city of Toronto* (2).

The application must therefore be dismissed with costs.

Leave to appeal refused.

(1) [1909] A.C. 624, at 631.

(2) [1939] S.C.R. 271.

HIS MAJESTY THE KING ..... APPELLANT;

AND

BESSIE MAY SNELL AND THE WORKMEN'S COMPENSATION BOARD OF THE PROVINCE OF BRITISH COLUMBIA (SUPPLIANTS) ..... RESPONDENTS.

1946
*Oct. 24
1947
*Feb. 4

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Negligence—Crown—Workmen's compensation—Damages—Death through accident caused by negligence of servant of the Crown (Dom.)—Action on behalf of dependents of deceased under Families' Compensation Act, R.S.B.C. 1936, c. 93, claiming damages against the Crown—Exchequer Court Act, R.S.C. 1927, c. 34 (as amended), ss. 19(c), 50A—Claim and acceptance, prior to the action, of compensation from the Workmen's Compensation Board of British Columbia—Question as to effect thereof on right of action or extent of recovery—Workmen's Compensation Act, R.S.B.C. 1936, c. 312, s. 11—Subrogation of the Board—Board a co-suppliant in the action.

The husband of S, while working in the course of his employment by one D, in the province of British Columbia, was the victim of an accident through which he died, which accident was caused by the negligence of a member of the Canadian military forces while acting within the scope of his duties or employment. S was awarded compensation for herself and her infant son by the Workmen's Compensation Board of British Columbia under the *Workmen's Compensation Act*, R.S.B.C. 1936, c. 312. She brought the present action (by petition of right) for the benefit of herself and her son under the *Families' Compensation Act*, R.S.B.C. 1936, c. 93, claiming damages against the Crown by virtue of ss. 19 (*c*) and 50A of the *Exchequer Court Act*, R.S.C. 1927, c. 34 (as amended in 1938, c. 28, and 1943, c. 25). S. 11 of said *Workmen's Compensation Act* provides for cases where an accident happens in such circumstances as entitle the workman or his dependents "to an action against some person other than his employer", and subs. 3 thereof provides in effect that, if a workman or dependent claims compensation from said Board, the Board shall be subrogated to the rights of the workman or dependent as against such other person. In the present action the Board was a co-suppliant, pleading its statutory right of subrogation, and also an equitable assignment in writing from S to it.

Held: The claiming and acceptance by S of compensation under said *Workmen's Compensation Act* did not bar her right to recover, nor affect the amount recoverable, from the Crown in the present action. S. 11(3) of that Act only affected rights as between the dependents and the Board. The direction by the Exchequer Court that the amount it awarded as damages to S should be payable to the Board and the amount it awarded as damages to her son should be paid into court to abide the Court's order, with liberty to the Board to apply for a declaration as to its rights, was unobjectionable.

Judgment in the Exchequer Court, [1945] Ex. C.R. 250, affirmed.

*Present:—Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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APPEAL by the Crown from the judgment of the Honourable Mr. Justice Sidney Smith, Deputy Judge of the Exchequer Court of Canada (1), in favour of the suppliants against the Crown (in right of the Dominion of Canada) for damages.

The action was brought (by petition of right) for damages by reason of the death through accident of Bertram Snell who was, at the time of the accident, working in the course of his employment as a servant of one Dines, in the province of British Columbia. The accident was caused by negligence of a member of the Canadian military forces while acting within the scope of his duties or employment. The action was brought on behalf of the widow of the deceased and her infant son, under the *Families' Compensation Act,* R.S.B.C. 1936, c. 93, and amendments thereto. Prior to the action the widow had claimed and been awarded compensation for herself and her son by the Workmen's Compensation Board of British Columbia under the *Workmen's Compensation Act,* R.S.B.C. 1936, c. 312. The said Board was a co-suppliant in the action, pleading that it was subrogated, pursuant to provisions of s. 11 of the said *Workmen's Compensation Act,* to the claims of the dependents, and also pleading an equitable assignment in writing from the widow to it.

On behalf of the Crown it was alleged that in consequence of the election by the widow to claim compensation, and payment to and acceptance by her of the monthly award of the Board for herself and her son as compensation for the death of her husband, she had suffered no loss or damage in law which would entitle her to maintain an action against the Crown under s. 19(*c*) of the *Exchequer Court Act,* R.S.C. 1927, c. 24 (an alternative submission in the present appeal was that she had no claim except to the extent that the award to her under the *Workmen's Compensation Act* had not fully compensated her); that she had assigned her right of action and, as a result, was not entitled to maintain an action; that the provisions of the said *Workmen's Compensation Act* were not applicable

(1) [1945] Ex. C.R. 250; [1946] 1 D.L.R. 632.

to the Crown and that the suppliant Board could acquire no right of action against the Crown by subrogation under that Act.

The contentions of the parties are further stated in the reasons for judgment in this Court now reported.

By the formal judgment in the Exchequer Court it was ordered that the suppliants were entitled to recover from the Crown, as damages suffered by the widow the sum of $13,500 payable to the Board and by them to be dealt with in due course, and as damages suffered by the son the sum of $3,500 to be paid into court to the credit of the suppliants to abide the order of the Court, and that the Board be at liberty to apply to the Court for a declaration that the Board is by subrogation entitled to the said sum of $3,500 and to payment out to them of said sum.

W. R. Jackett for the appellant.

F. A. Sheppard, K.C. for the respondents.

KERWIN, J.—On September 29, 1943, Bertram Snell died in consequence of a collision between two motor trucks on a highway in the Province of British Columbia. The collision was occasioned by the negligence of Sapper Neufeld, a member of the military forces of His Majesty in the right of Canada, which negligence occurred while Neufeld was acting within the scope of his duties or employment. At the time, Snell was engaged in the course of his employment in driving a truck of his employer, one Dines, and the collision occurred between that truck and one owned by the Dominion Crown and driven by Neufeld. This Court has not had occasion to pass upon the judgment of the Exchequer Court in *McArthur* v. *The King* (1), where it was decided that a member of the Non-Permanent Active Militia of Canada on active service was not an officer or servant of the Crown within section 19(*c*) of the *Exchequer Court Act*, and it is not now necessary to do so as section 50A of that Act, as enacted by chapter 25 of the Statutes of 1943, provides:

> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and

(1) [1943] Ex. C.R. 77.

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thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

For another reason the date, June 24, 1938, is of importance, as it was then that chapter 28 of the statutes of that year was assented to, by which section 19(*c*) was repealed and re-enacted but with the omission of the words "on any public work" at the end thereof.

It has been authoritatively determined that section 19(*c*) not only conferred jurisdiction upon the Exchequer Court to adjudicate the classes of claims described but also that in such cases liability is imposed upon the Crown to respond in damages for the negligence of its officers or servants where, in like circumstances, such a liability would rest upon a subject corporation or individual according to the law of the province in which the claim arose as that law existed at the time when the *Exchequer Court Act* began to operate: *Canadian National Railway Co.* v. *Saint John Motor Line Limited* (1). Prior to June 24, 1938, even if Neufeld were an officer or servant of the Crown, a petition of right for such an occurrence as the one here in question could not have succeeded, since the negligence was not committed during Neufeld's presence on a public work: *The King* v. *Dubois* (2); *The King* v. *Moscovitz* (3). June 24, 1938, must, therefore, be taken as the date as of which the question must be determined whether in like circumstances a liability would rest upon a subject. At that time there was in force in British Columbia the *Families' Compensation Act,* R.S.B.C. 1936, chapter 93, whereby an action for damages for the death of Snell might be brought against the wrongdoer by and in the name of the widow for the benefit of herself and infant son. There was also in force the *Workmen's Compensation Act,* R.S.B.C. 1936, chapter 312.

A petition of right was accordingly brought against the Crown by the widow for damages for Snell's death. The accident having happened in such circumstances as entitled a workman's dependent to an action against some person other than the workman's employer, and the widow having claimed under the *Workmen's Compensation Act,* the

(1) [1930] S.C.R. 482, at 488.
(2) [1935] S.C.R. 378.
(3) [1935] S.C.R. 404.

Workmen's Compensation Board of British Columbia established thereby is, by virtue of subsection 3 of section 11, "subrogated to the rights of the workman or dependent as against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other person." The Board also took an equitable assignment in writing from the widow. The Board was joined as a co-suppliant, not as a necessary party,—since the claim is that of the widow on behalf of herself and her infant son—but as a proper party.

The dispute of the claim is founded upon the facts that the widow had a right to claim compensation under the provisions of the *Workmen's Compensation Act* although she might choose not to exercise it; that she did make such a claim; that the Board ordered that certain monthly sums be paid to her for herself and for the son; and that these sums have been and are being paid. Although it is doubtful if the point is open on the pleadings, it was also argued that even if these circumstances did not defeat the present claim, the compensation awarded under the *Workmen's Compensation Act* should lessen *pro tanto* the sum awarded by the trial judge.

If the appellant's arguments were sound, they would apply as well between subjects as between the Crown and subject. It is well settled that it is only pecuniary loss for which compensation is to be paid under Lord Campbell's Act and legislation similar thereto, such as the British Columbia *Families' Compensation Act,* and that any pecuniary advantage a dependent has received from the death must be set off against her probable loss. In *Grand Trunk Ry. Co.* v. *Jennings* (1), the Privy Council decided, in an action under the Ontario *Fatal Accidents Act* as it then stood, that while the total amount of a life insurance policy need not as a matter of law be deducted from what would otherwise be payable as the pecuniary loss contemplated by the Act, the receipt of the insurance money was a proper circumstance to be taken into consideration. This has since been changed by statute in Ontario but not in British Columbia. In litigation between subjects, an action by the dependent of a workman whose

(1) (1888) 13 App. Cas., 800.

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death was caused by a third party would not be defeated by reason merely of the dependent's right to claim compensation under the *Workmen's Compensation Act*. If the dependent had claimed compensation, the Board, by subsection 3 of section 11, would have been "subrogated to the rights of the workman or dependent as against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other person." It is not necessary to determine precisely to what the words "or any outstanding part" refer, but I am satisfied that they would not apply so as to reduce the claim of the dependent against a subject wrongdoer. The Board is subrogated to the dependent's rights against the third party and the Board's rights would not be defeated or curtailed by anything done by the dependent. That is, as between subjects, it seems clear that the wrongdoer could not successfully contend that the legislature intended that the receipt by a dependent of compensation under the *Workmen's Compensation Act* should be deducted from the sum otherwise payable under the *Families' Compensation Act*. If that were so, the subrogation of the Board to the dependent's rights would be illusory. Liability to the same extent attaches to the Crown.

Mrs. Snell is therefore entitled on behalf of herself and her infant son to damages. No question was raised as to the amounts allowed by the trial judge and nothing is said, therefore, as to the manner of their compilation. The petition of right being carried on at the instance of the Board, even if it were not a party, the judgment would still be in favour of the widow and infant. As between the Board and the widow and her son, the former is entitled to the amounts awarded and I think there is ample power in the Exchequer Court to direct, as has been done in this case, that the damages suffered by the widow should be payable to the Board, and that the damages suffered by the infant should be paid into Court for the benefit of all the suppliants to abide the order of the Court, with liberty to the Board to apply for a declaration that it is entitled by subrogation to the same sum and to payment out to the Board thereof.

The appeal should be dismissed with costs.

The judgment of Taschereau and Estey JJ., was delivered by

ESTEY J.—The late husband of the respondent, Bessie May Snell, was killed in a collision between a truck driven by himself, in the course of his employment, and an army vehicle driven by a soldier. Mrs. Snell applied for and received compensation under the *Workmen's Compensation Act,* R.S.B.C. 1936, c. 312.

This action is brought by the Workmen's Compensation Board of British Columbia and Mrs. Snell against the Crown in the right of the Dominion. The Board pleads an equitable assignment from Mrs. Snell to it and its right to subrogation under section 11(3) of the *Workmen's Compensation Act.*

The pleadings admit that the late Mr. Snell's death was caused by the negligence of the driver of the army vehicle and therefore that Mrs. Snell had an action against the Crown in the right of the Dominion by virtue of her position under the *Families' Compensation Act,* R.S.B.C. 1936, c. 93, and her consequent rights under section 19(*c*) and section 50A of the *Exchequer Court Act,* R.S.C. 1927, c. 34, as amended 1938 S.C., c. 28, and 1943 S.C., c. 25.

The Crown, however, contends that so far as Mrs. Snell is concerned, having received compensation under the *Workmen's Compensation Act,* she has either suffered no pecuniary loss, or alternatively has been fully compensated therefor and therefore has no cause of action, or in the further alternative that she is entitled to only the difference between what she has been awarded under the *Workmen's Compensation Act* and what may be found to be full compensation.

So far as the Workmen's Compensation Board is concerned, the Crown sets up a number of defences which may be summarized thus: that the Board suffered no pecuniary damage; the assignment is ineffective as against the Crown; and section 11(3) of the *Workmen's Compensation Act* does not give any remedy to the Board against the Crown in the right of the Dominion.

An examination of Mrs. Snell's position under the provincial *Workmen's Compensation Act* and under the sections of the *Exchequer Court Act* already referred to indicates

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that she had both a claim under the provincial Act and under the *Exchequer Court Act*. The contention here is that, having exercised her right and having accepted compensation under provincial legislation, that election on her part has barred her right to recover from the Crown in the right of the Dominion, if not completely, then to the extent that she has recovered compensation under that Act.

The position of one who elects under the *Workmen's Compensation Act* of Ontario was determined by this Court in *Toronto Railway Company* v. *Hutton* (1), where Mr. Justice Duff (later Chief Justice) stated at p. 421:

> If he elects to claim compensation, the employer becomes subrogated to the claimant's rights against the third person; in other words, he becomes entitled to enjoy the benefit of them and may enforce them in the name of the claimant. But all this is intended to be and is a disposition as to the rights of the employer and the claimant *inter se*.

And at p. 422:

> It follows, of course, that the transactions between the Board and the plaintiff are transactions to which for the purpose of this litigation the appellant company is a stranger and that they do not afford any answer to the respondent's claim in the action.

The material provisions of the *Workmen's Compensation Act* of British Columbia here under consideration are to the same effect as those of the Ontario Act in *Toronto Railway Company* v. *Hutton, supra.* It follows, therefore, that the position of the party whose negligence caused the injury is unaffected by the provisions of the *Workmen's Compensation Act.*

The compensation under the statute is in no way a settlement of Mrs. Snell's claim for damages arising out of the negligence of the appellant. The basis for the compensation under the statute, that of "injury by accident arising out of and in the course of employment", is a much wider and different basis from that of a claim founded in negligence. A computation of the claim is also, as set out in the statute, quite different from that which would be followed in a negligence action. Moreover, the *Workmen's Compensation Act* provides in effect that the claim of Mrs. Snell at common law for damages continues and may be enforced. It therefore follows that the contention of the

(1) (1919) 59 Can. S.C.R. 413.

Crown that whatever damages Mrs. Snell may have suffered have been recovered and because thereof she has no further claim, is not tenable.

The statute does provide that, in the event of the party entitled to compensation accepting same, the Board is subrogated to or stands in the position of the party receiving compensation as against the party whose negligence caused the action. These are matters entirely between the party entitled to compensation and the Board. In this case both of these are parties to the action. It therefore becomes unnecessary to determine certain of the issues raised had the action been brought in the name of the Board only.

Both were parties to the action as framed and tried in the Exchequer Court. There the learned trial judge in his judgment directed how the funds received should be dealt with as between the Board, Mrs. Snell and her infant son. If the appeal otherwise failed, this disposition of the funds was not objected to.

The appeal should be dismissed and the judgment of the Exchequer Court affirmed.

RAND J.—In this case, the Dominion Crown, liable for the tort of its servant, claims a deduction from damages recoverable by the widow and child under the *Families' Compensation Act* of British Columbia, of the sums payable to them under the *Workmen's Compensation Act*. The contention is that the death statute is intended merely to maintain to the dependents the benefits they would have received if death had not ensued the accident, and that there must be taken into account all benefits that arise to them by reason of the death.

There is no doubt a distinction has been established between the effect on damages of such benefits in the case of injuries not causing death and those that result fatally. In *Bradburn* v. *Great Western Ry. Co.* (1), the court excluded evidence of moneys received under a policy of accident insurance, on the ground concisely stated by Pigott, B. in these words:

> He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it.

(1) (1874) L.R. 10 Ex. 1.

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A different rule in death cases was first applied by Lord Campbell in *Hicks* v. *Newport, etc., Ry. Co.* (1), where he directed the jury to deduct from the aggregate sum found the amount of accident insurance accruing to the persons claiming. In *Grand Trunk Ry. Co.* v. *Jennings* (2), a further distinction was recognized between life and accident insurance, and it was held that the former should be regarded only to the extent that its payment may have been accelerated. This seems to rest on the view that the benefit of the accident insurance was a legal consequence of the act of the wrongdoer, that as death might never happen from accident, the act brought about, in a legal sense, not only the loss but the mitigation; but that in an insurance against death alone, only time separates the beneficiary from the benefit. The ruling as to accident insurance has been superseded, however, by an amendment to the English Act passed in 1908.

The question, then, is whether the rule applies to such a right as that to compensation under the Workmen's Act, and in my opinion it does not.

Section 11 of that Act is as follows:

11. (1) Where an accident happens to a workman in the course of his employment in such circumstances as entitle him or his dependents to an action against some person other than his employer, the workman or his dependents, if entitled to compensation under this Part, may claim such compensation or may bring such action.

(2) If the workman or his dependents bring such action and less is recovered and collected than the amount of the compensation to which the workman or dependents would be entitled under this Part, the workman or dependents shall be entitled to compensation under this Part to the extent of the amount of the difference.

(3) If any such workman or dependent makes an application to the Board claiming compensation under this Part, the Board shall be subrogated to the rights of the workman or dependent as against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other person.

(4) In any case within the provisions of subsection (1), neither the workman nor his dependents nor the employer of the workman shall have any right of action in respect of the accident against an employer in any industry within the scope of this Part; and in any such case where it appears to the satisfaction of the Board that a workman of an employer in any class is injured owing to the negligence of an employer or of the workman of an employer in another class within the scope of this Part, the Board may direct that the compensation awarded in such case shall be charged against the last-mentioned class.

(1) (1857) Reported in a note in 4 B. & S. 403.
(2) (1888) 13 App. Cas. 800.

It will be seen that the section deals specifically with the right of dependents under the Families' Act so as to create in effect a *quasi* indemnity and to subrogate the Board to the rights of the dependents when they have accepted compensation. But it is obvious that if such moneys can be deducted from the amount recoverable on the tort, the subrogation would be nullified. It would in fact reverse the plain purpose of the section and place upon the compensation fund *pro tanto* a primary liability. In the result, the Board at most would be entitled only to the excess of the claim against the wrongdoer over the compensation, the portion which equitably belongs to the dependents. The intention is clearly to preserve in full the cause of action, including damages, against the wrongdoer and to create a legal right in the Board to enforce it in the name of the dependents for the benefit of the compensation fund. Now the insurances held deductible were absolute in obligation; but the section, by importing that quality of indemnity, invests the right to compensation with a character outside of the category of benefits within the rule.

The Board is a co-petitioner and the judgment provides for the payment to it of the moneys recovered for the benefit of the widow. In the case of the child, the direction is to pay the sum recovered into Court with liberty to the Board to apply for a declaration of interest.

The effect of the statutory subrogation, a matter solely between the dependent and the Board, is to constitute the dependent a trustee of the right of action for the Board. The petitioners are, therefore, trustee and *cestui que trust*.

Whether or not that relationship raises in the Board an equitable right against the Crown, I do not find necessary to decide. The defence in this respect alleges simply that the Workman's Act is not applicable to the Crown, and that the Board "can acquire no right of action against the respondent by subrogation under the said Act", which I take to mean can create no legal right and to deny the competency of provincial legislation to affect a claim against the Crown given by a Dominion Act. But that leaves untouched the question whether the Crown is bound to recognize the beneficial ownership of such a claim. There

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is no doubt that many petitions of right have been presented and determined in chancery without challenge to the jurisdiction of the court to entertain them. The consideration that the remedies used by equity to enforce its decrees could not, by their nature, operate against the Crown is not present in a relation which permits the coercion of the court to be exercised upon a private person. The question is examined in chapter 11 of Clode on Petition of Right, where the instances in which petitions have been actually dealt with are enumerated. In an analogous case, *In re Rolt* (1), the petitioners were the assignees of a bankrupt contractor with the Crown, and I see no ground in principle why an interest of this nature should not be admitted against the Crown where it can be made effectual by a remedy operating upon the trustee: *The Queen* v. *Smith* (2), Strong J., at p. 66:

> Had the proof borne out this case, and had it appeared that the assignment was so limited, the suppliants would have been undoubtedly entitled to recover in respect of work actually performed by the original contractors, for such an equitable assignment would have been entirely free from objection, either upon the general law, or upon any provision contained in the contract, and the record would have been properly framed for relief upon such a state of facts.

Its convenience is obvious; to the Crown, the result is indifferent; it conforms to the equitable rule of concluding all features of a controversy in the one proceeding; and it secures the interest of a semi-public body.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.—The contention of the Crown is that the dependents of the deceased, being entitled to compensation under the *Workmen's Compensation Act,* have no right of action under section 19(*c*) of the *Exchequer Court Act,* and alternatively, have no claim except to the extent that the amount awarded under the Compensation Act has not fully compensated them in respect of their claim under the *Families' Compensation Act.* It is further submitted in any event that the respondent Board has no claim at all under section 19(*c*) and that the *Workmen's Compensation Act* is ineffective to give it any.

(1) (1859) 4 DeG. & J. 44 (45 E.R. 18).
(2) (1883) 10 Can. S.C.R. 1.

It is, of course, well settled that the damage awarded under statutes of the nature of the *Families' Compensation Act* are limited to the pecuniary benefit which the dependents might reasonably have expected from the continuance of the life of the deceased. By reason of the provisions of section 19(*c*), the Crown becomes liable to pay such damages when the death has been caused in circumstances such as are here admittedly present.

Turning to the *Workmen's Compensation Act,* section 11 is as follows:

(1) Where an accident happens to a workman in the course of his employment in such circumstances as entitle him or his dependents to an action against some person other than his employer, the workman or his dependents, if entitled to compensation under this Part, may claim such compensation or may bring such action.

(2) If the workman or his dependents bring such action and less is recovered and collected than the amount of the compensation to which the workman or dependents would be entitled under this Part, the workman or dependents shall be entitled to compensation under this Part to the extent of the amount of the difference.

(3) If any such workman or dependent makes an application to the Board claiming compensation under this Part, the Board shall be subrogated to the rights of the workman or dependent as against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other person.

It is the submission of the Crown that the compensation provided by the above section is full compensation equivalent by the law of the province to the pecuniary value of the support the widow and her son would have received from the deceased and that consequently no loss has been sustained. The Crown further says that if the award is not by law full compensation, the Crown is liable only for any deficiency. The contention in effect is that the provision by way of Workmen's Compensation operates in ease of the tort-feasor. The Crown further says that section 11(3) canot confer any right upon the respondents as against the Crown.

It is said in answer by the respondents that while it is true that provincial legislation may not bind the Crown in the right of the Dominion *ex proprio vigore,* nonetheless the Crown may not take the benefit of the provisions entitling the dependents to compensation without reference

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to the terms upon which compensation is awarded, namely, the statutory subrogation of the Board to the rights of the dependents as against the wrong-doer.

It is said that where statutory rights are in question, as distinct from common law rights, *Crooke's Case* (1) is authority for the view that if the Crown, in order to establish rights it claims, must invoke the very statute which conditions those rights, the Crown is bound by the derogation, and reference is made to *Re Excelsior Electric Dairy Machinery Ltd.* (2) and to *Attorney General for British Columbia* v. *Royal Bank of Canada* (3), per Macdonald, J. A., at 294 and 297.

I do not find it necessary to pass upon the soundness of this contention, as I think the respondents are entitled to succeed upon the basis of their further contention, namely, that the relevant sections of the *Workmen's Compensation Act* are to be construed as affecting *inter se* the rights of the dependents and the Board only; *Toronto Railway Company* v. *Hutton* (4); and has no effect upon the liability of the Crown under section 19(*c*) to the person injured or his dependents.

In *Workmen's Compensation Board* v. *Canadian Pacific Railway Co.* (5), it was held that the rights given by section 8 of the then Act, 6 Geo. V, Cap. 77, constituted a statutory contract made with the workman for his benefit and for the benefit of members of his family dependent upon him. I think the principle of this decision is not limited to a case within section 8 where the accident happens outside the province, but applies equally to cases in which the accident takes place within the province. The relevant provisions of the statute here in question, R.S.B.C., cap. 312, are not materially different from the Act of 1916.

Hutton's case (6) was decided under the Ontario statute of which the corresponding provisions are not in essence dissimilar from those of the British Columbia statute. It was held in that case that an election to claim compensation under the Act did not bar the claim of the injured workman against the tort-feasor. In the language of

(1) (1691) 1 Shower K.B., 208.
(2) (1922) 52 O.L.R. 225 at 228.
(3) [1937] 1 W.W.R. 273.
(4) (1919) 59 Can. S.C.R. 413.
(5) [1920] A.C. 184.
(6) (1919) 59 Can. S.C.R. 413.

Mignault J., with whom the Chief Justice and Brodeur J. agreed, at p. 426, the subrogation effected by the statute "gives the * * * Board the control of the action", but does not divest the right of action from the workman or his dependents. The main contention of the appellant, therefore, in my opinion, fails.

The formal judgment directs recovery by both the Board and Bessie May Snell, payment to be made to the Board. It is objected that:

(*a*) the provincial legislation is incompetent to give the Board any right of action in its own name against appellant, and that,

(*b*) the assignment by Bessie May Snell to the Board is equally ineffective, as the right of action is *ex delicto* and therefore not the subject of assignment.

Mignault J., in dealing with a similar contention in *Hutton's* case (1), said at pp. 427-428:

> * * * the appellant appears to me to be without interest to complain of this modification of the judgment. By paying the damages according to the judgment it will be discharged from any possible claim either by the respondent or by the Board.

In the present case, as in *Hutton's* case (1), the essential ground of the appeal and of the defence to the action was that the election of the respondent Snell to claim compensation barred the action. In my opinion, what happens with respect to the proceeds of the judgment as between the respondents in view of the discharge involved in payment, is a matter which, at this stage of the action, does not concern the appellant.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. P. Varcoe.*

Solicitor for the respondents: *W. S. Lane.*

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(1) (1919) 59 Can. S.C.R. 413.

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*Mar. 13, 14
*Apr. 18

HIS MAJESTY THE KING ..... APPELLANT;

AND

RAYMOND QUINTON ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Indictment for attempted rape—Verdict of assault causing bodily harm—Appellate court substituting conviction of common assault—Appeal to this Court by the Crown—Conviction to be changed to that of indecent assault—Conviction for "included" offences under section 951 Cr. C.—Sections 72, 292(c), 300, 1016 Cr. C.

A jury, upon an indictment for attempted rape, returned a verdict of assault upon a female, causing actual bodily harm. Upon an appeal by the accused, the Court of Appeal held that an indictment for attempted rape did not include the offence for which he was found guilty, and the Court then substituted a conviction for common assault. The Crown appealed to this Court, asking that the substituted conviction be changed to that of indecent assault.

Held that the appeal should be dismissed.

Per the Chief Justice and Kerwin, Kellock and Estey JJ.:—The offence of indecent assault may be included in a count of attempted rape under section 951 Cr. C.; but, in this case, it was not open to the appellate court, in view of the finding of the jury, to substitute a conviction of indecent assault.

Per The Chief Justice and Estey JJ.:—The jury, in finding the accused not guilty as charged on the count of attempted rape, negatived the existence of the element of indecency and in effect found the accused not guilty of indecent assault. Therefore, the appellate court, so far as substituting one conviction for another under section 1016 (2) Cr. C., had no other course open to it than to substitute that of common assault.

Per Kerwin and Kellock JJ.:—Section 1016 (2) Cr. C. requires it to appear to the Court of Appeal on the actual finding that the jury "must" have been satisfied of facts which proved the respondent guilty of indecent assault.

Judgment of the Court of Appeal ([1947] O.R. 1) affirmed.

APPEAL by the Crown, upon leave to appeal granted under section 1025 Cr. C., from a judgment of the Court of Appeal for Ontario (1), allowing in part an appeal by the respondent from a conviction of having committed an assault upon a female causing bodily harm and substituting a conviction of common assault.

W. B. Common K.C. for the appellant.

Vera L. Parsons K.C. for the respondent.

*Present:—Rinfret CJ. and Kerwin, Taschereau, Kellock and Estey JJ.

(1) [1947] O.R. 1.

The judgment of the Chief Justice and of Estey J. was delivered by

ESTEY J.:—The accused was indicted for attempted rape under section 300 of the Criminal Code. The learned trial judge instructed the jury that included in the count of attempted rape were the other offences of indecent assault, assault on a female occasioning actual bodily harm (sec. 292(c)), and common assault.

The jury returned a verdict of assault on a female occasioning actual bodily harm.

Upon an appeal by the accused the appellate court in Ontario held that an indictment for attempted rape did not include the offence of assault on a female occasioning actual bodily harm within the meaning of section 951. The learned judges of that court then substituted under sec. 1016(2) a verdict of common assault and imposed sentence of one year in reformatory.

The accused does not appeal but the Crown appeals to this court and asks that the substituted verdict of common assault be changed to that of indecent assault.

Leave to appeal was granted to the Crown on the basis that *Rex* v. *Stewart* (1) in which the Appellate Division in Alberta held that the offence of indecent assault is by virtue of the provisions of section 951 included in a count of attempted rape and, therefore, is in conflict with the decision of the appellate court of Ontario in this case.

The commission of the offence of rape includes an act of indecency, as stated by my Lord the Chief Justice in *Wright* v. *The King* (2):

> No doubt in a crime such as the one (rape) under consideration, the initial step might be stated to be an indecent assault, followed by the subsequent step which might be described as an attempt to rape * * *

Section 72 of the Criminal Code defines an attempt:

> Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

This section requires that one to be guilty of an attempt must intend to commit the completed offence and to have done some act toward the accomplishment of that

(1) (1938) 71 C.C.C. 206; [1938] 3 W.W.R. 631.

(2) [1945] S.C.R. 319, at 322.

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objective. That act must be beyond preparation and go so far toward the commission of the completed offence that but for some intervention he is prevented or desists from the completion thereof.

> Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it but acts immediately connected with it are. Parke B. in *Reg.* v. *Eagleton* (1), quoted by Lord Reading C.J. in *Rex* v. *Robinson* (2).

It is the existence of both the intent and the act in such a relationship that the former may be regarded as the cause of the latter. The intent unaccompanied by the act does not constitute a criminal offence.

In the early case of *Rex* v. *Scofield* (3), Lord Mansfield stated at p. 403:

> So long as an act rests in bare intention, it is not punishable by our laws: but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.

This case is commented upon in Broom's Legal Maxims, 6th Ed. p. 305:

> It is a rule, laid down by Lord Mansfield, and which has been said to comprise all the principles of previous decisions upon this subject, that so long as an act rests in bare intention, it is not punishable by our laws; but when an act is done, the law judges not only of the act itself, but of the intent with which it was done; and if the act be coupled with an unlawful and malicious intent, though in itself the act would otherwise have been innocent, yet, the intent being criminal, the act likewise becomes criminal and punishable.

It appears from the foregoing that the intent may determine the criminal quality of the act. There is present in the offence of rape the intent to commit an indecent act. The same intent is required in the offence of attempted rape. In the latter that intent may be found from the nature of the act or from the conduct of the accused immediately associated with the commission of that act or indeed both. If such an intent be not present the offence of attempted rape is not committed. The act cannot be dissociated from the intent as evidence which caused the accused to do such act.

(1) (1855) Dears, 515, at 538.
(2) [1915] 2 K.B. 342, at 348.
(3) (1786) Caldecott's Rep. 397.

In *Rex* v. *Louie Chong* (1), the magistrate found the accused guilty of indecent assault and stated a case for the opinion of the appellate division in Ontario as to whether he was justified in finding the accused guilty of indecent assault, where the accused in taking hold of the girl did so in a manner that did not import indecency. At the same time, however, he offered her money to go with him for an immoral purpose. The judgment of the court written by Middleton J. affirmed the magistrate's conviction. His Lordship in delivering the judgment stated:

> It appears to me that an act in itself ambiguous may be interpreted by the surrounding circumstances and by words spoken at the time the act is committed * * *. It is in each case a question of fact whether the thing which was done, in the circumstances in which it was done, was done indecently. If it was, an indecent assault has been committed.

His spoken words which were part of his conduct evidenced the intention of the accused and determined the criminal quality of his act.

It would, therefore, appear that a count charging an attempt to commit rape would include the offence of indecent assault under section 951.

Though the offence of indecent assault is included in a count of attempted rape under section 951 it was not in this case, because of the finding of the jury, open to the appellate court to substitute a verdict of indecent assault. Section 951 provides that the

> accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved * * *

The learned trial judge explained to the jury the ingredients essential to find the accused guilty upon one or other of the four counts. Those of attempted rape and indecent assault require a finding of indecency, while that of actual bodily harm to a female does not. The jury in finding the accused not guilty as charged on the count of attempted rape negatived the existence of the element of indecency and, therefore, in effect found the accused not guilty of indecent assault.

Where an indictment contained three counts: (1) that the accused did unlawfully kill, under section 268; (2) grievous bodily harm, sec. 284; and (3) wanton or furious

(1) (1914) 23 C.C.C. 250.

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driving, sec. 285, the jury found the accused guilty of wanton or furious driving. Chief Justice Anglin stated at p. 47:

> In a case such as that at bar, that the jury had found that neither the whole offence charged in count No. 1 nor the whole offence charged in count No. 2 had been proved, is an intendment which we must make in support of the verdict.

And at p. 48:

> It was within the province of the jury to find that the offence charged in the third count was satisfactorily proven, but that, for reasons which we can only surmise and as to the validity or the adequacy of which we are not at liberty to inquire some essential element of each of the offences charged in the first and second counts respectively was, in their view, not established beyond reasonable doubt. *Barton* v. *The King* (1).

The jury in finding the accused guilty of assault occasioning actual bodily harm to a female negatived the existence of the element of indecency essential to the finding of a verdict of indecent assault. Therefore, the appellate court could not conclude "that the jury * * * must have been satisfied of the facts which proved him guilty of" indecent assault as required by section 1016(2) before it can substitute a verdict of guilty of that other offence. *Rex* v. *Hayes and Pallante* (2); *Rex* v. *Collins* (3).

In a case where the accused was found guilty of murder this court so satisfied was in a position to and did reduce the verdict to one of manslaughter. At p. 350 Chief Justice Duff:

> The finding makes it clear that the jury must have been satisfied of the facts necessary to constitute manslaughter, and we are, consequently, of opinion that the Court of Appeal would have authority under s. 1016 to substitute a verdict of manslaughter for the verdict of the jury and to pronounce sentence upon the prisoner. *Rex* v. *Hopper* (4); *Manchuk* v. *The King* (5).

The learned judges in the appellate court, because of the verdict of the jury, so far as substituting one verdict for another under section 1016(2), had no other course open to them than to substitute that of common assault.

The appeal should be dismissed.

(1) [1929] S.C.R. 42.
(2) (1942) 77 C.C.C. 195; [1942] O.R. 52.
(3) (1922) 17 Cr. A.R. 42.
(4) [1915] 2 K.B. 431.
(5) [1938] S.C.R. 341.

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The judgment of Kerwin and Kellock J.J. was delivered by

KELLOCK J.:—This is an appeal by the Attorney General of Ontario, pursuant to leave granted under section 1025 (1) of the Criminal Code, from the judgment of the Court of Appeal for Ontario, dated December 13, 1946.

The present respondent was charged with attempted rape and on his trial before Schroeder J. and a jury was convicted of "assault upon a female occasioning actual bodily harm". The learned trial judge had charged the jury that they might convict as charged, or of indecent assault, or assault upon a female occasioning actual bodily harm or common assault or not guilty.

The respondent appealed in writing to the Court of Appeal and on the hearing of the appeal the court raised the question whether it was competent for the jury to return the verdict they had returned. It was held that such a verdict was not open to the jury and the court substituted a conviction of common assault, being of opinion that the jury by their verdict, in view of the learned judge's charge, had negatived indecent assault. Roach J.A., who delivered the judgment of the court, expressed disagreement with the decision of the appellate division of Alberta in *Rex* v. *Stewart* (1), by which it was held that, on a charge of attempting to have carnal knowledge of a girl under the age of fourteen, the accused might be convicted of indecent assault, under section 951 (1).

The Attorney General now appeals on the ground that the Court of Appeal was in error in holding that indecent assault is not an included offence in a charge of attempted rape. He asks that a conviction for indecent assault be substituted. We are not called upon otherwise to consider the judgment in appeal. Counsel for the respondent agrees with the submission of the appellant that the Court of Appeal was in error in the view taken with respect to indecent assault being included in the charge of the indictment here in question.

If common assault be an included offence in a charge of attempted rape as held by the Court of Appeal, and there can be no question but that such an assault would

(1) (1938) 71 C.C.C. 206.

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be an act within section 72, then such an act, though in itself ambiguous, may, interpreted by the surrounding circumstances, including words spoken at the time, amount to indecent assault; *Rex* v. *Louie Chong* (1). It is not necessary that the act constituting the assault be in itself indecent in its nature. If the assault, coupled with the intention required by section 72, is of such a nature as to constitute an attempt within the rule as laid down in *Rex* v. *Robinson* (2), such assault must necessarily be indecent; *Rex* v. *Louie Chong* (1). In other words, the crime of attempted rape progresses from assault through indecent assault to the complete crime. If the facts of the suppositious case referred to by Roach J.A. amount to the offence of attempted rape, the assault itself necessarily becomes indecent. This would appear to have been the view of the majority in *Wright* v. *The King* (3).

However, I agree with the Court of Appeal in the view that it was not open to that court, in view of the learned trial judge's charge and the verdict of the jury, to substitute a conviction for indecent assault. Section 1016 (2) requires it to appear to the Court of Appeal on the actual finding that the jury "must" have been satisfied of facts which proved the respondent guilty of indecent asault. The highest that Mr. Common puts his argument, and properly so, is that:

> It is quite possible that the jury might be under the erroneous impression that a conviction for assault occasioning actual bodily harm on a female was more serious than that of indecent assault.

That is not sufficient. I do not think that the Court of Appeal were required, in the circumstances here present, to come to the conclusion the statute requires.

I would accordingly dismiss the appeal.

TASCHEREAU J.:—I am of opinion that this appeal should be dismissed.

Appeal dismissed.

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(1) (1914) 32 O.L.R. 66.
(2) [1915] 2 K.B. 342.
(3) [1945] S.C.R. 319, at 322

ROBERT BARNES (PLAINTIFF) .....APPELLANT;

AND

SASKATCHEWAN CO-OPERATIVE WHEAT PRODUCERS LIMITED AND SASKATCHEWAN POOL ELEVATORS LIMITED (DEFENDANTS) ..... } RESPONDENTS.

1946
*Oct. 31
*Nov. 1
1947
*Feb. 4

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Co-operative handling and marketing of wheat—Saskatchewan Co-operative Wheat Producers Ltd.—Contracts between company and members —Rights of members—Deductions by company, from returns from sale of wheat, for its activities and towards acquiring handling facilities —Claims for repayment, for interest, or for declaration as to rights—Alleged breach of trust—Claim that interest on claimant's deductions should be paid before payment of patronage dividends to later shareholders.

Saskatchewan Co-operative Wheat Producers Limited, referred to *infra* as the "association", was incorporated in 1923 under the *Companies Act*, Sask., and its incorporation was confirmed by statute (Sask.) in 1924, c. 66. The main object was the co-operative handling and marketing of wheat for its members, grain growers in the province, each member buying a share for $1. Saskatchewan Pool Elevators Limited, referred to *infra* as the "Elevator Co.," was incorporated in 1925 under said *Companies Act* for purpose of acquiring elevator facilities and handling grain delivered to the association; its capital stock was owned by the association and the directors of each company were the same persons.

Appellant delivered wheat to the association. Deliveries during 1924, 1925, 1926 and 1927 were under contract of December 27, 1923. Another contract was made on February 7, 1927, for deliveries for the five years following; but after the crop year of 1929-30, appellant (as were all others who had signed contracts) was released from his obligation to deliver wheat under it. Appellant ceased farming in 1938.

Said contracts provided (as did contracts with other grain growers) for deductions by the association, from gross returns from sale of wheat, of expenses, of a "commercial reserve" to be used for purposes and activities of the association, and of an "elevator deduction" towards acquiring facilities for handling grain.

Under said contracts the association deducted "commercial reserves" and "elevator deductions", crediting the amounts thereof in appellant's account. The last of said deductions were made out of the proceeds of the 1928 crop.

*Present:—Kerwin, Rand, Kellock and Estey JJ. Hudson J. also was present at the hearing, but he died before the delivery of judgment.

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Appellant claimed repayment of amounts so deducted, and interest thereon, or, alternatively, a judgment declaring his rights.

On July 16, 1925, the directors of the association passed a resolution that elevator deductions should bear interest at 6 per cent. This was followed by statements forwarded from time to time by the association to the growers, showing the amount of elevator deductions and interest thereon, but stating that "the crediting of interest during the present contract, as well as the payment of interest on the certificates, is conditioned on the Pool Elevators having sufficient earnings, after taking care of expenses and depreciation, to provide for same."

In 1929 the association issued two certificates, one setting out commercial reserves and the other setting out elevator deductions, taken under said contract of 1923. These certificates were under seal, and, as recommended by the directors, were approved by resolution of November 26, 1928, at the annual meeting of the association delegates. They were delivered to the growers who had signed said contract of 1923, and contained the following (the rate of interest mentioned on commercial reserves and elevator deductions being 5 and 6 per cent. respectively): "Interest from September 1, 1928, will be paid annually at the rate of * * * on the sums represented by this certificate which shall from time to time remain unpaid, provided, however, that the Company reserves the right to declare that a lower or other rate of interest, or no interest, shall be payable in any year or years, all interest payments shall be non-cumulative in effect."

Interest was paid, on elevator deductions, from September 1, 1925, to August 31, 1930, and on commercial reserves, from September 1, 1927, to August 31, 1930. (In each case, interest for the year ending August 31, 1930, was not paid until 1941). Also it was stated in evidence that on the elevator deductions interest of 3 per cent. was paid for 1943 and would be paid for the next year.

On September 17, 1931, the directors passed a resolution, referring to said certificates and to the association's indebtedness to the Government (hereinafter mentioned), that, as it must use all available funds in order to pay said indebtedness, in future no interest be declared or paid to the holders of such certificates, but that all interest earned by the moneys represented thereby be retained for the purpose of reducing said indebtedness or for any other proper association activity.

Up to and including the crop year 1929-30, the association, when receiving the wheat, made an advance on account of the price to the grower. In 1929-30 this advance was followed by such a drop in the price of wheat that the advance was more than what was ultimately realized. The overpayment to the growers was treated as a loss to the association, which arranged for the Saskatchewan Government to pay its debts to the banks and accept repayment in amortized instalment payments, the last of which is payable in 1951. The assets of the association and the Elevator Company were given as security, as set out in statutes, 1931, c. 90, and 1932, c. 77. By s. 3 of the latter Act, "no person who * * * has or may hereafter acquire

any right, title or interest in any elevator deduction or commercial reserve * * * shall be entitled to demand repayment of money which has been placed in any such deduction or reserve or to bring or continue action to enforce any right or interest in respect of such money or deductions or reserves, or any earnings thereof * * *," until the Government has been paid in full.

After the crop year 1929-30, the association abandoned the compulsory pool which it had operated, notified growers of release from their obligation to deliver wheat, and operated a voluntary pool, rendering the same services as theretofore to those growers who desired it, and it entered into business of buying and warehousing grain.

"Patronage dividends" were paid to growers prior to 1930, and again in 1940 and in subsequent years. From 1940 these patronage dividends have been paid, to shareholders delivering wheat to the association, part in cash and part credited to their deduction accounts. The part so credited has been utilized by the association in arranging for repayments in certain cases, under which appellant, as having ceased farming, would qualify to benefit. Appellant contended that, with surplus funds available, interest should be paid on the commercial reserves and elevator deductions before payment of patronage dividends, which, he contended, were, in breach or repudiation of trust, being paid to later shareholders who had made no contribution to the deductions now in question but were getting the benefit of the facilities provided by these deductions and receiving patronage dividends on the same basis as those who became shareholders under the contracts of 1923 and 1927.

Held: Appellant's claims for repayment of deductions and for interest were barred at this time by said s. 3 of c. 77, 1932. Also his action failed for further reasons as follows:

Per Kerwin and Estey JJ.: The contracts with appellant contained no covenant to repay the deductions. The association received and utilized them within the terms of the contracts. There was no breach of covenant or of trust.

The contracts contained no covenant to pay interest. As to the certificates, the proviso therein should not be disregarded as repugnant. Its language qualified, rather than destroyed, the covenant. That interpretation is the natural and reasonable one, and also accords with the conduct of the parties (which may be looked at to assist in construction). The resolutions of the association for payments of interest were mere expressions of intention.

The association's method of paying patronage dividends without having first paid interest now claimed did not violate any trust. Its abandonment of the compulsory pool and its subsequent steps and operations were within its powers and at the same time maintained for those growers who desired it, through the voluntary pool, all the rights and advantages under their contracts. The commercial reserves and elevator deductions have been used within the terms of the contracts under which appellant authorized them.

There being no breach by the association, and in view of its policies adopted and its unquestioned good faith, no purpose would be served in directing a declaratory judgment, which could only be effective

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after the provincial government has been paid in full. This, according to the terms of agreement with that government, would not be until 1951, while under the association's present policy appellant may have received his repayments before that time.

Per Rand and Kellock JJ.: The association was a corporate body with a nominal authorized capital, its effective capital being intended to be provided by the deductions under the contracts. That effective capital was committed to it for certain purposes and impressed with certain contractual and equitable duties; but administrative control over the funds for the purposes of the association was a condition of and a restriction upon each contributor's interest in the association, which interest was a fractional share in the subsidiary capitalization representing for this purpose the whole of the assets, the amount not being fixed, but fluctuating from time to time as the association's needs might require. The dealing with such interests consistently with the co-operative scheme was designed from time to time to maintain ownership of them in the hands of persons who were active participants in the association's business, and it was desirable as a policy that the interest of a contributor who had ceased to market his product through the association be taken over for transfer to a person participating. The interest of a contributor was not that of a debt. There was no failure of the primary purposes to which the money was to be applied; and no suggested breach of contractual or equitable obligation would amount to such a failure or give rise to any right to rescind the original transaction by winding up or otherwise; the relief in any such case would be confined to such modes of compelling a corporation to adhere to the objects for which it was created as might be open to the interested members.

The contributions were made without express stipulation as to interest. The fundamental object of the enterprise would require that any distribution of interest must be only out of net returns; such limitation lies initially on any provision for interest. Assuming, but not deciding, that the certificates were an obligation rather than a declaration of intention, yet the mode of exercising the power reserved therein, consistently with the matter in which it appears, must be taken to be informal and, since it is not required to be communicated to the contributor, of a purely internal character; at most the certificate sets a standard of return to which the association should adhere but on which decision is not intended to be brought within a formal rigidity; the essential fact is the recognition of an obligation to distribute grounded in the circumstances of the contributions. The revocation need not be specific for each year or for a term of years. The circumstances in which the resolution of September 17, 1931, was passed were such as to preclude a distribution of interest; the resolution was simply a declaration that, until otherwise decided, no payments would be made; and it was a proper exercise of the reserved power.

In all the circumstances, including the fact that appellant was merely one of a class with identical interests in the association, a declaration defining his interest should not be made.

Appeal from the judgment of the Court of Appeal for Saskatchewan, [1946] 1 W.W.R. 97, dismissed.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Saskatchewan (1) allowing (Gordon J.A. dissenting) the defendants' appeal from the judgment of Bigelow J. (2) which declared that the defendant Saskatchewan Co-operative Wheat Producers Limited became a trustee for the plaintiff of the deductions made from his grain for commercial reserve deductions, being $94.99, and the amount of the elevator deductions, being $158.03, and that the plaintiff had effectively terminated the trust so declared, and that the plaintiff was entitled to payment by the defendant Saskatchewan Co-operative Wheat Producers Limited of the amount of the said deductions when the claims of the Province of Saskatchewan under the Statutes of Saskatchewan, 1932, c. 77, and 1933, c. 80, are satisfied, together with interest on said deductions (at 5 per cent and 6 per cent respectively, per annum) from September 1, 1930; and ordered that the plaintiff have liberty at any later date to apply for an injunction restraining the defendants from paying further patronage dividends until the plaintiff's claim is paid.

The Court of Appeal allowed the defendants' appeal and dismissed the plaintiff's action. (Gordon J.A., dissenting, would have declared that the defendant Saskatchewan Co-operative Wheat Producers Limited held the deductions in question in trust for the plaintiff, that it committed a breach of trust which justified the plaintiff in determining that trust, and that it was bound to pay interest to the plaintiff annually at said rates provided that such interest was earned.)

Special leave to appeal to the Supreme Court of Canada was granted by the Court of Appeal for Saskatchewan.

G. H. Yule K.C. and *H. M. Hughes K.C.* for the appellant.

R. H. Milliken K.C. and *E. C. Leslie K.C.* for the respondents.

The judgment of Kerwin and Estey JJ. was delivered by

ESTEY J.—The appellant, Robert Barnes, was a farmer and wheat grower in the Rush Lake District in Saskatchewan until he retired in 1938 and moved to Winnipeg.

(1) [1946] 1 W.W.R. 97; [1946] 3 D.L.R. 552.
(2) [1945] 1 W.W.R. 257.

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The respondent, the Saskatchewan Co-operative Wheat Producers Limited, hereinafter referred to as the Association and commonly known as the Pool, was incorporated in 1923 under the *Companies Act* of the Province of Saskatchewan and confirmed by statute in 1924 (1924 S.S., c. 66, and amendments thereto).

The respondent Saskatchewan Pool Elevators Limited, hereinafter referred to as the Elevator Company, was incorporated in 1925 under the Saskatchewan *Companies Act* for the purpose of acquiring elevator facilities and handling grain delivered to the Association. All the capital stock of the Elevator Company has been at all times and now is owned by the Association and the directors of the Association and the Elevator Company always have been and are the same persons. It is a totally owned and controlled subsidiary of the Association.

In 1923 the appellant was one of a large number of wheat growers in Saskatchewan who entered into contracts with the Association, in the main for the co-operative handling and marketing of wheat.

The first contract with the appellant was dated the 27th day of December, 1923, and under this and a subsequent contract, dated the 7th day of February, 1927, he delivered wheat to the respondent from the year 1924 until he (as were all others who had signed contracts) was released from his obligation to deliver wheat after the crop year of 1929-30.

The appellant claims the repayment from the Association of certain amounts deducted from the selling price of his wheat under the terms of these contracts and known as commercial reserves and elevator deductions; interest thereon at the rate of 5 per cent and 6 per cent respectively from September 1, 1930; or in the alternative a declaratory judgment setting forth the rights of the plaintiff with respect to these commercial reserves and elevator deductions.

Under the first contract the appellant purchased a share of the capital stock of the Association for $1.00. Since then he has been and is a shareholder of the Association. In this action, however, he bases his claim upon his con-

tracts rather than upon his position as a shareholder and therefore his rights must be determined as fixed by the contracts between himself and the Association.

The first contract, dated the 27th of December, 1923, provided for the taking of the commercial reserves and the elevator deductions in the following terms:

(*a*) Commercial Reserves

8. (*d*) To pay or retain and deduct from the gross returns from the sale of the wheat delivered to it by the Growers the amount necessary to cover all brokerage, advertising, taxes, tolls, freights, elevator charges, insurance interest, legal expenses, operating costs and expenses, and all other proper charges, such as salaries, fixed charges and general expenses of the Association and, in addition, the Association may deduct such percentage, not exceeding one per cent (1%) of the gross selling price of the wheat as it shall deem desirable as a commercial reserve to be used for any of the purposes or activities of the Association.

(*b*) Elevator Deductions

8. (*f*) To deduct from the gross returns from the sale of all wheat handled by the Association for Growers who have executed this agreement or an agreement similar in terms a sum out of each Grower's proper proportion thereof, not exceeding two cents (2c.) per bushel and to invest the same for and on behalf of the Association in acquiring either by construction, purchase, lease or otherwise such facilities for handling grain as the Directors of the Association may deem advisable or in the capital stock or shares of any company or association formed for the purpose of so erecting, constructing or acquiring such facilities and to sell or otherwise dispose of any such investment and re-invest the proceeds thereof in like manner.

Before the completion of this contract and under date of February 7, 1927, the appellant and the Association entered into a second contract covering the years 1928 to 1932 inclusive. The authority to deduct the commercial reserve is provided for in this second contract in para. 6(*d*) in identical language as in para. 8(*d*) of the first contract except that after the word "used" the words "in the conclusive discretion of the Association" are inserted.

The elevator deductions are provided for under para. 6(*e*) of the second contract in language much to the same effect as para. 8(*f*), except that it contains these words:

* * * to hold and retain the same for such period as the Directors of the Association may deem advisable, either with or without paying interest thereon; * * *

This is the only reference to the payment of interest with respect to these funds in either of these contracts.

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Under the first contract the Association deducted commercial reserves from Barnes in the sum of $67.38, and under the second contract $27.61, a total of $94.99. The elevator deductions under the first contract totalled $110.56 and under the second contract $47.47, or a total of $158.03, or a total deduction under both contracts of $253.02. As these deductions were made the Association credited the amounts thereof in Barnes' account. The last deductions under the contracts were made out of the proceeds of the 1928 crop.

Similar amounts were deducted from all growers, and thereby the Association realized commercial reserves in the sum of $6,567,851.17, and elevator deductions in the sum of $12,188,060.07, a total of $18,755,911.24.

Commercial reserves were used for the purposes and activities of the Association, and the elevator deductions were utilized to purchase the capital stock of the elevator company.

If, as the appellant contends, these commercial reserves and elevator deductions were received and applied by the Association, subject to a trust, for the benefit of the growers who signed the contracts, the terms of the trust must be found within these contracts. They contain neither a covenant for payment of interest thereon nor for repayment of the principal. The evidence establishes, and it is not contended otherwise, that the Association has received and utilized these funds within the terms of the contracts and its own powers as incorporated. There is no breach of covenant or of trust under these contracts alleged with respect to these deductions nor does the record disclose any. The appellant's claim for repayment thereof must fail.

The appellant submits that he is entitled to interest upon these two funds. This claim is not founded upon any covenant or term in the contract of the 27th of December, 1923, or that of the 7th of February, 1927, but upon subsequent events. In fact, the only reference to interest in either of these contracts is that in the contract dated February 7, 1927, where in para. 6(*e*) it is provided that with respect to elevator deductions these may be

retained "for such period as the Directors of the Association may deem advisable, either with or without paying interest thereon."

It would appear that, while the Association did not obligate itself to pay interest under these two contracts, as early as July 16, 1925, it did entertain an intention to pay interest. Upon that date the directors passed a resolution that elevator deductions should "bear interest at the rate of six per cent (6%) and that interest date from the date of the final payment". This resolution of July 16, 1925, was followed by statements issued and forwarded from time to time by the Association to the growers showing the amount of the elevator deductions and interest thereon. These statements contained the following:

> The crediting of interest during the present contract, as well as the payment of interest on the certificates, is conditional on the Pool Elevators having sufficient earnings, after taking care of expenses and depreciation, to provide for same.

Interest was paid upon elevator deductions from September 1, 1925, to August 31, 1930, (the payment for year ending August 31, 1930, not made until 1941).

The first contract covered the crops up to and including that of 1927. In 1929 the Association issued two certificates, one setting out commercial reserves and the other elevator deductions taken under the first contract. These certificates were under the seal of the Association and as recommended by the directors were approved by a resolution passed November 26, 1928, at the annual meeting of the Association delegates. They were delivered to the growers who had signed the contract of December 27, 1923, and bind the Association. These elevator deduction certificates contained the following:

> Interest from September 1, 1928, will be paid annually at the rate of Six (6) per cent per annum on the sums represented by this Certificate which shall from time to time remain unpaid, provided however, that the Company reserves the right to declare that a lower or other rate of interest, or no interest, shall be payable in any year or years, all interest payments shall be non-cumulative in effect.

The identical language appears in the certificate evidencing commercial reserves except that the rate of interest is 5 per cent instead of 6 per cent. This is the first

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mention of interest on commercial reserves, but Mr. Robertson stated it was decided to pay interest on them in 1928 and that interest was paid thereon from September 1, 1927, to August 31, 1930. Deductions under the contract dated February 7, 1927, were taken only in the crop year 1927-28 and no certificates were issued covering same.

These certificates contain an obligation on the part of the Association to pay interest from September 1, 1928, with a proviso that the Association may declare that a lower rate or no interest shall be payable "in any year or years". The appellant submits that the proviso in effect destroys the covenant to pay interest and is therefore repugnant and should be disregarded.

It would appear, however, that the language used in the proviso qualifies rather than destroys the covenant. In appreciation of the possibility of reduced earnings the Association reserved the right by this proviso to "in any years or years" reduce the rate or provide that no interest should be paid. Not only does such an interpretation appear the natural and reasonable construction, but it is in fact in accord with the conduct of the Association. These certificates were issued in 1929. The Association had paid interest on the elevator deductions since September 1, 1925, and on commercial reserves from September 1, 1927, and continued to do so until August 31, 1929. The heavy loss incurred by the overpayment in 1929-30 and the subsequent indebtedness to the government made any payment of interest impracticable if not impossible. When in 1941 the financial position of the Association permitted, interest was paid for the year ending August 31, 1930. It was also stated in evidence that interest on the elevator deductions of 3 per cent was paid for 1943 and would be paid for the next year. This payment is subject to the suggestion that it was prompted by the commencement of this action, but it should also be noted that the financial position of the Association had considerably improved. Moreover, the appellant took no exception to, nor made any inquiry with respect to any of these steps. In fact, it would appear that throughout he left the question of the paying of interest entirely a matter for the Association. He made

no mention of interest until his last letter to the Association dated August 31, 1943, before the commencement of this action.

Such conduct may be looked at to assist in the construction of this resolution: *Chapman* v. *Bluck* (1), where Tindal, C.J., stated at p. 193:

* * * there is no better way of seeing what they intended than seeing what they did, under the instrument in dispute.

and Park, J., at p. 195:

The intention of the parties must be collected from the language of the instrument, and may be elucidated by the conduct they have pursued.

See also *Watcham* v. *East Africa Protectorate* (2), and *Firestone Tire and Rubber Co. Ltd.* v. *Commissioner of Income Tax* (3).

This construction is supported both by the language of the resolution and the conduct of the parties, and is to be preferred to that suggested by the appellant, in that it avoids any application of the rule as to repugnancy. *Git* v. *Forbes* (4), where Duff J. (later Chief Justice), whose conclusions were supported by the Privy Council (*Forbes* v. *Git* (5)), stated:

The rule as to repugnancy, therefore, is obviously a rule to be applied only in the last resort and when there is no reasonable way of reconciling the two passages and bringing them into harmony with some intention to be collected from the deed as a whole.

In fact, interest at 6 per cent was paid on elevator deductions on the basis of the resolution of July 16, 1925, to August 31, 1930, and interest at 5 per cent on commercial reserves from September 1, 1927, to August 31, 1930. Interest was therefore paid in accordance with the terms of these certificates from September 1, 1928, until August 31, 1930.

Counsel for the appellant submits that a resolution passed by the Board of Directors on September 17, 1931, and the consequent non-payment of interest constitutes a breach of the Association's obligations to pay interest under these two certificates. This resolution reads as follows:

Resolutions passed by the Pool Board Sept. 17, 1931:

Whereas elevator deduction certificates and commercial reserve certificates have been issued to all persons from whom elevator deduc-

(1) (1838) 4 Bing. N.C. 187.
(2) [1919] A.C. 533.
(3) [1942] S.C.R. 476, at 482
(4) (1921) 62 Can. S.C.R. 1 at 10.
(5) [1922] 1 A.C. 256.

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tions and commercial reserve deductions have been taken from the proceeds of the sale of wheat and (or) coarse grains delivered to the Company during the years 1924 to 1927 both inclusive; and

Whereas such certificates provide for the Company paying interest thereon; and

Whereas large sums of money are owing by the Company to the Government of Saskatchewan in connection with the sale of the 1929 crop; and

Whereas the Company must use all available funds in order to repay such sums of money;

Therefore, be it resolved that in future no interest be declared or paid to the holders of any such elevator deduction certificates and (or) commercial reserve certificates, but that all interest earned by the moneys represented by such certificates be retained by the Company for the purpose of reducing its said indebtedness to the Government of Saskatchewan or for any other proper Company activity.—Carried.

This resolution was passed when the financial position of the Association was such that it was indebted to the provincial government for over $22,000,000, as security for which had been pledged assets of both of the respondents, and when, as Mr. Robertson stated:

It was necessary for us to secure a guarantee of our bank line of credit from the Dominion Government in 1931 in order to be able to operate.

Both in the recitals and in the operative part of this resolution reference is made to the indebtedness to the Government of Saskatchewan. This indebtedness was created by an overpayment to the growers in 1929-30. Up to and including the crop year 1929-30, the Association received the wheat and coincident therewith made an initial payment or an advance on account of the price to the grower. Then as his agent it pooled and sold the wheat and paid to the grower the balance of the price in subsequent payments as funds permitted. This practice is provided for in para. 16 of the contract. In 1929-30 the initial advance was followed by such a drop in the price of wheat that the advance per bushel was more than that ultimately realized, with the result that in making its initial payment or advance the Association overpaid the growers to the extent of $13,305,654.98. In this emergency the Association arranged with the government to pay its indebtedness to the bank and accept repayment thereof "in nineteen equal amortized payments, principal and interest", which totalled over $22,000,000. The last instalment is payable in 1951,

and at the time of the trial, while all payments had been made up to date, there was still a balance owing of about $7,700,000. The assets of both of the respondents were given as security therefor, as set out in the Statutes of Saskatchewan, 1931, c. 90, and 1932, c. 77. Under section 3 of the latter statute:

* * * no person who * * * has or may hereafter acquire any right, title or interest in any elevator deduction or commercial reserve * * * shall be entitled to demand repayment of money which has been placed in any such deduction or reserve or to bring or continue action to enforce any right or interest in respect of such money or deductions or reserves, or any earnings thereof * * *

This section constitutes a bar to the plaintiff's action except in so far as he asks a declaratory judgment and an injunction.

It is provided in para. 17 of the Articles of the Association "the business of the Company shall be managed by the Directors". No question is raised as to the authority of the directors to pass this resolution of September 17, 1931.

The operative portion of this resolution, when read in the light of the recitals, is intended, and should be so construed, to cover the period of financial need created by the overpayment of 1929-30 and now evidenced by its indebtedness to the government and repayable as already stated. The depression had greatly reduced the price of wheat. A perusal of these agreements and statutes will indicate the depressed condition of the wheat market and the uncertainty with regard to the future. Under these circumstances it was evident that all available sources of revenue would be required for some time to pay the government and the necessary costs of operations. The directors, under the certificates and para. 17 of the Articles of the Association, had authority to provide for non-payment of interest "in any year or years". That authority did not require that they specify the years; they might have done so, but the fact that they did not does not constitute an excess of authority nor invalidate the resolution.

The last phrase in the resolution, "or for any other proper Company activity", evidences their further caution in that these revenues might be required, or it might be

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more convenient at a given moment to use them in some other activity of the Association other than for the payment of the government indebtedness. Without the addition of these words it might be contended that the resolution restricted them entirely to payment of the government.

Any other construction of this resolution would involve a distinct change in policy on the part of the Association with respect to the payment of interest, which was not intended, as evidenced by the payment in 1941 of the interest due as of September 1, 1930, and as stated upon this point by Mr. Robertson:

> The policy has always been the same since the inception of the organization.

Immediately after the overpayment, consideration was given to the collection of it from the growers to whom it was paid. That was not done; rather it was decided to treat it as a company loss.

There were no certificates and therefore no convenant to pay interest on the deductions under the contract of February 7, 1927. The appellant's essential difficulty in his claim for interest is that when he signed the contracts in 1923 and 1927 he did not then see to it that there was a provision included for the payment of interest. It is true that the Association through its resolutions provided for the payment of interest, but these are, to one who claims on a contract, mere expressions of intention. The Association has been very careful in its communications with the growers and in the phrasing of the certificates not to unqualifiedly obligate itself to pay interest.

The appellant's further contention is that, with surplus funds available, interest should be paid upon the commercial reserves and elevator deductions before payment of patronage dividends. His position is stated as follows:

> The Appellant's complaint is not that to pay patronage dividends is not proper, but to pay them as they have been paid without making provisions for performance of the promise of the trustee to pay interest, and to divert monies to pay patronage dividends without paying interest, is a breach of trust or what may be more accurately described as a repudiation of trust.

If there be a trust it is, as Mr. Justice MacDonald states, by virtue of the contracts dated December 27, 1923, and

February 7, 1927, and whatever trust their terms may create, with respect to these funds, they do not impose any obligation upon the Association to pay interest. The certificates cover only the deductions under the first contract (December 27, 1923). They do not create a trust but only a promise to pay subject to a proviso already discussed. The absence of any unqualified obligation to pay interest disposes of the appellant's contention, but as he suggests that his investment is being "wiped out" and asks for a declaration as to his rights, it should be pointed out what the Association is now doing with regard to these funds.

Notwithstanding the absence of any covenant to pay interest or to repay the principal, the Association has been providing for repayment of the principal to certain of its members, including now those who find themselves in a position similar to that of the appellant. In recent years the Association has realized substantial surpluses, out of which it has transferred to the patronage dividend account the following amounts:

1939-40	$ 500,000
1940-41	900,000
1941-42	1,030,000
1942-43	1,800,000

Out of this patronage dividend account, in 1940 and since, have been paid (*a*) patronage dividends and (*b*) in 1944 during the currency of this litigation, payment of 3 per cent on elevator deductions. These patronage dividends or, as the Association prefers, excess profits refunds, were paid to the growers prior to 1930 and were then discontinued until 1940.

From and after 1940 these patronage dividends have been paid to the shareholders delivering wheat to the Association, part in cash and part credited to their deduction accounts. This part so credited has been utilized by the Association to make repayments to (*a*) estates of deceased members, (*b*) growers who have ceased farming, (*c*) growers who are totally disabled but may still have an interest in delivering grain, and (*d*) growers who have reached the age of 70 years, or such lower age as the Board may from time to time determine. In 1940, $2,559,217.44,

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representing the accumulated credits of growers for patronage dividends covering the period 1930 to 1938 inclusive, was paid to the growers. In addition, an amount of $290,065.66 was retained for the purchase of deduction certificates, making a total distribution during the fiscal year ending July 31, 1940, of $2,849,283.10. Then in the three following years the distribution was as follows:

	Paid out in cash as part of Patronage Dividend to Growers	Retained to purchase Certificates
1940-41	$239,981.01	$239,703.12
1941-42	441,350.34	433,650.73
1942-43	510,365.32	463,271.58

At the trial, Mr. Barnes' age was given as being over 70 and he therefore qualifiies for repayment under both (*b*) and (*d*) of the foregoing heads.

This method enables the Association to pay out the deductions taken from those who have ceased to be growers and to transfer the amounts thereof to the deduction accounts of those who are currently growers. The Association under this method works toward the end that those who are currently growers and shareholders provide the capital. The financial position of the Association during the years 1930 to 1940 made impracticable, if not impossible, the payment of patronage dividends.

Under this plan the Association is not violating any trust or obligation that it has assumed with respect to these deductions, and therefore does not subject itself to any liability.

One of the appellant's main complaints seems to be that those who purchased shares since 1932 and made no contribution to the deductions are getting the benefit of the facilities provided by these deductions and receiving patronage dividends on the same basis as those who became shareholders under the contracts of 1923 and 1927. When the compulsory pool was abandoned, no further contracts were entered into. In order to maintain and to increase its volume of business, the Association decided to offer shares to growers not already members at $1 per share. Some 24,800 growers purchased these shares. It is true that they then made no contribution to these deductions,

but since 1940 they have contributed toward the purchase of these deductions, as above explained, through a retention of a portion of their patronage dividends and for which they received credit in their respective deduction accounts. It possibly would have been done earlier had the Association realized sufficient surplus to declare a patronage dividend. In any event, the Association has again acted within its powers and without creating a breach of any obligation it owed to the appellant.

The appellant further contends that these deductions were taken subject to an undertaking that the wheat would be handled by the Association in a pool in which it would act as agent on behalf of the growers, and that since 1929-30 it has not done so and is therefore in breach of its contract. It is clear that at the time the contracts of 1923 and 1927 were executed, the Association intended and covenanted to operate a compulsory pool in which it would act as agent for the grower. The experience of 1929-30 caused the Association to abandon the compulsory pool and as a consequence notified the growers that they were released from their obligations to deliver wheat under the contract. The Association then decided to operate a voluntary pool, rendering the same services as contracted for in the compulsory pool to those growers who desired it. This it did from 1931 in the years that "the Canadian Wheat Board did not function. That is the Wheat Board operates as a pool of course."

At the same time the Association entered into the business of buying and warehousing grain delivered by its shareholders, and further, as required by the Grain Act, it received grain from non-members so far as its facilities permitted. The Association in making this change acted well within its powers under its Act of Incorporation, and at the same time maintained for those growers who desired it, through the voluntary pool, all the rights and advantages under their contracts.

The appellant does not suggest that he was denied any rights under his contracts of December 27, 1923, or February 7, 1927, nor that he, either at the time or now, objects to the Association having adopted this additional method of handling grain. In fact, after he was advised

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that he was not obligated to deliver wheat to the Association, he continued to do so, but the evidence does not disclose whether the Association purchased or stored the grain or whether it was pooled.

These commercial reserves and elevator deductions have been used within the terms of the contracts under which the appellant authorized their deduction and retention without any covenant to pay interest or to repay the principal. The subsequent steps taken by the Association, and already detailed, do not provide a basis upon which the appellant can claim either of these.

The Association, however, has as a matter of policy commenced making repayments of the principal, on the basis already discussed, to certain groups of which the appellant is one. These payments are made to the members within these groups in the order of the reception of their respective applications and in any year up to the amount of the funds available.

Under the circumstances of this case, there being no breach on the part of the Association and it having adopted the policy just mentioned, and the good faith of the Association not questioned, there would appear to be no purpose to be served in directing a declaratory judgment which, as the appellant concedes, could only be effective after the provincial government has been paid in full. This, according to the terms of the agreement with that government, would not be until 1951, while under the present policy of the Association the appellant may have received his repayment before that date.

The appellant cited a number of cases including *Grainger* v. *Order of Canadian Home Circles* (1). There the company imposed upon the plaintiff substantial changes in the contract. Some of these changes were validly made, but so far as they were not, a declaratory judgment was directed setting forth the plaintiff's rights. A breach of contract was in that case proved. In the case at bar no breach has been established, and no case has been cited that goes so far as to direct a declaratory judgment against a party carrying on within the limits of its contractual rights.

The appeal should be dismissed with costs.

(1) (1914) 31 O.L.R. 461, affirmed (1915) 33 O.L.R. 116.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.—The incorporation of the co-operative company in 1923 and its confirmation by statute in 1924 had as its object the establishment of co-operative selling of the principal product of Saskatchewan, wheat. Prior to that time the business of marketing grain was carried out as a separate private enterprise; and it can be gathered from the material before us, what is a basic inference from the co-operative principle, that elimination of the intermediate profit was the *sine qua non* of the organization.

The mode of introducing that feature into the mechanism adopted makes it important to examine closely the constitution of the company incorporated to achieve the purposes in view. There was the general authorization to carry on the business of co-operative collecting, buying, handling, marketing and selling the product in all of its ramifications. But a business of the scope envisaged required obviously a substantial capital, and it is the manner in which capital was to be raised and dealt with that constitutes, for the purposes of this appeal, the controlling consideration of the enactment.

The share capital, originally $100,000, later $200,000, was divided into the same number of shares of the value of $1 each. Members were to be grain growers in the province, and originally were required to bind themselves by contract to market all their wheat through the company. Power was given to limit the holding of a member to one share, and that was done by clause 4a of the Articles. Section 6 specifically forbade the declaration or payment to the shareholders of any dividend. Clause 24 of the Articles provided:

> 24. * * * The Directors may, subject to the terms of the Grower's contract, deduct such sums for elevator purposes as they deem advisable and may invest on behalf of the Company, such deductions, either in the purchase of elevator facilities or in the stock of a company or companies to be formed or hereto formed, for the purpose of acquiring such facilities.

Sections 13 and 14 of the Act were as follows:

> 13. In the event of the company going into liquidation or being wound up, voluntarily or otherwise, the assets of the company in liquidation shall, after the payment of all just debts, claims, costs and expenses, be distributed among such persons, their successors or assigns, whether members of the company or not, who have delivered to the company a

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commodity or commodities for sale by the company, *pro rata*, in proportion to the amount retained by the company from the proceeds of the sale of such commodity or commodities, and shown to be standing to the credit of such persons on the books of the company at the time of the commencement of such winding up or liquidation.

14. No transfer sale or assignment of or charge on the interest of any person in any moneys deducted by the company from the proceeds of any commodity or commodities handled by the company, or the interest of any person in any security or property in which the same may have been invested, or in the proceeds of any such investment, shall be valid until approved by the company, in a manner to be determined by the company, who shall have an absolute discretion as to the granting of such approval, and until such approval the company shall not be required to recognize any such transfer, sale assignment or charge in any way whatsoever.

The share capital was obviously not designed to raise the necessary funds, and the method of doing that is implied by clause 24 of the Articles. Under the original contracts which bound the member to an exclusive marketing for a period of five years, there were the following provisions dealing with deductions and related matters:

8. The Grower hereby appoints the Association his sole and exclusive agent * * *

* * * *

(*d*) To pay or retain and deduct from the gross returns from the sale of the wheat delivered to it by the Growers the amount necessary to cover all brokerage, advertising, taxes, tolls, freights, elevator charges, insurance interest, legal expenses, operating costs and expenses, and all other proper charges, such as salaries, fixed charges and general expenses of the Association and, in addition, the Association may deduct such percentage, not exceeding one per cent (1%) of the gross selling price of the wheat as it shall deem desirable as a commercial reserve to be used for any of the purposes or activities of the Association.

* * * *

(*f*) To deduct from the gross returns from the sale of all wheat handled by the Association for Growers who have executed this agreement or an agreement similar in terms a sum out of each Grower's proper proportion thereof, not exceeding two cents (2c) per bushel and to invest the same for and on behalf of the Association in acquiring either by construction, purchase, lease or otherwise such facilities for handling grain as the Directors of the Association may deem advisable or in the capital stock or shares of any company or association formed for the purpose of so erecting, constructing or acquiring such facilities and to sell or otherwise dispose of any such investment and re-invest the proceeds thereof in like manner.

* * * *

17. The Grower covenants and agrees to, and hereby does irrevocably apply for one (1) share out of the Ordinary Shares in the capital stock of the Association and agrees to pay to the Association the par value

thereof, namely, the sum of One Dollar ($1.00). The Association covenants and agrees to accept the said application and to allot to the Grower one (1) share of stock out of the Ordinary Shares in the capital stock of the Association, provided the signatures required by paragraph 1 hereof are obtained within the time therein set out. Should such signatures be not so obtained the Grower agrees that the said sum of $1.00 shall be a contribution to the Association for the purposes set out in paragraph 18 hereof.

18. The Grower covenants and agrees to pay the further sum of Two Dollars ($2.00) to defray the expenses of organization, including the expenses of and of formation of the committee known as The Wheat Pool Organization Committee to carry on field service and educational work and other proper activities of the Association.

Power to distribute money, proceeds or investments was contained in section 4(*cc*) of the Act:

(*cc*) To pay or recoup to, reimburse for or distribute to, any person or persons who have entered into a marketing contract with the company, any moneys contributed directly or indirectly to the company by them, or deducted or withheld from the proceeds of any grain sold by them through the company or the proceeds of any such moneys or any investment thereof. All such payments or distributions, as far as practicable, to be made on the basis of the same proportion in which they were contributed by such persons respectively; such payment or distribution to be made in whole or in part at such times and place and in such manner as in the absolute discretion of the company may seem expedient; provided any or all of such contributions, deductions, or the proceeds or earnings thereof may be withheld or retained with or without paying interest thereon and may be invested or reinvested in any company, corporation or business, whether operated upon a profit, non-profit, patronage dividend basis or otherwise. The provisions of this clause shall be construed and read as if they had been in force since the first day of January, 1929.

Clause 10 of the Articles dealt with the case of a member ceasing to be under contract or making default in its performance, and power was given the directors to forfeit the share held by him. A proviso declared

that upon such forfeiture any surplus of reserves or elevator or other deductions standing to the credit of such member, shall thereupon be valued by the Directors of the Company and settlement made with such defaulting member. The decision of the Board of Directors as to the value of the interest of such member in such surpluses, reserves or other deductions shall be final.

In the case of death or bankruptcy of a member, clause 11 provided that the representative "shall be entitled to the same distribution and other advantages" as if he were the registered holder of the share.

By clause 19 the business was to be conducted in such manner and on such a basis that so far as possible no

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profit should be taken from, charged to or exacted against any member on the marketing of any grain for him by the company, pursuant to a contract between them.

At the end of the first contract period, which covered the crop years from 1923 to 1927 inclusive, there was issued to each contract holder, from whom elevator deductions had been made, a certificate under the seal of the company in these terms:

ELEVATOR DEDUCTIONS
CERTIFICATE

THIS IS TO CERTIFY that R. BARNES, 166-007 of RUSH LAKE in the Province of Saskatchewan has been credited on the books of SASKATCHEWAN CO-OPERATIVE WHEAT PRODUCERS LIMITED, with the sums shown on the attached coupons, which sums represent the Elevator Deductions made in accordance with the terms of the contract between the said Company and its grower members, from the returns of the sale of wheat and other grains delivered prior to July 21st, 1928; particulars of which Deductions are shown for each year on coupons attached.

Interest from September 1st, 1928, will be paid annually at the rate of Six (6) per cent per annum on the sums represented by this Certificate which shall from time to time remain unpaid, provided however, that the Company reserves the right to declare that a lower or other rate of interest, or no interest, shall be payable in any year or years, all interest payments shall be non-cumulative in effect.

The Company may, in accordance with the terms of the said contract, retain the said sums or may repay all or any part of the said sum or sums upon any interest due date, by giving notice of its intention so to do, in at least two daily newspapers to be published in the province of Saskatchewan, or by letter addressed to the holder thereof at his last address appearing on the books of the company and interest on the sums to be so repaid shall cease to accrue from the date for payment fixed in such notice, or the company may at its option in lieu of payment, allot to the holder of such certificate shares of stock in any company in which the company may have invested the said moneys, to an amount equal to the principal sum then remaining unpaid, provided, that if the holder hereof shall cease to be a member of the company by reason of the forfeiture of the share of such member as provided by article 10 of the Articles of Association of the Company, the sums then standing to the credit of such holders as evidenced by this Certificate shall be valued and paid by the directors as provided by the aforesaid article 10.

No portion of the sums represented by this Certificate shall be paid without the delivery to the Company of the coupon covering the sum intended to be paid, or in the case of the final coupon payment without the delivery of such coupon accompanied by this Certificate.

The amount set forth herein is subject to income tax deductions (if any).

No transfer or assignment of this Certificate or any portion thereof shall be valid unless and until approved by the Company in such manner and subject to such conditions as the Company may determine.

A similar certificate was issued to cover the commercial reserve deductions.

The question raised in this appeal is whether the appellant, from whose returns both elevator and reserve deductions were made, is entitled to a declaratory judgment that, as for a breach of trust or otherwise, the principal sums or interest on them or both are now owing to him. Admittedly his right to recover is in any case barred at this time by section 3, chapter 77, of the Statutes of Saskatchewan, 1932.

What was set up was a corporate body with a nominal authorized capital, the effective capital of which, both fixed and working, was intended to be provided by the deductions under the contracts. This meant an informal within the formal capitalization.

The former, as to the elevator deductions, has been invested by the company in fixed assets. The handling facilities are owned largely by the elevator company of which the parent company holds all of the capital stock; and that stock is seen to be the converted form of the original contributions. The commercial reserves were to be held and applied generally to the purposes of the company, including working capital for subsidiaries.

What, then, is the relation of the individual contributor to the company? The clue to that lies, mainly, I think, in the provision of section 13 for the mode of distribution of assets on liquidation. That section treats the contributions as the basic capital and each contributor as having an "interest" in the company. That interest is recognized throughout the Act, and I think it clear that it is a fractional share in the subsidiary capitalization representing for this purpose the whole of the company's assets. The amount is not fixed, but from time to time fluctuates as the needs of the company may require. Theoretically, the operations on the co-operative basis would never yield a profit; but they would take into account all appropriate accounting charges, including that on the capital which furnished the means for carrying them on.

The effective capital was thus committed to the company for certain purposes and impressed with certain contractual and equitable duties; but it was committed permanently

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to those purposes and duties. Should the original purposes fail, the company would be wound up and the distribution of assets made under section 13 of the Act; but administrative control over the funds for the purposes of the organization was a condition of and a restriction upon the interest created.

The dealing with those interests consistently with the co-operative scheme is designed from time to time to maintain ownership of them in the hands of persons who are active participants in the company's business. If, for instance, a contributor has ceased to market his product through the company, it is desirable as a policy that he cease likewise to have a voice in the company's affairs and that his interest be taken over for transfer to a person participating; and clauses (*dd*) and (*ee*) of section 4 of the statute seem directed to that object:

> (*dd*) To provide for the expropriation of or taking over of the shares or other interests in the company or in the assets thereof of any person or persons who cease to become holders of contracts with the company and to make provisions for compensation therefor;
>
> (*ee*) To make provision that a shareholder who ceases to be a holder of a contract in the company shall not have any right to vote in the affairs of the company;

Thus the entire concern of the company, plant, administration and operations, becomes confined to those who are presently availing themselves of its functions. Paragraph (*cc*) provides for a partial distribution of money, proceeds or investments, among other cases, as where the informal capital was being reduced because of an excess in deductions or where surplus assets or profits appeared. But the elimination of these interests, except upon a winding-up, could no more be brought about than that of share capital.

From this it follows that the interest of the contributor is not that of a debt, and that it is inaccurate, technically, to speak of the repayment or the recovery of the contributions. If the recital in the certificate that the sums may be repaid on any interest due date, means "in accordance with the terms of the said contract", it is without foundation in fact; and so far as it purports to declare a power based on a misconception of and inconsistent with the nature of the interest affected, it is *ultra vires*. There has been no failure of the primary purposes to which the

money was to be applied; and no suggested breach of contractual or equitable obligation would amount to such a failure or give rise to any right to rescind the original transaction by winding-up or otherwise. The relief in any such case would be confined to such modes of compelling a corporation to adhere to the objects for which it was created as might be open to the interested members.

The contributions were made without express stipulation as to interest: the certificate is claimed to have contractual force only because it is under seal; there is nothing in the Act expressly authorizing its issue; and no question of estoppel can arise.

The contention is that the certificate constitutes an obligation by which interest became payable except as the company might for each year declare that none or a reduced percentage would be paid. This presents more complication, but when viewed in the background of the *de facto* capital structure, the purpose and intention of the language become clearer.

The real complaint is that, while since 1930 no return has been made to the contributors, enormous sums are being distributed as patronage dividends by the elevator company. But the latter are part of the operations of the enterprise. The implied contract with those offering grain on co-operative terms is to handle the products at cost. That was the essence of the original purpose to which the contributions were made. It happens that the appellant is no longer farming and is not now enjoying the benefit of this co-operative feature. But he was its beneficiary until retirement; he was likewise one of the recipients of an initial over-advance in 1929, amounting to more than $13,000,000, the settlement of which with the banks and the provincial government has taxed the entire resources of the company and on which there still remains a principal debt of over $5,000,000.

The provision for "interest" reflects the minds of the incorporators. They sought to shun even the appearance in terminology of profits; and in relation to dividends on the capital stock of the elevator company, the resolution of July 8, 1931, speaks of "interest on capital stock". What is intended is a limitation in distribution to the equivalent

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of interest from the returns of the funds committed to the enterprise, but that distribution can be made only out of net returns. To confine interest to available earnings could never defeat the fundamental object of the enterprise; to bind the company to pay interest in any event, might do that, and consequently be *ultra* the company's powers. This limitation lies initially, then, on any provision for interest. Whether as to its payment the company is a debtor or under a trust duty, it is unnecessary to decide.

What then is the effect of the language of the certificate? Is it a declaration of intention or of obligation? Assuming, but not deciding, it to be the latter, in the background of investment as against money lent and the limitation of payment out of net returns, its interpretation takes on another aspect. That

> Interest from September 1st, 1928, will be paid annually at the rate of Six (6) per cent per annum on the sums represented by this Certificate which shall from time to time remain unpaid, provided however, that the Company reserves the right to declare that a lower or other rate of interest, or no interest, shall be payable in any year or years, all interest payments shall be non-cumulative in effect.

adds nothing to what I should consider the duty of the company toward the holder, except as it might be construed as analogous to a standing declaration which, as each year expires without action under the reservation, gives rise to a right to that year's interest. But the mode of exercising the reserved power consistently with the matter in which it appears, must be taken to be informal and, since it is not required to be communicated to the contributor, of a purely internal character.

This view is strengthened when it is set against the fact that there is no other competing interest in the company for these distributions. At most, the certificate sets a standard of return to which the company should adhere but on which decision is not intended to be brought within a formal rigidity. The essential fact is the recognition of an obligation to distribute grounded in the circumstances of the contributions; and the exclusive appropriation of returns for the benefit of conflicting interests such as patronage dividends would be a violation of that duty.

In those circumstances, the contention that the revocation should be specific for each year or for a term of years, must be rejected.

On July 8, 1931, the elevator company passed the following resolution:

> That all earnings of Pool Elevators in future years, declared to be available, including interest on capital stock and excess earnings, be used to meet the amount of the overpayment.

And on September 17, 1931, that was followed by one of the company in this language:

> Whereas elevator deduction certificates and commercial reserve certificates have been issued to all persons from whom elevator deductions and commercial reserve deductions have been taken from the proceeds of the sale of wheat and (or) coarse grains delivered to the Company during the years 1924 to 1927 both inclusive; and
>
> Whereas such certificates provide for the Company paying interest thereon; and
>
> Whereas large sums of money are owing by the Company to the Government of Saskatchewan in connection with the sale of the 1929 crop; and
>
> Whereas the Company must use all available funds in order to repay such sums of money;
>
> Therefore be it resolved that in future no interest be declared or paid to the holders of any such elevator deduction certificates and (or) commercial reserve certificates, but that all interest earned by the moneys represented by such certificates be retained by the Company for the purpose of reducing its said indebtedness to the Government of Saskatchewan or for any other proper Company activity.

It may be pointed out that the surplus of the company comes substantially from the elevator company, and from the action of the latter it followed, apart from the outstanding debt to the province, that virtually no net would accrue to the company in that period. This would preclude a distribution of interest. The company's resolution "that in future no interest be declared * * * all interest earned by the moneys represented by such certificates be retained by the Company", so far as it might be taken to purport to bind the company for the future, would obviously be of no effect; it is simply a declaration that, until otherwise decided by the company, no payments will be made; and I think it a proper exercise of the reserved power.

Is the appellant, then, entitled to a declaration defining the interest held by him in the company? In addition to the complication of the arrangement, what must be kept in mind is that he is only one of many thousand grain

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growers who are members of the company and have made similar contributions. The preamble of the contract recites:

> And whereas, this Agreement, although individual in expression, is one of a series either identical or generally similar in terms between the Association and Growers of wheat in the Province of Saskatchewan and shall constitute one contract between the several Growers of wheat in the Province of Saskatchewan signing the same and this Association.

The appellant is therefore merely one of a class with identical interests in the company. In all these circumstances, I do not think such a declaration should be made.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Gilbert H. Yule.*

Solicitors for the respondents: *MacPherson, Milliken, Leslie & Tyerman.*

See Reg v Sorsal 117 CCC 327 / See Reg v. McNeil, 34 C.R. 305

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*Mar. 13
*Apr. 28

E. S. WHITE APPELLANT;

AND

HIS MAJESTY THE KING RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Offence of indecent assault—Judge sitting without a jury—Self-misdirection—Judge's report—No finding as to statements by complainant or accused—Acquittal based on evidence of a witness—Reversal of acquittal by court of appeal—New trial—Evidence—Witnesses—Credibility of—Application by court of appeal of section 1014(2) Cr. C.—"No substantial wrong or miscarriage of justice"—Reasonable doubt as to guilt of accused—Whether verdict be the same if proper self-direction by trial judge—Sections 1013(4), 1013(5) and 1014(2) Cr. C.

The appellant was charged with the offence of indecent assault upon C, alleged to have taken place at a dental clinic while C was under examination. Complete discrepancy is disclosed between the testimony of the complainant and that of the accused. A witness, B, working in the clinic, gave evidence that he passed the open door of the room upon two occasions, without stating the time and the intervals of time between them, and that he had noticed that the accused was then writing at a table. The magistrate acquitted the accused, and, in his judgment, said that the case was one to be decided entirely on the credibility of the witnesses, that there should be a conviction or a dismissal of the charge whether the evidence of the complainant or that of the accused was accepted; and he added that, if the

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

evidence of B was accepted, "there must be a dismissal of the charge," stating later that he was "bound in law to accept his evidence". The Court of Appeal allowed the appeal of the Crown and directed that the accused be retried upon the same charge. Upon an appeal by the accused to this Court,

Held that the judgment appealed from should be affirmed.

Per the Chief Justice and Kellock and Estey JJ.:—The evidence of B does not go so far as to contradict the evidence of the complainant nor corroborate the evidence of the accused upon the points that are material to the determination of the issue; and, even if B's evidence was believed, it was still necessary for the magistrate to consider all the evidence and the credibility and the weight to be given to the statements made by the respective witnesses. The magistrate has not considered the evidence upon any such basis, but rather has founded his decision upon a misdirection that if B's evidence was believed "there must be a dismissal." Comments as to the issue of credibility of witnesses.

Per Kerwin J.:—The proposition upon which the magistrate proceeded cannot be supported: he does not state whether he believed the evidence of the complainant or of the accused, and, in proceeding to discuss the evidence of B apart from that of the complainant and accused, he failed to perform the responsibility resting upon him.

The appellant also contended that, under s. 1014(2) Cr. C., the Court of Appeal should have dismissed the appeal by the Crown, as "no substantial wrong or miscarriage of justice has actually occurred".

Per the Chief Justice and Kellock and Estey JJ.:—The appellate court, when there has been no decision arrived at upon a consideration of the evidence, particularly in a case where the evidence is so restricted to a few facts and where any adjudication must depend so largely upon the credibility and the weight to be given to the evidence of the respective parties, is unable to conclude that, under s. 1014(2) Cr. C., "no substantial wrong or miscarriage of justice has actually occurred."

Per Kerwin J.:—The appellant's claim should be dismissed. Effect must be given to the will of Parliament in permitting appeals by the Crown from acquittals (s. 1013(4) Cr. C.) and to the provisions of s. 1014(2) Cr. C. by which, according to s. 1013(5) Cr. C., the powers of a court of appeal are, *mutatis mutandis*, to be similar to the powers given by the former. Applying those provisions to this case, the proper rule to be followed by the Court of Appeal was that the onus was on the Crown to satisfy the Court that the verdict would not necessarily have been the same if the magistrate had properly directed himself. But, without in any way weakening the salutary rule that an accused is entitled to the benefit of a doubt as to his guilt, when a court of appeal has to apply the provisions of s. 1014(2) Cr. C., it must be concluded in the present case that the magistrate would not necessarily have acquitted the appellant if he had given himself the proper direction.

Rex v. *Covert* (28 C.C.C. 25), *Rex* v. *Bourgeois* (69 C.C.C. 120), *Rex* v. *Probe* (79 C.C.C. 289) and *Rex* v. *O'Leary* (80 C.C.C. 327) discussed.

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APPEAL by the accused from the judgment of the Court of Appeal for Ontario, allowing an appeal by the Attorney General for Ontario against the acquittal by Magistrate James B. Garvin on a charge of indecent assault and directing that the accused be retried upon the same charge.

G. Arthur Martin K.C. for the appellant.

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

The judgment of the Chief Justice and of Kellock and Estey JJ. was delivered by

ESTEY J.—The magistrate found the accused not guilty of the offence of indecent assault. The facts material to the offence were deposed to by the complainant and contradicted by the accused. The complainant stated that the offence took place at a dental clinic while she was under an examination by the accused, a qualified dentist in the Dental Corps. A witness Black gave evidence that he was at the time working in the same clinic and that upon two occasions he passed the room where he saw the complainant and the accused. The door of the room was open and upon each occasion he noticed that the accused was writing at a table. Just when or at what intervals of time he passed the room is not disclosed, nor does the evidence disclose either the plan or size of the clinic.

At the conclusion of the hearing the magistrate reserved judgment and later acquitted the accused, his judgment reading in part as follows:

> The case is one that must be decided entirely on the credibility of the witnesses. If the evidence of the complainant is accepted, there must be a conviction. On the other hand, if the evidence of the accused is accepted, there must be a dismissal of the charge. Also, in my judgment, if the evidence of the witness Black is accepted, there must be a dismissal.

An examination of the evidence of the witness Black, while relevant in determining the credibility of both the complainant and the accused, is upon the main issue restricted to his observations upon two occasions as he passed the door. It does not go so far as to contradict the evidence of the complainant nor corroborate the evidence of the accused upon the points that are material

to the determination of the issue. If therefore Black's evidence was believed, it was still necessary for the magistrate to consider all of the evidence, the credibility and the weight to be given to the statements made by the respective witnesses and to determine whether the accused was guilty or not guilty.

It is clear that the magistrate has not considered the evidence upon any such basis but rather has founded his decision upon a misdirection that if Black's evidence was believed "there must be a dismissal."

The appellate court, when there has been no decision arrived at upon a consideration of the evidence, particularly in a case where the evidence is so restricted to a few facts and where any adjudication must depend so largely upon the credibility and the weight to be given to the evidence of the respective parties, is unable to conclude that under section 1014(2) Cr. C. "no substantial wrong or miscarriage of justice has actually occurred."

It would appear also that the magistrate misdirected himself relative to the determination of Black's credibility. He stated:

> In my judgment the evidence of Black substantially meets all the above tests and I feel that I am bound in law to accept his evidence.

He based his statement upon *Rex* v. *Covert* (1). In that case the accused was charged that he did unlawfully keep intoxicating liquor in a place other than a dwelling house. The prosecution adduced evidence that the accused had upon his premises a bar or a counter and was in possession of intoxicating liquor and then relied upon the statutory provision that placed upon the accused the burden of proving that he had not committed the offence. The accused in giving his evidence gave an explanation which, if believed, discharged the statutory burden placed upon him and entitled him to an acquittal. Notwithstanding this and apparently without indicating a reason therefor the magistrate found the accused guilty. Mr. Justice Beck, with whom the majority of the court concurred, condemned the decision which he described as made "arbitrarily and in disregard of the evidence." When the learned judge stated: "It cannot be said without limitation that a judge

(1) (1916) 28 C.C.C. 25.

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can refuse to accept evidence," he no doubt had in mind the failure on the part of the magistrate to act judicially rather than arbitrarily. Certainly the tests he suggests do not deprive the magistrate of any of his powers but would rather seem to emphasize that he discharge his duty and not only determine the question of credibility but indicate that he has done so.

The issue of credibility is one of fact and cannot be determined by following a set of rules that it is suggested have the force of law and, in so far as the language of Mr. Justice Beck may be so construed, it cannot be supported upon the authorities. Anglin J. (later Chief Justice) in speaking of credibility stated:

> by that I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory—in a word, the trustworthiness of their testimony, which may have depended very largely on their demeanour in the witness box and their manner in giving evidence. *Reymond* v. *Township of Bosanquet* (1).

The foregoing is a general statement and does not purport to be exhaustive. Eminent judges have from time to time indicated certain guides that have been of the greatest assistance, but so far as I have been able to find there has never been an effort made to indicate all the possible factors that might enter into the determination. It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biassed, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.

The judgment of the appellate court directing a new trial should be affirmed and the appeal dismissed.

KERWIN J.—The appellant was acquitted by a magistrate of a charge that he did unlawfully indecently assault one Emily Cumming, a female, contrary to section 292

(1) (1919) 59 Can. S.C.R. 452, at 460.

of the Criminal Code. The Attorney General of Ontario appealed to the Court of Appeal for that province against the acquittal on the grounds that the magistrate misdirected himself in stating that he was bound in law to accept the evidence of one Black, a witness at the trial, and that the magistrate was wrong in coming to the conclusion that he could exercise no discretion in weighing the credibility of that evidence. The Court of Appeal allowed the appeal and directed that the accused be retried upon the same charge.

In giving judgment, the magistrate said:

> The case is one that must be decided entirely on the credibility of the witnesses. If the evidence of the complainant is accepted, there must be a conviction. On the other hand, if the evidence of the accused is accepted, there must be a dismissal of the charge. Also, in my judgment, if the evidence of the witness Black is accepted, there must be a dismissal.

After stating that Black was to some extent an independent witness and that if his evidence was to be accepted, he, the magistrate, did not see how there could be a conviction, he continued:

> I think the evidence of Black should be examined having regard to the principle of law laid down in *Rex* v. *Covert* (1).

This was a judgment of Beck J. on behalf of the majority in the Appellate Division of the Supreme Court of Alberta and the magistrate quoted therefrom the following paragraphs:

> We are bound to presume the accused was innocent, until proved guilty; he gave all the available evidence and that evidence, if true, explained away the inference or presumption against him.
>
> It will be objected, of course, that the magistrate may have disbelieved entirely the evidence on behalf of the accused, and that it was open to him to do so; but in my opinion it cannot be said without limitation that a judge can refuse to accept evidence. I think he cannot, if the following conditions are fulfilled:
>
> (1) That the statements of the witness are not in themselves improbable or unreasonable;
>
> (2) That there is no contradiction of them;
>
> (3) That the credibility of the witness has not been attacked by evidence against his character;
>
> (4) That nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him; and
>
> (5) That there is nothing in his demeanour while in Court during the trial to suggest untruthfulness.

(1) (1916) 28 C.C.C. 25.

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To permit a trial judge to refuse to accept evidence given under all these conditions would be to permit him to determine the dispute arbitrarily and in disregard of the evidence, which is surely not the spirit of our system of jurisprudence.

The *Covert* case (1) arose in connection with an application by way of *certiorari* to quash a summary conviction under the *Liquor Act* of Alberta and was decided before the judgment of the Judicial Committee in *Rex* v. *Nat Bell Liquors Limited* (2). There a number of judgments in various courts were overruled and it was decided that a conviction by a magistrate for a non-indictable offence could not be quashed on *certiorari* on the ground that the depositions show that there was no evidence to support the conviction. The *Covert* case (1) is mentioned at page 141 of the report.

What the Court of Appeal had before it in the present case was an appeal and the proposition upon which the magistrate proceeded cannot be supported. Nowhere does he say whether he believed the evidence of the complainant or of the accused, and to proceed to discuss the evidence of Black apart from that of the complainant and accused is really to shirk the responsibility resting upon him. Unless, therefore, there is some other valid ground of attack, the order of the Court of Appeal ordering a new trial cannot be impugned.

It was contended, however, that, under subsection 2 of section 1014 of the Criminal Code, the Court of Appeal should have dismissed the appeal. This subsection reads:

> 2. The court may also dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred.

We do not know if the point was argued nor, since no written reasons were delivered, whether it was considered, in the Court of Appeal. The test in applying subsection 2 in the case of an appeal by an accused from a conviction is well known and was reiterated in this Court in *Schmidt* v. *The King* (3). But it is said that on an appeal by an Attorney General from an acquittal a different rule is to be followed and reliance is placed upon two decisions in

(1) (1916) 28 C.C.C. 25.
(2) [1922] 2 A.C. 128.
(3) [1945] S.C.R. 438.

the Saskatchewan Court of Appeal, *Rex* v. *Bourgeois* (1), and *Rex* v. *Probe* (2). The effect of these decisions is that upon an appeal by an Attorney General from an acquittal, even if substantial error has been shown, the Court should not grant a new trial where doubt could be entertained by the tribunal of fact as to the guilt of the accused. This conclusion was based upon a consideration of the rule that the accused is entitled to the benefit of a doubt as to his guilt. While not referred to on the argument of this appeal, it was decided in *Rex* v. *O'Leary* (3), by the British Columbia Court of Appeal, that when the appellate court was satisfied from the report of the magistrate that he would have convicted in the particular case without corroboration of an accomplice, no substantial wrong or miscarriage of justice had actually occurred because, even if the trial judge had not misdirected himself, he must have reached the same conclusion as he actually did.

The first two cases, of course, go much further than the last, and the reasoning upon which they proceeded cannot be justified. The dissenting opinion of Martin J., now Chief Justice of Saskatchewan, in the first case is to be preferred. As he points out, Chief Justice Anglin, speaking for this Court in *Belyea* v. *The King* (4), refers to subsection 5 of section 1013 of the Criminal Code as enacted in 1930 by which the procedure upon an appeal by an Attorney General and the powers of the Court of Appeal shall *mutatis mutandis,* and so far as the same are applicable to appeals upon a question of law alone, be similar to the procedure prescribed and the powers given by sections 1012 to 1021 Cr. C. inclusive. Chief Justice Anglin stated

> that the effect of the words *"mutatis mutandis"* is that clause (*a*) (of subsection 3 of section 1014 Cr. C.) must be made to read, on an appeal (by an Attorney General) being allowed, to
>
> (*a*) quash the *acquittal* and direct a judgment and verdict of *conviction* to be entered.

That in fact was what was done in the *Belyea* case (4).

The point with which we are concerned under subsection 2 of section 1014 Cr. C. was apparently not argued in

(1) (1937) 69 C.C.C. 120.
(2) (1943) 79 C.C.C. 289.
(3) (1943) 80 C.C.C. 327.
(4) [1932] S.C.R. 279, at 297.

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Kerwin J.

Pitre v. *The King* (1), so that the remarks at the end of the judgment of Smith J. may properly be considered as *obiter dicta* but to give to this subsection the meaning ascribed in the judgments in Saskatchewan where a court of appeal has before it an appeal by the Attorney General from a conviction would be to permit an appellate court to encroach upon the field of the tribunal of fact. Without in any way weakening the salutary rule that an accused is entitled to the benefit of a doubt as to his guilt, effect must be given to the will of Parliament in permitting appeals from acquittals and to the provisions of subsection 2 of section 1014 Cr. C. by which, according to the terms of subsection 5 of section 1013 Cr. C., the powers of a court of appeal are *mutatis mutandis* and so far as the same are applicable to appeals upon a question of law alone, to be similar to the powers given by the former. Applying those provisions to the present case, the proper rule to be followed by the Court of Appeal was that the onus was on the Crown to satisfy the Court that the verdict would not necessarily have been the same if the magistrate had properly directed himself. No doubt there will be circumstances such as arose in *Rex* v. *O'Leary* (2) where not only that cannot be shown but the opposite is true, but that situation does not arise here. In the present case it must be concluded that the magistrate would not necessarily have acquitted the appellant if he had given himself the proper direction.

The appeal should be dismissed.

TASCHEREAU J.:—I am of opinion that this appeal should be dismissed.

Appeal dismissed.

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(1) [1933] S.C.R. 69.

(2) (1943) 80 C.C.C. 327.

IRENE TELFORD (PLAINTIFF) ..... APPELLANT;

AND

ALAN C. SECORD (DEFENDANT) ..... RESPONDENT.

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*Nov. 21,22, 25, 26

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*Feb. 4

IRENE TELFORD (DEFENDANT) ..... APPELLANT;

AND

DONALD NASMITH (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trial—Evidence—Trial, with jury, of actions for damages caused by collision of motor cars—Questions by cross-examining counsel to party as to convictions on previous occasions under Highway Traffic Act—New trial—Right to jury.

The actions, tried together, with a jury, were for damages caused by a collision between a motor car owned and driven by appellant and one owned and driven by respondent S. The jury found negligence in each driver contributing to the accident, and apportioned the fault, against said respondent 75 per cent. and against appellant 25 per cent.; and, accordingly, judgments were given for damages, to appellant against said respondent, and to a passenger in the latter's car, now also a respondent, against appellant. On appeal by said respondents, the Court of Appeal for Ontario ordered a new trial ([1945] 4 D.L.R. 450). That order was now affirmed by this Court on the ground that, at the trial, appellant's counsel, in cross-examining the respondent driver (and following some explanatory remark by the latter that it was his "first occasion in court", and counsel indicating intention to attack credibility) elicited from him that on certain charges of speeding in previous years he had paid fines; but it was not established that he had himself committed the offences (he might, as owner of a car driven by others, have "incurred penalties" under *The Highway Traffic Act,* Ont., without having himself "violated" the Act; he stated that on none of the occasions had he appeared in court); and, assuming evidence as to the convictions was admissible at all, such evidence could only have been adduced if counsel were in a position to show that the witness had himself committed the offences; respondents had met the onus under s. 27(1) of *The Judicature Act,* R.S.O. 1937, c. 100 (of showing a "substantial wrong or miscarriage"). But this Court held that the direction by the Court of Appeal that the new trial should be without a jury should be set aside; as a jury is an eminently proper tribunal for trial of the matters in issue, sufficient ground had not been shown to deprive appellant, by said direction, of that right. (The Court found it unnecessary to decide whether, in view of s. 55 of *The Judicature Act,* and the authority thereby and by the Rules conferred upon the trial judge, the direction could be supported.)

*Present:—Kerwin, Rand, Kellock and Estey JJ. Hudson J. also sat at the hearing, but he died before judgment was delivered.

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TELFORD v. SECORD — TELFORD v. NASMITH

APPEALS from judgments of the Court of Appeal for Ontario (1), which set aside judgments of Barlow J. on the findings of a jury, and ordered a new trial, to be had before a judge without a jury.

There were two actions, tried together before Barlow J., with a jury. They arose out of a collision on February 12, 1944, on Highway No. 2, near Highland Creek, Ontario, between a motor car owned and driven by the appellant and one owned and driven by the respondent Secord. The appellant sued Secord for damages for personal injuries and damage to her car, and the respondent Nasmith, a passenger in Secord's car, sued the appellant for damages for personal injuries. The jury found negligence on the part of both drivers causing or contributing to the cause of the accident, found the degrees of such negligence to be: respondent Secord 75 per cent., and appellant 25 per cent., and assessed appellant's total damages at $3,000 and respondent Nasmith's total damages at $5,000. In accordance with such findings, judgment was given in favour of the appellant for $2,250 against the respondent Secord and judgment was given in favour of the respondent Nasmith for $1,250 against the appellant. The said Secord and Nasmith appealed to the Court of Appeal for Ontario, which gave judgments as above stated (Laidlaw J.A. dissented, except that he would direct a new trial as between Nasmith and the present appellant, but confined to the ascertainment of the quantum of damages sustained by Nasmith). Appellant appealed to this Court.

D. L. McCarthy K.C. (in one appeal) and *J. R. Cartwright K.C.* (in the other appeal) for the appellant.

F. J. Hughes K.C. for the respondent Secord.

J. J. Robinette K.C. for the respondent Nasmith.

The judgment of the Court was delivered by

KELLOCK J.—These appeals are taken from orders of the Court of Appeal for Ontario, dated 6th July, 1945, which allowed appeals by the respondents from judgments of Barlow J., dated 24th February, 1945, entered pursuant to the verdict of a jury. The two actions arose out of a

(1) [1945] 4 D.L.R. 450.

collision on 12th February, 1944, between automobiles owned and driven by the appellant and the respondent Secord, respectively, the appellant Nasmith being a passenger in the Secord car. The actions were tried together. By the order in appeal a new trial was directed, Laidlaw J.A. dissenting. The view of the majority was that the trial was unsatisfactory by reason of conduct on the part of counsel representing the appellant at the trial and also on the ground that a jury acting judicially and with a proper appreciation of its duties must necessarily have arrived at a greater amount of damages than was awarded Nasmith. The majority were also of the view that the damages, in the absence of other explanation, might also be the result of the conduct of counsel already referred to. Laidlaw J.A. dissented on the ground that no sufficient or any objection had been made at trial and that the present respondents had failed to show any substantial wrong or miscarriage of justice. While a new trial was directed, that trial was directed to take place without a jury.

In our opinion, the appeal should be dismissed but the direction that the new trial shall take place without a jury must be deleted. We do not consider it necessary to deal with all the matters of which the respondents complain with regard to the conduct of the trial. We think it is sufficient to refer to one matter only which, in our opinion, makes it necessary that a new trial should be had.

Immediately before commencing his cross-examination of the respondent Secord, counsel for the appellant, in the absence of the jury, said, basing himself upon the provisions of section 18(1) of *The Evidence Act,* R.S.O. 1937, Chap. 119, that he proposed to cross-examine the witness with respect to previous convictions under *The Highway Traffic Act,* R.S.O. 1937, Chap. 288. He said: "I submit I have that right on purely a question of credibility; I am not submitting it on any other ground, it is on the ground of credibility." And again: "I am not trying to put the convictions in as evidence to show he is a bad driver on previous occasions or because he was convicted of speeding on previous occasions that he was speeding on this occasion, I am submitting it on credibility, * * *"

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Kellock J.

Objection was made by counsel for both respondents and at the conclusion of argument with regard to the point the learned trial judge ruled as follows:

His Lordship: Mr. Levinter put his application for leave to introduce by way of cross-examination questions as to previous convictions of the defendant Dr. Secord, on the ground that he is entitled to cross-examine as to those by way of attacking the credibility of the witness; well, that might be so from a certain standpoint, yet in an action of this kind before a jury it would have a very different effect entirely, and for that reason alone, regardless of any other reasons that there may be, I must rule that the questions cannot be asked. If I am wrong and this goes farther, it will have to be corrected elsewhere. Bring the jury back.

The cross-examination proceeded and in the course of it the witness, in excusing himself for the way in which he had given some answers on discovery, made the statement: "This is my first occasion in court. I am not familiar with the proceeding." The following then occurred:

Mr. Levinter: It is your first occasion in court?

A. Yes, with the exception of giving expert evidence.

Q. Have you never been in court before?

A. No.

Q. Never in police court before?

A. No, sir.

Mr. Levinter: Am I entitled to now on the question of credibility?

His Lordship: No, I don't think so.

Mr. Walker: I object to these innuendoes my friend is constantly making.

Mr. Hughes: Do you mind if I say that after Your Lordship's ruling my friend has directly gone through it; now, My Lord, may I withdraw any objection and let the jury have whatever he has got in his head so that there will be no questions said to the jury afterwards that we endeavoured to keep anything back, let him put it in.

His Lordship: Very well.

Cross-examining counsel then elicited from the witness that on certain charges of speeding in 1938, 1939, 1940 and 1943 he paid fines, but the witness said that other persons drove his car as well as himself and he was unable to say whether on any of the occasions he himself had been driving. He also said that on none of the occasions had he appeared in court.

Somewhat inadvisedly counsel for the respondent Nasmith, who preceded counsel for the appellant, said in the course of his address to the jury:

By innuendo he gets it across to you people that this man is a speed fiend, a terrible fellow—just by innuendo—that he is full of convictions, that he must have been in court many times; then my learned friend fortunately brings out, "Well, let us hear all about

this", I had not heard about it, and we find over a period of driving as many miles as he does in a year, we find over the period of those years a certain number of fines for speeding; my friend does not bring forward and indicate who is fined.

Appellant's counsel followed in due course and the following occurred:

My friend bitterly complains that I brought out these convictions for speeding; gentlemen, I would have laughed, just as you laughed yesterday, if I had brought out that in 1938 *he* was speeding so much, we all laugh sometimes when these things happen, but you do not have two in 1938, and one in 1939, and you don't have another in 1940, you don't have another in 1943—

His Lordship: Mr. Levinter, just a moment; you brought that evidence as to credibility and nothing else, now you are using it for exactly the other purpose—

Mr. Levinter: My friend raised it in his argument at great length, and surely I am entitled to respond to my learned friend's argument.

His Lordship: Proceed.

Mr. Levinter: Those are the only times that he was convicted apparently, now was he putting on speed on this occasion?

By section 26 of *The Highway Traffic Act* it is provided that no vehicle shall be driven upon any highway within a city, town or village at a greater speed than thirty miles an hour except in certain special localities, and at fifty miles per hour outside such municipalities. By sub-section (4), any person "who violates" any of the provisions of the section is rendered liable to certain penalties, including certain fines.

By section 46 it is provided that the owner of a motor vehicle shall "incur the penalties" provided for any violation of the Act unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver not being the owner is also made liable for such penalties.

Accordingly, even assuming that a breach of the speed limit laid down by the statute would constitute a "crime" within the meaning of sub-section (1) of section 18 of *The Evidence Act*, which we do not consider it necessary to decide, the appellant did not establish, as to any of the convictions, that it was the witness who had "violated" the statute.

We are of the opinion that, assuming evidence as to these convictions was admissible at all, such evidence could only have been adduced if counsel were in a position to

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show that the witness had himself committed the offences. We think that the withdrawal of objection on the part of counsel for the respondents must be deemed to have proceeded on the assumption that this would be done. On this ground alone we think that the order for a new trial must be affirmed. We do not think it open to the appellant to contend that the course pursued did not have its intended effect. We therefore think that the onus resting upon the respondents under section 27 of *The Judicature Act*, R.S.O. 1937, Cap. 100, has been met.

With respect to the direction that the new trial should be without a jury, we think that, as a jury is an eminently proper tribunal for the trial of the matters that are in issue between the parties, sufficient ground has not been shown to deprive the appellant of that right. Whether, in view of the right to a jury given by section 55 of *The Judicature Act*, and the authority thereby and by the Rules conferred upon the trial judge, the order in appeal can be supported, need not be decided. There rests with the trial judge sufficient power and authority to conduct the trial as it should be conducted, and, should he see reason to try the action without a jury or to dispense with the jury at any stage, his discretion is not subject to review; *Currie* v. *Motor Union Insurance Co.* (1); *Wilson* v. *Kinnear* (2). We think that the course followed in *Reiffenstein* v. *Dey* (3) should be followed here and the direction complained of must therefore be set aside.

The appeal will therefore be allowed in part as indicated. The right to a trial by jury is a substantial right, and, as success is divided, we think there should be no costs of this appeal. The costs below will not be interfered with.

Appeals allowed in part.

Solicitors for the appellant: *Luxenberg, Levinter, Ciglen & Grossberg* (in one action) and *Smith, Rae, Greer & Cartwright* (in the other action).

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

Solicitors for the respondent Nasmith: *David J. Walker.*

(1) (1924) 27 O.W.N. 99.
(2) (1925) 57 O.L.R. 679.
(3) (1913) 28 O.L.R. 491, at 498.

ISAIE ADAM (PLAINTIFF) ..... APPELLANT;

AND

DAME MARIE BLANCHE OUELLETTE (DEFENDANT) ..... RESPONDENT;

AND

METROPOLITAN LIFE INSURANCE CO. ..... (MISE-EN-CAUSE).

1947

*Feb. 26
*May 13

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

Insurance (Life)—Will—Joint application for policy by father and son—Son as insured and father as beneficiary—Insured reserving right to substitute beneficiary—Conditions of policy as to change of beneficiary—Whether inserted for benefit of beneficiary or company—Wife of insured substituted as beneficiary by will of insured—Whether father or widow entitled to proceeds of policy—Communication between parties to contract during lifetime of insured—Whether necessary before revocation of beneficiary by testamentary instrument—Articles 1029 and 2591 C.C.

The appellant and his son, then partners, arranged to obtain from the company mise-en-cause a policy of insurance on the son's life for $5,000. The policy was issued upon the joint application of both, the father being mentioned to be the beneficiary. There was a proviso, the father assenting to it, that the son reserved to himself the right to operate at any time a substitution of beneficiary. The policy contained conditions for a clause enumerating change of beneficiary: that it should be effected by notice in writing to the insurance company, with the deposit of the policy in its office, there to be endorsed by the company and that the change would operate only after such endorsement. In 1926, the son obtained two loans from the company on the security of the policy, and the appellant and his son for that purpose transferred to the company the policy, to be returned in reimbursement of the loans. In 1940, the son died and left a will bequeating to his wife all his movables and unmovables, etc., including his insurances. The proceeds of the policy were claimed by the appellant as beneficiary under the policy and by the respondent under the will of her husband. The appellant contended that the substitution of beneficiary had not been effected within the terms of the clause above mentioned and also that there had been already a transfer of the policy to the company as security for the loans. The Superior Court maintained the appellant's action claiming the amount of the policy; but the appellate court reversed that judgment, holding that the right of the insured to change the beneficiary could be exercised by will.

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

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Held, affirming the judgment appealed from, Rand J. dissenting, that the widow respondent was entitled to recover the proceeds of the policy. The conditions of the policy, which the appellant invoked in support of his contentions, were not inserted therein for his own benefit. The first clause, as to conditions for change of beneficiary, was clearly providing for the protection of the insurance company itself, which alone had the right to invoke it, and quoad the appellant, it was *res inter alias acta.* The second clause has no bearing upon the issue in this case: the transfer of the policy to the insurance company was restricted to the amount of the loans made by it to the insured. The surplus of the proceeds of the policy belonged to the respondent as beneficiary duly substituted by the will of the deceased and could no more be claimed by the appellant who had been legally revoked as beneficiary under the conditions of the policy.

Per Rand J. dissenting:—The policy notwithstanding the power of revocation is a contract for the benefit of a third person within article 1029 C.C., and, in the absence of a rule either of the Code or the prior law, that article leaves untouched, if it does not indeed exclusively contemplate, powers of revocation provided by or inherent in the contract. In the present contract of insurance, as in any other obligation, underlying particular formalities that may be specified, there is assumed a fundamental communication between the parties. As there is no suggestion that the contract here, either expressly or impliedly, contemplates a designation by a testamentary instrument, it must be concluded that a communication between the parties in the lifetime of the insured is a *sine qua non* of such a modification.

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec reversing the judgment of the Superior Court, E. Fabre Surveyer J. and dismissing the appellant's action.

The appellant claimed the proceeds of a life insurance policy as beneficiary named in the policy itself; while the respondent based her rights on the fact that her husband, by his will, has left her all his property "including his assurances".

Jacques Cartier K.C. for the appellant.

André Sabourin for the respondent.

The judgment of the Chief Justice and of Kerwin, Taschereau and Estey JJ. was delivered by—

TASCHEREAU J.—L'appelant, demandeur en première instance, réclame le produit d'une police d'assurance dont il prétend être le bénéficiaire. Sa réclamation a été admise par la Cour Supérieure, mais la Cour du Banc du Roi a rejeté son action.

Dans le cours du mois de juillet 1914, la Metropolitan Life Insurance Company, la mise-en-cause, a émis une police d'assurance au montant de $5,000 (vingt paiements), à la demande conjointe de l'appelant Isaïe Adam et de son fils Joseph Ovila Adam. Aux termes mêmes de la police, il est mentionné que le fils est l'assuré, et que le père sera bénéficiaire dans le cas de survie. L'une des clauses les plus importantes de cette police, est qu'avec le consentement du père, le fils s'est réservé le droit de changer de bénéficiaire à son gré, et de déterminer par conséquent toute autre personne de son choix, comme devant recevoir à sa mort le produit de la police. Les conditions relatives au changement de bénéficiaire sont les suivantes:—

Changement de bénéficiaire:—Lorsqu'on s'est réservé le droit de révocation, l'assuré pourra, pendant que la police est en vigueur, s'il n'a été fait aucun transfert de la police tel que stipulé ci-après, désigner un nouveau bénéficiaire avec ou sans droit réservé de révocation, en déposant un avis par écrit au bureau central de la Compagnie, accompagné de la police pour être endossée en bonne et due forme. Un tel changement prendra effet sur l'endossement dudit avis sur la police par la Compagnie. Si un bénéficiaire quelconque, sous une désignation soit révocable ou irrévocable, meurt avant l'assuré, l'intérêt de ce bénéficiaire reviendra à l'assuré.

Tel que la police le permet, des avances substantielles ont été faites au fils, à même les montants accumulés. Dans le cours du mois de janvier 1940, le fils est décédé après avoir fait un testament, dont la seule clause importante pour déterminer ce litige est la suivante:—

Je donne et lègue à mon épouse Dame Marie Blanche Ouellette tous les biens, meubles, immeubles, argent, créances y *compris mes assurances et tous* autres biens et droits quelconques que je possèderai au jour et heure de mon décès pour lui appartenir en pleine propriété à compter de mon décès, l'instituant ma légataire universelle en propriété mais à la condition qu'elle garde viduité et sans aucune obligation de faire inventaire ou donner caution.

La compagnie mise-en-cause, requise de payer et par l'appelant qui allègue son titre de bénéficiaire, et par l'épouse du fils qui invoque le testament, a déposé entre les mains du Protonotaire la somme de $3,192.30, montant représentant la valeur de la police, déduction faite des avances, au moment du décès.

La question de savoir si le père, bénéficiaire original, peut être révoqué, ne se présente pas. Evidemment, il s'agit, il est vrai, d'une stipulation en sa faveur, qu'il a

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Taschereau J.

acceptée, et le fils qui a stipulé ne pourrait la révoquer sans violer les dispositions de l'article 1029 C.C. Mais le bénéficiaire et l'assuré ont tous deux convenu que telle révocation pourrait s'opérer par l'unique volonté du fils. Le seul problème qui se pose alors est donc de savoir si la révocation a été faite légalement.

Il est certain qu'un changement de bénéficiaire peut s'opérer par testament (Arr. 2591 C.C.), et qu'un mari peut attribuer à son épouse les bénéfices d'une police d'assurance (S.R.Q., 1941, ch. 301, art. 3).

Quand dans son testament, le fils dit: "Je donne et lègue à mon pouse * * * y compris mes assurances, etc.," il emploie, je crois, des mots qui ne laissent pas de doute quant à ses intentions, malgré qu'il eût d'autres polices d'assurance. Avant que la compagnie mise-en-cause eût payé, copie du testament lui fut signifiée.

L'appelant soutient que ce changement de bénéficiaire ne satisfait pas les conditions de la clause précitée, parce qu'un avis par écrit n'a pas été déposé au bureau central de la compagnie, accompagné de la police, et parce qu'également il avait déjà eu un transfert de la police à la mise-en-cause pour garantir les avances consenties.

L'appelant semble croire que ces clauses sont insérées dans la police pour son bénéfice à lui, et qu'à défaut par l'assuré de remplir une condition de son contrat avec l'assureur, il aura le droit de s'en prévaloir. Je crois qu'il fait erreur.

La première de ces deux conditions existe clairement pour la protection de la compagnie elle-même. Celle-ci en effet peut seule l'invoquer, mais *quoad* l'appelant, elle est res *inter alias acta*. On conçoit facilement la nécessité d'une pareille clause, et la raison impérieuse pour laquelle l'assureur exige qu'elle soit l'une des conditions de la police. Dans le cas d'exigibilité du montant de la police, c'est le bénéficiaire qui doit recevoir le paiement, et comment la compagnie saurait-elle à qui verser les montants dus, si elle n'était pas protégée par une clause semblable? Mais si l'avis qui lui est donné n'est pas strictement conforme aux termes de la police, ce n'est sûrement pas le bénéficiaire original légalement révoqué, et dont les droits sont totalement éteints, qui peut être admis à se plaindre.

Quant à l'autre condition, à l'effet que l'assuré ne peut changer de bénéficiaire s'il a été fait un transfert de la police, elle ne saurait je crois affecter davantage le résultat de cette cause.

Pour garantir des avances faites à l'assuré, la police a en effet été transférée à la mise-en-cause, mais ce transfert ne vaut que jusqu'à concurrence des montants avancés. C'est la police elle-même qui le dit. Le surplus évidement appartient au nouveau bénéficiaire dûment nommé, et non pas à l'ancien qui est révoqué. Quand la mise-en-cause stipule "qu'aucun transfert ne sera fait", cela signifie que la compagnie n'acceptera pas le transfert tant que les avances n'auront pas été remboursées, mais quand elles le sont, le surplus doit nécessairement être payé au bénéficiaire nouveau, qui se trouve investi de tous les droits éventuels que peuvent conférer les termes de la police.

L'appelant, premier bénéficiaire, n'avait qu'un droit précaire, qui aurait cependant perdu ce caractère pour devenir certain et définitif, si l'assuré était mort avant d'exercer à son gré son droit incontestable de révocation. Ce droit a été exercé dans le testament, et comme conséquence, au moment de l'ouverture de la succession du fils, la révocation et l'attribution à un nouveau bénéficiaire des avantages de la police, se sont simultanément produites.

Je crois que l'appelant ne peut pas réussir, et que son appel doit être rejeté avec dépens de toutes les cours.

RAND J. (dissenting): This is a controversy over the proceeds of a life insurance policy. The appellant was the father of the insured and was the beneficiary named in the policy. The respondent is the widow and claims the money under the will of her deceased husband.

The policy called for the payment of premiums for twenty years, and there were the usual cash surrender rights. The application, signed by both the father and the son, is incorporated in the policy, and contained the following questions and answers:

19. Qui va recevoir le montant de la police postulée à la fin de dotation?

R. Joseph Oliva Adam.

Degré de parenté vis-à-vis de la personne proposée à l'assurance?

R. L'assuré même.

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Rand J.

20. Désirez-vous réserver le droit de changer de bénéficiaire en n'importe quel temps, sans le consentement du bénéficiaire désigné ci-après?

R. Qui.

21. En cas de décès qui sera désigné pour recevoir le montant de la police postulée?

R. Isaïe Adam.

By the policy, the company promised to pay on the death of the insured to the appellant "bénéficiaire avec droit de révocation". Change of beneficiary was dealt with in the following manner:

> Changement de beneficiaire.—Lorsqu'on s'est réservé le droit de révocation, l'assuré pourra, pendant que la police est en vigueur, s'il n'a été fait aucun transfert de la police tel que stipulé ci-après, désigner un nouveau bénéficiaire avec ou sans droit réservé de révocation, en déposant un avis par écrit au bureau central de la Compagnie, accompagné de la police pour être endossée en bonne et due forme. Un tel changement prendra effet sur l'endossement dudit avis sur la police par la Compagnie. Si un bénéficiaire quelconque, sous une désignation soit révocable ou irrévocable, meurt avant l'assuré, l'intérêt de ce bénéficiaire reviendra à l'assuré.

Provision was made also, after the insurance had been three years in force, to make loans up to 85 per cent of the cash surrender value, "sur transfert et de la remise valable de la police". Two loans were so made by the insured and his interest in the policy was as required assigned to the company by a document to which the beneficiary likewise was a party. These loans remained unpaid at the time of death.

The language of the will which is said to carry the funds to the respondent is this:

> tous les biens, meubles, immeubles, argent, *créances y compris mes assurances* et tous autres biens, etc.

It is contended that this language is not appropriate to a change of beneficiary, and that it applies rather to insurance payable to the estate of the deceased, of which there were several policies. But for the purpose of the conclusion to which I have come, I will assume the will to purport to substitute the wife for the father as beneficiary, and as no statutory provision is applicable, the question is whether that change has been brought about.

The judgment at trial holding against the respondent was reversed on appeal, on the ground that the power to change the beneficiary could be exercised by will. The

clause providing the mode for such a change was treated as for the benefit only of the insurer, which the designated beneficiary had no standing to invoke. In the language of Barclay J.:

> Such a clause was inserted for the protection of the company, and was not intended to confer different rights or more extensive rights upon the beneficiary than he had under the terms of the application. Being of that opinion, I consider that the policy with the stipulated right to revoke at any time was and always remained in the "patrimoine" of the deceased, the assured, and that he could and did validly change the beneficiary by the terms of his will.

The essence of this holding lies in the last four lines, and the decisive question is, what is the legal effect in the circumstances of the language in the policy "bénéficiaire avec droit de révocation".

The consideration of this question must, I think, start with the fact that the policy notwithstanding the power of revocation is a contract for the benefit of a third person within article 1029 of the Civil Code:

> A party in like manner may stipulate for the benefit of a third person, when such is the condition which he makes to another; and he who makes the stipulation cannot revoke it, if the third person has signified his assent to it,

as interpreted by this Court in *Hallé* vs. *Canadian Indemnity Company* (1). The Article, by its declaration of the effect of assent, does not assume or imply any particular mode of revocation; but as the matter is in contract, in the absence of a rule either of the Civil Code or the prior law, the Article leaves untouched, if it does not indeed exclusively contemplate, powers of revocation provided by or inherent in the contract. The designation of a third person, subject to revocation, none the less fixes pro tempore the issue or object of the benefit; and the question becomes whether assent adds anything to the legal relation of the beneficiary to the obligation.

To treat the interest of the policy as simply augmenting the patrimoine of the insured, which is in fact to take the contract out of article 1029 C.C., lends itself to a confusion of two conceptions of transfer, that of alienation or transmission and that of a designation that completes a special form of obligation. If the policy should provide for the payment of moneys to the estate of the insured, the contract is not one within article 1029 C.C. because no

(1) [1937] S.C.R. 368.

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third person within the meaning of the Article is involved. In such case, the appropriation of that interest by will takes effect as a testamentary transmission of property of the testator: but a person taking by way of designation in the policy, takes as a party to a contract.

Can a will co-exising with a policy naming a beneficiary change that beneficiary? If the designation remains unrevoked, by the effect of the contract the obligation at the moment of death matures. Conceiving the insurance to be within the patrimoine, a will purporting to deal with it and operating as a transmission becomes effective at the same instant. It is not suggested that the execution of the will itself revokes the designation, and we have both instruments therefore approaching the same moment at which they both become accomplished. Does the will override the contract? During the time of that parallel currency, what is the interest of the beneficiary? If he has any at all, how can it be said that the benefit of the insurance is within the patrimoine? If the power to revoke is all the testator holds, then it is a question not of transmission of patrimoine, but of designation for the purposes of a contract.

To the policy, the application of Article 1029 C.C. must I think be given some effect following the assent of the beneficiary. On the view of the Court below, that assent is of no significance; the relation of the beneficiary after is precisely the same as before. The contract ought, then, to be construed with the Article as creating a right in the beneficiary which is subject to revocation only by way of a modification of the contract. In other words, the parties to the contract have reserved to themselves as parties the right to modify the benefit which otherwise would be irrevocable in the third person. But only to that extent is the right of the beneficiary made precarious.

How then is a contract or obligation changed by the parties? What is the minimum of act or matter by which it can be said the contract has been modified? For that we must look to the contract itself. Here, as in any other obligation, underlying particular formalities that may be specified, there is assumed a fundamental communication between the parties. They may, of course, agree in advance that any act by either party may signify a change in some

feature of the obligation: but in one form or another there must be agreement between them. The company could obviously waive any particular requirements stipulated for its protection, but the essential fact remains that the change must be effected by agreement. As there is no suggestion that the contract here, either expressly or impliedly, contemplates a designation by a testamentary instrument, we are bound to conclude that a communication between the parties in the lifetime of the insured is a sine qua non of such a modification.

Article 2591 C.C. does not appear to have any bearing upon the question raised. Its language is:

> A policy of insurance on life or health may pass by transfer, will, or succession, to any person, whether he has an insurable interest or not in the life of the person insured.

The subject matter there is insurance for the benefit of the insured, an interest within his patrimoine, and the Article renders it subject to those modes of transfer or transmission which apply to the patrimoine generally. But it must be interpreted and reconciled with article 1029 C.C, and where a contract has created a right in a third person, that right takes the benefit of the insurance outside the scope of article 2591 C.C.

I would, therefore, allow the appeal and restore the judgment of the Superior Court with costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *Jacques Cartier K.C.*

Solicitor for the respondent: *Ivan Sabourin.*

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LILLIAN NILES AND OTHERS (PLAINTIFFS) ..... } APPELLANTS; * Nov. 20, 21

BLANCHE V. LAKE (DEFENDANT) ..... RESPONDENT. * Feb. 4

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trust—Contract—Banks and Banking—Account opened in bank in joint names of two persons, at instance of one of them, who, from her own moneys, made all deposits—Death of latter—Claim by survivor to moneys—Agreement, in bank form, executed by both persons under

* Present:—Kerwin, Taschereau, Rand and Kellock JJ. Hudson J. also sat at the hearing, but he died before judgment was delivered.

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seal—Terms of agreement—Circumstances in question—Resulting trust in favour of deceased—Moneys held to belong to her estate—Costs.

A arranged with a bank to open a "joint account" in the names of herself and L (a sister of A), in which A (who kept the bank-book) made the initial and other deposits from her own moneys and on which she issued cheques. She died within three months after the account was opened. Prior to A's death L made no deposits in, or cheques on, the account, nor did she know what deposits or withdrawals were made. When the account was opened, A and L, as required by the bank, executed under seal a document, in the bank's standard form, addressed to the bank, by which they "for valuable consideration (receipt whereof is hereby acknowledged)" mutually agreed "jointly and each with the other or others of us" and also with the bank, "that all moneys now or which may be hereafter deposited to the credit of the said account, and all interest thereon, shall be and continue the joint property of the undersigned with right of survivorship", and each of them "in order effectually to constitute the said joint deposit account hereby assigns and transfers to all of the undersigned jointly and to the survivor or survivors" of them any and all moneys theretofore, then or thereafter deposited to the credit of the account together with all interest "to be the joint property of the undersigned and the property of the survivor or survivors of them"; each irrevocably authorized the bank to accept from time to time as a sufficient discharge for any sum or sums withdrawn any receipt, cheque, etc., "signed by any one or more of the undersigned without any further signature or consent of the other or others of the undersigned thereto"; they agreed "with each other and with the said Bank that the death of one or more of the undersigned shall not affect the right of the survivors or any one of them or of the sole survivor to withdraw all of the said moneys and interest" from the bank and to give a valid and effectual discharge or receipt therefor.

Held: The moneys in the account at A's death belonged to her estate. The fact that all the deposits were made by A from her own money raised the presumption of a resulting trust in her favour, and neither the terms of the document nor other circumstances in evidence served to rebut that presumption or to cut down A's beneficial interest raised in equity under it.

The mere fact that the document was under seal did not prevent it being shown that there was no consideration from L.

The document should, under the circumstances and in its language, be construed as being for the protection of the bank and to facilitate its dealing with the account.

Judgment of the Court of Appeal for Ontario, [1946] O.R. 102, reversed, and judgment at trial, [1945] O.R. 652, restored.

This Court held that the costs throughout should be paid out of the fund in question. (*Per* Kellock J.: The proper construction of the document fundamentally affected the rights of the parties and as to that there had been such difference of judicial opinion as to make it

plain that there was an important and debatable legal issue: *Boyce* v. *Wasbrough*, [1922] 1 A.C. 425, at 435). (Kerwin J. took the view that L should pay the costs in this Court and in the Court of Appeal; that the case was not one where an exception should be made to the general rule that a litigant should pay the costs of carrying an unsuccessful defence to appeal. He would not interfere with the direction at trial that costs of all parties be paid out of the estate, except to provide that they come out of the fund. But he could not treat the case as analogous to the construction of a will or as exhibiting any special circumstances warranting an infraction of the general rule.)

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1) allowing the defendant's appeal from the judgment of Greene J. (2) declaring that the sum of $10,070.80 which, at the time of the death of Georgena Arnott (late of Port Hope, Ontario) was on deposit in the Royal Bank of Canada at Port Hope, Ontario, in a certain "joint account" in the names of the said Georgena Arnott and the defendant, belonged to and was an asset of the estate of the said Georgena Arnott, deceased, and ought to be distributed according to the terms of her will. The judgment of the Court of Appeal declared that the said sum was the property of the defendant.

F. A. Brewin and *Hugh Powell* for the appellants.

J. R. Cartwright K.C. for the respondent.

KERWIN J.—The plaintiffs in this action are four sisters and a brother of the late Mrs. Georgena Arnott, and the defendant, Mrs. Blanche V. Lake, is another sister. The dispute concerns a sum of money on deposit with the Port Hope Branch of the Royal Bank of Canada in Account No. 2047, standing in the names of Georgena Arnott and Blanche V. Lake or the survivor, which sum, when the account was closed, amounted to $10,070.80. Mrs. Arnott died February 27th, 1944, and this sum was transferred by Mrs. Lake, on September 9th, 1944, to her own account. The plaintiffs claim that it is an asset of the estate of Georgena Arnott.

Mrs. Arnott and her husband lived in Port Hope where the latter died December 9th, 1943. At that time Mrs. Arnott was in the Port Hope Hospital, and, while still

(1) [1946] O.R. 102; [1946] 2 D.L.R. 177.
(2) [1945] O.R. 652; [1945] 4 D.L.R. 795.

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there, sent for the Manager of the branch of the bank where she and her husband had had a joint account. This account and Account No. 2047, while commonly so described, are strictly not joint accounts, as money might be withdrawn by either of two parties and the survivor. The Manager saw Mrs. Arnott on December 16th, 1943, when she told him that she desired to open an account in the names of herself and her sister, the defendant, Blanche V. Lake. Having already been told by an intermediary of her desire to open a joint account, the Manager had taken with him the Bank's standard form, which he told Mrs. Arnott it would be necessary for her and her sister to sign. Mrs. Arnott signed it and handed him for deposit to the account the sum of $560, part of the assets of the estate of her husband, all of which had been willed by him to her. The document was sent by the Bank to Mrs. Lake who lives in Toronto, who also signed it and then returned it to the Bank.

The document is under seal and reads as follows:

Form LE 233A—Agreement re Joint Account

Revised 12-41

To The Royal Bank of Canada

Port Hope, Ontario Branch:

We, the undersigned, having opened a Savings Deposit Account with the above-named Branch of the Royal Bank of Canada in our joint names do for valuable consideration (receipt whereof is hereby acknowledged) hereby mutually agree, jointly and each with the other or others of us also with the said The Royal Bank of Canada, that all moneys now or which may be hereafter deposited to the credit of the said account, and all interest thereon, shall be and continue the joint property of the undersigned with right of survivorship; and each of the undersigned in order effectually to constitute the said joint deposit account hereby assigns and transfers to all of the undersigned jointly and to the survivor or survivors of them any and all moneys which may have been heretofore or may now or hereafter be deposited to the credit of the said account together with all interest which may accrue thereon to be the joint property of the undersigned and the property of the survivor or survivors of them.

Each of the undersigned hereby irrevocably authorizes the said Bank to accept from time to time as a sufficient discharge for any sum or sums withdrawn from the said deposit account any receipt, cheque or other similar document signed by any one or more of the undersigned without any further signature or consent of the other or others of the undersigned thereto.

It is understood and agreed by the undersigned with each other and with the said Bank that the death of one or more of the undersigned shall not affect the right of the survivors or any one of them

or of the sole survivor to withdraw all of the said moneys and interest from the said Bank and to give a valid and effectual discharge or receipt therefor. Provided, however, that this understanding and Agreement is subject to the requirements of any Succession Duty Act in respect of such moneys and the interest thereon.

This Agreement shall be binding upon the heirs, executors, administrators, and assigns of each of the undersigned parties thereto.

Witness our hands and seals this 16th day of December, A.D. 1943.

Signed, Sealed and Delivered
in the presence of

HAROLD GORDON JEX	GEORGENA ARNOTT (Seal)
ARTHUR J. D. LAKE	BLANCHE V. LAKE (Seal).

The bank-book for this account, No. 2047, was given to Mrs. Arnott who kept it and drew cheques on the account on the following dates in the amounts set out:

January 3, 1944	$ 97.00
January 18, 1944	5.75
February 7, 1944	112.30

These cheques were for personal and hospital expenses. In addition to the original deposit of $560, the following deposits were made in the account by Mr. Bonneville, Mrs. Arnott's solicitor, on her direction:

February 15, 1944	$1,139.26
February 17, 1944	6,570.00
February 24, 1944	1,977.83

All of these were the proceeds of insurance policies on the life of Mrs. Arnott's husband. Mrs. Arnott made her last will and testament on December 29, 1943, by which she appointed the defendant and the latter's husband executors, bequeathed a number of articles to various relatives, including the plaintiffs and defendant, and devised and bequeathed the residue of her estate to her sisters and brother in equal shares. The exact value of the estate is not shown in the evidence, but, from the statement of claim, it would appear that the money on deposit in Account 2047 would account for considerably more than half of the total.

Prior to December 16, 1943, Mrs. Arnott had told Mrs. Lake on one of the latter's visits to the hospital that she was going to open a bank account in their joint names, but the amount of money that would be deposited, or the purpose of having the account in the two names, was not mentioned. Nor was the matter discussed thereafter

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between them except that when Mrs. Lake made another visit to her sister in the hospital, Mrs. Arnott asked her if she had signed the document sent to her by the Bank and was told that she had done so. Mrs. Lake did not know what sums were deposited from time to time or what withdrawals were made. After Mrs. Arnott's death, when the relatives were meeting with Mr. Bonneville, Mrs. Lake said, according to her own testimony, that she supposed the joint account had been arranged for convenience, while, according to the evidence of some of the others who were present, the word "supposed" had been omitted. While unimportant in my view, the fact is that while Mrs. Lake lived in Toronto, one of the plaintiff sisters lived in Port Hope and another at Cobourg, about seven miles distant. All of the sisters and the brother were on good terms with each other.

Under these circumstances, unless the document prepared by the Bank and signed by Mrs. Arnott and Mrs. Lake leads to a different conclusion, the money in question should be held to be an asset of Mrs. Arnott's estate, as there would be a resulting trust in favour of Mrs. Arnott, since all the moneys deposited to the joint account had belonged to her. It is argued, first, however, that the document by its very terms shows a contrary intention. Particular emphasis is placed upon that part by which the two sisters

> hereby mutually agree, jointly and each with the other or others of us and also with the said The Royal Bank of Canada, that all moneys now or which may be hereafter deposited to the credit of the said account, and all interest thereon, shall be and continue the joint property of the undersigned with right of survivorship; and each of the undersigned in order effectually to constitute the said joint deposit account hereby assigns and transfers to all of the undersigned jointly and to the survivor or survivors of them any and all moneys which may have been heretofore or may now or hereafter be deposited to the credit of the said account together with all interest which may accrue thereon to be the joint property of the undersigned and the property of the survivor or survivors of them.

It is said that the agreement that the moneys should be the joint property of the two sisters and the transfer by the terms of the document of all moneys to them jointly and to the survivor distinguishes the present case from *In re Mailman* (1), and reliance is placed upon a number of decisions, particularly in the Ontario courts.

(1) [1941] S.C.R. 368.

The principle applicable to a case of this nature is set forth in the *Mailman* case (1), where most of the earlier decisions are referred to. It was there decided that the form prepared by the Bank and used by the parties did not rebut the presumption of a resulting trust. The document in that case is quite different from the one before us but, while it is true that the legal property in the chose in action was vested in Mrs. Arnott and Mrs. Lake and is now vested in Mrs. Lake, equity raises an equitable interest in Mrs. Arnott by virtue of the doctrine of resulting trusts, and there is nothing in the document to cut down that equitable interest. The language is no more absolute or unequivocal than in a deed of land or a transfer of shares of stock by the owner to the joint names of the transferor and transferee. "In fact", as pointed out in the second edition of Hanbury's Modern Equity, page 213, "cases of *transfer* by one person into the joint names of himself and a stranger are in no way different from *purchases* by one person in the joint names of himself and a stranger, in which cases the presumption most certainly arises."

It was next argued that, the document being under seal, consideration for the transfer was thereby imported. That means no more than that a deed requires no consideration to support it, and, notwithstanding this general rule, a deed is always impeachable for fraud. No fraud is suggested here nor is the plea of *non est factum* advanced on behalf of the appellants. The old law, before the coming into force of the *Law of Property Act, 1925,* in England, is set forth in all the textbooks and a convenient statement appears in the second edition of Norton on Deeds, page 410: "where A conveys the whole fee simple by a conveyance operating at common law, without consideration, there is a resulting use to him in fee simple, unless uses are declared." The doctrine of resulting trusts has been raised up, as is pointed out in Maitland's Equity, at page 79, in analogy to the law of resulting uses. It is not necessary to go into the moot point discussed by Maitland at the page indicated, but these matters are mentioned to show that the mere fact of the document in question being under seal does not prevent the appellants from showing that there was no

(1) [1941] S.C.R. 368.

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consideration. That, they have done, and the resulting trust follows. It would, I think, be unfortunate if the appellants could not succeed in this case where Mrs. Arnott executed a document prepared by a bank for its own protecton and without regard to the real intention of any one signing it.

The appeal should be allowed and the judgment at the trial restored by which it was declared that the sum of $10,070.80, which was on deposit in the Royal Bank of Canada at Port Hope in Account No. 2047, belonged to and was an asset of the estate of Georgena Arnott, deceased, formerly of the Town of Port Hope, and ought to be distributed according to the terms of her last will and testament. In my view, the respondent should pay the appellants their costs in the Court of Appeal and in this Court and an exception should not be made to the general rule that a litigant should pay the costs of carrying an unsuccessful defence to appeal. The trial judge, although deciding in favour of the present appellants, directed that the costs of all parties be paid out of the estate, and I would not interfere with that direction,—except to provide that the costs should come out of the fund. However, I am unable to treat the case as analagous to the construction of a will or as exhibiting any special circumstances that would warrant an infraction of the general rule.

TASCHEREAU J.—Georgena Arnott died in Port Hope, Ontario, on the 27th of February, 1944. Under the terms of her will, the appellants and the respondent were made residuary legatees, and the respondent was also appointed co-executor with her husband, Arthur Lake.

The late Georgena Arnott lived all her life in Port Hope, and shortly before her husband's death, which occurred on December the 8th, 1943, she had become seriously ill, and had been taken to a hospital where she was confined until she died.

In December, 1943, while in the hospital, she had expressed the wish to open a joint savings account with her sister, the respondent, Mrs. Blanche V. Lake, and for that purpose the manager of the Royal Bank, Mr. Freeman, went to see her. During the interview which took place

between Mrs. Arnott and the manager of the bank, and at which was present a personal friend, Mr. H. G. Jex, Mrs. Arnott then signed the following document:

Agreement re Joint Account
To The Royal Bank of Canada,
Port Hope, Ontario Branch:

We, the undersigned, having opened a Savings Deposit Account with the above named Branch of the Royal Bank of Canada in our joint names do for valuable consideration (receipt whereof is hereby acknowledged) hereby mutually agree, jointly and each with the other or others of us also with the said The Royal Bank of Canada, that all moneys now or which may be hereafter deposited to the credit of the said account, and all interest thereon, shall be and continue the joint property of the undersigned with right of survivorship; and each of the undersigned in order effectually to constitute the said joint deposit account hereby assigns and transfers to all of the undersigned jointly and to the survivor or survivors of them any and all moneys which may have been heretofore or may now or hereafter be deposited to the credit of the said account together with all interest which may accrue thereon to be the joint property of the undersigned and the property of the survivor or survivors of them.

Each of the undersigned hereby irrevocably authorizes the said Bank to accept from time to time as a sufficient discharge for any sum or sums withdrawn from the said deposit account any receipt, cheque or other similar document signed by any one or more of the undersigned without any further signature or consent of the other or others of the undersigned thereto.

It is understood and agreed by the undersigned with each other and with the said Bank that the death of one or more of the undersigned shall not affect the right of the survivors or any one of them or of the sole survivor to withdraw all of the said moneys and interest from the said Bank and to give a valid and effectual discharge or receipt therefor. Provided, however, that this understanding and Agreement is subject to the requirements of any Succession Duty Act in respect of such moneys and the interest thereon.

This Agreement shall be binding upon the heirs, executors, administrators, and assigns of each of the undersigned parties thereto.

WITNESS our hands and seals this 16th day of December, A.D. 1943.

SIGNED, SEALED AND DELIVERED in the presence of

Harold Gordon Jex	Georgena Arnott (Seal)
Arthur J. D. Lake	Blanche V. Lake (Seal)

The document was sent by the bank manager to Toronto, where it was signed and returned by Mrs. Lake. During the months of January and February of 1944, the initial

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deposit of $560 was increased by Mrs. Arnott personally and, when she died, there was in the joint account a sum of $10,070.80.

The appellants asked for a declaration that this sum of $10,070.80 belongs to, and is an asset of, the estate of the late Georgena Arnott and ought to be distributed according to her last will, that is to say, to the residuary legatees.

Mr. Justice Greene, who heard the case, granted the order, but the Court of Appeal unanimously came to the conclusion that the money was the sole property of the respondent. The appellants claim that Mrs. Lake, the survivor of the joint account, took only the legal interest in the account, and that there was a resulting trust of the beneficial interest in favour of the estate. The respondent's contention is that the moneys are her property beneficially.

This agreement expressly provides that "all moneys deposited to the credit of the account shall be the joint property of the undersigned", that there is "right of survivorship", that there is assignment or transfer to "all the undersigned jointly and to the survivor or survivors, of them, of all moneys in the account to be joint property of the undersigned and property of the survivor or survivors of them".

In view of this language, it is not disputed by the appellants that there has been an effective assignment to Mrs. Lake and that the execution by both of them of the bank agreement gave to Mrs. Lake as the survivor upon the death of Mrs. Arnott *a legal title* to the debt of the bank created by the opening of the account, but it is argued that the position in equity is otherwise, and that, in order to have the *beneficial interest* transferred to the donee, there must be satisfactory affirmative proof of intention on the part of the donor to do so. It is therefore submitted that, the document being silent on that point and there being no evidence of a beneficial or equitable ownership in favour of Mrs. Lake, as distinguished from the legal property, the doctrine of resulting trust must apply.

The law is well settled, I think, that when a person transfers his own money into his own name jointly with that of another person, except in cases with which we are not concerned, then there is *prima facie* a resulting trust for the transferor. This presumption, of course, is a presump-

tion of law which is rebuttable by oral or written evidence or other circumstances tending to show there was in fact an intention of giving beneficially to the transferee.

One of the leading cases on the matter is undoubtedly the case of *Dyer* v. *Dyer* (1), reported and annotated in White & Tudor's "Leading Cases in Equity", 9th Ed., at page 749. Eyre, C.B., who delivered the judgment of the Court, said:

> The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive—results to the man who advances the purchase-money.

Commenting on the principle enunciated by Chief Baron Eyre, the authors say at page 756, that it "applies to personal as well as real estate", and at page 763 they state:

> It is clear that a voluntary transfer of stock into the names of the transferor and a stranger makes that stranger a trustee by implication for the transferor. In *Standing* v. *Bowring* (2), the plaintiff *transferred* Consols into the joint names of herself and her godson, to whom she was not *in loco parentis*. It was held that there was *prima facie* a resulting trust, which was, however, displaced by evidence of intention.

And at the same page (763) we also find:

> All resulting trusts which arise simply from equitable presumption, may be rebutted by parol evidence: thus it may be shown that it was the *intention*, at the time of the purchase, of the person who advanced the purchase-money, that the person to whom the property was conveyed or transferred either solely or jointly with such person should take beneficially (3). And the person who paid the money cannot alter such intention at a subsequent period (4).

In 33 Halsbury, 2nd Ed., page 149, we find:

> Where a person purchases property in the name of another or in the name of himself and another jointly, or gratuitously transfers property to another or himself and another jointly, then, unless there is some further intimation or indication of an intention at the time to benefit the other person, the property is, as a rule, deemed in equity to be

(1) (1788) 2 Cox 92; 2 R.R. 14.

(2) (1885) 31 Ch. D. 282. In the authors' footnote giving the citation, there is added: "See *Batstone* v. *Salter*, L.R. 10 Ch. 431; and cf. *Re Howes*, 21 T.L.R. 501".

(3) The authors here cite as follows: *Goodright* v. *Hodges*, 1 Watk. Cop. 227; *Rider* v. *Kidder*, 10 V. 364; *Rundle* v. *R.*, 2 Vern. 252; see Order, n. (1), *ibid; Redington* v. *R.*, 3 Ridg. P.C. 181; *Deacon* v. *Colquhoun*, 2 Dr. 21; *Wheeler* v. *Smith*, 1 Gif. 300; *Nicholson* v. *Mulligan*, 3 Ir.R. Eq. 308; *Re Rowe*, 58 L.J. Ch. 703; *Fowkes* v. *Pascoe*, L.R. 10 Ch. 343; *Standing* v. *Bowring*, 31 Ch. D. 282.

(4) The authors here cite: *Groves* v. *G.*, 3 Y. & J. 163; *Redington* v. *R.*, 3 Ridg. P.C. 106; *Gooch* v. *G.*, 62 L.T. 384.

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held on a resulting trust for the purchaser or transferor. There is a resulting trust even where the transfer is into the joint names of the transferor and an infant to whom the transferor does not stand *in loco parentis*, and the mere fact that an infant cannot since 1925 be validly appointed a trustee does not affect the presumption.

On the same point, Underhill in Law of Trusts & Trustees, 8th Ed., page 158, says:

> When real or personal property is vested in a purchaser along with others, or in another or others alone, and whether jointly or successively, a resulting trust will be presumed in favour of the person who is proved (by parol or other evidence) to have paid the purchase-money in the character of purchaser.
>
> (2) This presumption may be rebutted—
>
> (*a*) by parol or other evidence that the purchaser intended to benefit the others; or
>
> (*b*) by the fact that the person in whom the property was vested was the lawful wife or child of the purchaser, or was some person towards whom he stood *in loco parentis*, or was trustee of a settlement by which he previously settled property.

Further authorities on the same subject may be found in Modern Equity, Hanbury, 3rd Ed., page 180, and following.

In *Russell* v. *Scott* (1), it was held that there was a presumption of a resulting trust in favour of an aunt who had opened a joint account with her nephew but, at the death of the aunt, the nephew was allowed to claim the balance of the account, because it was found that the presumption of any resulting trust in favour of the donor and her estate of the balance of the moneys had been rebutted.

All these authorities, as well as many others which it would be superfluous to cite here, clearly indicate that a mere gratuitous transfer of property, real or personal, although it may convey the legal title, will not benefit the transferee unless there is some other indication to show such an intent, and the property will be deemed in equity to be held on a resulting trust for the transferor.

The respondent has cited the *Mailman* case (2) in support of her contentions. The facts in that case were somewhat different from those with which we have now to deal. Particularly, the agreement signed by the parties to open the joint account was not drafted in the same terms. It read as follows:

(1) (1936) 55 Commonwealth Law Reports 440, particularly at 448 and 449.

(2) [1941] S.C.R. 368.

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AGREEMENT
JOINT DEPOSIT ACCOUNTS

To the Bank of Nova Scotia,
Caledonia, Queens Co., N.S.

The undersigned, having opened a deposit account with you in their joint names, hereby agree with you and with each other that, except only in the case of some other lawful claim before repayment, all moneys from time to time deposited to the said account and interest, may be withdrawn by any one of the undersigned, or his or her attorney or agent, and each of the undersigned hereby irrevocably authorizes the said bank to accept from time to time as a sufficient acquittance for any amounts withdrawn from said account, any receipt, cheque, or other document signed by any one of the undersigned, his or her agent, without any further signature or consent.

The death of one or more of the undersigned shall in no way affect the right of the survivors, or any one of them, to withdraw all moneys deposited in the said account, as aforesaid.

Dated at Caledonia, Queens Co., N.S., this 30th day of September, 1935.

Witness(es)

L. G. Irving	Hannah Mailman
L. G. Irving	George B. Mailman.

It was found by this Court that this document contained no references expressed or implied to the ownership of the money when deposited, or to any previous agreement having been entered into between the parties concernnig the opening of the account. The Court reached the conclusion that the sole purpose and effect of the document was to authorize the bank to accept from time to time, as a sufficient acquittance for any amount withdrawn from the deposit account, any receipt, cheque or document signed by either. There was nothing to show that the intention of Mrs. Mailman who had opened the account with her husband, was other than the one presumed by the law, that is to say, there was no evidence of intention of creating a joint tenancy. The document as construed by the majority of the Court did not make the husband the beneficial owner of the money that he was authorized to withdraw and for which he was accountable to his wife or her estate.

The Court, however, held at page 376 as follows:

The deposit money having admittedly been owned by Mrs. Mailman when it was placed in the joint account, and the presumption of law unquestionably being that she did not intend to create a joint tenancy in favour of her husband, the decisive question is: Is there evidence upon which it can reasonably be held that her intention was other than that which the law presumes it to have been?

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It is obvious that if there is any such evidence there are but two sources in which it can be sought, viz.: the signed bank deposit agreement form and the appellant's own deposition before the Registrar of Probate.

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In the present case, it is submitted that the document itself contains all that is required to support the proposition that Mrs. Lake, the respondent, took beneficially, and that, therefore, the presumption of a resulting trust has been negatived.

With this proposition I am unable to agree, and I have come to the conclusion that, although the legal interest has passed to Mrs. Lake, she did not take beneficially, and a resulting trust has been created in favour of the transferor and her estate.

Nothing in the document defeats the presumption, and the evidence adduced, far from rebutting it, destroys all possible suggestion that the transferor ever intended that Mrs. Lake would receive beneficially. Of course, the document, which is under seal, may be considered as conclusive, and I do not propose to vary its terms, but the terms themselves do not warrant the conclusion that the Court is now asked to draw.

The words "shall be the joint property of the undersigned" or "right of survivorship" and "all moneys in the account to be joint property of the undersigned" are indeed apt words to convey a legal title to the fund, but not to convey the whole fund beneficially. Something more than a mere transfer is required to destroy the presumption of a resulting trust and an intimation of such an intent must appear in the document itself, or as a result of evidence which reveals the intention to benefit the transferee.

Mrs. Arnott when she signed the agreement did not read it. She was merely told by the manager of the bank: "It will be necessary for you to sign one of our *standard forms* for the operation of a joint account". She furnished all the money that went in the account, kept the pass-book, and she was the only person who drew cheques on the account. Being ill in the hospital, she obviously relied on her sister's judgment whom she later appointed her

executor, to look after her affairs and thought it convenient to have an account opened upon which her sister could sign cheques, if she, Mrs. Arnott, became incapacitated. 1947 NILES, ET AL. v. LAKE Taschereau J.

The fact that Mrs. Arnott made a will ten days after the opening of the account and in which she treated all her sisters and brother alike, makes it improbable that she would deprive the will of all its effect by making a gift *inter vivos* of practically all her estate to one sister. Mrs. Lake, the respondent, was never told that there was any intention that she would take the residue of the account beneficially, and moreover, after the death of her sister she said that she supposed that the account had been opened "for convenience only".

All these facts show that Mrs. Arnott never intended to give beneficially to her sister and I am, therefore, of opinion that the presumption of a resulting trust has not been destroyed.

I would allow the appeal and restore the judgment of Mr. Justice Greene. The costs throughout of all parties, including the costs of the motion before Mr. Justice Hope on November 13, 1944, should be paid out of the fund.

RAND J.—This appeal raises the question of the beneficial interest in a bank account opened by the testatrix, Mrs. Arnott, in her own name and that of the respondent in the following circumstances. The testatrix was a sister of the parties to this proceeding. Shortly before the death of her husband on December 8, 1943, she had been seized with serious illness and taken to a hospital in Port Hope. Under his will, of which she was the sole beneficiary, she came into property consisting of a home and approximately $10,000 insurance money. On the 16th of December she had the local manager of the Royal Bank attend her at the hospital for the purpose of the account. Her words to him were few and simple: "I want to open a joint account in your bank with my sister, Mrs. Blanche V. Lake", and thereupon handed him $560 in cash. His reply was that "it will be necessary for you to sign one of our standard forms for the operation of a joint account" and "to give us a specimen of your signature": he had brought both forms with him and they were thereupon signed by

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the testatrix without the former being read over to her. On the same day, that document was forwarded to the respondent at Toronto with a letter stating "your sister wishes to place her savings account at this place in your joint names which we have done" and requesting her to "sign the enclosed form at the bottom below Mrs. Arnott's signature, and also supply us with a specimen of your signature on our Form LE 411, a copy of which we enclose." Mrs. Lake accordingly signed and returned both forms. Subsequently, deposits of the insurance cheques and three withdrawals for expenses were made by the testatrix who retained the account book.

On the 15th of December, Mrs. Arnott had called in a solicitor and had given him instructions for a will. We do not have this in evidence, but apparently it was revoked by a later will executed on the 29th day of December under which, apart from a few minor specific bequests, her estate was distributed equally between her sisters and brother. Although her health temporarily improved, she continued in the hospital until her death on the 27th of February, 1944. A few days later, at the reading of her will, the first mention of the joint account to the family was made by Mrs. Lake who remarked in relation to it, "I suppose it was for convenience".

The document, executed under the seals of both Mrs. Arnott and Mrs. Lake, is in these words:

To The Royal Bank of Canada,
Port Hope, Ontario Branch:

We, the undersigned, having opened a Savings Deposit Account with the above named Branch of the Royal Bank of Canada in our joint names do for valuable consideration (receipt whereof is hereby acknowledged) hereby mutually agree, jointly and each with the other or others of us and also with the said The Royal Bank of Canada, that all moneys now or which may be hereafter deposited to the credit of the said account, and all interest thereon, shall be and continue the joint property of the undersigned with right of survivorship; and each of the undersigned in order effectually to constitute the said joint deposit account hereby assigns and transfers to all the undersigned jointly and to the survivor or survivors of them any and all moneys which may have been heretofore or may now or hereafter be deposited to the credit of the said account together with all interest which may accrue thereon to be the joint property of the undersigned and the property of the survivor or survivors of them.

Each of the undersigned hereby irrevocably authorizes the said Bank to accept from time to time as a sufficient discharge for any sum or sums withdrawn from the said deposit account any receipt, cheque

or other similar document signed by any one or more of the undersigned without any further signature or consent of the other or others of the undersigned thereto.

It is understood and agreed by the undersigned with each other and with the said Bank that the death of one or more of the undersigned shall not affect the right of the survivors or any one of them or of the sole survivor to withdraw all of the said moneys and interest from the said Bank and to give a valid and effectual discharge or receipt therefor. Provided, however, that this understanding and Agreement is subject to the requirements of any Succession Duty Act in respect of such moneys and the interest thereon.

Apart from the document, I see nothing in the facts to indicate any intention on the part of the testatrix to transfer to her sister a beneficial interest in the funds. The presumption arising upon such a voluntary transfer of property into another title or legal power, without more, is that of a resulting trust to the donor, and the burden is on those asserting a beneficial transfer to establish that fact. That this elderly lady, facing all the possibilities of the future, intended to make an immediate gift of one-half of all her insurance money or a gift on her death of what then remained, to the sister, is an inference wholly unwarranted. Admittedly there was no special reason for a preference to this sister, and the equal division in the will would make such a gift all the more inexplicable. It is scarcely to be questioned, therefore, that the opening of the account was solely for the convenience of Mrs. Arnott, and that she at all times intended to preserve her beneficial ownership of the moneys deposited in it.

But it has been held by the Court of Appeal that the language of the agreement is conclusive that a joint tenancy in beneficial as well as legal interest was created and that evidence of a different intention is inadmissable because it would contradict that language; and it is necessary to decide whether or not that view is sound.

A careful examination of its language makes it perfectly clear to me that what was intended by all parties was the creation of a relationship to the bank in such terms as would preclude any challenge to the irrevocable authority of either of the depositors to deal with the account in unqualified fashion and as if she were the sole owner of the funds; that an estoppel should be raised that would remove the possibility of controversy between the depositors or persons representing them involving the bank.

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They agree "jointly"—necessarily with the bank—and "each with the other or others of us and also with the" bank: each agrees directly with the bank and with the other as to the bank; the undertaking with the bank is that the funds "shall be and *continue*" joint property with survivorship, regardless obviously of the amount that either may have withdrawn and regardless of any individual interest thus affected; from day to day the balance was to *continue* to be the *"joint property"*, a title by estoppel imposed on the fluctuating account whatever at any moment it might be. "In order *effectually to constitute* the joint deposit", formal assignments are made by each to the joint and surviving interest; an irrevocable authority in either to discharge the bank from its obligation is created; and the survivor is declared in absolute authority over what remains. These are all constituent elements of a conclusive relation to the bank; whatever the interest in the money of the depositors *inter se,* these were the terms interposed between them and the bank. They, therefore, do not set up a joint tenancy, a title characterized by an immediate beneficial interest of a moiety in each of the owners; and no one has suggested the category of ownership into which they fit. Whatever else may be the effect of the deposit, as to the account, the terms, among other things, create a body of irrevocable powers and commitments vis-a-vis the bank; but once these powers have been exercised, the terms are exhausted and to questions of ownership of funds *dehors* the bank they are irrelevant.

This accords with the actual intent of the testatrix toward her sister in relation to the agreement; it was necessary for the purposes of the bank; she did not intend its language to touch any interest in the money as between them; what she wanted was a joint account simply and the form was something required by the bank. Neither she nor her sister had in mind to contract with each other; the money was hers to retain or to make a gift of to the sister, but not to bargain about with her. If the language of the document did not, as it does, show the true purpose, the situation would seem to be such as Middleton J. had in mind when in *Re Hodgson* (1) he said: "unless it is

(1) (1921) 50 O.L.R. 531 at 534.

proved that the document is not intended to define the rights of the parties as between themselves and is a mere memorandum defining the rights and duties of the bank".

To hold otherwise would, as the result of the bank's requirement, deny to a depositor the privilege of opening a joint account for the purpose of convenience: that, in other words, the bank would dictate the terms of beneficial ownership, irrelevant to its protection, as a condition of that form of accommodation. The common sense of the situation is confirmed by the language of the agreement in negativing such a construction.

In *In re Mailman* (1), Crocket J. at p. 378 says:

> Even if one were disposed to regard it as an agreement between the parties themselves as to their respective rights concerning the deposit fund, those rights as already appears, are definitely restricted to the authority of each to withdraw money from the account in the manner stated in the first paragraph. This does not itself necessarily imply the right of the appellant to take the money as his own.

There was no clause declaring the property to be joint, but what is significant is the evident hesitation to treat the terms as defining the interests of the depositors *inter se,* as intended to do more than specify the basis of deposit from the standpoint of the bank.

I would allow the appeal and restore the judgment at trial. All costs should be paid out of the funds in question.

KELLOCK J.—Apart from the written document here in question, the evidence does not show that the deceased, Georgena Arnott, intended the respondent to have any beneficial interest in the moneys in the account. All that the deceased said to Mr. Jex was that she "wished to take out a joint savings account with" her sister. All that she said to the Bank manager was: "I want to open a joint account in your bank with my sister, Mrs. Blanche V. Lake". The manager said to her that "it will be necessary for you to sign one of our standard forms for the operation of a joint account". This she signed without reading. The respondent, who saw the deceased at the hospital on two occasions after the document was signed, but who had not seen her before the arrangement with the bank was made, was merely asked on one occasion if she had signed the bank

(1) [1941] S.C.R. 368.

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document. There was no other conversation between the sisters regarding the account. The respondent expressed herself after the death to the effect that the object of the deceased in connection with the account was "convenience only".

It is, I think, well settled that in such circumstances, apart from the terms of the document itself, there would be a resulting trust of the beneficial interest in favour of the estate of the deceased; *Standing* v. *Bowring* (1). The question, then, becomes one as to the effect of the document, but the circumstances under which it came into being and that it was the bank which required it for its purposes affects its interpretation.

It may first be observed that the transaction which produced the document was the purchase by Mrs. Arnott of a contract with the bank. The document, which is signed by the sisters under seal, evidences the contract with the bank, an agreement between Mrs. Arnott and the respondent as well as an assignment by each.

In effect the two sisters agree with the bank and with each other that all deposits "shall be and continue to be the joint property of the sisters with right of survivorship". Each of the sisters *in order effectually to constitute the said joint deposit account* assigns to themselves jointly and to the survivor or survivors. There are further provisions for withdrawl on the cheque of either and that death shall not affect the right of the survivor "to withdraw" the moneys and to give a discharge to the bank. There is also a provision that the contents shall be binding upon the heirs, executors, administrators and assigns of each of the sisters.

The recital as to the existence of valuable consideration and the fact of execution under seal may be at once disposed of. That the agreement and assignment were in fact voluntary and that all moneys in the account were provided by the deceased may be proved notwithstanding; *Walrond* v. *Walrond* (2); *Kekewich* v. *Manning* (3); *Glesby* v. *Mitchell* (4).

(1) (1885) 31 Ch. Div. 282.
(2) (1858) 7 W.R. 33.
(3) (1851) 1 De G.M. & G. 176.
(4) [1932] S.C.R. 260.

The mere transfer into the joint names or purchase in joint names is sufficient to constitute joint ownership with its attendant right of survivorship. As put in Williams on Personal Property, 18th Ed., p. 518:

> If personal property, whether in possession or in action, be given to A and B simply, they will be joint owners * * *. As a further consequence of the unity of joint ownership, the important right of survivorship, which distinguishes a joint tenancy of real estate, belongs also to a joint ownership of personal property.

And again at p. 520:

> If, however, the persons are simply made joint owners, the law will be sufficient of itself to carry the property to the survivor. And it is now by no means unusual to vest personal estate in two or more persons, as joint owners, simply by conveying it to them without further words.

In such a case where the consideration is furnished wholly by one there is, as *Standing* v. *Bowring* (1), shows, a resulting trust for him if the other is a stranger.

Where it is expressly stated in the instrument that the property is to be joint, as in *Weese* v. *Weese* (2), and *Re Reid* (3), it is nonetheless always a question "whether the document was intended to embody the rights of the" (parties) or was a memorandum defining the rights and duties of the bank; *Stadder* v. *Canadian Bank of Commerce* (4); *re Hodgson* (5).

In *In re Jackson* (6), moneys to which three sisters were entitled as tenants in common were invested in mortgages in each of which there was a joint account clause by which it was declared that the mortgage money belonged to the mortgagees on joint account *in equity as well as at law* and that they and the survivors and survivor of them should remain entitled in equity as well as at law to the mortgage money and the interest and that the receipt of the survivors or survivor of them or of the executors or administrators of such survivor, or their or his assigns, should be an effectual discharge for the same and every part thereof respectively.

Had the joint account clause not been inserted in the mortgages the three sisters would have been entitled as tenants in common to the mortgage moneys. The evidence

(1) (1885) 31 Ch. Div. 282.
(2) (1916) 37 O.L.R. 649.
(3) (1921) 50 O.L.R. 595.
(4) (1929) 64 O.L.R. 69, at 71.
(5) (1921) 50 O.L.R. 531, at 534, *per* Middleton J.
(6) (1887) 34 Ch. D. 732.

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showed that the clause had been inserted by the solicitor who prepared the documents without special instructions in order to facilitate any subsequent dealing with or discharge of the mortgage debt and security and not with the object of vesting the beneficial interest in the surviving sister or sisters to the exclusion of the predeceasing sister or sisters. There was evidence also that in connection with one of the mortgages the effect of the clause had been explained to the mortgagees. But it was held that it was a question of intention and that, notwithstanding the clause, the sisters had intended a tenancy in common.

So far as the evidence in the case at bar goes, there is no evidence that the deceased intended the beneficial interest to go to the respondent. As to the language in the document, which it is contended has that effect, the deceased was ignorant of this as she had never read it. In my opinion, the document is to be construed as not intended to affect the beneficial title as between the sisters at all, but merely to facilitate the bank in its dealing with the account. The decision in *In re Mailman* (1) does not decide anything in conflict with this.

I would therefore allow the appeal. With respect to costs, I think that the rule applied in *Boyce* v. *Wasbrough* (2) may, with propriety, be extended to the circumstances of this case. The proper construction of the document of December 16, 1943, fundamentally affects the rights of the parties and as to that there has been such difference of judicial opinion "as to make it plain that there was in fact a legal issue to be debated both important and debatable". I think, therefore, that the costs of all parties throughout should, as between party and party, be paid out of the fund which is the subject matter of the litigation.

Appeal allowed. Costs throughout of all parties to be paid out of the fund.

Solicitors for the appellants: *Mason, Cameron & Brewin.*

Solicitors for the respondent: *Smith, Rae, Greer & Cartwright.*

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(1) [1941] S.C.R. 368.

(2) [1922] 1 A.C. 425, at 435.

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WESTERN DOMINION COAL MINES LIMITED (SUPPLIANT) ..... APPELLANT; * Feb. 17, 18 * May 13

AND

HIS MAJESTY THE KING (RESPONDENT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Contract—Claim for subsidy from the Crown in respect of coal mining—Order in Council establishing Emergency Coal Production Board—Plan proposed by Board as to assistance to operators of coal mines—Communications between claimant and the Board—Interpretation—Question whether contract, or other ground for claiming subsidy, established.

By Order in Council P.C. 10674 of November 23, 1942, the Emergency Coal Production Board was established and made responsible, under direction of the Minister of Finance, for taking necessary or expedient measures for maintaining and stimulating the production of Canadian coal and for ensuring an adequate and continuous supply thereof, and included in its powers and duties was (under direction of the Minister) that of "rendering or procuring such financial assistance in such manner to such coal mine as the Board deems proper, for the purpose of ensuring the maximum or more efficient operation of such mine, provided, however, that in no case shall the net profits of operation exceed standard profits within the meaning of the Excess Profits Tax Act."

Appellant, a coal mining company in Saskatchewan, claimed from the Crown a subsidy in respect to its coal mining from October 1, 1942, to March 31, 1943, basing its claim mainly on the ground that communications between appellant and the Board and appellant's operations had raised an obligation to pay such subsidy. The claim was dismissed in the Exchequer Court, [1946] Ex. C.R. 387, and appeal was now brought to this Court.

Appellant claimed that its "deep seam" operation was undertaken entirely as a war or national emergency measure and to assist the coal administrator in increasing production, that at all times material it was carried on at a loss. Appellant's "strip" operation made a profit exceeding said loss. Appellant's net profit on both operations for the period in question fell below its "standard profits" fixed under the *Excess Profits Tax Act*, by $44,209.30, which sum it claimed.

Among the facts were the following: At the Board's first meeting (in December, 1942), it recommended "that in the first instance assistance be made available in the form of accountable advances based on estimated needs", as "in most cases it would be inadvisable if not dangerous to withhold assistance until" audited annual statements were available and studied or until an inspector's report could be made. Forms were prepared for the purpose of obtaining information

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

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as to production, costs, revenue, etc., and on the back were instructions and the Board's plan or formula. On January 6, 1943, the Chairman of the Board, answering appellant's letter setting out increased costs due to an increased wage rate (authorized by the National War Labour Board), stated that the matter would be "looked after" as soon as the formula for making accountable advances had been decided. On January 29, 1943, the Executive Secretary of the Board wrote to appellant that the Board had "approved a plan whereby operators who are operating at a loss may be reimbursed" and enclosed forms "F-4" to be completed and forwarded, on which was the Board's plan or formula, stating, *inter alia*, that "the maximum amount of subsidy paid is regulated" by the lesser of (*a*) profits not to exceed "standard profits" as ascertained under the *Excess Profits Tax Act* or (*b*) such amount of net taxable profits as shall be equal to 15 cents per net ton of coal produced or sold. Appellant completed and forwarded the forms, and on February 11, 1943, the Executive Secretary of the Board wrote to appellant that in the light of the statements therein and the seasonal nature of appellant's operations, "any question of subsidy should be deferred" until returns were received for the current financial year and until clarification of the situation in respect to standard profits, that in the meantime monthly submissions of forms should be continued, and that with respect to sales, "until a rate of subsidy, if any, is actually set no change need be made in your billing, and if a subsidy becomes payable", a back claim for additional amounts could be made. Appellant, besides forms covering certain months, sent, later, forms for the six months period now in question, covering, separately, the strip and deep seam operations. Appended to the minutes of a meeting of the Board on July 29, 1943, was a list of operators "receiving or authorized to receive F-4 assistance not authorized by individual minutes", which list included appellant, but with no amount set opposite its name. Though information on the forms was available to the Board before that date, it had not examined or "processed" the form statements. On December 9, 1943, in reply to a letter from appellant to the Executive Secretary of the Board, the Assistant Accountant, for the Accountant, of the Board, wrote that "we may assure you that the [Board] has authorized subsidy on your operations from the 1st of October, 1942", and, "to facilitate the computation of the correct amount of subsidy to which you are entitled", requiring a certified consolidated return. On March 3, 1944, the Chairman of the Board wrote to appellant that, "after making a careful review of the circumstances surrounding your claim for subsidy assistance, we have arrived at the conclusion that it would not be possible to justify a recommendation" for it.

Held: The appeal should be dismissed. On the documents and facts in evidence, no contract or other ground for allowance of the claim was established.

Per the Chief Justice and Taschereau and Estey JJ.:

The deep seam operation was, on the evidence, undertaken by appellant entirely of its own volition and it was not shown that it was at any time continued in consideration of a promise that a subsidy would be paid.

Though information as to the "stripping" and "deep seam" operations was asked for and supplied separately, yet (at least for the period in question) there was no suggestion that they would be treated separately in determining any question of subsidy. Appellant was not "operating at a loss" within the Board's said letter of January 29, 1943, and, on the basis of that letter, did not qualify for a subsidy.

The statement in said letter of December 9, 1943, in the absence of evidence establishing either actual authority from the Board or that the writer was held out as one apparently having authority to make such communication, should not be accepted as an admission binding upon the Board.

The Board's decisions would, as the evidence indicated, be recorded in the minutes of the Board, and could be adduced in evidence by production of the minutes or (under provision in said Order in Council) of a document signed by its Chairman. As to said list appended to the minutes of July 29, 1943, it was clear that no decision had been arrived at by the Board as to a subsidy to appellant; and no other minutes were produced mentioning appellant. The Board accepted appellant as an operator entitled to be considered for a subsidy. The Board's conduct was not that of a party contracting, but rather that of one endeavouring to determine whether appellant was, on the basis of the Order in Council and the plan, entitled to receive a subsidy. Appellant was throughout supplying information asked for with the intent and purpose of convincing the Board of its right to a subsidy under the Order in Council and plan. The essential elements of a contract were not present.

Per Kerwin J.: The facts afforded no basis for appellant's claim. Clearly, on the evidence, there was no contract; and there was nothing in said Order in Council, the minutes of the Board, or the actions of any of its responsible officers, upon which appellant might base a claim to a subsidy based upon a statute or anything similar thereto.

Per Rand J.: The opening of the deep seam was initiated by appellant and carried on until at least the early part of 1943 voluntarily and for its own purposes, with no inducing action by the Government or the then Fuel Administrator beyond the general exhortation for a country-wide increase in production. The statement in said letter of January 29, 1943, that the Board had approved a plan whereby "operators who are operating at a loss" might be reimbursed, meant, both in the plain and ordinary meaning of the language and when construed with the references in the context, a loss on total operations. There was nothing in the documents that could fairly be said to have misled appellant into believing that the general plan included the subsidizing of isolated operations. It did not appear that the operation of the deep seam during the period in question was ever involved in any bargain in which its continued operation was conditioned on payment of subsidy, or that the Board throughout was not restricting subsidy to the results of appellant's operations as a whole. As to a claim based (with contract, including any basis of estoppel, excluded) on compliance with conditions of an obligatory subsidy—the conditions, by their very terms, involved the Board's discretion, which could be exercised only after operating results became known and on an appreciation of all circumstances: a dis-

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cretion which became executed only when the subsidy was in fact paid; a contention that increased output in response to the Board's appeal would *ipso facto* guarantee to any company producing it a return of either standard profits or 15 cents per ton was wholly inconsistent with what the Board laid down. As to inclusion of appellant's name on said list of July 29, 1943—the correspondence makes it clear that there was a lack of co-ordination between the different departments of the Board; and the inference that appellant's operations had not been finally considered is confirmed by the absence of any amount for subsidy opposite its name; the entry was therefore, in fact, provisional; it is relevant to the period in question only as it might evidence recognition by the Board that the conditions on which it ordinarily acted were present; but it actually made its finding to the contrary, and the discretionary nature of its reserved power permitted it to do that.

APPEAL by the suppliant from the judgment of His Honour J. C. A. Cameron, Deputy Judge (now puisne Judge) of the Exchequer Court of Canada (1) dismissing its claim against the Crown for payment of a subsidy in respect to the suppliant's coal mining for the period from October 1, 1942, to March 31, 1943.

A. E. Hoskin K.C. and *E. F. Newcombe K.C.* for the appellant.

R. D. Guy K.C. and *R. D. Guy Jr.* for the respondent.

The judgment of the Chief Justice and Taschereau and Estey JJ. was delivered by—

ESTEY J.—This in an appeal from the judgment of Mr. Justice Cameron in the Exchequer Court dismissing the suppliant's claim for a subsidy, with respect to its coal mining, of $44,209.30 for the period October 1, 1942, to March 31, 1943.

The appellant (suppliant) is engaged in coal mining in Saskatchewan, where in September, 1939, it began production through stripping operations and in 1941 through deep seam operations. Both were continued throughout the period material to this litigation.

By Order in Council P.C. 3117, dated October 18, 1939, approval was given to the appointment by the Wartime Prices and Trade Board of a coal administrator. Later when a national emergency in the production of coal developed, an Order in Council, P.C. 10674, dated Novem-

(1) [1946] Ex. C.R. 387; [1946] 4 D.L.R. 270 (in part).

ber 23, 1942, and passed under the authority of the *War Measures Act*, established the Emergency Coal Production Board with the coal administrator as chairman. This Order in Council, among other things, provided:

3. (1) The Board shall be responsible, under the direction of the Minister, for taking all such measures as are necessary or expedient for maintaining and stimulating the production of Canadian coal and for ensuring an adequate and continuous supply thereof for all essential purposes and, without restricting the generality of the foregoing, the Board shall have the power and duty, under the direction of the Minister, of

* * * *

(*e*) rendering or procuring such financial assistance in such manner to such coal mine as the Board deems proper, for the purpose of ensuring the maximum or more efficient operation of such mine; provided, however, that in no case shall the net profits of operation exceed standard profits within the meaning of the Excess Profits Tax Act;

The other clauses under para. 3(1) gave to the Board power of opening and operating new coal mines, prohibiting or limiting operation and directing production policies with respect to coal mines, but it is not contended that any of these powers were exercised with respect to the appellant's operations. It is by virtue of the power and duty of the Board under para. 3(1)(*e*) that the appellant bases its claim.

This Order in Council does not provide for a general subsidy payable to all who are engaged in coal mining operations. It goes no further than to provide that:

* * * the Board shall have the power and duty, under the direction of the Minister, of

* * * *

(*e*) rendering or procuring such financial assistance in such manner to such coal mine as the Board deems proper, for the purpose of ensuring the maximum or more efficient operation of such mine * * *

This power is to be exercised as the Board deems proper, or in other words, in the exercise of its discretion toward the attainment of the ends therein specified. The Crown's position is that upon this basis the appellant's claim was duly considered and, as a consequence, the chairman of the Board advised the appellant under date of March 3, 1944, that financial assistance or a subsidy on its behalf could not be recommended.

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The appellant's main contention is rather that by virtue of interviews and correspondence a contract was concluded between itself and the Board under which it was entitled to a subsidy. Its petition alleges that the deep seam operation was not necessary to the company's business "but was undertaken entirely as a war or national emergency measure and for the purpose of assisting the coal administrator in increasing the production of coal;" that such deep seam operation was, at all times material, carried on at a loss; that "at the request of the Board," it "did everything in its power to assist the Board in increasing the production of coal and in securing the maximum of production;" and again, that it "had performed the emergency services and maximum production desired and requested by the Government of Canada and the Board;" that for all this "the Board from time to time acknowledged the high efficiency of the company's operations and its great assistance in the national emergency."

The evidence supports many of the foregoing allegations but does not establish, nor is there an allegation to the effect, that at any time there was a promise on the part of the Emergency Coal Production Board to pay a subsidy. The Board under this Order in Council was charged with an important responsibility during the days of the war, a responsibility that involved the control of the output of coal throughout the entire Dominion. In the course of its duties it was constantly advising, directing and suggesting to the coal operators throughout Canada and determining in certain cases what, if any, financial assistance on the basis of need was necessary. Under the circumstances, the Board would from time to time make requests of operators quite apart from any question of subsidy.

Not only had the appellant's operations of the deep seam mine commenced but was actually in production in September, 1941, before the creation of the Emergency Coal Production Board by Order in Council P.C. 10674, dated November 23, 1942. In fact, the evidence of Mr. Brodie, president of the appellant company, makes it clear that the undertaking of the deep seam operations was a matter entirely of its own volition.

> Q. You did mine the deep seam, and started operations in May, 1941?
> A. Yes.

Q. And as you stated in your examination for discovery, "It was purely voluntary on our part in starting this thing?"
A. It was.

Moreover, the evidence does not establish that the deep seam operations were at any time continued in consideration of a promise that a subsidy would be paid.

The Board held its first meeting on December 7, 8, and 9, 1942, when it decided that because certain mines, in order that their production might be maintained, would require financial assistance, to recommend to the Minister of Finance that "assistance be made available in the form of accountable advances based on estimated needs * * * ." The Board indicates in its minutes that accountable advances were necessary as "in most cases it would be inadvisable if not dangerous to withhold assistance until the audited annual statements of the companies" would be available, or until an Inspector might make a report. No evidence was adduced that the Minister acted upon this recommendation, but in that the Board proceeded upon this basis at all times material, it may be assumed that the Minister did so.

On the basis of these minutes, at first form F-4 and later F-4A were prepared for the purpose of obtaining information with respect to production, employment costs, revenue and disbursements and generally such information as the Board might require for the exercise of its power and duty under Order in Council P.C. 10674. On the back of these forms certain instructions were printed and contain the plan or formula of the Board.

The National War Labour Board had in November, 1942, made an order authorizing an increase in wages retroactive to October 1, 1942, in the coal mines. As a consequence of this the appellant, under date of January 4, 1943, made its first request (so far as material to this litigation) for financial assistance. The letter stated that this order had increased its disbursement for wages in both strip and deep seam operations in the sum of $2,660.53, and concluded:

We, therefore, would like to know in just what manner this is going to be handled and in what way we are going to be compensated for this additional cost.

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So far as the record indicates, there had been no promise that they would be compensated for this increase in wages, but it is clear that it might be an item to be considered with respect to the rendering of financial assistance and was so accepted by the Board.

The Chairman of the Board replied:

January 6, 1943.

Via Air Mail
Dear Mr. Brodie:

I have your letter of January 4, addressed to Mr. Neate, setting out the increased costs to your Company due to the new wage rate.

I discussed this matter at the Emergency Coal Production Board meeting this morning and have been asked to say that this matter will be looked after just as soon as the formula for making accountable advances to companies has been decided. This should not take many days.

Yours very truly,
J. McG. Stewart
Chairman.

Mr. Brodie, president of the appellant company, was in Ottawa immediately after this exchange of letters and interviewed Mr. Stewart and others associated with the Board. A number of matters were discussed but in the result the question of financial assistance was not advanced further than indicated in Mr. Stewart's letter of January 6, 1943. Mr. Brodie, relative to that interview, deposed:

Q. Do you remember this? At that time did the Board say we have got out a formula?

A. They said we would be taken care of and that the formula was not approved and prepared, but it would follow later.

Q. Then did you get the formula later?

A. Yes, we got the form F-4 with certain instructions.

The forms F-4 containing the formula were sent to the appellant for the first time with a letter dated January 29, 1943:

January 29, 1943.

Via Air Mail
Dear Mr. Brodie:

Our File 101-6-2

Referring to your letter of the 4th instant and our reply of the 6th instant in connection with accountable advances, I am instructed to advise you that the Board has approved a plan whereby operators who are operating at a loss may be reimbursed on the basis of standard profits as ascertained under the Excess Profits Act or alternatively to a maximum net profit of 15 cents per net ton before taxation.

For the purpose of establishing a basis on which these advances may be calculated, a new form F-4 has been prepared and I enclose

a supply for your use. I note that the increased wage scale was, in the case of Western Dominion, approved as of October 1, 1942, and in order to study the effect of such increased wages, I will require a form F-4 for each of the months of October, November and December, 1942, and monthly thereafter as soon after the close of business each month as possible.

I would request that the form be read carefully with particular attention paid to the instructions shown on the back. Inaccurate or incorrectly prepared forms will only cause unnecessary delay in making subsidy payments.

If you will forward the forms for the three months, October, November and December immediately, prompt consideration will be given thereto.

Yours very truly,
J. R. Cox,
Executive Secretary.

On the back or reverse side of form F-4 the printed instructions set out the formula or plan followed by the Board. These read in part as follows:

1. This production subsidy statement must be completed monthly,

* * * *

3. Subsidy may be paid as an accountable advance to the mine operator monthly or quarterly. If a change in wage scales should be authorized by The National War Labour Board, the operator should submit at once a statement showing the effect of such change on his payroll so that the amount of the accountable advance may be adjusted.

4. The maximum amount of subsidy paid is regulated by the lesser of the amounts indicated hereunder:

(*a*) Profits not to exceed "Standard Profits" as ascertained under the provisions of the *Excess Profits Tax Act* or

(*b*) Such amount of net taxable profits as shall be equal to 15 cents per net ton of coal produced or sold.

The forms F-4, covering the months of October, November and December, 1942, were completed and forwarded to the Board by the appellant under date of February 5, 1943. These were acknowledged by the Board under date of February 11, 1943, in a letter reading as follows:

February 11, 1943.

Attention: Mr. A. E. Turner, Secretary-Treasurer
Dear Sir:

I have received your letter of February 5 enclosing returns on Form F-4 for your stripping and shaft operations separately for the months of October, November and December, 1942. In the light of these statements and the seasonal nature of your operations, I am of the opinion that any question of subsidy should be deferred until your audited returns are received for your current financial year and also until you have been able to clarify the situation in respect to Standard Profits.

In the meantime I think that these returns on Form F-4 should continue to be submitted each month and I attach a further twelve copies of the form.

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With respect to sales of coal as in Section 2 of the Instructions, until a rate of subsidy, if any, is actually set no change need be made in your billing, and if a subsidy becomes payable, it will be quite simple to make a back claim for the additional amounts.

Yours very truly,

J. R. Cox,
Executive Secretary.

This letter makes it clear that in so far as the Board was concerned "any question of subsidy should be deferred" to the end of the appellant's current financial year. Moreover, in the concluding paragraph, "until a rate of subsidy, if any, is actually set" and "if a subsidy becomes payable" indicates in clear and unmistakable language that at that date there had been no agreement or promise that a subsidy would be paid. This letter was not replied to by the appellant nor was any exception ever taken to the foregoing statements.

Moreover, under date of April 15, 1943, with its operating statement for the eleven months ending February, 1943, showing a loss on deep seam operations, the appellant wrote to the deputy coal administrator and pointed out its loss and "one item that created a very substantial increase in cost was the award given by the National War Labour Board in November, retroactive to the 1st of October." This letter, although written after the close of the period in question, was in reference to it. There is no suggestion that any agreement had been made or was even under consideration at that time. On the basis of that loss caused in part by the increase in wages, the appellant asked an increase in price of certain coal, which was immediately granted and the appellant notified thereof by the deputy coal administrator under date of April 17, 1943.

While the appellant had from time to time sent in forms covering certain months, under date of June 7, 1943, it sent in forms F-4 duly completed for the six months period in question, October 1, 1942, to March 31, 1943, covering both the strip and deep seam operations. By letter dated June 14 the Board requested certain further information, which was forwarded under date of June 21. Separate forms covered the strip and deep seam operations and disclosed that during the six months in question the appellant realized a profit in the stripping operations of $110,497.07,

and suffered a loss in the deep seam operations of $82,546.37, or a profit on both operations of $27,950.70. An adjustment made with the Income Tax Department increased this profit to $30,790.70. The $44,209.30 claimed is the difference between this profit of $30,790.70 and the amount of $75,000.00 fixed as the appellant's standard profit under the *Excess Profits Tax Act*. The evidence does not support this, nor was it contended that the Board had undertaken to pay that or any other specific amount.

On July 29, 1943, the Board held a meeting and appended to its minutes a list of operators entitled:

20th meeting on Thursday, July 29, 1943

Companies receiving or authorized to receive F-4 assistance not authorized by individual minutes.

The list included the appellant. The information requested on the forms F-4 was available to the Board before that date but it had not examined or "processed" (as stated in the record) these statements (Form F-4). In any event, it is clear that no decision had been arrived at on the part of the Board with respect to the subsidy.

The appellant relied particularly upon a letter of December 9, 1943, signed by Mr. A. O. Blouin for A. E. Bradfield, accountant. This letter it alleged constituted an acknowledgment on the part of the Board to pay a subsidy. It was a reply to a short letter from the appellant dated December 3, 1943, enclosing a copy of its letter on September 8, 1943, and asking a reply to the latter. The letter of September 8 read as follows:

September 8, 1943.

Mr. J. R. Cox,
Executive Secretary,
Emergency Coal Production Board,
238 Sparks Street,
Ottawa, Canada.

Dear Sir:

Re: Forms F-4—October, 1942, to March, 1943.

We forwarded forms covering the above period to you on June 7 and on July 17 wrote you further advising you of the amount of our standard profits as fixed by the Board of Referees. Since that time we have not heard further from you in this matter.

We believe that there is a very substantial amount due us in this connection in respect of the losses of the deep seam mine. We would like to point out that we have incurred very heavy expenses in endeavouring to increase the production of coal from our operations. The funds

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available from the above would be very useful to us at this time and we would appreciate hearing from you at an early date advising when we may expect this matter to be disposed of.

Yours very truly,

Secretary-Treasurer.

The reply signed by Mr. Blouin dated December 9, 1943, reads as follows:

December 9, 1943.

Air Mail

Dear Sirs:

In reply to your letter of December 3, we may assure you that the Emergency Coal Production Board has authorized subsidy on your operations from the 1st of October, 1942. In order to facilitate the computation of the correct amount of subsidy to which you are entitled, we will require a consolidated F-4A Return for the six months period, October 1 to March 31 (the end of your fiscal year), certified by your auditor. We would suggest that you also have prepared, at the same time, a consolidated F-4A statement to date from April 1, certified by your auditor. It will then be in order for you to submit monthly F-4A statements for subsidy for subsequent months. Your annual audited statement will then be the basis of final adjustment.

You will understand, of course, that separate statements are required for the different operations and that these must be prepared in accordance with the instructions to operators regarding costs.

Yours very truly,

A. O. Blouin

for A. E. Bradfield

Accountant.

Mr. Neate deposed, as one would expect, that whatever approval for subsidy made by the Board would appear in the minutes. No minutes were produced other than that of the meeting on July 29, 1943, when the appellant was included on the list of "Companies receiving or authorized to receive F-4 assistance * * * ."

The Crown submitted that the admission of Mr. Blouin, as contained in this letter written in his capacity of assistant accountant to Mr. Bradfield, that "we may assure you that the Emergency Coal Production Board has authorized subsidy on your operations from the 1st of October, 1942," was made without authority and therefore not binding upon the Board. No evidence was tendered as to Mr. Blouin's duty or authority other than that he was assistant accountant to Mr. Bradfield. There is no suggestion that the Board represented or held him out as one authorized to communicate the decisions of the Board, nor that in the ordinary course of his duties he would be called upon

to communicate these decisions. The statement, in the absence of evidence establishing either actual authority from, or that he was held out as one apparently having authority to make such communication by the Board, cannot be accepted as an admission binding upon the Board. Bowstead on Agency, 9th Ed., 263; Phipson on Evidence, 8th Ed., 231; *Barnett* v. *South London Tramways Co.* (1); *George Whitechurch Ltd.* v. *Cavanagh* (2).

The decisions of the Board, as the evidence indicated, would be recorded in the minutes of the Board and adduced in evidence either by the production of these minutes or by a document signed by the chairman, as provided for in the Order in Council P.C. 10674, para. 4(5) of which reads:

> 4. (5) In any Court or for any purpose, any document purporting to be signed by the Chairman of the Board shall be conclusive evidence that any statement, order or designation therein recorded was the act of the Board, without proof of the signature or official character of the Chairman.

Then the appellant pressed that Mr. Neate's answer constituted an admission that the Board was obligated to pay a subsidy. Mr. Neate deposed:

> Q. Yes. That is what they are getting 25 cents a ton subsidy on, is that correct, during the last year? I think the amount owing, which is not in suit, is over $40,000. When Mr. Blouin wrote his letter in December we were on the subsidy list and were entitled to a subsidy?
> A. Very definitely.

The first part of this question relative to the 25 cents per ton and the $40,000 refer to matters not here in issue. If one confines the answer "Very definitely" to the Blouin letter then if Mr. Neate meant the appellant was on the subsidy list the answer is not only consistent with the other parts of his evidence, but with the conduct of the Board as disclosed in the record. If the answer is construed as an admission that the appellant was entitled to a subsidy, it is clearly contrary to the other parts of Mr. Neate's evidence where he makes it clear that the policy of the Board was to pay a subsidy only if the company was operating at a loss. It is very difficult, therefore, to determine what is meant or what weight ought to be given to such an answer and, therefore, by itself it does not support any definite conclusion, much less one that is contrary to all the other evidence.

(1) (1887) 18 Q.B.D. 815. (2) [1902] A.C. 117.

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Under date of March 3, 1944, Mr. Brunning, as chairman, expressed his views to the appellant:

Via Air Mail March 3, 1944.

Dear Sirs:

After making a careful review of the circumstances surrounding your claim for subsidy assistance, we have arrived at the conclusion that it would not be possible to justify a recommendation to the Board for subsidy assistance to your project. It will be unnecessary for you to submit F-4A Production Subsidy Statements.

Your profits for the fiscal years 1942 and 1943 have been substantially higher than for previous fiscal periods. These have been due in some measure to the generous assistance which has already been accorded to you by the Board.

May we take this opportunity of thanking you for your co-operation during the period of emergency in the production of coal. We are pleased to advise that this emergency is now past.

Yours very truly,

E. J. Brunning
Chairman
Emergency Coal Production Board.

It is true that in the deep seam operations the appellant had suffered a loss but had realized such a surplus upon the stripping operations that in the result it made a larger profit than in the previous year. The information relative to these operations was asked for and supplied separately, but throughout the record, at least for the period we are here concerned with, there is no suggestion that they would be treated separately in determining any question of subsidy. The Board's letter (quoted above) of January 29, 1943, stated:

* * * the Board has approved a plan whereby operators who are operating at a loss may be reimbursed * * *

It is clear that the appellant was not an operator operating at a loss, and therefore, on the basis of this letter, which basis obtained throughout the period in question, did not qualify for a subsidy.

The Board accepted the appellant as a coal operator entitled to be considered for a subsidy. The Board's conduct is not that of a party contracting but rather that of one who is endeavouring to determine whether the apellant was, on the basis of the Order in Council and the formula or plan, entitled to receive a subsidy. The appellant on its part was throughout obviously supplying all the information asked for with the intent and purpose of convincing

the Board that it was entitled to a subsidy under the Order in Council and the formula or plan. When all the information was obtained and the matter considered, the chairman pointed out that, inasmuch as the appellant had realized a profit and therefore it had not incurred a loss upon the whole of its operations, it was not entitled to a subsidy.

The essential elements of a contract are not present in this case. *May and Butcher, Limited* v. *The King* (1). *Hillas & Co. Ltd.* v. *Arcos Ltd.* (2).

The appeal should be dismissed with costs.

KERWIN J.—The appellant's petition of right was rightly dismissed in the Exchequer Court. All the relevant facts are set forth in the judgment of Mr. Justice Cameron and on these facts I have been unable to discover any basis for the claim of the appellant to payment out of the public treasury. The evidence is quite clear that there was no contract between the Crown and the appellant, and I can see nothing in the Order in Council setting up the Emergency Coal Production Board, or in the minutes of that Board, or the actions of any of its responsible officers, upon which the appellant may base a claim to a subsidy based upon a statute or anything similar thereto. The appellant seems to have thought that because it incurred further expenses and increased the production of coal by its deep seam operations at a loss, it should be entitled to divorce those operations from its strip mining operations upon which it had a profit. As a matter of fact, the appellant secured various financial advantages in connection with both classes of operations, and has not made out a case in which it might be said that, even if strictly not entitled to succeed, there was some equity which should be considered in disposing of the case.

The appeal should be dismissed with costs.

RAND J.—The question in this proceeding is whether the appellant coal company is entitled to recover from the Crown a subsidy in respect of coal mined by it during the six months' period from October 1, 1942, to March 31, 1943. The right is put both on the ground of a contract entered

(1) [1934] 2 K.B. 17, at 21 (decided in 1929).
(2) (1932) 147 L.T. 503.

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into by the company with the Crown represented by the Emergency Coal Production Board and by compliance with the conditions of regulations having the force of law.

The company's operations during the period in question consisted of strip and deep seam mining. Much of the greater part of the production came from the former, which had been commenced in 1939, and was highly profitable. In the Spring of 1941, the company decided to sink a shaft primarily for the purpose of obtaining a supply of water then urgently needed, but at the same time to open new deposits to meet the growing war demands then foreseen. It was expected that this operation would meet its own depreciation and depletion charges and in time recoup the outlay; but a large deficit resulted instead. For the first year and a half labour shortage contributed to this, but other factors had evidently not been fully appreciated or weighed by the company.

Prior to November 23, 1942, a Coal Administrator appointed by the Wartime Prices and Trade Board administered generally coal production throughout the Dominion. On that day, by Order in Council P.C. 10674, the Emergency Board was set up to meet, as its name implies, a threatened coal shortage. The powers of the Board included:

> (*e*) rendering or procuring such financial assistance in such manner to such coal mine as the Board deems proper, for the purpose of ensuring the maximum or more efficient operation of such mine; provided, however, that in no case shall the net profits of operation exceed standard profits within the meaning of the *Excess Profits Tax Act;*

On the 9th of December following, the Board passed minutes of which the following are material here:

> With a view to maintaining production at certain mines the Chairman was of the opinion that financial aid would be necessary in several instances. After reviewing the financial position of certain mines, the members approved the Chairman's suggestion that a memorandum should be immediately submitted to the Honourable the Minister of Finance to the following effect:
>
> The Board recommends that in the first instance assistance be made available in the form of accountable advances based on estimated needs; and that payments be made by Commodity Prices Stabilization Corporation Limited on the recommendation of the Board. In most cases it would be inadvisable if not dangerous to withhold assistance until the audited annual statements of the companies can be made available and studied or until the report of a Mines Inspector or other authority can be made.

The Board further recommends that the following principles be followed in making settlements with companies to which accountable advances may be made:

(a) That the amounts and terms of payment of accountable advances be reviewed at least once every three months and be based wherever possible on audit and inspection reports satisfactory to the Board.

(b) That (save in exceptional cases) settlements be made with companies on the basis of standard profits as ascertained under the provisions of the Excess Profits Tax Act or such amount of net taxable profits as shall be equal to 15 cents per net ton of coal produced or sold, whichever amount may be the less.

* * * *

(e) That in cases in which unprofitable operations have been carried on in 1942 at the request of the Coal Administrator, the Board, if satisfied that the Coal Administrator's request was reasonable and that the request for reimbursement of losses is bona fide, will join with the Coal Administrator in recommending such reimbursement.

It will conduce to clearness to deal first with certain aspects of the deep seam operation. On December 23, 1941, the company wrote to F. G. Neate, Technical Adviser of the Wartime Prices and Trade Board, foreshadowing a coal shortage at the beginning of the new year, and proceeded:

Our Company, last Spring, realized that the call from this field would require a very considerable increase in output. We, therefore, planned for additional production in the shape of sinking a new shaft to the Lower Seam to give us at least a 1,000 ton per day capacity. This program was rushed as fast as possible, but our schedule was badly disrupted through delays beyond our control. Steel was almost impossible to get,—steel erectors equally so, and due largely to the fact that material supplies delayed us, in place of getting into production along about the 1st of September, we were unable to get going until the 1st of November. However, we had to meet the situation the best way possible and fully expected to have 1,000 tons a day by the 1st of November, but due to the above delays, we will not reach the 1,000 tons until January 1.

The letter then goes on to state that an expenditure of $100,000 had already been made, but that a 1,000-ton production would not be sufficient to meet the developing situation, and that it would be necessary to instal additional units. It then adds, "We are, therefore, going to ask for a write-off on this additional expenditure in two years." The matter was taken up with the Department of Munitions and Supply and ultimately, of a total expenditure of $189,000, depreciation of two-thirds was allowed over the company's fiscal years of 1943, 1944 and 1945.

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On December 29, 1942, the company wrote the Board, and after mentioning the allowance, recounted the difficulties that had been and were being met owing to a serious deficiency of manpower. It then proposed that the Government take over the deep seam development and operate it entirely as a wartime project. The plant would remain under the management of the company and the opinion was expressed that "under the circumstances the property would unquestionably recover the capital expenditure very rapidly." This letter was acknowledged by Neate, at that time the administrative officer of the Board, to the effect that the matter would be placed before the Board at its next meeting. Nothing further appears which deals directly with this request, but it is undisputed that the proposal was not entertained.

It is thus beyond question that the opening of the deep seam was initiated by the company and carried on until at least the early part of 1943 voluntarily and for its own purposes, with no inducing action on the part of the Government or the then Fuel Administrator beyond the general exhortation for a country-wide increase in production. Nor was any recommendation made by the Board under paragraph (*e*) of the minute quoted.

We come then to the operations of the company as a whole. On January 4, 1943, the president wrote Neate, as Deputy Coal Administrator, informing him of orders issued by the War Labour Board in November to advance wages retroactive to the 1st of October, 1942, giving details of the increased payroll for the deep seam and strip operations separately, and inquiring how the company would be compensated for the additional cost. This letter was answered on the 6th of January by the Chairman of the Board, stating that the matter had been discussed that day, and that he had been requested to say that it would "be *looked after* just as soon as the *formula* for making accountable advances to companies has been decided." This was followed on January 29 by a letter to the president which should be quoted in full:

> Referring to your letter of the 4th instant and our reply of the 6th instant in connection with accountable advances, I am instructed to advise you that the Board has approved a plan whereby operators who are

operating at a loss may be reimbursed on the basis of standard profits as ascertained under the *Excess Profits Tax Act* or alternatively to a maximum net profit of 15 cents per net ton before taxation.

For the purpose of establishing a basis on which these advances may be calculated, a new form F-4 has been prepared and I enclose a supply for your use. I note that the increased wage scale was, in the case of Western Dominion, approved as of October 1, 1942, and in order to study the effect of such increased wages, I will require a form F-4 for each of the months of October, November and December, 1942, and monthly thereafter as soon after the close of business each month as possible.

I would request that the form be read carefully, with particular attention paid to the instructions shown on the back. Inaccurate or incorrectly prepared forms will only cause unnecessary delay in making subsidy payments.

If you will forward the forms for the three months, October, November and December immediately, prompt consideration will be given thereto.

The forms mentioned contained on the reverse side certain instructions, of which the following are material:

1. This production subsidy statement must be completed monthly, in duplicate, certified by the proprietor, partner or in the case of a corporation by a person authorized by by-law to sign, and the original promptly forwarded to the Office of The Emergency Coal Production Board, 238 Sparks Street, Ottawa. The duplicate must be retained for your files.

* * * *

3. Subsidy may be paid as an accountable advance to the mine operator monthly or quarterly. If a change in wage scales should be authorized by The National War Labour Board the operator should submit at once a statement showing the effect of such change on his payroll so that the amount of the accountable advance may be adjusted.

4. The maximum amount of subsidy paid is regulated by the lesser of the amounts indicated hereunder:

(*a*) Profits not to exceed "Standard Profits" as ascertained under the provisions of the Excess Profits Tax Act or

(*b*) Such amount of net taxable profits as shall be equal to 15 cents per net ton of coal produced or sold.

5. "Standard Profits." If the operator has not had his "Standard Profits" assessed under the Excess Profits Tax Act he should at once make application to the Inspector of Income Tax, Ottawa, for the establishment of a standard.

About the middle of January, the president, following his letter of December 29, 1942, had met the Board, and in his language at the trial:

I took it up with the Emergency Coal Production Board, and pointed out that our deep seam operations were running at a loss and therefore we had to have some relief, either by an increase in the price of coal or a subsidy. They agreed that the matter *would be taken care of* at that time.

* * * *

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They said we would *be taken care of* and that the *formula* was not approved and prepared, but it would follow later.

And

We got the form F-4 with certain instructions.

On his examination for discovery these answers were given:

Q. Had this interview anything to do with anything except the question of how far you were going to be compensated for any increase in wages?

A. That was the whole purpose.

* * * *

Yes, both the deep seam and the strip were discussed. Perhaps I might say there that the decision was coming from the National War Labour Board authorizing an increase in the rates of pay and therefore—

* * * *

Q. Have you any statement anywhere from the board that any particular basis of subsidy was authorized in respect of the deep seam mine?

A. Yes, they forwarded me a letter.

Q. I mean there is nothing except what appears in the correspondence?

A. No.

The total loss on the deep seam operation is stated to have been $434,000, and that for the six months' period, $82,000; and the claim submitted, originally for $30,847 on a total production basis for the six months with a net of 15 cents a ton maximum, was by amendment at the trial increased to $44,209.30, the difference between the net surplus and the standard profits of $75,000.

The precise language of the letter of January 29, 1943, is of the utmost importance: "The Board has approved a plan whereby *operators who are operating at a loss* may be reimbursed." Here is a statement of the Board's intention toward coal mining generally throughout Canada. What is it that is to be operated at a loss? Conceivably, any part of a business, the accounts of which could be segregated. But that the plain and ordinary meaning of the language is total operations, I think unquestionable. This is confirmed when it is construed with the reference to "standard profits", and to the instructions on Form F-4A. The purpose, obviously, was the instigation of production by means of financial assistance where without it the production would not have been carried on; commercial profit would meet the ordinary case; but where a company was operating either at a loss or so near a loss as to have no incentive to produce, the Board would furnish the needed

stimulus. At the same time, notwithstanding price control, increased production would in general absorb increases of cost, such as wages. If, then, with the knowledge of the Board, operations were commenced or continued by reason only of the proposals for subsidy, the condition of assistance would be present. The minute of December 9 would seem to put the actual intention of the Board beyond doubt; and there is nothing in the documents that can fairly be said to have misled the company into believing that the general plan included the subsidizing of isolated operations; at the least, it should have raised the question in the mind of the president whether his case was covered and have been followed by inquiry. In other words, it is unreasonable on the part of the company to claim the wider interpretation on the written communications.

The same limitation is implied also in a letter to the appellant from the Executive Secretary of the Board dated February 11, 1943:

> I have received your letter of February 5, enclosing returns on Form F-4 for your stripping and shaft operations separately for the months of October, November and December, 1942. In the light of these statements and the seasonal nature of your operations, I am of the opinion *that any question of subsidy should be deferred until your audited returns are received for your current financial year and also until you have been able to clarify the situation in respect to Standard Profits.*

and in the letter from the Deputy Coal Controller of April 17, 1943:

> *If and when subsidy should become payable on the basis of your rates on Form F-4, in accordance with our recent ruling,* of which a copy is attached, there would be no deduction of tonnage on your subsidy statements.

It may be that the president left Ottawa in January, 1943, with an impression that in some way by a "formula" the deficit in the deep mining operations would be "looked after". But the Board was then making up its mind and there is nothing to indicate that he gave any more information than that the seam was being operated at a loss. Whether the precise extent of the loss or its relation to the rest of the operations was presented or considered we do not know. But the discussion was necessarily preliminary and the Board, as it is made clear in the subsequent docu-

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ments, was not in a position to give a categorical assurance of assistance, particularly so in the unusual operating situation.

The general plan would require a special application to a minor segment of a company's undertaking; but nothing looking to that took place. Moreover, the large capital expenditure had been completed only a few months before, and it would have been extraordinary that it should be abandoned so soon afterwards. No doubt the president's concern was chiefly with that seam; but when the letter of January 29 with the forms was received, the "formula", at the time of the meeting in Ottawa in course of preparation, was then before him, couched in terms of overall operations, and making no provision for exceptional cases. Even the preliminary assurances said to have been given were linked with the basis then being formulated, and whatever general impression he had carried from the meeting, he was not at liberty from that moment to disregard the considered and precise statement so communicated. In the view most favourable to him, he continued on an understanding that some as yet undefined special treatment would be accorded his deep workings, an understanding quite unwarranted in the face of the declaration of the Board, and it appears neither that the Board held such an understanding nor was aware that he did.

Giving to the company the benefit of every reasonable inference, and interpreting the facts in the background of the emergency and war conditions then prevailing, I am unable to find that the operation of the deep seam during the six months in question was ever involved in any bargain in which its continued operation was conditioned on the payment of the subsidy. Nor can I detect any indication that the attitude of the Board was not consistent throughout, that it was not at all times restricting subsidy to the results of the operations of the company as a whole. Not until the year 1944 was there a suggestion that the deep seam be dealt with separately, but the record does not disclose its fate. The company has not yet alleged an agreement by which the deficit itself would be recouped nor that a profit, however based, would be guaranteed; and the

amendment at trial related to the output of the seam claims simply the difference between the net surplus of the company and the standard profits.

With contract, including any basis of estoppel, excluded, compliance with the conditions of an obligatory subsidy is urged. But these conditions, by their very terms, involved the discretion of the Board which could be exercised only after operating results became known and on an appreciation of all circumstances: a discretion which became executed only when the subsidy was in fact paid. This contention is really that an increased output in response to the appeal of the Board would *ipso facto* guarantee to any company producing it a net return of either the standard profit or of 15 cents for every ton produced, whichever was lower: but that is wholly inconsistent with what the Board laid down.

The inclusion of the appellant's name on a list of companies to which subsidy was approved was relied on; but the correspondence makes it clear that there was a lack of co-ordination between the different departments of the Board; time after time requests were made for statements that had long before been sent to the Board; and the inference that the company's operations had not been finally considered is confirmed by the absence of any amount for subsidy opposite its name. The entry was therefore, in fact, provisional: it is the converse aspect of "accountable advances". It was made only in July, 1943, and it is relevant to the six months' period ending March 31, 1943, only as it might evidence recognition by the Board that the conditions on which the Board ordinarily acted were present; but the Board actually made its finding to the contrary, and the discretionary nature of its reserved power permitted it to do that.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Pitblado, Hoskin & Co.*

Solicitor for the respondent: *F. P. Varcoe.*

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*Feb. 12, 13
*May 13

THE LABOUR RELATIONS BOARD OF SASKATCHEWAN (RESPONDENT) — APPELLANT;

AND

DOMINION FIRE BRICK AND CLAY PRODUCTS, LIMITED (APPLICANT) — RESPONDENT;

AND

CLAY PRODUCTS WORKERS' UNION (RESPONDENT) ..... — RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Appeal—Parties—Status to appeal—Right of Labour Relations Board, Sask., to appeal from judgment holding it had no jurisdiction in matter brought before it—Right of Board, as a party under its official name, to appear in legal proceedings.

The Labour Relations Board of Saskatchewan (established under Statutes of Saskatchewan, 1944 (2nd Session), c. 69) appealed to this Court from the judgment of the Court of Appeal for Saskatchewan, [1946] 3 W.W.R. 459, holding, on a question raised before it on preliminary objection by the present respondent company, that the Board had no status to appeal from the judgment of Anderson J., [1946] 3 W.W.R. 200, setting aside a ruling of the Board that it had jurisdiction to hear a certain matter brought before it. Before this Court a further objection was taken by said company that the Board was not a body known to the law and consequently could not appear in any legal proceedings.

Held: (1) Effect should not be given to the latter objection. (*Per* the Chief Justice and Kerwin J.: The effect of ss. 4 and 9 of said Act is that the Board is a legal entity and can appear in legal proceedings and be heard as to its rights. *Per* Rand and Kellock JJ.: Assuming that the Board is not an entity distinct from its members, it was not for said company at this stage, having chosen to designate them by their collective name and after having obtained a decision in its favour, including an order for payment of costs, to get rid of them now by such an objection; *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants,* [1901] A.C. 426, at 445, referred to).

(2) The Board had the right to appeal to the Court of Appeal. (*Per* the Chief Justice and Kerwin J.: An examination of the cases indicates that for many years it has been taken as settled that a body such as the Board has a right to appeal where its jurisdiction is in question. *Per* Rand and Kellock JJ., referring to *The King's Bench Act,* R.S.S.

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

1940, c. 61, s. 2 (14) ("party"); *The Court of Appeal Act*, R.S.S. 1940, c. 60, s. 6; and to the proceedings taken in the present matter; also to *Mackay* v. *International Association of Machinists* ([1946] 2 W.W.R. 257, at 260, 264): The Board was both a proper and a necessary party to the proceedings here in question and, being a party, had the right of appeal to the Court of Appeal and required no further or other status; the argument that a tribunal charged with the responsibility of deciding as between other persons should have no interest in supporting its decision in a Court of Appeal, is irrelevant here in view of said statutory provisions. *Per* Estey J.: It is indicated by authorities (cases reviewed) that over a long period of time it has been recognized that where the jurisdiction of a body such as the Board, constituted to discharge judicial functions, is questioned in a superior court, it may defend its jurisdiction and, in the event of an adverse judgment, take an appeal therefrom).

APPEAL by the Labour Relations Board of Saskatchewan from the judgment of the Court of Appeal for Saskatchewan (1) dismissing its appeal from the judgment of Anderson J. (2).

On an application before the said Board for an order determining that the employees employed by Dominion Fire Brick and Clay Products, Limited (hereinafter sometimes called the Company) at its plant near Claybank, Saskatchewan, except the office staff, plant foreman and chief engineer, constituted an appropriate unit of employees for the purpose of bargaining collectively, determining that the Clay Products Workers' Union represented a majority of the employees in that unit, and requiring the Company to bargain collectively with the said Union, the Company raised a preliminary objection that it was not an employer within the meaning of *The Trade Union Act, 1944* (Statutes of Saskatchewan, 1944, Second Session, c. 69) and therefore the Board lacked jurisdiction to make the order applied for. On the question raised by this preliminary objection, the Board decided against the Company, and ruled that the Board had jurisdiction. On application by the Company by way of *certiorari*, Anderson J. (by his judgment above referred to) quashed or set aside the order of the Board, holding that, in view of the nature of the Company's work or undertaking, the Board had no jurisdiction (the jurisdiction lying with the Wartime Labour Relations Board

(1) [1946] 3 W.W.R. 459; [1946] 4 D.L.R. 574.
(2) [1946] 3 W.W.R. 200; [1946] 4 D.L.R. 130.

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under Federal Order in Council P.C. 1003, of February 17, 1944). The Board appealed to the Court of Appeal for Saskatchewan. When the appeal was called for hearing, counsel for the Company advanced the preliminary objection that the Board had no status to bring the appeal. The hearing was adjourned and, after argument later on the preliminary objection, effect was given thereto and the appeal dismissed. From that judgment the present appeal was brought to this Court (by special leave granted to the Board by the Court of Appeal for Saskatchewan). Before this Court the additional point was raised, that the Board was not a body known to the law and consequently could not appear in any legal proceedings.

F. A. Brewin and *M. C. Shumiatcher* for the appellant.

J. C. Osborne and *G. F. Henderson* for the respondent Dominion Fire Brick and Clay Products, Limited.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—This is an appeal by the Labour Relations Board of Saskatchewan from an order of the Court of Appeal of that province and, in order to understand what is involved, it is necessary to go back to an application made to that Board by Clay Products Workers' Union. The application was for an order (1) that the employees employed by Dominion Fire Brick and Clay Products, Limited, at its plant near Claybank, Saskatchewan, except the office staff, plant foreman and chief engineer, constituted an appropriate unit of employees for the purpose of bargaining collectively, (2) that the Union represented a majority of the employees in that unit and (3) requiring the Company to bargain collectively with the applicant.

On that application the Company raised a preliminary objection that it was not an employer within the meaning of the Saskatchewan *Trade Union Act, 1944,* but the Board overruled this objection. The Company thereupon applied to Anderson J., in the Court of King's Bench, Crown Side, who ordered that the order of the Labour Relations Board be quashed without the actual issue of a writ of *certiorari*

and that security for costs be dispensed with. The respondents on that application were the Board and the Union and they were ordered to pay the Company's costs.

Before us, a new objection was taken for the first time by the Company respondent that the Labour Relations Board was not a body known to the law, and consequently could not appear in any legal proceeding. That objection may first be disposed of. Section 4 of *The Trade Union Act, 1944,* as amended, constitutes the Board, provides that a majority shall constitute a quorum, and that a decision of a majority present and constituting a quorum shall be the decision of the Board. By section 9:

> 9. A certified copy of any order or decision of the board shall within one week be filed in the office of a registrar of the Court of King's Bench and shall thereupon be enforceable as a judgment or order of the court, but the board may nevertheless rescind or vary any such order.

The effect of these provisions is that the Board is a legal entity, and, as put by Riddell J., speaking on behalf of the majority of the Ontario Court of Appeal in a case of mandamus: *Re Provincial Board of Health for Ontario and City of Toronto* (1): it has "rights as well as duties, and in that view it has a right to be heard in Court."

The ground of the decision of the Court of Appeal was that the Board was not a party aggrieved, but MacDonald J.A., who delivered the judgment of the Court, is clearly in error in stating that no costs were awarded against the Board by Anderson J. However, the matter may be put on a broader basis. Even if the cases mentioned by MacDonald, J.A., could be distinguished in the manner indicated by him, the fact that the point made by the Court of Appeal was not even taken in those cases or in cases such as *Stonor* v. *Fowle* (2) and *Combe* v. *De la Bere* (3) indicates that for many years it has been taken as settled that a body such as the Board has a right to appeal where its jurisdiction is in question.

The appeal should be allowed and, in accordance with an intimation from the Bench at the close of the argument, the matter should go back to the Court of Appeal for its

(1) (1920) 46 O.L.R. 587, at 596.
(2) (1887) 13 App. Cas. 20.
(3) (1881) 22 Ch. D. 316.

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determination as to the admissibility of certain affidavits filed on behalf of the Board and on the substantive matter raised by the original application for *certiorari*. The appellant is entitled to its costs in this Court in any event to be taxed only after the substantive matter in dispute shall have been finally disposed of. All other costs will be disposed of by the Court of Appeal.

The judgment of Rand and Kellock JJ. was delivered by

KELLOCK J.—This is an appeal by the "Labour Relations Board," established by Chapter 69 of the Statutes of Saskatchewan, 1944, 2nd Session, from the judgment of the Court of Appeal of Saskatchewan dismissing an appeal by the Board from the judgment of Anderson J. in the Court of King's Bench, quashing, in *certiorari* proceedings, an order of the Board purporting to have been made on April 15, 1946, under powers granted to it by the statute. The Court of Appeal gave effect to a preliminary objection by counsel for the respondent company that the Board had no sufficient interest or status to appeal the judgment of Anderson J. On the appeal to this Court, the additional point was raised that the Board was not a body known to the law and consequently could not appear in any legal proceedings. It will be convenient to consider this last objection first.

The Board is constituted by section 4 of the statute and is to consist of seven members, appointed by the Lieutenant Governor in Council. The majority of the members constitutes a quorum and a decision of the majority of such quorum is the decision of the Board. By section 9 a certified copy of any order or decision of the Board is to be filed in the office of a registrar of the Court of King's Bench and thereupon it becomes enforceable as a judgment or order of the court.

The respondent instituted the *certiorari* proceedings by notice of motion pursuant to Rule 4 of the Crown Practice Rules of Saskatchewan and the notice was directed to the Board by its official title and also to the respondent union and the Attorney General of Saskatchewan. By

Rule 11 such a notice is required to be served upon "the person or one of the persons who made the judgment, conviction or order" and in pursuance of this provision the notice of motion was served upon the Board. The method of service was not disclosed to us.

Assuming that the respondent company is right in objecting that the Board is not an entity distinct from its members, I think that it is not for the respondent company at this stage, having chosen to designate them by their collective name and after having obtained a decision in its favour, including an order for the payment of costs, to get rid of them now by such an objection. I think the language of Lord Lindley in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (1) may be used with propriety here. After saying that the respondent was not a corporation, His Lordship said: "The use of the name in legal proceedings imposes no duties and alters no rights; it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used."

With regard to the ground of decision of the Court of Appeal, it is necessary to refer to certain other statutory provisions. By *The King's Bench Act,* R.S.S. 1940, Chap. 61, section 2 (14), "party" includes "every person served with notice of * * * any proceedings, although not named in the record". It may be pointed out here that in the notice of motion here in question the Board, as well as the union, are named respondents and, as already mentioned, the Board was served. Accordingly, the Board was a "party" in the Court of King's Bench. By section 6 of *The Court of Appeal Act,* R.S.S. 1940, Chap 60, it is provided that the Court of Appeal shall have jurisdiction and power, subject to the rules of court, to hear and determine all appeals or motions in the nature of appeals respecting any judgment, order or decision of any judge of the Court of King's Bench.

In *Mackay* v. *International Association of Machinists* (2), the defendant association had applied to the Labour Relations Board for an order requiring an employer to refrain from certain alleged unfair labour practices and

(1) [1901] A.C. 426, at 445. (2) [1946] 2 W.W.R. 257.

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the Board made an order granting the application. In that case, which was an appeal in *certiorari* proceedings, Martin C.J.S. said at 260:

> Counsel for the association cited many authorities showing that it is not the practice in Canadian Courts to make an inferior Court or tribunal a party in *certiorari* proceedings; all that these authorities indicate is that the inferior tribunal is not formally named as a defendant but that circumstance cannot alter the fact that the tribunal may be a party as it undoubtedly is in this province by virtue of the service of the notice upon it.

Gordon J.A., at 264, said:

> Both under the English practice and under our own Crown Practice Rules (Rule 11) the notice of motion for a writ of *certiorari* must be served upon "the person or one of the persons who made the judgment, conviction or order". Service on one member of the Labour Relations Board was effected in this case and the Board is therefore a party and a necessary party to the proceedings.

In my opinion, the Board was both a proper and a necessary party to the proceedings here in question and, being a party, had the right of appeal to the Court of Appeal and required no further or other status. It is urged that a tribunal charged with the responsibility of deciding as between other persons should have no interest in supporting its decision in a Court of Appeal. However that may be in other circumstances, the argument is irrelevant here in view of the statutory provisions referred to. A number of illustrations could be given where statutory bodies not dissimilar in function to the appellant Board have appeared by counsel to support their decisions. It is sufficient to refer to *The King* v. *Electricity Commissioners* (1).

I would accordingly allow the appeal and refer the matter back to the Court of Appeal to be disposed of on the merits.

ESTEY J.—The Labour Relations Board of Saskatchewan as constituted under *The Trade Union Act, 1944* (1944 Statutes of Saskatchewan, ch. 69) made an order dated April 15, 1946, declaring its jurisdiction to determine the proper bargaining unit for the employees at the Dominion Fire Brick and Clay Products, Ltd. Its jurisdiction to do so was questioned before Mr. Justice Anderson who

(1) [1924] 1 K.B. 171.

under date of July 16, 1946, directed that the order of the Board be quashed without the issue of a writ of *certiorari*.

The Labour Relations Board appealed from the order of Mr. Justice Anderson to the Court of Appeal, and, upon preliminary objection being taken, the Court held that the Labour Relations Board had no status to appeal because the order of Mr. Justice Anderson did not in any way affect the interests of the Board.

In *In re Jane McEwen* (1), the Board of Review for Manitoba was one of the appellants to this Court from an order of the Court of Appeal in that province directing the issue of a writ of *certiorari* and that a proposal of the Board dated October 29, 1937, be quashed. An order for payment of costs was made against the Board in the Court of Appeal, as Mr. Justice Anderson did in the case at bar, but the main issue in that case, as here, was the jurisdiction of the Board to make the order, and no question was raised as to the status of the Board of Review as an appellant.

In *The King* v. *London County Council* (2), the London County Council had made an order permitting premises to be open for cinematographic entertainments on Sundays and certain holidays. The Divisional Court held that the Council had exceeded its jurisdiction, made absolute a rule *nisi* for a writ of *certiorari* and directed that the order should be quashed. The London County Council appealed and the Court of Appeal affirmed the decision of the Divisional Court.

In *Hetherington* v. *Security Export Co.* (3) the Provincial Secretary-Treasurer of New Brunswick had signed a distress warrant under sec. 6 of the *Liquor Exporters' Taxation Act* of that province. The jurisdiction of the Secretary-Treasurer was questioned in an application for a writ of *certiorari*. The Court of first instance directed the writ of *certiorari* to issue. The Appellate Division discharged that order. In this Court the decision of the Appellate Division was reversed but was restored by the Privy Council. Throughout these proceedings the Provincial

(1) [1941] S.C.R. 542.
(2) [1931] 2 K.B. 215.
(3) [1924] A.C. 988.

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Secretary-Treasurer was both respondent and appellant and no question was raised as to his status to defend his jurisdiction in either capacity.

The record in the *Hetherington* case (*supra*), as in *The King* v. *London County Council* (*supra*), is not clear as to the disposition of costs upon the original application. It is not, however, suggested in any of the cases that an order directing either the payment of costs or the discharge of any of its duties is essential to give to the judicial body the status to take an appeal.

See also *Combe* v. *De la Bere* (1); *Stoner* v. *Fowle* (2); *Rex* v. *Electricity Commissioners* (3).

The learned judges in the Court of Appeal referred to *Board of Education* v. *Rice* (4), where both *certiorari* and *mandamus* were granted, and to *Local Government Board* v. *Arlidge* (5), where in the Court of Appeal (6), Lord Justice Vaughan Williams concluded his reasons for quashing an order for the issue of a writ of *certiorari* with a direction that the matter be "sent back to the Local Government Board to be determined in the manner provided by law". In neither of these cases is the status of the respective Boards to appeal discussed and, when considered with the authorities already cited, they do not appear to support the requirement or qualification suggested in the judgment here appealed from.

The application for a writ of *certiorari* is not an appeal upon the merits. It raises questions as to the legality of the proceedings. Very often, as in this case, it is the jurisdiction of the tribunal to make the order in question. The foregoing authorities indicate that over a long period of time it has been recognized that where the jurisdiction of the body, constituted to discharge judicial functions, is questioned in a superior court, it may defend its jurisdiction and, in the event of an adverse judgment, take an appeal therefrom.

(1) (1881) 22 Ch. D. 316.
(2) (1887) 13 App. Cas. 20.
(3) [1924] 1 K.B. 171.
(4) [1911] A.C. 179.
(5) [1915] A.C. 120.
(6) *The King* v. *The Local Government Board; Ex parte, Arlidge,* [1914] 1 K.B. 160, at 184.

The Court of Appeal had already held that the Labour Relations Board exercised judicial functions: *Bruton* v. *Regina City Policemen's Association* (1), and that the Board was a party in *certiorari* proceedings: *Mackay and Mackay* v. *International Association of Machinists Lodge No. 1057* (2).

In my opinion, the appeal should be allowed and the matter referred back to the Court of Appeal as suggested by my brother Kerwin.

Appeal allowed and order of the Court of Appeal set aside (further terms of judgment pronounced in accordance with the last paragraph in the judgment of Kerwin J.).

Solicitor for the appellant: *Morris C. Shumiatcher.*

Solicitors for the respondent Dominion Fire Brick and Clay Products, Limited: *Grayson and McTaggart.*

re Vancouver School Teachers' Etc., Assn v. Vancouver, 1 & W.W.R. 337

REGINA INDUSTRIES LIMITED ..... APPELLANT;

AND

THE CITY OF REGINA ..... RESPONDENT.

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*Feb. 12
*May 13

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Taxation—Business tax—City Act, Sask., R.S.S. 1940, c. 126, ss. 460, 461, 463—Assessment of company for business tax—Company claiming that business in question was that of the Crown, that company was agent of the Crown and not liable—Contract between company and Crown for manufacture of gun-carriages—Construction of contract with regard to question in issue.

Appellant company, under an agreement with the Crown (Dom.), manufactured gun-carriages for the Crown (for which purpose it was incorporated in 1941) on property in the city of Regina held by the Crown under lease from the owner thereof. The City of Regina (respondent) assessed appellant in 1944 for a business tax under *The City Act*, R.S.S. 1940, c. 126, which provides that (s. 460) taxes shall be levied upon lands, businesses, and special franchises, that (s. 463(1)) the assessor shall assess either the owner or the occupant of every parcel

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

(1) [1945] 2 W.W.R. 273. (2) [1946] 2 W.W.R. 257.

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of land in the city, and every person who is engaged in business; and that (s. 461) the interest of the Crown in any property including property held by any person in trust for the Crown shall be exempt from taxation.

The said agreement contained, *inter alia,* terms under which the Crown provided to appellant the premises, the machinery and equipment, material to be used, funds for operation, specifications, etc.; the title to all equipment and supplies, completed and partially completed articles, was at all times in the Crown, which assumed risks and liabilities incidental to ownership thereof, and appellant was not liable for loss or destruction of or damage to articles and supplies except such as might result from its negligence or wilful misconduct; appellant hired employees and had control over and was responsible for the operation of the plant, but was subject to provisions for consultation with, furnishing information to, and supervision by, the Government Minister and inspector; appellant, upon acceptance of each gun-carriage, received a fee, to cover management and supervisory services; on cancellation by the Crown of the contract, appellant should be paid its cost to the date of its giving up possession, including a fee in respect of work not completed, and might be given an allowance for exceptional hardship resulting from cancellation; appellant was to be indemnified against losses, costs, claims, etc., arising out of performance of the contract and not resulting from gross negligence on its part.

Held, on consideration of all the terms of the agreement, the business was that of the Crown, not of appellant, who was the agent of the Crown, and was not a "person who is engaged in business" within the meaning of s. 463(1) of said Act, and was not subject to the business tax in question; the case came within the authority of *City of Montreal v. Montreal Locomotive Works Ltd.* (P.C.), [1946] 3 W.W.R. 748; [1947] 1 D.L.R. 161.

Judgment of the Court of Appeal for Saskatchewan, [1944] 3 W.W.R. 741, reversed.

APPEAL by Regina Industries Limited from the judgment of the Court of Appeal for Saskatchewan (1) dismissing its appeal by way of stated case from a decision of the Saskatchewan Assessment Commission sustaining an assessment in the year 1944 by the City of Regina (the respondent) against the appellant for business tax in respect of certain property in the City of Regina, held by the Crown (in right of Canada) under lease from the owner thereof, on which the appellant manufactured gun-carriages for the Crown under contract with the Crown (therein acting and represented by the Minister of Munitions and Supply of Canada). The appellant contended that it did not carry on a business on the premises but managed and operated on behalf of the Crown a business

belonging to the Crown; that the Crown, and not the appellant, carried on the business in question; and that, therefore, the appellant was not liable to assessment for business tax under *The City Act* (R.S.S. 1940, c. 126). The Court of Appeal for Saskatchewan held that the appellant carried on the business for profit as an independent contractor, and was therefore subject to be assessed for business tax under the provisions of the said Act. It answered in the affirmative the questions in the stated case, which were: Whether the Saskatchewan Assessment Commission was right in holding (1) that the buildings and other property referred to in the assessment were occupied and/or used by the appellant for business purposes within the meaning of *The City Act* and that the appellant was liable to assessment for the whole of the said buildings and property, and (2) that the appellant was liable for assessment although solely engaged in performing a contract for the Crown.

P. G. Hodges K.C. and *W. R. Jackett* for the appellant.

E. C. Leslie K.C. for the respondent.

The judgment of the Chief Justice and Kerwin and Estey JJ. was delivered by —

ESTEY, J.—The appellant was incorporated under the Dominion *Companies Act* in October, 1941, for the express purpose of executing and performing its obligations under a contract with His Majesty in the right of Canada and the General Motors of Canada Ltd., dated October 17, 1941, and subsequently amended May 10 and June 30, 1943. The General Motors of Canada under this agreement agreed to lease, and did lease by a separate document to His Majesty the land and buildings in the City of Regina upon which the operations under the contract were carried out and also guaranteed the due performance of the appellant's obligations under this contract.

Under the terms of this agreement gun-carriages were manufactured for His Majesty, and both the Saskatchewan Assessment Commission and the Court of Appeal in Saskatchewan have held that the appellant was validly assessed in 1944 for a business tax by the City of Regina under the terms of *The City Act*, R.S.S. 1940, ch. 126.

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The appellant contends that it is not liable for the tax because it managed and operated the production of gun-carriages under the provisions of the contract not in its own right but on behalf of and, therefore, as agent for His Majesty in the right of Canada.

The relevant provisions of *The City Act* are as follows:

(1) [1944] 3 W.W.R. 741; [1945] 1 D.L.R. 220; [1945] C.T.C. 83.

460. Subject to the other provisions of this Act, the municipal and school taxes of the city shall be levied upon: (1) lands; (2) businesses; and (3) special franchises.

461. The following property shall be exempt from taxation:

1. The interest of the Crown in any property including property held by any person in trust for the Crown.

463. (1) The assessor shall assess either the owner or the occupant of every parcel of land in the city, and every person who is engaged in business or is the owner of a special franchise, and shall prepare an assessment roll showing the name of each person assessed, the property in respect of which he is assessed and the assessed value of the property.

The issue is determined by an examination of the contract in the light of the recent decision of the Privy Council in *City of Montreal* v. *Montreal Locomotive Works Ltd.* (1), a judgment affirming that of this Court (2). These judgments were not available to the Appellate Court as both were delivered after its judgment in this matter on November 25, 1944.

The Privy Council held that the Montreal Locomotive Works Ltd. were agents for the Crown in the manufacture of tanks and gun-carriages under a contract with His Majesty in the right of Canada dated October 23, 1940, and therefore not subject to the business tax imposed by the City of Montreal.

Lord Wright, in writing the judgment of the Privy Council, pointed out that while in earlier cases the single test of control had been used to determine whether the relationship of master and servant existed, then stated:

> In the more complex condition of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.

Under the terms of the contract in question, His Majesty provided to the appellant the premises, the machinery and all necessary equipment, material to be used in the pro-

(1) [1946] 3 W.W.R. 748; [1947] 1 D.L.R. 161.
(2) [1945] S.C.R. 621.

duction of the gun-carriages, and the funds for operating purposes. His Majesty provided the specifications, plans and drawings for the gun-carriages, and, though the appellant was required to maintain a staff of inspectors, the decision of the government inspector was final.

The title to all equipment and supplies, completed and partially completed articles, was at all times in His Majesty. The risks and liabilities incidental to the ownership thereof was expressly assumed by His Majesty and, further, the appellant was not liable for loss or destruction or damage of such articles and supplies, except as might result from its negligence or wilful misconduct.

An estimate of the wages and of all costs of operation was made by the appellant before the 20th of each month, and when the amount so estimated was approved by the Minister, the Government deposited the amount thereof in a special account upon which the appellant drew cheques and made all necessary payments.

The appellant received a fee from His Majesty upon the acceptance of each gun-carriage by the government inspector, but the agreement provided that "such carriages may only be rejected by the inspector on the ground that the same do not conform to such specifications," and then provided "the cost of correction * * * shall be part of the cost of the work under this contract * * * unless the character and total value of such spoiled materials shall clearly indicate gross mismanagement or lack of competence on the part of the Contractor [appellant]."

It is provided that this fee payable upon acceptance of each gun-carriage "shall be deemed to include and cover all management and supervisory services * * * performed by the Contractor * * *" except those which are included as part of the cost in other sections of the agreement. This circumstance was expressly covered in the decision of the Privy Council in the following language:

> A "fee" was payable in respect of each completed vehicle, but, when the whole plan is considered, that was solely as a reward for personal services in managing the whole undertaking. It was something very different from the risk of profit or loss which an independent contractor has to assume; every item of expense was borne by the Crown, just as the Government took every possible risk of loss or damage except in the very unlikely event, as already noted, of bad faith or wilful neglect on the part of the respondent. The undertaking throughout was the

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undertaking of the Government and not the undertaking of the respondent which was simply an agent of mandatory or manager on behalf of the Crown.

In maintaining that the appellant was not an agent of the Crown but rather an independent contractor, counsel for the respondent indicated certain differences which he pressed as sufficient to distinguish this case from the *Montreal* case (1). In particular, that the appellant is described throughout the contract in question as "contractor" whereas in the *Montreal* case (1) it is specifically set out in the contract that the Montreal Locomotive Works Ltd. was an agent of His Majesty. The opening words of the agreement "Regina Industries Limited (hereinafter called 'the Contractor')" indicate merely that this word is used only for convenience in the drafting and reading of the contract. That which is significant is the provision that

> the Contractor agrees to manage and operate the plant for and on behalf of His Majesty and to manufacture therein for the account of His Majesty * * * anti-tank gun-carriages * * * in such quantities and proportions as the Minister may from time to time direct in writing, and to be supplied and delivered to or to the order of His Majesty from time to time, as manufactured hereunder.

It was also pressed that the appellant had control of the plant. This provision appears in the following language:

> Subject to the foregoing provisions of this clause the Contractor shall have control over and be responsible for the operation of the plant * * *

In "the foregoing provisions" referred to, the appellant agrees, as the Minister requests, to consult the Minister and the Inspector upon all matters pertaining to the performance of this contract, to permit examination of all contracts, plans, specifications, and to furnish the Minister with specified reports, and concludes with the general phrase "such other information and data with respect to the work and the progress thereof as the Minister may from time to time require."

The contract also provides:

> The Minister shall have general supervision and full control over all such costs and expenses.

This includes wages and expenditures of all types. The Minister shall determine whether any items of costs or

(1) [1946] 3 W.W.R. 748; [1947] 1 D.L.R. 161.

expenditures are excessive or unnecessary. Then, after specifying how effect should be given to such determination, it is provided:

> The Minister will not in the exercise of this power and control over expenditures interfere with the management and conduct of the work by the Contractor in the absence of any gross negligence or wilful default on the part of the Contractor.

It was also pointed out that the workmen are the employees of the appellant and that it is optional with the appellant whether it extends to the workmen group, accident and sickness insurance benefits. A corporation may be an agent and, therefore, it does not follow as a necessary consequence that because the appellant hires the employees it is necessarily an independent contractor. It should be noted that if these benefits are extended to the workmen the cost thereof is provided by His Majesty.

These provisions and the contract read as a whole indicate the position of the appellant to be that of an agent with limited authority rather than that of an independent contractor managing and operating its own business to produce a product for a purchaser.

The contract expressly provides for cancellation on the part of His Majesty, in which event it is specifically provided that the appellant shall be paid the cost up to the date of his giving up possession including "a fair and reasonable fee in respect of the work not completed." There is a further clause providing that if "by reason of any action taken by the Minister" in effecting cancellation of the contract "exceptional hardship has resulted to the Contractor, then the Minister may * * * grant such allowance (not to include in any case, however, any allowance or compensation for loss or profit) to the Contractor * * *.

Then the further provision:

> His Majesty agrees to indemnify the Contractor against all losses, costs, expenses, liabilities and claims of any nature arising out of the performance of this contract and not resulting from gross negligence on the part of the Contractor.

These provisions make abundantly clear what is indicated throughout the contract that the Government supplies everything, including the costs of operation in advance, and that the appellant assumes no risk of loss except that which may arise out of his wilful or grossly negligent conduct.

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It was further pressed that the provisions for the surrender of the property and equipment at the termination of the agreement, the undertaking on the part of His Majesty to indemnify the appellant against any claim for infringement of patents, the guarantee of the due performance on the part of the appellant by the General Motors Ltd., all indicated the relationship of independent contractor. In general these do point rather to the relationship of independent contractor than that of agent, but they are not in themselves inconsistent with a contract of agency and do not outweigh the provisions of the contract under which the Government owns the land, equipment, materials, and supplies all of these and the funds as well as everything else for the conduct of the operations, retains the ultimate control and assumes the risks of the entire operation, which point so definitely to the relationship of agency.

All these circumstances bring this case within the authority of *City of Montreal* v. *Montreal Locomotive Works, Ltd.* (1). The appellant is, therefore, an agent of His Majesty under the provisions of this contract and is not a person who is engaged in business within the meaning of sec. 463(1) of *The City Act,* R.S.S. 1940, ch. 126, and therefore not subject to the business tax in question.

The appeal should be allowed, with costs to the appellant both here and in the Court below.

The judgment of Taschereau and Kellock JJ. was delivered by—

KELLOCK, J.—The appellant was incorporated in 1941 by Letters Patent under the Dominion *Companies Act.* General Motors of Canada Limited was at that time, and at all material times, the owner of certain land and buildings in the City of Regina and by lease dated October 17, 1941, the said property was demised by the last mentioned company to His Majesty the King in right of the Dominion. This lease was made in pursuance of an agreement of the same date between His Majesty, represented by the Minister of Munitions and Supply, the appellant, therein described as the "Contractor", and the lessor company therein called the "Controlling Company". The purpose of this

(1) [1946] 3 W.W.R. 748; [1947] 1 D.L.R. 161.

agreement and the lease was to bring about the manufacture of gun-carriages for His Majesty. The question in this appeal is as to the liability of the appellant for business tax in respect of the above premises in which the manufacture of these gun-carriages was carried on, having regard to the provisions of *The City Act*, R.S.S. 1940, ch. 126, as amended. The question arose by way of stated case which was answered in the affirmative and adversely to appellants. The question in the stated case was whether the Saskatchewan Assessment Commission was right in holding:

(1) That the buildings and other property referred to in the assessment were occupied and/or used by the appellant for business purposes within the meaning of *The City Act* and that the appellant was liable to assessment for the whole of the said buildings and property.

(2) That the appellant was liable for assessment although solely engaged in performing a contract for the Crown.

Since the decision appealed from, a similar situation has been considered by the Privy Council on appeal from this Court, in *City of Montreal* v. *Montreal Locomotive Works Limited* (1). In that case the substantial issue was whether the Locomotive Company was in occupation of certain premises itself so as to be taxable as the person carrying on business there or whether it was operating merely as a manager or agent of the Government. If the latter, the relation between the company and the Government under the contract would be one of mandate and it would not be on the premises in its own right and therefore not liable to tax under the legislation there in question. It was held that the Locomotive Company was acting throughout for and on behalf of the Government and was consequently not subject to taxation as the person carrying on or exercising a manufacture within the meaning of Article 363 of the Montreal Charter. That Article provided for a business tax on all trades or manufactures carried on or exercised by any person in the city, limited in amount to a percentage of the annual value of the premises in which such trades were carried on. The person engaged in carrying on the trade was made directly responsible for payment of the tax. In agreeing with the con-

(1) [1947] 1 D.L.R. 161; [1946] 3 W.W.R. 748.

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clusion of this Court that the Locomotive Company was not the person carrying on the trade, their Lordships said at p. 170 (1):

> The combined force of the whole scheme of operations seems to them to admit of no other conclusion. The factory, the land on which it was built, the plant and machinery were all the property of the Government which had them appropriated or constructed for the very purpose of making the military vehicles. The materials were the property of the Government and so were the vehicles themselves at all stages up to completion. The respondent supplied no funds and took no financial risk and no liability, with the significant exception of bad faith or wanton neglect: every other risk was taken by the Government. It is true that the widest powers of management and administration were entrusted to the respondent but all was completely subject to the Government's control. A "fee" was payable in respect of each completed vehicle, but when the whole plan is considered, that was solely as a reward for personal services in managing the whole undertaking. It was something very different from the risk of profit or loss which an independent contractor has to assume; every item of expense was borne by the Crown, just as the Government took every possible risk of loss or damage except in the very unlikely event, as already noted, of bad faith or wilful neglect on the part of the respondent. The undertaking throughout was the undertaking of the Government and not the undertaking of the respondent which was simply an agent or mandatory or manager on behalf of the Crown. The accuracy of the positive announcement in each of the contracts that the respondent was acting throughout under the contracts for and on behalf of the Government and as its agent cannot be controverted.

It is the contention of the present appellant that the principle of the above decision applies to the case at bar, notwithstanding any differences of fact or in the governing legislation.

The respondent raises the preliminary objection that under the relevant legislation the case was limited to a question of law only and it is submitted that the question upon which the decisions of the Assessment Commission and the Court of Appeal turned was whether or not the appellant was an agent of the Crown or an independent contractor. It is said that the finding of the Assessment Commission that the appellant was the occupant of the plant for the purposes of its business was a finding of fact and not of law. In my opinion, the question as to the person carrying on the business in question, depending, as it does, upon the construction of the contract here in question, is a question of law.

Under the provisions of sec. 463 of *The City Act*, R.S.S. 1940, ch. 126, an assessment may be made upon

(1) [1947] 1 D.L.R. 161.

"every person who is engaged in business" at a rate per square foot of the floor space "used for business purposes". By section 460 it is provided that municipal and school taxes shall be levied upon "(1) lands; (2) businesses; and (3) special franchises." While by section 463(1) it is the "owner" or the "occupant" of every parcel of land who is to be assessed, it is the "person who is engaged in business" and the "owner of a special franchise" who are to be assessed with respect to the two last mentioned species of property.

The definition of occupant reads as follows:

> "Occupant" includes the resident occupier of land or, if there is no resident occupier, the person entitled to the possession thereof, a leaseholder and a person having or enjoying in any way for any purpose whatever the use of land otherwise than as owner.

It was not contended by the respondent that if it were held that the appellant was merely an agent of the Crown in respect of the manufacture of the gun-carriages, there was another business being carried on upon the same premises at the same time, namely, the business of managing for remuneration that manufacture, and that the appellant was properly assessable in respect of that business. The Assessment Commission appear to have had that view, as they say:

> It is clear that while the appellant company is to manage and operate the plant for His Majesty it nevertheless is carrying on the business of so operating and managing the plant and manufacturing the gun-carriages therein.

Neither section 463 nor section 465, however, seem to contemplate assessment in respect of more than one business at the same time in respect of any one area or more than one "occupant" of that area and, as already stated, the contention on behalf of the respondent is limited to the contention that it ought to be held that the appellant was not an agent of the Crown but an independent contractor.

While the contract here in question is not exactly in the same form as that in question in the *Montreal* case (*supra*), it is clear that the draughtsman had before him the earlier contract. In my opinion, when the present contract is examined, it is clear that the considerations which led the Privy Council to conclude that the relationship of principal and agent existed between the parties in the *Montreal* case

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(1) are all present here also. The Crown and not the appellant was the lessee of the premises. The plant and machinery acquired and to be acquired were never at any time the property of the appellant but of the Crown. The materials and the completed carriages were also and at all stages the property of the Crown. The appellant supplied no funds and took no financial risk and no liability with the exception of gross negligence. Every other risk was taken by the Crown. The appellant had the widest powers of management and administration but these were completely subject to the control of the Crown. Section 38 of the General Conditions reads as follows:

> The Contractor recognizes and acknowledges that this contract is entered into for the purpose of or for purposes connected with the prosecution of the war in which His Majesty is now engaged and the Contractor agrees that notwithstanding this contract or any term or provision thereof the Minister shall have full power at any time and from time to time to take such steps and to do such acts and things as in his opinion may be necessary or advisable, in the interests of His Majesty, to facilitate, expedite or protect the work called for by this contract.

As in the *Montreal* case (1), a fee was payable in respect of each completed vehicle, but that was in payment of the management services. Every item of expense was to be borne by the Crown, including the cost of work which might be rejected by the Crown's inspector as not up to specifications unless the character and total volume of spoiled materials should clearly indicate gross mismanagement or lack of competence on the part of the appellant. While the contract does not contain the exact language of section 1 of the contract in question in the *Montreal* case (1) that "The government hereby acknowledges and agrees that the company is acting on behalf of the government and as its agent," it is provided by section 9 that "The Contractor agrees to manage and operate the plant for and on behalf of His Majesty". It is also recited by the amending contract of May 10, 1943: "Whereas by a certain contract * * * dated as of the 17th day of October, 1941, between the parties hereto providing for the equipment and operation by the Contractor on behalf of His Majesty * * * ." The considerations, therefore, which dictated the decision in the *Montreal* case (1) are all present in the case at bar and establish the correctness of the above recital.

(1) [1947] 1 D.L.R. 161.

While the contract does contain an agreement on the part of the appellant that on termination of the work it would deliver up to His Majesty possession of the plant for the remainder of the term of the lease, and while such a provision, taken alone, assumes that the appellant was in possession as against His Majesty, nevertheless, when all the terms of the agreement are considered it is plain, in my opinion, that the appellant never had possession in its own right but only as manager and operator for and on behalf of His Majesty. This provision was inserted *ex abundanti* to ensure that the appellant would discontinue its connection with the plant when the work was terminated. I, therefore, think that the business being carried on upon the premises was not the business of the appellant but that of His Majesty and that the appellant is not liable for the business tax.

Certain provisions of the contract in particular weighed in the view which the Court of Appeal took, namely, that it was provided in the contract that the Minister and inspectors should have access to the plant, that the Minister might exercise control over expenditures to see that the carriages were being produced at a reasonable price, that the equipment purchased should be the property of His Majesty, and the provision already referred to for delivery up of all government equipment and possession of the premises on termination, and the further provision that the Minister should not be liable for federal and provincial income taxes, excess profit tax and surtax. The substance of all of these are to be found in the Montreal contract and did not prevent the Privy Council from reaching the conclusion they did in that case.

I would allow the appeal, with costs here and below.

Appeal allowed with costs.

Solicitor for the appellant: *P. G. Hodges.*

Solicitors for the respondent: *MacPherson, Milliken, Leslie & Tyerman.*

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*Mar. 3, 4
*Mar. 13

ASCONI BUILDING CORPORATION.... PLAINTIFF;

AND

J. PAUL VERMETTE (PLAINTIFF BY CONTINUANCE OF SUIT) ..... } APPELLANT

AND

DOMINIQUE VOCISANO (DEFENDANT) RESPONDENT.

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

Statute—Application—"Interest Act"—Mortgage—Agreed bonus to mortgagee—Interest on loan paid in advance—Blended payment of principal money, interest and bonus—Bonus and interest deducted from amount of principal money stated in deed—Evidence that parties agreed to same before signing of deed—Action to recover amounts of bonus and interest—Interest Act, R.S.C. 1927, c. 102, sections 6 and 9.

Section 6 of the *Interest Act* (R.S.C., 1927, c. 102) provides that "whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended * * *, no interest whatever shall be * * * recoverable * * *, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance."

The respondent agreed to loan to the plaintiff corporation, on mortgage of real estate, $15,000 and later $16,000. These sums were made payable as principal without interest until maturity by monthly instalments of $300 for 23 months and the balance at the end of the 24th. It appeared from the evidence that the amounts advanced were actually $12,500 and $13,500, there having been a deduction of $5,000 composed of $1,500 interest and $1,000 bonus for each loan. An admission of those facts was contained in the respondent's plea to the action. The two loans were fully repaid at the time the properties securing them were sold. Subsequently, the plaintiff corporation brought an action under section 9 of the *Interest Act*, which was continued by the trustee in bankruptcy, to recover the above sum of $5,000, on the ground that it had been paid in contravention of section 6 of the Act, the appellant contending that the payments of principal money and interest and bonus were blended and that the deeds of mortgage did not contain a statement of such principal sum, and the rate of interest chargeable thereon. The Superior Court maintained the action, but the appellate court, by a majority, reversed that judgment. On appeal to this Court,

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

Held that the appellant could not recover. The agreement for the bonus and the interest was legal and enforceable.

Per The Chief Justice and Taschereau J.:—The principal money, or the interest or the bonus is not, upon the terms of the deeds, made payable pursuant to any of the methods mentioned in the statute. Therefore, there is no illegality if, before the mortgage has been given birth to, the parties have agreed to deduct or to pay in advance the interest and the bonus, and have stipulated in the deed of mortgage itself that no interest would be payable.

Per Kerwin J.:—As to the deduction of the bonus, the case is concluded against the appellant by the decision in the *Meagher's* case ([1930] S.C.R. 378). As to the deduction of the interest, its prepayment or retention, by a prior agreement of the parties, does not bring the case within the operation of section 6. The prime requisite for its operation is that, by the terms of the mortgage itself, the principal or interest secured thereby must be payable in one of the methods mentioned. In the present case, they are not so made payable and the result is that there is nothing to prevent the parties to a loan transaction agreeing, prior to the execution of the mortgage, to the deduction or payment in advance of interest for the term of the mortgage and then to provide by the mortgage document that there shall be no interest until default. The effect of such a collateral agreement is that the prepaid interest ceases to be such and becomes part of the principal advanced.

Per Rand J.:—Section 6 of the *Interest Act* is not designed to protect a borrower against agreeing to pay any particular rate or amount of interest. Its effect is that where repayment under a mortgage involves, in the forms mentioned, an increment of interest, it shall be made clear in the mortgage what the amount of the principal and the rate of interest are. Where the transaction is not either on its face or by the real intention of the parties within the section and the borrower is fully aware both of the actual amount of interest which he is paying, and the rate and principal with reference to which that calculation is made, the purpose of the section suffers no infringement. If, on the other hand, by that intention, the payments provided do involve interest within the section, then the form of words used would not ward off the penalties.

Per Kellock J.:—The present case, upon the evidence, is governed by the principle of *Meagher's* case ([1930] S.C.R. 378). There is no distinction to be drawn between the bonus and the interest paid in advance. Both became debts under the agreement for the loan and neither were at any time secured by the mortgage deed or included in any payment called for therein.

London Loan & Savings Co. of Canada v. *Meagher* ([1930] S.C.R. 378) followed.

Canadian Mortgage Investment Co. v. *Cameron* (55 Can. S.C.R. 409) discussed.

Singer v. *Goldhar* (55 O.L.R. 267) overruled by *Meagher's* case.

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ASCONI BUILDING CORPORATION AND VERMETTE v. VOCISANO

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Loranger J. and dismissing the appellant's action.

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

H. Gérin-Lajoie K.C. and *C. J. Gélinas* for the appellant.

John T. Hackett K.C. for the respondent.

The judgment of The Chief Justice and of Taschereau J. was delivered by

TASCHEREAU J.:—La Loi concernant l'intérêt, que l'on trouve au chapitre 102 des S.C.R. 1927, contient les deux articles suivants:

6. Lorsqu'une somme principale ou un intérêt garanti par hypothèque sur propriété foncière est stipulé, par l'acte d'hypothèque, payable d'après le système du fonds d'amortissement, ou d'après tout système en vertu duquel les versements du principal et de l'intérêt sont confondus, ou d'après tout plan ou système qui comprend réduction d'intérêt sur des remboursements stipulés, aucun intérêt n'est exigible, payable ni recouvrable sur une partie quelconque de la somme principale prêtée, à moins que l'acte d'hypothèque ne contienne un état de la somme principale et du taux de l'intérêt, calculé annuellement ou semi-annuellement et exigible sur cette somme, mais non d'avance. S.R., c. 120, art. 6.

* * * *

9. S'il est payé quelque somme à compte d'un intérêt, d'une amende ou peine qui ne sont pas exigibles, payables ou recouvrables, en vertu des trois articles qui précèdent, cette somme peut être répétée ou déduite de tout autre intérêt, amende ou somme pénale exigibles, payables ou recouvrables sur le capital. S.R., c. 120, art. 9.

Le demandeur, représenté devant cette Cour par Paul Vermette, syndic à la faillite, prétend que comme résultat de la violation de ces articles, il a droit de réclamer du défendeur intimé, la somme de $5,000.

Les faits sont les suivants:

Par acte authentique reçu devant le notaire Lavoie le 27 février 1941, l'intimé a prêté à Asconi Building Corporation, une somme de $15,000, remboursable en vingt-trois paiements mensuels de $300 chacun, donnant un total de $6,900. Quant à la balance de $8,100, elle devenait due et exigible le 1er mars 1943.

Par un autre acte authentique reçu devant le même notaire, le 17 juin 1941, l'intimé a également prêté à l'appelant un autre montant de $16,000 remboursable de la même façon, soit en vingt-trois paiements mensuels de $300 chacun, et la balance de $9,100, le ler juillet 1943.

Ces deux prêts étaient garantis par hypothèques, affectant des immeubles de l'Asconi Building Corporation, et chaque acte contient une clause à l'effet que dans le cas de vente, la balance due sur le prix deviendra exigible.

Quoiqu'il soit stipulé à ces deux actes que les prêts sont respectivement de $15,000 et de $16,000, payables sans intérêt, il est certain que le capital du prêt de $15,000 n'était que de $12,500, et que le capital de l'autre prêt de $16,000 n'était que de $13,500. Dans chaque cas, il y avait un montant de $2,500 représentant un bonus et des intérêts.

Le plaidoyer du défendeur ne laisse aucun doute sur ce point.

Le défendeur admet ce qui suit:

> That the loan of February 27, 1941, was in fact of $12,500, which with interest of $1,500 and bonus of $1,000, made the total mentioned in the deeds of $15,000 payable by plaintiff to defendant without interest save in event of default;
>
> That the loan of June 17, 1941, was in fact of $13,500, (whereof $11,100 cash and $2,400 representing eight monthly payments of $300 overdue on the first loan or to fall due on the two loans within two months and payable by plaintiff to defendant) which with interest of $1,500 and bonus of $1,000 made the total of $16,000 mentioned in the deed and payable by plaintiff to defendant without interest save in the event of default;

Le demandeur a donc reçu lors du premier prêt $12,500 et s'est obligé de rembourser $15,000, et lors du second, il a reçu $13,500 et a consenti à rembourser $16,000. Ces remboursements ont été faits par le syndic qui ignorait ces conditions qui n'apparaissaient pas aux actes reçus devant le notaire Lavoie, et le demandeur prétend maintenant, que les versements du principal et du bonus et des intérêts étant confondus, et que les actes ne contenant pas un état de la somme principale et du taux de l'intérêt, il a le droit de répéter, en vertu des dispositions de l'article 9, les intérêts et le bonus. La Cour Supérieure lui a donné raison, mais la Cour du Banc du Roi, les honorables juges Létourneau et Galipeault dissidents, a rejeté son action.

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Une action en répétition de ce genre doit réussir quand on trouve dans l'acte de prêt les éléments suivants:

1°. Une somme principale et des intérêts.

2°. Une somme garantie par hypothèque.

3°. Un taux d'intérêt qui n'est pas calculé d'avance.

4°. Des versements de capital et d'intérêts qui sont confondus.

Cette loi, qui est d'intérêt public, a évidemment été adoptée afin que l'emprunteur connaisse exactement le montant d'intérêts qu'il aura à payer, et afin qu'on ne lui extraie pas des taux usuriers. Dans une cause de *Canadian Mortgage Investment Co.* v. *Cameron* (1), M. le juge Walsh a défini ainsi les buts de la loi:

> The evil which the section aims to prevent is the imposition of an extortionate rate of interest through the medium of blended payments of principal and interest. Under this system without the protection which this section affords a highly usurious rate of interest might be wrapped up in these innocent-appearing blended payments without the slightest suspicion on the part of an ignorant or careless borrower that he was being made the victim of it. And so parliament stepped in and decreed that such a mortgage should itself tell the mortgagor exactly how much of the aggregate of these blended payments represents principal and exactly the rate at which the interest included in them calculated yearly or half-yearly not in advance is charged under penalty of the loss of all interest for breach of this direction. I think that if such a mortgage gives all the information to which the mortgagor is entitled under the statute the exact form of words which it uses to convey it to him is absolutely immaterial. A statement is something which is stated. Surely if there is to be found within and as part of the mortgage something which states the amount of the principal money and the rate of interest chargeable thereon calculated in one of the methods prescribed by the section the mortgage does contain a statement of these things. The main thing, in fact the only thing, needed is to give to the mortgagor the information to which the section entitles him, and I think he can be given it just as effectually through the medium of his own covenants as he can by tabulating it in a formal statement.

Au cours de l'argument, quelques causes seulement ont été citées, car, quoique la loi soit ancienne, la jurisprudence n'est pas très abondante. Les deux premières causes présentaient peu de difficultés. Dans *Standard Reliance Mortgage Corporation* v. *St. George Stubbs* (2), le débiteur hypothécaire avait pris action afin qu'il soit déclaré qu'aucun intérêt ne pourrait être perçu. Dans l'acte d'hypothèque, il avait été convenu "the principal is $700 and the rate

(1) (1917) 30 D.L.R. 792; [1917] 2 W.W.R. 18.
(2) (1917) 55 Can. S.C.R. 422.

of interest chargeable thereon is 10 per cent per annum." Il a été décidé que les exigences de la loi étaient satisfaites, et l'action a été rejetée.

Dans cette cause de *Canadian Mortgage Investment Co.* v. *Cameron* (1), qui est également venue devant cette Cour, (2) l'acte d'hypothéque contenait les clauses suivantes:

First: That he will pay to them, the said mortgagees, the above sum of one thousand four hundred dollars and interest thereon at the rate hereinafter specified in gold or its equivalent at the office of the said mortgagees at the city of Toronto, in the province of Ontario, as follows: That is to say, in instalments of one hundred and seventy-nine 90/100 dollars half-yearly on the 24th days of June and December in each year until the whole of said principal sum and the interest thereon is fully paid and satisfied, making in all ten half-yearly instalments. The first of said instalments to become due and be payable on the 24th of December, 1907. All arrears of both principal and interest to bear interest at ten per centum per annum as hereinafter provided.

Secondly: That he will pay interest on the said sum or so much thereof as remains unpaid at the rate of ten per centum per annum by half-yearly payments on the twenty-fourth days of December and June in each and every year until the whole of the principal money and interest is paid and satisfied, and that after maturity interest shall accrue due at the rate aforesaid from day to day, and that interest in arrear, whether on principal or interest, and all sums of money paid by the mortgagees under any provision herein contained or implied or otherwise, shall be added to the principal money and shall bear interest at the rate aforesaid, and shall be compounded half-yearly, a rest being made on the twenty-fourth days of the months of December and June in each year until all such arrears of principal and interest are paid; and that he will pay the same and every part thereof on demand.

Cette Cour en est arrivée à la conclusion que quand le débiteur hypothécaire convient de payer le principal et les intérêts en dix paiements semi-annuels, au taux de 10% le créancier a droit aux intérêts, vu que les exigences de la loi sont satisfaites.

Je suis porté à croire qu'il y a beaucoup de similitude entre la cause de *Singer* v. *Goldhar* (3) et celle qui nous est actuellement soumise. Dans la première, une somme de $3,500 avait été prêtée, mais une hypothèque de $4,700 avait été consentie, et faite remboursable par versements mensuels de $100 durant 11 mois, et la balance à la fin du douzième mois. La cour d'appel d'Ontario a décidé qu'il y avait confusion du capital et des intérêts, qu'aucun taux

(1) (1917) 33 D.L.R. 792; [1917] 2 W.W.R. 18.
(2) (1917) 55 Can. S.C.R. 409.
(3) (1924) 55 O.L.R. 267.

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d'intérêt n'était stipulé et que la différence au delà de $3,500 ne pouvait être réclamée. M. le juge Masten parlant pour la Cour s'exprima ainsi:

> Mr. Brown's next point is a suggestion which he couples with the former argument, viz., that the agreement is one and single for a bonus of $1,200; that the $4,700 is by agreement of the parties made principal on the face of the mortgage; and that the 12 instalments by which this $4,700 is to be paid are all instalments of principal, and thus there is no blending of principal and interest; and that the statute applies only to cases where there are periodical payments involving interest and principal combined, but not to cases where a single or definite sum (designated by the appellant as a bonus) is agreed by the mortgagor to be paid for the accommodation afforded. With this he couples the further argument that the mortgagor is estopped by the terms of the mortgage and by its receipt-clause from claiming that the $4,700 is not wholly principal.
>
> Again I would agree but for the statute. Its provisions make it incumbent on the Court, if the issue is raised, to ascertain what in fact was actually the "principal money advanced," and what was the "interest" or compensation to the mortgagee for the advance.

Mais je crois que cette décision ne doit pas faire jurisprudence depuis le jugement rendu par cette Cour dans *London Loan & Savings Co. of Canada* v. *Meagher* (1). Dans cette cause, l'appelant avait prêté la somme de $30,000 avec intérêts au taux de 7½%, mais il avait été convenu qu'en considération de ce prêt, l'appelant recevrait un bonus de $3,000, que l'emprunteur a convenu de payer. L'acte d'hypothèque a été consenti pour la somme de $30,000 sans aucune référence au bonus de $3,000. L'appelant a émis un chèque en faveur de l'intimé pour la somme de $28,505.55, soit $30,000 moins certaines déductions pour les taxes, les primes d'assurance, les frais légaux, et a reçu un chèque de l'intimé pour le bonus de $3,000. L'appelant a poursuivi pour réclamer le bonus de $3,000 et a réussi devant le tribunal de première instance et devant la cour d'appel d'Ontario, mais ce jugement a été renversé par cette Cour, et M. le juge Smith rendant le jugement unanime de la Cour, s'exprima de la façon suivante à la page 382:

> The application of the act therefore must be confined to mortgages that come clearly within the description set out in the act itself.

Et encore à la même page:

> As already pointed out, the $3,000 that the mortgagor agreed to pay as consideration for the loan, *whether he got it as interest or as something different from interest,* could have been recovered as a debt,

(1) [1930] S.C.R. 378.

not under the mortgage, but under the agreement for the loan, and the full $30,000 was advanced, whether the bonus is taken as paid by the mortgagor's cheque or by retention from the loan, unless the act applies.

Et à la page 383, le juge Smith dit encore:

These considerations form an additional reason for confining the application of the act to mortgages coming strictly within the description in section 6. Taking the precise language of this section, it is only where any principal money or interest is, by the mortgage itself, made payable on any of the plans mentioned, that the section applies, the words being "is, *by the same,* made payable on the sinking fund plan," and it is only to mortgages described in the preceding part of the section that the final provision and section 9 apply. The proper conclusion seems to be that the provisions of the statute applied only to mortgages which on their face come within the description set out in section 6.

Dans le cas qui nous occupe, la somme principale ou l'intérêt ou le bonus, n'est pas, par l'acte même, fait payable suivant l'une des méthodes mentionnées au statut et, il s'ensuit qu'il n'y a pas d'illégalité si, avant la création de l'hypothèque, les parties ont convenu de déduire ou de payer d'avance les intérêts et le bonus, et ont stipulé dans l'acte d'hypothèque lui-même qu'aucun intérêt ne sera payable.

L'appel doit donc être rejeté avec dépens.

KERWIN J.:—This appeal involves the construction of section 6 of the *Interest Act,* R.S.C. 1927, chapter 102:

6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

This section was considered by this Court in *London Loan and Savings Co. of Canada* v. *Meagher* (1), where, prior to the execution of a mortgage, it was agreed between lender and borrower that $3,000 should be paid as a bonus for the making of the loan, and the payment was made. This agreement was held to be no part of the mortgage document itself and therefore the principal "secured by mortgage" was not "by the same" made payable in any of the three methods described in the section. That is, the bonus became part of the principal advanced upon which

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the agreed rate of interest was payable as a straight loan. The case of *Singer* v. *Goldhar* (1) was relied upon by the appellant in the present appeal. It was held in *Meagher's* case (2) that the result in *Singer* (1) was not in conflict with the decision announced by this Court but part of the reasoning in *Singer* (1) must be taken to be overruled and therefore those decisions in Ontario which followed the same line of reasoning.

In the case of each loan in question in this appeal, it appears from the evidence that the amount actually deducted was composed of interest and bonus. As to that part representing bonus, the case is concluded by the *Meagher* (2) decision. While it is true that the Court there treated the bonus as interest, there is a great deal to be said for the opinion that the two are entirely distinct, and in view of the fact that Parliament is restricted to legislation in relation to interest, that phase of the matter should be kept in mind. Treating as open the question whether what is undoubtedly interest may be prepaid (or deducted from the amount of the loan), such a prepayment or retention, by a prior agreement of the parties, does not bring the case within the operation of section 6. In construing an enactment by which Parliament sought to remedy an existing evil, the Courts must give it such a reasonable interpretation as will carry out that intention but that intention can only be gathered from the terms of the enactment. The prime requisite for the operation of the section is that, by the terms of the mortgage itself, the principal or interest secured thereby must be payable in one of the methods mentioned. Here, the principal or interest is not so made payable and the result is that there is nothing to prevent the parties to a loan transaction agreeing, prior to the execution of the mortgage, to the deduction or payment in advance of interest for the term of the mortgage and then to provide by the mortgage document that there shall be no interest until default. The effect of such a collateral agreement is that the prepaid interest ceases to be such and becomes part of the principal advanced.

The appeal should be dismissed with costs.

(1) (1924) 55 O.L.R. 267.
(2) [1930] S.C.R. 378.

RAND J.:—I take the facts in this appeal to be these: the parties intended that the respondent should lend and the appellant borrow the sum of $15,000, repayable in two years; that interest should be charged at the rate of 5 per cent per annum on the sum borrowed and in addition a premium or bonus of $1,000 be exacted; and that the interest for the two years so calculated and the premium should be paid in advance by way of deduction from the principal of the loan as in fact they were. The mortgage on its face, agreeably to that intention, declares the sum of $15,000 to be payable as principal without interest until maturity and thereafter at a rate specified, by monthly instalments of $300 for 23 months and the balance at the end of the 24th.

The question of law arising on these facts is whether section 6 of the *Interest Act* prevents what was intended from being done. The section reads:

> 6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

The transaction can be viewed in either of two aspects: first, as a payment over of $15,000 and the return payment by the borrower, whether out of the loan or out of other moneys belonging to him, of the amount intended as interest and premium, effected by the equivalent retention of that sum by the lender; or as a loan only of what ultimately passed from the lender to the borrower, with the difference between that sum and the amount of the obligation of repayment representing interest and premium: two aspects of the same objective facts, one including the intention of the parties as an essential element and the other confining itself to the naked acts themselves.

Interest in its original sense is the consideration for the *use* of money, and strictly considered, the payment of interest in advance necessarily abstracts from the sum, the use of which is intended to be paid for; consequently

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it cannot be said that such a payment is for the use of the whole of the principal sum. If, on the other hand, the deduction is said to be the consideration for the use of what is actually advanced, then that becomes principal, and the rate of interest will vary accordingly. From the standpoint of the lender, the so-called payment in advance reduces somewhat the risk of ultimate recovery of the principal, while exhibiting a lower rate for the same return in interest; and from the standpoint of the borrower, there is a loss of the use of the interest so deducted. The elusive difference between the two views lies in the converse mathematical interpretations to which the facts lend themselves; the basis of the calculation in principal and rate is modified, but the actual advance and the actual amount of interest to be received remain the same.

No doubt under the usury acts, the form which the loan or the consideration for interest might take played little part in the question of the real nature of the bargain. An agreement providing for interest at the maximum rate in advance was illegal *ab initio* regardless of its form; what the Court was concerned to ascertain was the actual loan and the consideration for its use. In the language of Lord Mansfield in *Floyer* v. *Edwards* (1):

> And where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. If the substance is a loan of money, nothing will protect the taking more than 5 per cent.

I think it too late, however, to question acceptance of the notion of interest payable in advance. In *Floyer* v. *Edwards* (1), Lord Mansfield says:

> Upon a nice calculation, it will be found that the practice of the bank in discounting bills exceeds the rate of 5 per cent; for they take interest upon the whole sum for the whole time the bills run, but pay only part of the money, viz., by deducting the interest first; yet this is not usury.

Then, in *Lloyd* v. *Williams* (2), Blackstone J. is reported to have

> conceived that interest may as lawfully be received before-hand for forbearing as after the term is expired for having forborne. And it shall not be reckoned as merely a loan of the balance: else every banker in London who takes 5 per cent for discounting bills would be guilty of usury.

(1) (1774) 98 E.R. 995, at 996.
(2) (1772) 96 E.R. 465, at 466.

Nothing in the French civil law contrary to these views has been suggested. A distinction might be urged between discounting negotiable paper and discounting a loan of money, but in substance the principle as it affects the consideration received is the same.

Now section 6 of the *Interest Act* is not designed to protect a borrower against agreeing to pay any particular rate or amount of interest; in fact, under section 2 of the Act there is complete freedom of action in a contract for interest. The object of section 6 is something quite different. It is that where repayment under a mortgage involves, in the forms mentioned, an increment of interest, it shall be made clear in the mortgage what the amount of the principal and the rate of interest are. Obviously no device to defeat that purpose could be tolerated; but where the transaction is not either on its face or by the real intention of the parties within the section and the borrower is fully aware both of the actual amount of interest which he is paying, and the rate and principal with reference to which that calculation is made, the purpose of the section suffers no infringement. If, on the other hand, by that intention, the payments provided do involve interest within the section, then the form of words used would not ward off the penalties.

This conclusion, I think, follows necessarily from *London Loan & Savings Company of Canada* v. *Meagher* (1). There, a bonus of $3,000 was retained from the loan; as here, the mortgagor knew the amount of principal and of the bonus and the actual agreement as to repayment was as expressed by the instrument; by the preliminary feature of the transaction the "amount advanced" was taken to be the original sum from which the deduction was made, in the conception of which the stipulations of the instrument were made and interpreted. Smith J. treats the mode of dealing with the advance for which Mr. Lajoie argues as "begging the question", which I take as meaning that the case is brought within section 6, where the language itself does not do so, only when the parties intend such terms as that section envisages. Certainly I

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am unable to agree that the validity of the provisions in the instrument depends on whether the advance deduction is described as a "bonus" or "interest".

As no other ground is suggested requiring us to ascribe to the written obligation an interpretation which contradicts its precise form, it must be taken and enforced according to that form. Its terms may, of course, be significant to the operation of other statutes ,but whatever consequences of that sort may follow, it is sufficient here that neither the letter nor the purpose of the *Interest Act* is violated by them.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.—This is an appeal from the Court of King's Bench, Appeal Side, of the province of Quebec, allowing an appeal by the respondent (defendant) from a judgment of the Superior Court.

By a deed of mortgage dated February 27, 1941, Asconi Building Corporation, now in bankruptcy and represented by its trustee the appellant Vermette, mortgaged certain real property in or adjacent to the city of Montreal to the respondent. By the deed the company acknowledged receipt of the sum of $15,000 and covenanted to repay the same in two years from March 1, 1941, by twenty-three consecutive monthly instalments of $300 each and the balance of $8,100 on March 1, 1943, all without interest. There is a provision in the deed that in the event of sale of the premises then the balance outstanding would immediately fall due and be payable. This event in fact happened in the month of April, 1942, and the full balance of the $15,000 then outstanding was paid to the respondent. In this action the company and its trustee seek the recovery of the difference between the sum of $12,500, which was the amount actually paid over to the company at the time of the execution of the deed, and the $15,000. In addition there was claimed a further sum of $2,500, resulting from a similar dealing in respect of a mortgage deed of June 17, 1941, in the sum of $16,000. I shall deal first with the mortgage of February 27, 1941.

The property mortgaged was, at the time of the deed, already heavily encumbered and that situation was prominent in the minds of the parties at the time of the negotiations for the loan. The judgment of the Superior Court proceeded upon the ground that section 6 of the *Interest Act*, R.S.C., cap. 102, applied and accordingly the appellant was entitled to succeed by reason of the provisions of section 9. The majority in the Court of King's Bench were, however, of opinion that the Act had no application.

Section 6 is as follows:

> Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

This section was considered by this court in *London Loan and Savings Co. of Canada* v. *Meagher* (1). In that case the Trans-Canada Theatres Ltd., the mortgagor, had applied to the appellant company for a mortgage loan of $30,000. The loan company agreed to make the loan at 7½ per cent, payable half-yearly, but stipulated that in consideration of the making of the loan, it should receive from the mortgagor a bonus of $3,000, which the mortgagor agreed to pay. The mortgage was dated the 15th of March, 1922, and on its face was for $30,000, with interest at 7½ per cent, but there was no reference to the bonus. The mortgagee issued its cheque to the mortgagor for the amount of the loan of $30,000, less certain expenses which were the obligation of the mortgagor, and took a cheque from the mortgagor for the $3,000 bonus, which last mentioned cheque the mortgagee agreed to hold until its cheque for $30,000 had been forwarded to the mortgagor. The mortgage, after some payments of interest were made, fell into arrear and the mortgagor became insolvent. The mortgagee advertised the property for sale, whereupon the liquidator of the mortgagor paid off the full balance of the

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$30,000 then outstanding with interest without any knowledge of the bonus. He subsequently brought action to recover the $3,000 with interest.

It was held in this court that the action failed. The court was of opinion that (1) the full $30,000 was advanced whether the bonus was to be taken as paid by the mortgagor's cheque or by retention from the loan; (2) the mortgage there in question was not by its terms made payable on any of the plans mentioned in section 6 nor was there anything in the mortgage itself which brought it within the description set out in the section; and (3) the $3,000 agreed to be paid as consideration for the loan, whether regarded as interest or as something different from interest, could have been recovered as a debt, not under the mortgage, but under the agreement for the loan. The court therefore held the Act did not affect the mortgage.

Turning to the provisions of the statute and paraphrasing the section, it provides that whenever any principal or interest secured by a mortgage of real estate is by the terms of the mortgage itself made payable on any of the plans there mentioned, no interest may be recovered on any part of the principal money advanced unless the statement prescribed by the statute is contained in the mortgage.

For the purposes of the question with respect to interest with which it deals, the statute raises the question in every case as to what was in fact "the principal money advanced". In *Meagher's* case (1) the court held that the full face amount of the mortgage, viz., $30,000, had been in fact advanced, and it therefore followed that no part of the $3,000 bonus, even though it were regarded as interest in the sense of compensation for money lent, was interest "secured by" the mortgage and therefore no part of such bonus was included in any payment called for by the mortgage. Hence the statute did not apply.

Turning to the facts of the case at bar, the mortgage deed, considered by itself and without more, shows merely that it was given to secure the sum of $15,000 repayable as already stated. By reason of the statute, however, it is necessary to inquire what was the principal money actually

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advanced. It is objected by the respondent that as this is a matter of evidence the matter is governed by the provisions of article 1234 of the Civil Code and the mortgage deed must be taken as conclusive. However, this article is subject to the provisions of article 1245 C.C., by which a judicial admission is complete proof against the party making it. In his plea the respondent pleads:

> That the loan of February 27, 1941, was in fact of $12,500 which with interest of $1,500 and bonus of $1,000 made the total mentioned in the deed of $15,000 payable by plaintiff to defendant without interest save in event of default.

Had appellant been content to rely upon this plea, then there was nothing else in the case to contradict the facts pleaded that the interest and the bonus were in fact secured by the mortgage. Appellant, however, was not content to rely upon this plea but called evidence to establish that the actual facts were to the contrary. This evidence, in my opinion, establishes that there was an agreement between mortgagor and mortgagee prior to the giving of the mortgage by which, by reason of the nature of the security or lack of it, the mortgagor agreed to pay in advance to the respondent the sum of $1,000 bonus and $1,500 for interest in consideration of the agreement of the respondent to make the loan at all, these amounts to be deducted from the proceeds of the loan, with the result that neither of these amounts was at any time secured by the mortgage deed.

The only evidence put in at the trial was put in on behalf of the appellant. Among the witnesses so called was the respondent who in chief said the following:

> D. En réalité, il n'y avait pas de différence entre l'intérêt et le bonus? c'était tous les deux pour la même chose?
>
> R. Non, non.
>
> D. Comment calculez-vous quinze cents dollars à cinq pour cent?
>
> R. Je vais vous dire: Monsieur Chait a calculé tout cela. C'était tout fait avant de terminer cette affaire-là.
>
> * * * *
>
> D. Pourquoi avez-vous fait une distinction entre les intérêts et le bonus?
>
> R. Pour faire comprendre cela, cela a marché suivant les ordres de monsieur Chait.
>
> D. Le plein montant de deux mille cinq cents dollars était en considération du prêt?
>
> R. Non, non, non. Mille dollars, c'était pour le bonus et quinze cents dollars pour les intérêts.

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D. Mais les deux montants vous étaient payés pour vous faire consentir à faire le prêt?

R. Oui, certainement, certainement.

D. C'était une rémunération qui vous était donnée pour prêter votre argent à la compagnie?

R. Oui, certainement.

* * * *

It is true that the respondent also said at one point that the monthly payments of $300 included both "capital and interest" and at another that they were only capital. In my opinion such answers, and other of like import, directed to an interpretation of the effect of the mortgage deed do not militate against the evidence quoted above and were in fact inadmissible as trenching on the province of the court.

One Asconi, president of the appellant, who acted for the appellant in the negotiations with the respondent, gave the following evidence:

D. Sur quoi vous êtes-vous basé pour donner $1,000 de bonus?

R. C'est pour le bonus. Le bonus, c'était pour avoir l'argent direct de M. Dominic Vocisano.

D. Est-ce lui, M. Vocisano, qui a exigé un bonus de $1,000?

R. Oui, c'est lui.

D. Est-ce le défendeur qui a exigé le bonus et les intérêts pour faire le prêt?

R. Oui.

The appellant also put in evidence the receipt given by the mortgagor to the respondent at the time of the completion of the advance under the mortgage. It reads:

Montreal, February 27, 1941. Received from Dominic Vocisano, cheque of $12,500 being the amount of loan executed today before me, I. R. Lavoie, N.P., less interest and bonus totalling $2,500. Signed: Asconi Building Corporation per Orpheo Asconi.

The document indicates that the "amount of the loan" was the full sum of $15,000 and that the interest and bonus were paid in advance.

In the minutes of its Board of Directors, held on the day on which the mortgage deed is dated, there is the following:

It was moved, seconded and unanimously resolved that the Company do borrow from Dominique Vocisano, the sum of fifteen thousand dollars ($15,000) without interest, interest at the rate of five per cent per annum *being deducted from the principal,* and to repay the said sum as follows.

* * * *

Then follow the terms of the repayment already mentioned and the following:

All overdue instalments shall bear interest at the rate of six per cent (6%) per annum. And that the Company, for the security or repayment of the said sum of *capital and interest* as aforesaid, do hypothecate a certain area of rectangular figure forming part of that lot * * *

The interest here mentioned can only be the 6 per cent. as the interest of $1,500 was to be paid in advance by deduction. The whole $15,000 secured by the mortgage deed was the "capital".

With respect to the second loan of June 17, 1941, no receipt was produced and the minutes of the mortgagor company authorizing the second borrowing do not contain the extracts quoted above relating to the first loan. Otherwise however the considerations relating to the making of both loans are substantially the same and the evidence of the respondent quoted above was expressly with relation to both. The witness Asconi gave the following evidence also with respect to the second loan:

D. Est-ce le défendeur qui a exigé le bonus et les intérêts pour faire le prêt?
R. Oui.

Accordingly, in my opinion, on the above evidence the case, with respect to both loans, is governed by the principle of *Meagher's* case (1). There is no distinction to be drawn between the bonus and the interest paid in advance. Both became debts under the agreement for the loan and neither were at any time secured by the mortgage deed or included in any payment called for therein.

Counsel for the appellant relied upon *Singer* v. *Goldhar* (2). This decision is referred to in *Meagher's* case (1) where Smith J. at p. 385 said that the result reached was not in conflict with the construction placed upon the statute in *Meagher's* case (1). It is also stated on the same page that in *Singer's* case (2) the court was there dealing with a mortgage which had no provision for repayment on any of the plans described in section 6.

In *Singer's* case (2) the mortgage in question was for $4,000, repayable in eleven monthly instalments of $100, the balance to be repaid at the end of twelve months and there was no provision for the paying of interest. In the

(1) [1930] S.C.R. 378.
(2) (1924) 55 O.L.R. 267.

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action, which was one for foreclosure, there was no oral evidence but it was admitted that $3,500 only had been advanced, while $3,800 had been repaid. It was held that the mortgage was satisfied. As in Ontario a mortgagor is not estopped by the terms of the mortgage from showing the actual amount advanced, the decision could have been put on the ground that there was no liability upon the mortgagor beyond the amount actually advanced. This, however, was not the ground of the decision but that the difference between the amount advanced and the face amount of the mortgage was interest and could not be recovered by reason of the statute.

In *Meagher's* case (1) the court was not called upon to decide a case such as was involved in *Singer's* case (2), as in the latter the liability of the mortgagor for bonus could not have been placed upon any basis outside the terms of the mortgage itself. I think therefore that the statement in the judgment with respect to the mortgage in *Singer's* case (2) must be considered as *obiter*. In my opinion it is inconsistent with the actual decision in *Meagher's* case (1).

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Lajoie, Gélinas and MacNaughton.*

Solicitors for the respondent: *Hackett, Mulvena, Hackett and Mitchell.*

(1) [1930] S.C.R. 378.
(2) (1924) 55 O.L.R. 267.

AYLMER M. KEYES (PLAINTIFF).....APPELLANT; 1947

AND *Feb. 10, 11.
*May 13.

THE ROYAL BANK OF CANADA (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Banks and Banking—Bills of Exchange—Postdated cheque—Cheque, dated next day after date of issue, certified by bank by oversight on day of issue, and charged to drawer's account—Drawer countermanding payment at opening of business on day of date of cheque—Claim by drawer against bank for amount of cheque—Circumstances in question—Claims by bank as to true date, as to estoppel, to right of holder in due course—Bills of Exchange Act, R.S.C. 1927, c. 16, ss. 165, 167, 27, 29, 131, 133, 21.

On January 8, 1945, appellant made out and signed a cheque dated January 9, 1945, to M for $2,000 on appellant's savings account with respondent, the Royal Bank of Canada, at Calgary, and also signed his name on the back of the cheque, and presented it, along with an undated deposit slip in M's name, to the teller of the Canadian Bank of Commerce at Calgary, who filled in the date, January 8, on the deposit slip, and did not notice (nor was it drawn to her attention) that the cheque was postdated. The teller, immediately after the deposit, sent the cheque by messenger to the Royal Bank's office where the proper officers, not noticing that it was postdated, certified it and returned it. Later on the same day, M withdrew from her account in the Bank of Commerce (in which account the amount of said cheque had been credited) the sum of $2,000. Appellant, having learned from M on the evening of January 8 that the transaction, to help finance which the cheque was intended, had not gone through, attended, at the opening of business on January 9, at the Royal Bank to stop payment of the cheque, but was told of the certification and that payment could not be stopped. Later the Royal Bank paid the amount of the cheque through the clearing house to the Bank of Commerce. Appellant sued the Royal Bank for said amount of $2,000, claiming that it was improperly charged to his account. The bank claimed that the instrument was a bill of exchange other than a cheque or alternatively that the true date was January 8, and, should it be held that appellant was entitled to countermand, the bank counterclaimed against appellant as endorser; the bank also (by amendment allowed by the Appellate Division, Alta.) pleaded estoppel, and alternatively, that appellant, in breach of duty to the bank, misled or caused to be misled the bank into certifying the cheque on January 8, by reason whereof the bank became entitled to debit appellant's account with the amount of the cheque.

Held (Rand J. dissenting): Appellant was entitled to recover the amount from the respondent bank. (Judgment of the Appellate Division, Alta., [1946] 2 W.W.R. 187, reversed, and judgment at trial, [1946] 1 W.W.R. 65, restored).

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

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Per the Chief Justice and Kerwin J.: The law that a cheque may be countermanded before the time of its payment as designated by its ostensible date, applied in this case. As between appellant and the respondent bank, January 9 was the true date of the cheque. Whether or not appellant, by signing his name on the back of the cheque, became an endorser, the respondent bank could not claim against him as such, as the respondent bank did not become a holder in due course. The plea of estoppel against appellant failed because the employees of the respondent bank who participated in the certification of the cheque did not rely upon appellant's endorsement.

Per Taschereau and Estey J.J.: Appellant was within his rights in asking that the respondent bank stop payment. The certification of the cheque before its date was, as against appellant, invalid. On the evidence, the only reason that the bank certified the cheque was because its employees overlooked the fact that it was postdated; appellant was no party to this, and the essentials to found an estoppel were not present. Even if appellant be regarded as an endorser, yet the respondent bank received the cheque upon the terms of its contractual relationship with appellant, and its relationship is determined on that basis, and the bank could not under the circumstances claim as a holder in due course as against appellant.

Per Rand J., dissenting: Appellant never intended that M should be contractually related to the cheque, that is to say, that she should ever be a party to any legal right or obligation created by its transfer to the Bank of Commerce or any subsequent dealing with it; crediting her account with the proceeds was a matter *dehors* the cheque. The payee was therefore a fictitious person, and under s. 21 of the *Bills of Exchange Act*, the cheque may be treated as payable to bearer; and in any event, appellant was estopped from denying that fictional existence. A cheque can be negotiated before its date; the Bank of Commerce became, therefore, the holder of the cheque with an engagement on appellant's part at least as drawer; and that title was transferred to the respondent bank. Assuming the countermanding to have been effective, the respondent bank was remitted to the rights of a transferee from the Bank of Commerce; and the counterclaim was well founded.

APPEAL by the plaintiff from the judgment of the Supreme Court of Alberta, Appellate Division (1), allowing the appeal of the defendant, the Royal Bank of Canada, from the judgment of H. J. Macdonald J. (2) in favour of the plaintiff for the sum of $2,000, being the amount of a certain postdated cheque drawn by the plaintiff on his account with the said bank and debited by the bank against that account, but which the plaintiff claimed should not have been so debited because he countermanded the cheque before the time at which, according to the cheque, it was payable. Facts giving rise to, and the nature of, the ques-

(1) [1946] 2 W.W.R. 187; [1946] 3 D.L.R. 179.

(2) [1946] 1 W.W.R. 65; [1946] 2 D.L.R. 42.

tions in dispute are stated in the reasons for judgment now reported and are indicated in the above headnote. The bank alleged that the cheque, which was issued on January 8, 1945, but dated January 9, 1945, was in law a bill of exchange other than a cheque, or alternatively that the true date thereof was January 8, 1945. The Bank, should it be held that the plaintiff was lawfully entitled to countermand, counterclaimed for $2,000 against the plaintiff as endorser. The Appellate Division dismissed the action, and also (by the formal judgment) gave leave to the bank to amend its statement of defence and counterclaim by adding certain paragraphs which in effect alleged (1) that the plaintiff was estopped from saying that the cheque was postdated, and (2) alternatively that the plaintiff, in breach of his duty to the bank, misled or caused to be misled the bank into certifying the cheque on January 8, 1945, by reason whereof the bank became entitled to debit the plaintiff's account with the amount of the cheque.

Special leave to appeal to the Supreme Court of Canada was granted to the plaintiff by the Supreme Court of Alberta, Appellate Division.

R. L. Fenerty for the appellant.

J. J. Saucier K.C. for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—The appellant, A. M. Keyes, had a sum of money on deposit in a savings account in the main office, in Calgary, of the respondent, the Royal Bank of Canada. On January 8, 1945, he issued a cheque dated January 9, 1945, to a Mrs. J. I. Mundy on this account for two thousand dollars. At the opening of business on the 9th, he attended at the main office to stop payment of the cheque but found that it had been marked "certified" the previous day. Later, on the 9th, the amount of the cheque was paid through the clearing house to the Canadian Bank of Commerce which had been instrumental on the 8th in having it so marked. If that were all, there would be no difficulty, as the law is clear that, a cheque being merely an order of a customer on his banker to pay a sum

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of money, such order may be countermanded before the time of its payment as designated by its ostensible date. The respondent, however, relies upon the circumstances of the case to void this result and the Appellate Division of the Supreme Court of Alberta agreed with it and, reversing the judgment at the trial, dismissed Keyes' action to recover the two thousand dollars.

The tale commences with the friendship between Keyes and Mrs. Mundy. He had previously given or loaned her several small sums, when she requested a loan of two thousand dollars to help finance the purchase of a tea room in Calgary. The transaction was to be closed on January 8th, and, while Keyes stated at one stage in his evidence that he told Mrs. Mundy he would think over the matter, at another he testified that he said he would deposit the required sum to her credit in the Bank of Commerce where she had a savings account and where he also had an account. Accordingly, on the afternoon of the 8th he attended the proper branch of the latter institution in Calgary and made out and signed the cheque on his account with the main office of the respondent in Calgary for two thousand dollars payable to J. I. Mundy or order, but dated the cheque January 9th. He did this, he explained, because he intended, if the proposed purchase did not materialize, to stop payment of the cheque. He made out an undated deposit slip in Mrs. Mundy's name and endorsed the cheque since, again according to his evidence, that was his custom. He presented the cheque and deposit slip to the teller, who filled in the date, January 8th, on the latter. Keyes asked the teller the present total to the credit of Mrs. Mundy's account including the $2,000, which information the teller declined to give. The teller did not notice that the cheque was post-dated but, in accordance with the Bank of Commerce's custom when dealing with cheques of $1,000 and over, sent this cheque, by messenger, to the Royal Bank's main office, where the latter's proper officers, not noticing the date, marked the cheque "certified" and returned it to the messenger. Later the same afternoon Mrs. Mundy withdrew by a cheque on her account with the Bank of Commerce the sum of $2,000.

That evening Mrs. Mundy telephoned Keyes and asked if he had deposited the two thousand dollars to her account and was told he had. Despite the efforts of the respondent, it was impossible to secure the attendance of Mrs. Mundy at the trial, but it is evident that she must have known that Keyes had deposited the two thousand dollars to her account, as otherwise she had not a sufficient sum to her credit to permit the withdrawal of that amount. During the course of the telephone conversation just mentioned, Keyes asked her if the purchase of the tea room had been completed and was told that it had not. He then decided to stop payment of the cheque and the next morning presented himself at the respondent's main office before the doors were open and gave the necessary instructions. He was told that the cheque had been marked "accepted" the previous day and that nothing could be done about the matter.

Nothing of what transpired was, of course, known to the respondent except that on January 8th the Bank of Commerce presented a cheque dated January 9th drawn by Keyes on his account with the former and that the cheque bore his endorsement as well as his signature as drawer. The cheque was never endorsed by Mrs. Mundy, as it was explained by various witnesses that when a cheque is deposited to the credit of the account of a payee, it is not considered necessary by the banks to insist upon the latter's endorsement. The respondent did not know that the cheque had been deposited by Keyes to Mrs. Mundy's account in the Bank of Commerce.

By section 165 of the *Bills of Exchange Act*, R.S.C. 1927, chapter 16, a cheque is a bill of exchange drawn on a bank, payable on demand, and except as otherwise provided, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque. By section 167, the duty and authority of a bank to pay a cheque drawn on it by its customer are determined by countermand of payment. While some criticism of postdated cheques appear in English textbooks, the practice in this country is well established, and by section 27 of the Act (which applies to cheques) a bill is not invalid by reason only that it is antedated or postdated. The respondent, however, relied upon section 29 of the Act:—

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29. Where a bill or an acceptance, or any endorsement on a bill, is dated, the date shall, unless the contrary is proved, be deemed to be the true date of the drawing, acceptance or endorsement, as the case may be

and argued that it has been shown that the true date of the cheque was January 8th and not January 9th. It is contended that by presenting the cheque on the earlier date to the Bank of Commerce with the request that the two thousand dollars be deposited to Mrs. Mundy's credit, and by inquiring the present total to her credit, the plaintiff must be taken to have meant that the true date of the cheque was the 8th.

It is unnecessary to consider the effect of the actions of the plaintiff as between him and the Bank of Commerce, except to note that it would apparently be held in some jurisdictions that the Bank of Commerce, by obtaining the respondent's certification of the cheque, must be taken to have accepted the latter as its debtor,—since the certification took place, not at the instance of the drawer, but of the holder after the issue of the cheque. Whatever the position might be as between the Bank of Commerce and Keyes, his evidence makes it clear that the 9th was the true date.

As pointed out in Paget on Banking, 4th edition, page 111:—"his [the banker's] business is not to pay it [a cheque] before the ostensible date, that being his customer's intention and direction." On the following page the same author draws attention to the fact that efforts had been made to get out of the difficulty by representing the banker as having purchased the cheque during its currency, and so being holder in due course entitled to sue the drawer. In effect that was another of the arguments advanced by the respondent, but the case of *Da Silva* v. *Fuller* (1) has been accepted for many years as correctly stating the law. In that case a postdated cheque was lost and was paid by the banker on the day before its date and it was held that the banker was not protected and must repay the loser. The case is unreported but it is mentioned in the 6th edition of Bayley on Bills at page 319 and in the 11th edition of Chitty on Bills of Exchange at pages 188 and

(1) (1776) Sel. Ca. 238, MS. Referred to in Bayley on Bills, 6th Ed., 319, and Chitty on Bills of Exchange, 11th Ed., 188, 279.

279. It was also referred to by Baron Parke during the course of the argument in *Morley* v. *Culverwell* (1) at the end of the following statement:—

> The condition of an indorser of a bill payable after date is this, that he is a surety for the payment of it by the acceptor at a particular time and place, on presentment for payment. If the acceptor pays the bill before it is due to a wrong party, he is not discharged. It has been so held in the case of a banker's cheque payable to bearer; if the banker pays it before it is due, he is not protected.

See also Hart's Law of Banking, 4th edition, p. 366, and Halsbury, 2nd edition, vol. 1, pp. 820-821. I agree with the statement in Grant on Banking, 7th edition, p. 67, that the decision of the Supreme Court of Queensland in *Magill* v. *Bank of North Queensland* (2) is in direct conflict with the cases in England. The decision to the contrary, of the Court of Appeal of New Zealand, in *Pollock* v. *Bank of New Zealand* (3) is to be preferred.

It is contended that by signing his name on the back of the cheque, Keyes became an endorser, and reliance is placed upon sections 131 and 133 of the Act. By the former, when a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an endorser to a holder in due course and is subject to all the provisions of the Act respecting endorsers. By the latter, an endorser engages, on due presentment, that the bill shall be accepted and paid according to the tenor and that, if it is dishonoured, he will compensate the holder who is compelled to pay it. The argument fails *in limine* because under the rule mentioned the respondent did not become a holder in due course.

At the suggestion and with the leave of the Appellate Division and notwithstanding the appellant's objection, the respondent amended its defence by pleading estoppel. Accepting the leave of the Appellate Division, the plea fails because the two employees of the respondent who participated in the certification of the cheque did not rely upon the appellant's endorsement. This is clear from the evidence and in fact is admitted in the respondent's factum, although it is argued that that fact could not alter the express provisions of the statute, which, however, for the reasons already given, are not applicable.

(1) (1840) 7 M. & W. 174, at 178.
(2) (1895) 6 Q.L.J.R. 262.
(3) (1901) 20 N.Z.L.R. 174.

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Kerwin J.

The appeal should be allowed and the judgment at the trial restored with costs throughout.

The judgment of Taschereau and Estey, JJ., was delivered by

ESTEY J.—The appellant at Calgary on January 8, 1945, drew a cheque for $2,000 upon the Royal Bank of Canada where he had a savings account, postdating the cheque January 9th and making it payable to J. I. Mundy or order. Mrs. Mundy was negotiating the purchase of a restaurant and appellant had agreed to assist her in the purchase thereof to the extent of $2,000. She had asked that he deposit this to her account in the Canadian Bank of Commerce at Calgary on January 8th. The appellant had an account at the same branch of the Canadian Bank of Commerce and some time in the afternoon of January 8th tendered to the teller of that bank the cheque in question for $2,000 for deposit to the account of Mrs. J. I. Mundy. He did not draw the teller's attention to the fact that the cheque was postdated, nor did the teller notice that fact, but rather accepted it for deposit, and at once the amount thereof was credited to Mrs. Mundy's account. The teller in the course of receiving the cheque endorsed Mrs. Mundy's name thereon, and deposed that this was the usual banking practice. In so doing the bank was acting as agent for its customer, Mrs. J. I. Mundy.

A banker undertakes to do what is in the proper course of a banker's business, and so far differs from an agent who is not a banker.

Bank of England v. *Vagliano Brothers* (1).

Subsequently on the same afternoon Mrs. Mundy drew from her account $2,000. There is no allegation of fraud on the part of the appellant or of collusion between the appellant and Mrs. Mundy.

Immediately the cheque was deposited on January 8th in the Canadian Bank of Commerce it was sent by messenger to the Royal Bank of Canada for certification, where again the postdating was overlooked by the clerks of that bank and the cheque certified.

(1) [1891] A.C. 107, per Lord Selborne at 127.

On the evening of January 8th Mrs. Mundy informed the appellant that negotiations were concluded, at least for the time being, and she was not purchasing the restaurant. As a consequence, immediately the bank opened on January 9th and before the cheque reached the Royal Bank of Canada in the ordinary course of banking, appellant called at that bank and asked that payment of the cheque be stopped, when he was informed that, because it had been certified on the previous day, payment could not be stopped.

The appellant brought this action to recover from the Royal Bank of Canada the sum of $2,000, which he alleges was improperly charged to his account following the certification of the aforementioned cheque.

The Appellate Court in Alberta reversed the judgment of the learned trial judge in favour of the appellant and directed that judgment be entered for the respondent.

The appellant contends that he had a right to stop payment of the cheque on the morning of January 9th, and the respondent that if he had, he was by his own conduct estopped from doing so. The respondent asks judgment on its counterclaim on the basis that the appellant is either an endorser or that it is a holder in due course of the cheque.

The appellant in connection with his savings account received from the Royal Bank of Canada a pass or bank book setting forth "Savings Regulations" paragraph 2 of which reads:

> Funds deposited will be paid only to the depositor in person or upon presentation of his written order.

A cheque is a written order and the law imposes an obligation upon the bank to pay the depositor's cheque according to its tenor if the depositor has funds to the amount thereof at his credit. Halsbury, 2nd Ed., Vol. 1, p. 820:

> A banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose.

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Estey J.

A postdated cheque since 1776 has been accepted as a negotiable instrument. *Da Silva* v. *Fuller* (1); *Emanuel* v. *Robarts* (2).

In Falconbridge on Banking and Bills of Exchange, 5th Ed., p. 553:

> A cheque which is postdated is none the less a cheque, and is therefore payable, without grace, on demand on or after its date; but for some purpose it may be treated as if it were a bill of exchange payable at a future date.

Halsbury, 2nd Ed., Vol. 1, p. 820:

> Postdated cheques are not invalid, but the banker should not pay such a cheque if presented before its ostensible date.

Paget's Law of Banking, 4th Ed., p. 111:

> The real trouble is where a banker inadvertently pays a postdated cheque before the ostensible date. He cannot debit it then, and he must not dishonour cheques presented in the interval up to the ostensible date, which, but for paying the postdated one, he would otherwise have paid.

See also *Pollock* v. *Bank of New Zealand* (3):

The *Bills of Exchange Act*, R.S.C. 1927, chapter 16, section 165:

> A cheque is a bill of exchange drawn on a bank, payable on demand.

Section 27:

> A bill is not invalid by reason only that it
>
> * * *
>
> (*d*) is antedated or postdated, * * *

Bank of Baroda, Ld. v. *Punjab National Bank Ld.* (4). On June 13, 1939, Mitter took to the respondents, Punjab National Bank, Ld., a cheque dated June 20th drawn upon appellant, Bank of Baroda Ld., marked or certified "Marked good for payment on 20.6.39. For the Bank of Baroda, Limited, M. P. Amin, Manager." On June 19th the appellant bank suspended Amin and on the 20th sent notice to the respondent and other banks that his power of attorney was cancelled. Appellant bank refused to pay the cheque on June 20th notwithstanding its having been previously marked. The Appellate Division of the High Court of Calcutta affirmed the judgment at trial in favour of the respondent on the basis that the appellant had, by marking or certifying the cheque, accepted it. The Privy Council

(1) (1776) Sel. Ca. 238 MS. (referred to in Chitty on Bills of Exchange, 11th Ed., p. 188).
(2) (1868) 9 B. & S. 121.
(3) (1901) 20 N.Z.L.R. 174.
(4) [1944] A.C. 176.

reversed this decision on the ground that the ostensible authority of the manager did not extend to cover the certification of postdated cheques and that in the present case the manager had no authority in fact to do so. Lord Wright in delivering the judgment of the Privy Council, stated at p. 187:

> Their Lordships have referred to these matters as tending to support the view that certification is different both in its history and its effects from acceptance, even in jurisdictions in which either by statute or by custom it is declared to be "equivalent" to an acceptance.

Then, after pointing out that a postdated bill is under the English Act, section 13, subsection 2, as in the Canadian *Bills of Exchange Act*, section 27, not invalid by reason only that it is postdated, he continued at p. 193:

> But the material invalidity is that of the certification, taken in connection with the fact that the cheque was postdated. The true anomaly or invalidity consists in the attempt to apply certification to a cheque before it is due. Certification of a cheque when it is due may have operative effect and be valid as being directed to a cheque due in praesenti, such certification being presumably followed by debiting the drawer's account with the amount. This is particularly apparent when regard is had to the American or Canadian theory, that certification is equivalent to payment. It is impossible to treat the cheque as paid before it is due. The position might be different in jurisdictions where by law or custom certification is equivalent to acceptance, but nothing of the sort is applicable here. Even in such cases the difficulty of saying that there was constructive payment would remain. It is not easy to see why novel and anomalous theories should be invented to justify an unusual and unnecessary proceeding. This case can, however, be decided simply and sufficiently on the ground that the ostensible authority of the manager did not extend to cover the certifying of postdated cheques, and that in the present case the manager had no actual authority to do so. The bank accordingly was not bound. This in itself would be a sufficient ground for rejecting the respondent's claim.

It would appear from the foregoing that the Royal Bank of Canada had no ostensible authority to certify the appellant's cheque before its date, nor does the evidence suggest that it had any actual authority from the appellant to do it and, therefore, the certification as against the appellant was invalid.

The *Bills of Exchange Act* does not specifically deal with postdated cheques. A postdated cheque, however, has been accepted as a negotiable instrument and usually as a bill of exchange payable on the date thereof. Even an ordinary cheque has been described by Parke B. as "a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some entirely different." *Ram-*

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churn Mullick v. *Luchmeechund Radakissen* (1). It is a bill of exchange that is also a cheque and possesses the differences which distinguish a bill of exchange from a cheque as enumerated by Lord Wright at p. 184 in *Bank of Baroda, Ld.* v. *Punjab National Bank, Ld.*, (2) and in particular the basic difference that the liability of the drawee of a cheque does not depend upon acceptance by the drawee as in a bill of exchange, but rather upon the contractual relationship between the drawer-depositor and the drawee-bank, under which the obligation of the drawee-bank is to pay the cheque if funds of the drawer are available when it is presented on the date thereof or a reasonable time thereafter.

In *Ex parte Richdale. In re Palmer* (3), it was contended that when the drawer of a postdated cheque received notice that a declaration of bankruptcy had been made with respect to the payee it was his duty to stop payment of the cheque. There the cheque was drawn by the purchasers of a business in favour of the vendor for the balance of the purchase price. It was postdated and, because of the reason given by the appellant in the case at bar, it is interesting to note the reason in that case. The report indicates at p. 410:

> The cheque was postdated the 28th of April, the reason for this being that the licences could not be transferred without a written authority signed by Palmer, and Richdale & Tomlinson wished to be able to stop payment of the cheque in case this authority should not be given.

Palmer was declared a bankrupt on April 27th. It was held that the giving of the cheque was a dealing within the meaning of the *Bankruptcy Act* and that there was no obligation upon the drawers, when they heard of the payee's bankruptcy, to stop payment of the cheque.

In the foregoing case it was contended that the right to countermand should have been exercised. In many cases the countermanding of postdated cheques has taken place and without any suggestion that such a right did not exist in the drawer. See *Union Bank of Canada* v. *Tattersall* (4); *Carpenter* v. *Street* (5); *The Royal Bank of*

(1) (1954) 9 Moo. P.C. 46 at 69.
(2) [1944] A.C. 176.
(3) (1882) 19 Ch. Div. 409.
(4) [1920] 2 W.W.R. 497.
(5) (1890) 6 T.L.R. 410.

Scotland v. *Tottenham* (1); *Westminster Bank Ld.* v. *Hilton* (2). In the latter case the drawer brought an action against the drawee-bank for payment of a postdated cheque after he as drawer had instructed the bank to countermand payment thereof. His instructions to countermand were contained in a telegram in which he gave an incorrect number of the cheque. The plaintiff failed in his action, not because he had not the right to countermand, but because his instructions giving the incorrect number did not cover the cheque in question.

It has been suggested that a postdated cheque is so far a bill of exchange that the provisions relevant to cheques contained in Part 3 of the *Bills of Exchange Act* are not applicable thereto. In referring to a document in the form of a postdated cheque, Mr. Justice Duff (later Chief Justice) stated (in *Leduc* v. *La Banque d'Hochelaga* (3).

> A "cheque" is defined by the *Bills of Exchange Act* (s. 165) as "a bill of exchange drawn on a bank, payable on demand." The order in question, as accepted, is obviously not payable on demand, and consequently is not a cheque within this definition.

These remarks are restricted to section 165. The essential differences between a cheque and a bill of exchange, as already indicated, make it plain that, while it is a bill of exchange for some purposes, it cannot be so regarded for all purposes; in particular the drawee's liability under a cheque is not that of the drawee-acceptor under the *Bills of Exchange Act*. Moreover, because countermanding with respect to postdated cheques has been so long recognized in the courts, it would appear that the provision of section 167 of the *Bills of Exchange Act* in providing for countermanding is merely setting forth the common law with regard thereto.

Section 167:

> The duty and authority of a bank to pay a cheque drawn on it by its customer, are determined by
> (*a*) countermand of payment;

It follows that the appellant on January 9th, before the Royal Bank of Canada made payment of the cheque, was within his rights in asking that the bank stop payment of his cheque in favour of Mrs. Mundy.

(1) [1894] 2 Q.B. 715.
(2) (1927) 136 L.T.R. 315.
(3) [1926] S.C.R. 76, at 78.

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It was further contended that the appellant was estopped from denying that in reality the cheque was dated January 8th, because by his conduct he detracted the attention or in some way prevented the teller from noticing the post-dating. It is true that he did not draw to the attention of the teller of the Canadian Bank of Commerce the fact that his cheque was postdated. It is important to note that the positions of the Royal Bank of Canada and that of the Canadian Bank of Commerce are in their respective relations to the appellant entirely different and that in this action we are concerned only with the relationship which exists between the appellant and the Royal Bank of Canada. Apart from the question raised in the counterclaim as to the drawer being an endorser and the Royal Bank of Canada becoming a holder in due course, which will be dealt with later, the position as between the appellant and the respondent bank is as stated by Lord Atkinson in *Westminster Bank Ltd.* v. *Hilton* (1):

> It is well established that the normal relation between a banker and his customer is that of debtor and creditor, but it is equally well established that *quoad* the drawing and payment of the customer's cheques as against money of the customer's in the banker's hands the relation is that of principal and agent. The cheque is an order of the principal's addressed to the agent to pay out of the principal's money in the agent's hands the amount of the cheque to the payee thereof.

The foregoing indicates the relationship between the appellant and the Royal Bank of Canada, while the Canadian Bank of Commerce, in receiving the cheque for deposit, derives its rights through the negotiating of the cheque. *The Royal Bank of Scotland* v. *Tottenham* (2). It would seem that the positions of the two banks with respect to the appellant are entirely different.

The appellant in tendering for deposit to Mrs. Mundy's account his cheque to the Canadian Bank of Commerce was negotiating a postdated cheque. While certain dangers incident to the practice of issuing postdated cheques have been from time to time emphasized, these cheques are nevertheless recognized in law as valid negotiable instruments, and the Canadian Bank of Commerce became at least a holder for value in receiving the cheque as it did. *The Royal Bank of Scotland* v. *Tottenham* (2). There is no allegation of fraud on the part of the appellant or of

(1) (1927) 136 L.T.R. 315, at 317. (2) [1894] 2 Q.B. 715.

collusion between the appellant and Mrs. Mundy, and no evidence that he had any intention to deceive or mislead the Canadian Bank of Commerce, nor circumstances deposed to which would justify such an inference. If Mrs. Mundy had purchased the restaurant, the cheque was to be used to assist her. The record does not suggest that the appellant had any intimation that Mrs. Mundy would use the funds for any other purpose. Without that act on her part it is probable that, in spite of the fact that the postdating was overlooked by employees of both banks, this litigation would never have developed.

Whatever took place between the Canadian Bank of Commerce and the appellant, it is clear upon the evidence that the only reason the Royal Bank of Canada certified this cheque was because its employees overlooked the fact that the cheque was postdated. The appellant was no party to this, and, with great deference for the opinion of the learned judges in the Appellate Court, it would appear that the essentials to found an estoppel as set forth in *Greenwood* v. *Martins Bank* (1), are not present in this case.

The respondent by its counterclaim asks judgment against the appellant either because he is an endorser or, alternatively, that it is a holder in due course of the cheque from the Canadian Bank of Commerce. When asked why he had put his name on the back of the cheque, appellant replied: "Well, just, there are lots of cheques that I put my signature on the back of them, just as a matter of form." Even if the signature of the appellant so placed on the back of the cheque be deemed an endorsement under section 131 of the *Bills of Exchange Act*, his liability therefor is determined by section 133. That section provides that "the endorser of a bill * * * engages that on due presentment it shall be accepted and paid according to its tenor." This being a cheque, the respondent's duty was to honour it by payment according to its tenor. Before it was ever received by the bank on January 9th, the appellant had instructed the bank to countermand payment. The bank at that time was under a duty to

(1) [1933] A.C. 51.

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carry out his instructions. Even if, therefore, the appellant be regarded as an endorser, the respondent under these circumstances cannot succeed.

The respondent received the cheque, as already stated, upon the terms of its contractual relationship with its depositor and its relationship is determined on that basis, and it cannot under the circumstances claim as a holder in due course as against its principal-drawer.

The appeal should be allowed with costs throughout and the judgment of the learned trial judge restored.

RAND J. (dissenting)—The facts of this controversy are not in dispute. The appellant Keyes drew a cheque for $2,000 dated at Calgary the 9th day of January, 1945, on the respondent, the Royal Bank, purporting to be payable to the order of a woman named J. I. Mundy. On January 8th, he presented this cheque, endorsed by himself, but not by the payee and unknown to her, together with a deposit slip in her name, signed by him, to the Canadian Bank of Commerce, with the request that the amount be deposited to the credit of her account, and this was done. On the same day, the cheque was certified by the Royal Bank. Early next morning the appellant appeared at the Royal Bank and countermanded payment; but the respondent, observing its acceptance of the cheque, declined to accept the countermand and debited his account on that day, following the usual clearing house settlement.

The money was intended to be advanced to Mrs. Mundy to enable her to purchase a business, and it may have been in Keyes' mind to countermand if the contemplated transaction did not go through. Later in the day of January 8th, Mrs. Mundy drew a cheque on her account for the $2,000 which was paid to her; but she did not proceed with the purchase.

The action was brought to recover the amount represented by the cheque from the Royal Bank on the ground that the acceptance before its date was unwarranted, and that the countermand was effective; and the trial court upheld this contention. A counterclaim on the footing that the Royal Bank was a holder for value was dismissed. On appeal, that judgment was reversed. Harvey, C.J.A.,

with whom Macdonald, J.A., concurred, took the view that by his conduct the appellant was estopped from denying that the effective date of the cheque was January 8th; Ford, J.A., seems rather to put it on the ground that in the circumstances he had disabled himself from countermanding its payment; Parlee, J.A., adds that the negotiation on the 8th of January justified the Royal Bank in certifying the cheque before the day on which it was to become payable.

I do not find it necessary to deal with any of these grounds. It is unquestioned that, although the name shown as that of the payee was of the name of a known person, it was never intended by the drawer that Mrs. Mundy should be contractually related to the cheque, that is to say, that she should ever be a party to any legal right or obligation created by its transfer to the Bank of Commerce or any subsequent dealing with it: crediting her account with the proceeds was a matter *dehors* the cheque. The payee was therefore a fictitious person, and under section 21 of the *Bills of Exchange Act* the cheque may be treated as payable to bearer: *Vagliano Brothers* v. *Bank of England* (1); and in any event, the appellant is estopped from denying that fictional existence. That a cheque can be negotiated before its date is unquestioned: *Royal Bank of Scotland* v. *Tottenham* (2); *Union Bank* v. *Tattersall* (3). The Bank of Commerce became, therefore, the holder of the cheque with an engagement on the part of Keyes at least as drawer; and that title was transferred to the respondent. Even treating the acceptance as equivalent to payment, the case would be within the language of Parke B. in *Morley* v. *Culverwell* (4):

> E.R. 727.
>
> I am of opinion that nothing will discharge the acceptor or the drawer, except payment according to the law merchant—that is, payment of the bill at maturity: if a party pays it before, he purchases it, and is in the same situation as if he had discounted it.

Assuming, therefore, the countermand to have been effective, the Royal Bank is remitted to the rights of a transferee from the Bank of Commerce; and as no defence has been

(1) (1889) 23 Q.B.D. 243.
(2) [1894] 2 Q.B. 715.
(3) (1920) 52 D.L.R. 409.
(4) (1840) 7 M. & W. 174; 151

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suggested available to the respondent on the original negotiation to the latter bank, or the withdrawal by Mrs. Mundy, the whole of the facts surrounding which are before the court, the counterclaim is well founded.

I would, therefore, dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Fenerty, Fenerty & McGillivray.*

Solicitors for the respondent: *Hannah, Nolan, Chambers, Might & Saucier.*

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*Oct. 15, 16, 17, 18, 21.

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*May 13.

IN THE MATTER OF A REFERENCE AS TO THE VALIDITY OF SECTION 6 OF THE FARM SECURITY ACT, 1944, OF THE PROVINCE OF SASKATCHEWAN.

Constitutional law—Statute—Section 6 of the Farm Security Act of Saskatchewan—"Crop failure"—Period of suspension—No payment of principal—Principal, falling due during period, automatically postponed —Principal outstanding on 15th of September automatically reduced —Interest continuing to be payable as if principal had not been so reduced—Whether section 6 ultra vires of the legislature—"Interest" —"Bankruptcy and Insolvency"—"Agriculture"—Civil rights—Whether Section 6 affects Dominion Crown or its agencies—Provincial Mediation Board—Not exercising powers of a court, but fulfilling administrative functions—B.N.A. Act, sections 91 (19), 92 (13), 95, 96, 99, 100—Interest Act, R.S.C. 1927, c. 102—Farm Security Act, Sask. S., 1944, c. 30, as amended by Sask. S., 1945, c. 28, s. 2.

Section 6 of the *Farm Security Act 1944* (Saskatchewan) enacts *inter alia* that, when there is in the Province a "crop failure", as defined in the Act, then "the mortgagor or the purchaser" of a farm "shall not be required to make any payment of principal to the mortgagee or vendor during the period of suspension" and any "principal outstanding" on the fifteenth day of September in the period of suspension shall on that date become automatically reduced by four per cent * * * provided that notwithstanding such reduction interest shall continue to be chargeable, payable and recoverable as if the principal had not been so reduced."

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

REPORTER'S NOTE:—No reasons for judgment from Mr. Justice Hudson, as he died before delivery of judgment.

Held, Taschereau J. dissenting, that section 6 is wholly *ultra vires* the Legislative Assembly of the province of Saskatchewan. This enactment is legislation in relation to "interest" and such legislation is within the exclusive legislative jurisdiction of the Dominion Parliament under head 19 of section 91 of the *British North America Act.*

Per Taschereau J. (dissenting): Provisions of section 6 were competently enacted by the Legislature. Legislation to relieve farmers of financial difficulties and to lighten the burdens resulting from the uncertainties of farming operations is legislation in relation to "agriculture" (s. 95 B.N.A. Act.)—Also, the clauses contained in that section are dealing with the civil rights of the vendor or of the mortgagor (s. 92 (13) B.N.A. Act)—Moreover, in enacting the Act, the legislature was entering the field of contracts, and the legislature has power to insert in a private contract a statutory clause which affects the civil rights of one or both parties who contract, even if the rights of the parties are modified or totally destroyed.—The *Farm Security Act* is therefore in pith and substance a law relating to agriculture and civil rights and its constitutionality cannot be successfully challenged merely because it may incidentally affect "interest".

Per Taschereau J.—But the Act, and specially section 8, must be construed as not affecting the Crown in right of the Dominion or any of its agencies holding mortgages in the Province.

Per Taschereau J.—The Provincial Legislature, in creating the Provincial Mediation Board, did not confer to it the powers of a court, thereby infringing upon the prerogatives of the Dominion. The Board does not fulfil "judicial" or "quasi-judicial" but solely "administrative" functions.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 3f) of the questions contained in the Order in Council now recited:

"Whereas the Legislative Assembly of Saskatchewan at its second session in the calendar year 1944 enacted a statute entitled *An Act for the Protection of certain Mortgagors, Purchasers and Lessees of Farm Land* being Chapter 30 of the aforesaid second session and bearing the short title *The Farm Security Act, 1944;*

"And whereas section 6 of the said statute provides, amongst other things, for the automatic reduction, in the year of a crop failure, as defined, in the principal indebtedness of a mortgagor or purchaser by 4% or by the same percentage as that at which interest accrues on the principal debt whichever is the greater;

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"And whereas section 6 aforesaid was amended by the Legislative Assembly at its session in the calendar year 1945 by Chapter 28 of the statutes of that session;

"And whereas questions have been raised as to whether the Legislative Assembly has legislative jurisdiction to enact the provisions of section 6 aforesaid as amended;

"And whereas questions have also been raised as to the operative effect of section 6 aforesaid in the case of mortgages

(*a*) securing loans made by His Majesty in right of Canada either alone or jointly with any other person under the *National Housing Act, 1944,* or otherwise;

(*b*) securing loans made by the Canadian Farm Loan Board;

(*c*) assigned to the Central Mortgage and Housing Corporation.

"And whereas the Minister of Justice is of opinion that the same are important questions of law touching the constitutionality and interpretation of this provincial legislation;

"Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to the provisions of section 55 of the *Supreme Court Act,* is pleased to refer and doth hereby refer the following questions to the Supreme Court of Canada for hearing and consideration:

1. "Is section 6 of the *Farm Security Act, 1944,* being Chapter 30 of the Statutes of Saskatchewan 1944 (second session) as amended by section 2 of Chapter 28 of the Statutes of Saskatchewan, 1945, or any of the provisions thereof *ultra vires* of the Legislative Assembly of Saskatchewan either in whole or in part and if so in what particular or particulars and to what extent?"

2. "If the said section 6 is not *ultra vires,* is it operative according to its terms in the case of mortgages

(*a*) securing loans made by His Majesty in right of Canada either alone or jointly with any other person under the *National Housing Act, 1944,* or otherwise;

(*b*) securing loans made by the Canadian Farm Loan Board; or

(*c*) assigned to the Central Mortgage and Housing Corporation."

(Sgd.) A. D. P. Heeney,
Clerk of the Privy Council.

J. L. Ralston K.C. and *D. W. Mundell* for the Attorney-General for Canada.

Ives Prévost K.C. for the Attorney-General for Quebec.

G. W. Mason K.C., M. C. Shumiatcher and *R. S. Meldrum* for the Attorney-General for Saskatchewan.

H. J. Wilson K.C. for the Attorney-General for Alberta.

C. F. Carson K.C. and *L. S. Goodenough* for The Dominion Mortgage and Investments Association.

The judgment of The Chief Justice and Kerwin J. was delivered by

KERWIN J.:—The validity of section 6 of the *Farm Security Act* was attacked on several grounds and, on the other hand, its constitutionality was affirmed under various provisions of the *British North America Act*. One of the grounds of attack was that section 6 was in relation to interest, which is head 19 of section 91 of the B.N.A. Act, and that is the only point that I find it necessary to consider.

In the factum of counsel for the Attorney-General of Saskatchewan it is stated:—

> The pith and substance of the legislation is agricultural security and the reduction of unavoidable risks to individual farmers by a spreading of such risks as exist between both farmers and their creditors, and eventually perhaps, among the provincial population as a whole.

It may be taken that this is the object of the legislation but when one considers what the legislature is doing by subsection 2 of section 6 of the Act, which is the important provision, it seems plain that the pith and substance of the Act is interest. If, according to the other provisions, a mortgagor or a purchaser under an agreement of sale,

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of farm land in Saskatchewan, is able to realize, due to causes beyond his control, from the crops on the land a sum less than a sum equal to $6.00 per acre sown to grain in any one year on such land, then there is a crop failure within the meaning of the Act. If this event happens, the mortgage or agreement of sale is deemed to contain the condition that (1) the mortgagor or purchaser shall not be required to make any payment of principal during the period of suspension,—which by definition means the period commencing August 1st in the year of a crop failure and ending on July 31st in the next succeeding year; (2) any principal falling due during the period of suspension and any principal which thereafter falls due shall become automatically postponed for one year; (3) the principal outstanding on the fifteenth day of September in the period of suspension shall on that date become automatically reduced by four per centum thereof or by the same percentage thereof as that at which interest will accrue immediately after the said date on the principal then outstanding, whichever percentage is the greater; provided that, notwithstanding such reduction, interest shall continue to be chargeable, payable and recoverable as if the principal had not been so reduced.

As to (3), it was stated and not denied that all mortgages, or agreements of sale of land in Saskatchewan, practically without exception, bear interest at a rate greater than four per centum per annum. The effect, therefore, of (3) is that while the mortgage or agreement will be reduced by the amount of interest for the period of suspension, according to the proviso, the same amount of interest shall continue to be paid as if the principal had not been so reduced. It is not important to resolve the dispute between counsel as to exactly how this third limb of the condition would operate in various cases but two things are clear. One is that the interest for the period of suspension is cancelled, and the other is that the same amount of interest is payable, thereby effecting in substance a payment of interest in the future at a rate higher than that agreed upon. Legislation reducing the rate of interest payable under a contract is legislation in relation

to interest: *Board of Trustees of Lethbridge Northern Irrigation District* v. *Independent Order of Foresters* (1) and the legislation here in question is definitely in relation to interest.

Once that conclusion is reached, the decision in *Ladore* v. *Bennett* (2), so greatly relied on, can have no application. As was pointed out in the *Lethbridge* case (1), the legislation in question in *Ladore* v. *Bennett* (2) and also that in *Day* v. *Victoria* (3), was legislation in relation to a matter within section 92 of the B.N.A. Act, and any provisions with regard to interest were incidental. In the present case the provisions as to interest are the very warp and woof of the enactment. It is impossible to sever these from the remainder of the Act, and in my opinion, therefore, section 6 is wholly *ultra vires* the Legislative Assembly of Saskatchewan. This renders it unnecessary to answer the second question.

TASCHEREAU J.—By an Order in Council of the 14th of May, 1946, being P.C. 1921, His Excellency the Governor General in Council referred to this Court for hearing and consideration, pursuant to the authority of section 55 of the *Supreme Court Act*, the following questions:—

1. In section 6 of *The Farm Security Act*, 1944, being chapter 30 of the statutes of Saskatchewan 1944 (second session) as amended by section 2 of chapter 28 of the statutes of Saskatchewan, 1945, or any of the provisions thereof *ultra vires* of the Legislative Assembly of Saskatchewan either in whole or in part and if so in what particular or particulars and to what extent?

2. If the said section 6 is not *ultra vires*, is it operative according to its terms in the case of mortgages

(*a*) securing loans made by His Majesty in right of Canada either alone or jointly with any other person under *The National Housing Act*, 1944, or otherwise;

(*b*) securing loans made by the Canadian Farm Loan Board; or

(*c*) assigned to the Central Mortgage and Housing Corporation.

The Attorney General of Canada and the Dominion Mortgage and Investment Association submitted that this section, which is not severable from the rest of the Act, is *ultra vires* of the powers of the province of Saskatchewan, while the Attorney General of Alberta supported the view of the Attorney General of Saskatchewan, that the legisla-

(1) [1940] A.C. 513.
(2) [1939] A.C. 468.
(3) [1938] 3 W.W.R. 161

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tion is within the powers of the province. The Attorney General of Quebec asked the Court to make certain reservations if the Act were declared *ultra vires.*

This Act is challenged on the ground that it deals with interest, bankruptcy and insolvency which are within the exclusive legislative jurisdiction of the Dominion Parliament. It is also said that if the subject matter of section 6 were to be regarded as merely ancillary to legislation relating to Bankruptcy and Insolvency, the Provincial Legislature of Saskatchewan is nevertheless precluded from entering that field, because it is claimed that it is now occupied by the Dominion. It is further submitted that it is inconsistent with sections 96, 99 and 100 of the *British North America Act,* in that it confers the powers of a Court on a body not competently constituted to exercise such powers. As to question two, the contention of the Attorney General of Canada is that the Central Mortgage and Housing Corporation and the Canadian Farm Loan Board are agents of the Crown, and that the mortgages they hold, being vested in the Crown, cannot be affected by Provincial Legislation.

The section of the Act which is challenged enacts that when there is in the Province a "crop failure", as defined in the Act, then, the mortgagor or the purchaser of a farm shall not be required to make any payment of principal to the mortgagee or to the vendor, during the period of "suspension", and any principal outstanding on the 15th day of September, in the period of suspension, shall become automatically reduced by four per cent. but, *interest* shall continue to be chargeable, payable and recoverable, as if the principal had not been reduced. If the mortgagee and mortgagor or the vendor and purchaser do not agree as to whether or not there has been a "crop failure" in any year, either party may apply to the Provincial Mediation Board appointed by the provincial authorities which, after hearing both parties, determines whether or not there has been a "crop failure" in the year in question.

It is claimed by the Attorney General of Alberta that the Act is in pith and substance legislation in relation to

farm security in the province, as it affects farmers and the farming industry, a subject well within the powers of the Provincial Legislation.

Under the B.N.A. Act, "agriculture in the Province" is a matter on which Provincial Legislation may competently be enacted. The unambiguous terms of section 95 can leave no doubt. It reads as follows:

95. In each Province the Legislature may make laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

Agriculture is undoubtedly the main industry in Saskatchewan, and it is by far the principal source of revenue of its inhabitants. We have been told that from 1920 to 1943, the total estimated gross cash income to farmers of the province was $4,303,000,000 of which $3,006,000,000 was from wheat. This income is, of course, subject to wide fluctuations; and precipitation, pests, rust and weeds, and various other hazards of production, are variable factors which, to a very large extent, affect the revenues of the farmers. It has been submitted that the spreading of the risk more equitably between the mortgagor and mortgagee and between the vendor and the purchaser, in an effort to mitigate against these hardships, is a matter pertinent to the agricultural industry in Saskatchewan.

The word "agriculture" must be interpreted in its widest meaning, and ought not to be confined to such a narrow definition, that would allow the province to enact legislation, pertaining only, as Morrison J. said in *Brooks* v. *Moore* (1) "to those things that grow and derive their substance from the soil." I am strongly of opinion that legislation to relieve the farmers of financial difficulties, to lighten the burdens resulting from the uncertainties of farming operations, is legislation in relation to agriculture.

As it has often been said, it is the true nature and character of the legislation that has to be found in order

(1) (1906) 4 W.L.R. 110.

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to ascertain the class of subject to which it belongs. (*Russell* v. *The Queen*, (1); *Gallagher* v. *Lyon* (2)).

The same principle has also been reaffirmed by the Judicial Committee in *Shannon et al* v. *Lower Mainland Dairy Products Board, and the Attorney General for British Columbia* (3). (*Vide* also *Home Oil Distributors Limited and Attorney-General of British Columbia*, (4)).

I have reached the conclusion that this legislation, being a legislation enacted for the purpose of dealing with agricultural matters within the province of Saskatchewan, is legislation *in pith and substance* in relation to agriculture and that it was, therefore, competently enacted by the province of Saskatchewan.

Section 95 of the B.N.A. Act gives also power to the Parliament of Canada to make laws in relation to agriculture in all or any of the provinces, and it is only when the laws enacted by the province are repugnant to any Act of the Parliament of Canada, that they cease to have effect in and for the province. Here, the subject matter covered by the *Farm Security Act* is the only of its kind, and no federal legislation having been enacted, it results that the field is clear and that this law cannot be repugnant to any federal legislation. In order to avoid any possibility of encroachment, it is stated in the law that section 6, which is the impeached one, shall not apply to a mortgagor or purchaser:

(*a*) whose property is deemed to be under the authority of the court pursuant to subsection (1) of section 10 of *The Farmers' Creditors Arrangement Act, 1943*, (Canada);

(*b*) whose affairs have been arranged by and are subject to a composition, extension of time or scheme of arrangement approved by the court or confirmed by the Board of Review under *The Farmers' Creditors Arrangement Act, 1934*, (Canada) or approved or confirmed by the court under *The Farmers' Creditors Arrangement Act, 1943*, (Canada); or

(*c*) whose affairs have been so arranged and where the composition, extension of time or scheme of arrangement has been annulled pursuant to either of the said Acts.

It has been further submitted by the Attorney General of Saskatchewan that this legislation also relates to property and civil rights in the province, a subject within the competency of the Provincial Legislature. In its efforts to equalize the risks between the vendor and purchaser

(1) (1882) 7 A.C. 829.
(2) [1937] A.C. 869.
(3) [1938] A.C. 708, at 720 and 721.
(4) [1940] S.C.R. 444.

and the mortgagor and mortgagee in a period of crop failure, the Legislature has enacted that during such a period the purchaser or the mortgagor shall not be required to make any payment of principal to the mortgagee or to the vendor, and that during the period of suspension, the capital shall become automatically reduced by four per cent. These clauses, which are deemed to be incorporated in every agreement of sale notwithstanding anything to the contrary, unquestionably deal with the civil rights of the vendor or of the mortgagor.

The courts are not concerned with the wisdom of the legislation, but must apply the laws as they stand. In granting a period of suspension or a reduction of the principal of a civil debt, the Legislature of Saskatchewan legislates obviously on a civil subject matter which, under section 92 (13), is of a local and provincial nature. A civil debt is founded on some contract alleged to have taken place between the parties, or on some matter of fact from which the law would imply a contract between them. If the debt is not paid, an action lies to enforce the claim, and as it is within the powers of the Provincial Legislature to authorize the necessary action for the enforcement of the claim, it is also well within the same powers to suspend, reduce or extinguish it entirely. On such matters, the sovereignty of the Provincial Legislature cannot be challenged.

In enacting the *Farm Security Act*, the Legislature of Saskatchewan was dealing with agreements of sale and mortgages, and therefore was entering the field of contracts. In *Citizens Insurance Co.* v. *Parson* (1), Sir Montague Smith said at page 110:

> The words "civil rights and property" are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in express terms in any of the enumerated classes of subjects in section 91.

And at page 111, referring to the Quebec Act (14 Geo. III, chap. 83), he stated:

> In this statute, the words "property and civil rights" are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion (The B.N.A. Act) they are used in a different and narrower one.

(1) (1881) 7 A.C. 96.

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The well known "insurance cases" may be referred to in connection with the interpretation which has been given to s.s. 13 of section 92. In *Attorney General for Canada* v. *Attorney General for Alberta* (1); *Attorney General for Ontario* v. *Reciprocal Insurers* (2); and *In Re Insurance Act of Canada* (3), the Judicial Committee dealt with the power of the Dominion Parliament to license and control the activities of the Insurance Companies. It was held that this type of legislation could not be supported under the Dominion law to legislate over "Trade and Commerce", or "Criminal Law", or under any other of the enumerated or residuary provisions of section 91, because the legislation remained directly related to civil contracts and trenched upon the provincial power to legislate over "property and civil rights in the Province".

I know of no authority which prevents the Legislature to insert in a private contract a statutory clause which affects the civil rights of one or both parties to the contract, even if the rights of the parties are modified or totally destroyed.

It has been submitted that section 6 invades the federal field and is, therefore, *ultra vires* of the powers of the province, because it contains a clause which is to the effect that during the suspension period or after the reduction in capital, as the case may be, the interest will continue to run as if no suspension or reduction in capital had been made.

The clause is as follows:

> Notwithstanding such reduction, interest shall continue to be chargeable, payable and recoverable as if the principal had not been so reduced.

There is no doubt that under section 91 of the *British North America Act*, subsection 19, "interest" is a matter on which the Parliament of Canada only may properly legislate, and it is obviously in order to prevent any attack on that ground that the clause was inserted by the Legislature of Saskatchewan. But, with the clause as it stands, it is said that when the principal oustanding is automatically reduced, interest continues to be chargeable,

(1) [1916] 1 A.C. 488.
(2) [1924] A.C. 328.
(3) [1932] A.C. 41.

payable and recoverable on a principal which is not existent. It results that there is an increased rate on the amount of principal actually outstanding.

The answer to this objection is, that the Act is in pith and substance a law relating to agriculture and civil rights, and, if interest is affected, it is only incidentally. The Act is not directed to interest. Its main purpose and object is to assist farmers in times of distress by redrafting a civil contract, as a result of which their losses, due to a fortuitous event or an act of God, are shared partly with their mortgagees or vendors. If, as a consequence of this legal intervention of the Provincial Legislature in the contractual relations between two individuals, interest is incidentally affected, it remains nevertheless that the law is valid and not impeachable.

I think that this point has been definitely settled since the judgment of the Privy Council in *Ladore* v. *Bennett* (1). In that case, several municipalities of Ontario had failed to meet their debentures or interests, and were amalgamated together. The Ontario Municipal Board accepted a scheme which had been formulated for funding and refunding the debts of the amalgamated municipalities, under which former creditors of the old independent municipalities, received debentures of the new city of equal nominal amount to those formerly held, but with the interest scaled down in various classes of debentures. It was argued that the relevant statutes adopted by the Ontario Legislature were *ultra vires* because they invaded the field of "interest". It was held by the Judicial Committee that the *pith and substance* of the Ontario Acts were in relation to "municipal institutions in the Province" and that interest was affected only incidentally. The Acts were held valid.

In 1938, the Court of Appeal of British Columbia in *Day* v. *City of Victoria* (2), had reached a similar conclusion, and in the *Lethbridge* case (3), the *Day* v. *Victoria* case (2) was approved by the Privy Council.

In the *Lethbridge* case (3), it was held that the legislations adopted by the Provincial Government of Alberta,

(1) [1939] A.C. 468.
(2) [1938] 3 W.W.R. 161.
(3) [1940] A.C. 513.

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which purported to reduce by one-half the interest on certain securities guaranteed by the province, and the interest payable on securities issued by the province, were *ultra vires* of the powers of the province of Alberta; it was held that these legislations were in pith and substance in relation to interest. Their sole object was to reduce the rate. But, the principles enunciated in *Ladore* v. *Bennett* (1), were reaffirmed, and it is for the sole reason given above that the acts were declared to be without the powers of the Provincial Legislature.

Having come to the conclusion that the Act which is now under attack is in pith and substance and that its true character is in relation to agriculture, it naturally follows that its constitutionality cannot be successfully challenged merely because it may incidentally affect interest.

It has also been submitted that the Act is invalid because it invades the fields of "bankruptcy or insolvency" within the meaning of head 21 of section 91 of the B.N.A. Act. The short answer to this contention is that the Act does not even deal incidentally with insolvency or bankruptcy, if the meaning of these terms are properly understood. Its purpose is not, when there is a crop failure, to make a final distribution of the assets of the mortgagor or of the purchaser in the general interest of the creditors, or to make a compromise of any kind which would have the characteristics of bankruptcy or insolvency. Independently of the solvency or insolvency of the mortgagor or purchaser the Act merely purports to deal with a civil debt. It is the participation between two private individuals in a loss, which otherwise would be the sole burden of the mortgagor or purchaser, which lies at the very root of this legislation. (*Union St-Joseph* v. *Belisle*, (2); *Attorney General of Ontario* v. *Attorney General of Canada*, (3)).

With further contention that the impugned legislation confers the powers of a court not competently constituted to exercise such powers, cannot I think, be accepted. The only function of the Board is merely to decide whether

(1) [1939] A.C. 468.
(2) (1874) L.R. 6 P.C. 31.
(3) [1894] A.C. 189.

there has been or not a crop failure, and if it is found that such a condition exists, the rights and obligations of the parties then arise from the statute itself. No declaration of the rights of the parties is made by the Board, and I am therefore quite satisfied that it does not fulfil "judicial" or "quasi judicial" functions. (*Shell Co. of Australia* v. *Federal Commissioners of Taxation,* (1); *Haddart Parker & Co.* v. *Moorehead,* (2)).

I may also refer to the case of *The Attorney General of Quebec* v. *Slamac & Grimstead et al,* (3) in which the constitutionality of the *Workmen's Compensation Act* of Quebec was attacked. It was alleged that this Act was unconstitutional, *ultra vires* and void because it made the Commission a real tribunal conferring upon it a civil jurisdiction belonging to Superior and County Court judges of each province. The court of appeal of the province of Quebec held that the functions of the Commissioners were administrative and not judicial.

The Board must of course act "judicially" in the sense that it must act fairly and impartially, but this does not mean that its members are anything more than mere administrative officers in the performance of their duties. (*Saint-John* v. *Fraser,* (4)).

The second question submitted and which has now to be determined is the following:

(2) If the said section 6 is not *ultra vires,* is it operative according to its terms in the case of mortgages

(*a*) securing loans made by His Majesty in right of Canada either alone or jointly with any other person under *The National Housing Act,* 1944, or otherwise;

(*b*) securing loans made by *The Canadian Farm Loan Board,* or

(*c*) assigned to The Central Mortgage and Housing Corporation.

The *Farm Security Act* contains clause 8 which reads as follows:

8. This Act shall affect the rights of the Crown as mortgagee, vendor or lessor.

Having come to the conclusion that the Act itself is *intra vires* of the powers of the Legislature of Saskatchewan, it is now necessary to examine if the Act is operative as to

(1) [1931] A.C. at 295.
(2) (1909) 8 Commonwealth L.R.?
(3) [1933] 2 D.L.R. 289.
(4) [1935] S.C.R. at 452.

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what has been called the Federal Crown holding mortgages in the province. A negative answer to this question would of course not make the Act *ultra vires,* but it would merely mean that section 8 should be construed as not affecting the Dominion Crown or its agencies.

"It is true that there is only one Crown", but as Viscount Dunedin added in *In re Silver Bros. Ltd.,* (1)

> as regards Crown revenues and Crown property, by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province, and the revenues and property in the Dominion. There are two statutory purses.

In *Gauthier* v. *The King,* (2) Anglin J. as he then was, dealt with the matter as to whether or not the Crown in right of the Dominion was bound by a reference to the Crown in a provincial statute, and the then Chief Justice Sir Charles Fitzpatrick said at page 182 of the same case:

> I agree with Anglin J. that the provincial Act, read as a whole, cannot be interpreted as applicable, for the reasons he gives, to bind the Dominion Crown.
>
> And, in any event, the provinces have, in my opinion, neither executive, legislative nor judicial power to bind the Dominion Government. Provincial statutes which were in existence at the time when the Dominion accepted a liability form part of the law of the province by reference to which the Dominion has consented that such liability shall be ascertained and regulated, but any statutory modification of such law can only be enacted by Parliament in order to bind the Dominion Government. That this may occasionally be productive of inconvenient results is one of the inevitable consequences of a divided authority inherent in every federal system such as provided by the constitution of this country.

On the same matter see also *Burrard Power Company* v. *The King* (3).

The principles enunciated in these cases are, I believe, applicable here, and I have to come to the conclusion that the Act must be read as not affecting the Crown in right of the Dominion, or any of its agencies holding mortgages in the province.

For the above reasons, I would answer both interrogatories in the negative.

There should be no cost to either party.

(1) [1932] A.C. 514, at 524.
(2) (1917) 56 Can. S.C.R. 176, at 194.
(3) [1911] A.C. 91.

RAND J. The questions submitted to us by His Excellency in Council are these:

1. Is section 6 of the *Farm Security Act,* 1944, being Chapter 30 of the Statutes of Saskatchewan 1944 (second session) as amended by section 2 of Chapter 28 of the Statutes of Saskatchewan, 1945, or any of the provisions thereof, *ultra vires* of the Legislative Assembly of Saskatchewan either in whole or in part and if so in what particular or particulars and to what extent?

2. If the said section 6 is not *ultra vires,* is it operative according to its terms in the case of mortgages

(*a*) securing loans made by His Majesty in right of Canada either alone or jointly with any other person under the *National Housing Act,* 1944, or othewise,

(*b*) securing loans made by the Canadian Farm Loan Board, or

(*c*) assigned to the Central Mortgage and Housing Corporation?

The clauses of section 6, as amended, pertinent to the conclusion at which I have arrived, are as follows:

6. (1) In this section the expression:

1. "agreement of sale" or "mortgage" means an agreement for sale or mortgage of farm land heretofore or hereafter made or given, and includes an agreement heretofore or hereafter made renewing or extending such agreement of sale or mortgage;

2. "crop failure" means failure of grain crops grown in any year on mortgaged land or on land sold under agreement of sale, due to causes beyond the control of the mortgagor or purchaser, to the extent that the sum realizable from the said crops is less than a sum equal to six dollars per acre sown to grain in such year on such land;

* * *

5. "payment" includes payment by delivery of a share of crops;

* * *

(2) Notwithstanding anything to the contrary, every mortgage and every agreement of sale shall be deemed to contain a condition that, in case of crop failure in any year and by reason only of such crop failure:

1. the mortgagor or purchaser shall not be required to make any payment of principal to the mortgagee or vendor during the period of suspension;

2. payment of any principal which falls due during the period of suspension and of any principal which thereafter falls due under the mortgage or agreement of sale shall become automatically postponed for one year;

3. the principal outstanding on the fifteenth day of September in the period of suspension shall on that date become automatically reduced by four per cent. thereof or by the same percentage thereof as that at which interest will accrue immediately after the said date on the principal then outstanding, whichever percentage is the greater; provided that, notwithstanding such reduction, interest shall continue to be chargeable, payable and recoverable as if the principal had not been

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so reduced. (Sub-section (2) shall be deemed to have been in force on and from the thirtieth day of December, 1944. See amending act Chap. 28, Acts of 1945, Section 2 (3)).

* * *

(7) This section shall not apply to a mortgagor or purchaser:

(*a*) whose property is deemed to be under the authority of the court pursuant to sub-section (1) of section 10 of *The Farmers' Creditors Arrangement Act, 1943,* (Canada);

(*b*) whose affairs have been arranged by and are subject to a composition, extension of time or scheme of arrangement approved by the court or confirmed by the Board of Review under *The Farmers' Creditors Arrangement Act, 1934,* (Canada) or approved or confirmed by the court under *The Farmers' Creditors Arrangement Act, 1943,* (Canada); or

(*c*) whose affairs have been so arranged and where the composition, extension of time or scheme or arrangement has been annulled pursuant to either of the said Acts.

(8) The Provincial Mediation Board may by order exclude from the operation of this section any mortgage or agreement of sale or agreements of sale and in case of such exclusion this section shall not apply to the excluded mortgage or agreement of sale or class of mortgages or agreements of sale.

The definition of "crop failure" is embarrassed by the use of the words "to the extent that the sum realizable * * * is less than a sum equal to six dollars per acre"; they have been assumed to provide that any return less than six dollars an acre constitutes a failure, and this I take to be the case, although they would ordinarily signify something relative. I take the section, also, not to apply to a mortgage or contract which does not in some form carry interest.

The clause around which the controversy hinges is (3) and I find some difficulty in its precise interpretation. Apart from the proviso, its effect would be an immediate and actual percentage reduction on September 15th of the principal sum and the accrual of interest on the balance at the rate stipulated to apply in the circumstances of the day next following. But the proviso forces a modification of that simple result. If interest is to be charged "as if the principal had not been" reduced, either the same factors in the computation were intended to continue to be used, or the amount of interest to be maintained. In the latter case, treating the principal as actually reduced, the rate must vary with the deduction, and is to be that "at which interest will accrue immediately after the said date

(September 15)". On the present assumption, this, although mathematically possible, would involve calculating a decimal factor from what except to mathematicians would be a complicated equation on each ascertainment. To avoid that practical objection, some other rate would appear to be intended and, as counsel for Saskatchewan assumed, we return to the rate stipulated in the contract applied to the whole, i.e. the constructive principal. But this meets a further obstacle. No time is specified at which the charging of interest on the statutory reduction is to cease and if the interest is charged "as if the principal had not been so reduced", without a limitation implied it must continue payable in perpetuity. The appropriation of the reduction does not appear to be made to any particular part of the principal, and in the case of instalment payments many questions would arise. Conceivably the provision is not to affect the contract of interest up to the date of maturity; but a very few contracts for interest are limited to that point of time. Difficulties likewise would be encountered by special terms of the interest contract such as, for instance, that it should run until all of the principal money has been repaid and not merely until the obligation as to principal should be discharged. Assuming interest to accrue until the reduced balance has been paid, is the total principal then deemed discharged? That would in effect suspend the application of the deduction until the final payment of the remaining principal and would terminate the contract of interest on the discharge of the obligation for principal.

Interest is, in general terms, the return or consideration or compensation for the use or retention by one person of a sum of money, belonging to, in a colloquial sense, or owed to, another. There may be other essential characteristics but they are not material here. The relation of the obligation to pay interest to that of the principal sum has been dealt with in a number of cases including: *Economic Life Assur. Society* v. *Usborne* (1) and of Duff J. in *Union Investment Co.* v. *Wells* (2); from which it is clear that the former, depending on its terms, may be independent of

(1) [1902] A.C. 147.

(2) (1929) 39 Can. S.C.R. at 64[illegible]

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the latter, or that both may be integral parts of a single obligation or that interest may be merely accessory to principal.

But the definition, as well as the obligation, assumes that interest is referrable to a principal in money or an obligation to pay money. Without that relational structure in fact and whatever the basis of calculating or determining the amount, no obligation to pay money or property can be deemed an obligation to pay interest.

Apart then from the difficulties presented in a plan for the payment of interest and principal to which section 6 of the *Interest Act* would apply, and to cases where by special stipulation interest becomes more than merely an accessory to principal, and whatever else may be intended, the indisputable effect of section 6 must be taken to be a reduction of the principal and the maintenance of the quantum of interest as if that deduction had not been made. That effect cannot here be overborne by any play with the words of inconsistent conceptions; we are bound to treat the statutory language as language of reality, and as carrying its plain and unequivocal meaning. On this view, and, assuming for practical purposes what seems to be implied by section 2 of the *Interest Act*, that interest involves a "rate" relationship to the principal, the statute works a change of rate as the principal is diminished, which, in the Crown's contention, is legislation in relation to interest, a field of civil rights committed exclusively to the Dominion.

Mr. Mason argues that the enactment is designed to promote the stability of agriculture and is valid under section 95 of the Confederation Act. The immediate operation of the statute is put on the theory of the prevention of the annual growth of certain debts where crop failure prevents the parallel growth of the wealth out of which economically and generally it is said they are contemplated to be paid, accomplished by extending to the creditor the risk of that failure now borne alone by the debtor; but viewed most favourably to the provincial contention, the statute only in a most limited manner embodies that conception.

It is confined to creditors who have security for debt on land and it assumes that in substance it is only to that land and its fruits they look for payment, and that the fortunes of the debt should be deemed wrapped up in the fortunes of its security. It does not apply to farmers who have availed themselves of the benefits of the *Farmers' Arrangements Acts* of the Dominion, although why on the theory advanced they should be denied its benefit is difficult to see. Then clause 8, by giving the Mediation Board power to exclude a contract or class of contracts, and having regard to clause 7, enables the benefit of the section to be overborne by economic or even ethical considerations quite incompatible with the notion of a debt contractually conditioned in a genuine risk; and whatever the legislature may have had in mind, the section invests the Board with a power to restrict its application to any condition or to any class of debtors whatever.

The conclusion of the argument is that with such a purpose in view, the effect on the contract of interest is incidental to legislation valid under the principle of the decision of the Judicial Committee in *Ladore* v. *Bennett* (1). The *ratio decidendi* of that case rested on the provincial power to create and dissolve municipal organizations for local government, including the delimitation of their capacity to incur liability; and the view that contracts with these bodies stipulating for interest are made subject to that power; legislation dealing in substance with such institutions might therefore incidentally affect contracts of interest.

The general interest of agriculture may be advanced by many legislative means, some within the jurisdiction of the Dominion and some within that of the Province; but not all legislation which in its ultimate results may benefit agriculture is for that reason alone legislation within section 95. There is obviously a distinction between legislation "in relation" to agriculture and legislation which may produce a favourable effect upon the strength and stability of that industry: between consequential effects and legislation operation. But beyond any doubt, the field of that section does not include that of Interest in a substantive

(1) [1939] A.C. 468.

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aspect, and in each case the question remains, what is the real nature and character, the pith and substance of the enactment? If it is in the strict sense legislation within section 95, then incidentally it may affect other areas of jurisdiction, the operation of which may depend on the impact on the underlying matter of legislation in relation to agriculture; but where that is not the case, the means employed to bring about the benefit intended must not be such as are forbidden to the provincial jurisdiction.

What is done by section 6, notwithstanding that it is confined to farm lands, is strictly a modification of civil rights: that is the substance of the section: any benefit to agriculture hoped for or contemplated would be a resulting tendency to hold farmers to the land and its cultivation. But the alteration of the contract involves, as an inseverable part of its substance, legislation in relation to interest, and it is, because of that, *ultra vires; Board of Trustees of Lethbridge* v. *Independent Order of Foresters* (1). In this respect lies its distinction in principle from *Ladore* v. *Bennett* (2). Whether the purported dealing with principal is in these circumstances and in particular the use of the interest rate, a colourable device to nullify the accrual of interest, I do not find it necessary to decide.

It was suggested, though not seriously urged as a material consideration, that there might be contracts providing for crop payments not related to money with "interest" accruing in the same form, to which the section would apply. If there are such contracts, on the material before us they are in number insignificant; and assuming that the "rate" of reduction is not incompatible with their terms, and that "interest" under the Act of 1867 would apply to such an increment of price, the clear intention of the section that the entire group should be dealt with as one does not permit us to say that one class of contract would have been the subject of legislation without the other, and any question of severability is excluded.

Then it was argued that the untrammelled scope of discretionary action given by section 8 indicates conclusively that the power was furnished as a means for assisting insolvent debtors by a compulsory reduction of

(1) [1940] A.C. 513. (2) [1939] A.C. 468.

debts, and doubtless the power could be used as a sub-legislative control for such an application of the section. It was also contended that the legislation interfered with the status and powers of bodies incorporated under Dominion law; that the Mediation Board in determining the fact of crop failure upon which the specific terms of the statute declared to be annexed to every mortgage and contract became operative was, in so doing, exercising jurisdiction that brought it within section 96 of the Confederation Act and its finding therefore a nullity; and finally, that in any event the statute could not apply to debts arising from loans made by the Dominion Crown either solely or jointly with others under the *National Housing Act, 1944,* or to loans made by the Canadian Farm Loan Board or assigned to the Central Mortgage & Housing Corporation. To these points, because of the conclusion to which I have come, I do not find it necessary to address myself.

My answer to the first question is therefore that section 6 of the *Farm Security Act, 1944* is wholly *ultra vires.* This dispenses with an answer to the second question.

KELLOCK J.—Argument against the validity of the legislation was submitted to us by counsel on behalf of the Attorney-General of Canada on the following grounds, namely, that it was (*a*) in relation to interest; (*b*) in relation to bankruptcy and insolvency; and (*c*) inconsistent with sections 96, 99 and 100 of the *British North America Act,* in that it confers powers of a court on a body not competently constituted to exercise such power. Counsel on behalf of the Dominion Mortgage and Investments Association supported these contentions and also urged objection on the further grounds that the legislation impairs the status and essential capacities of companies incorporated by the Dominion and that it provides for delegation of legislative powers and functions by the provincial legislature to the Mediation Board which is unauthorized under the *British North America Act.* Both counsel submit that even if some part, or parts, of the

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section is valid, such parts are not capable of severance. On behalf of the Attorney-General of Saskatchewan the legislation was supported under (*a*) section 95, agriculture in the province; (*b*) section 92, (13) Property and Civil Rights in the province; and (*c*) section 92 (16) matter of a local or private nature in the province. Counsel for the Attorneys-General of Quebec and Alberta also supported the validity of the legislation, counsel for the last mentioned basing his submissions on the additional ground of section 92 (14)—administration of justice in the province.

As has been so often said, it is necessary in an inquiry of this sort to ascertain the pith and substance or the true nature and character of the enactment in question; *Attorney-General for Ontario* v. *Reciprocal Insurers* (1). The next step in a case of difficulty is to examine the effect of the legislation. A closely similar matter which calls for attention is the object or purpose of the legislation; *Attorney-General for Alberta* v. *Attorney-General for Canada* (2). See also *Attorney-General for Manitoba* v. *Attorney-General for Canada* (3). I therefore leave out of consideration the 4 per cent. rate specifically mentioned in the statute as it was made perfectly plain before us that as things stand no such rate is currently operative and has not been for some time.

In support of the submission that the section trenches upon the federal jurisdiction, with regard to interest, counsel directed argument principally to paragraph 3 of subsection (2). This paragraph enacts (1) that the principal outstanding on September 15th in a period of suspension shall be automatically reduced by the percentage there described; and (2) that notwithstanding such reduction, interest shall continue to be "chargeable, payable and recoverable" as if the principal had not been so reduced.

If, according to the plain language of the sub-section, the *principal outstanding* is automatically *reduced,* it follows that interest ceases to accrue thereafter on the

(1) [1924] A.C. 328, at 337.
(2) [1939] A.C. 117, at 130.
(3) [1929] A.C. 260, at 268.

amount of the reduction. There can be no such thing as interest on principal which is non-existent. As by the proviso it is enacted that interest shall continue to be "chargeable, payable and recoverable", (language to be found in the *Interest Act,* R.S.C., chap. 102) as if the principal had not been so reduced, such a provision therefore can operate in no other way than as an increased rate on the amount of principal actually outstanding, so that the same amount of money in respect of interest will be produced after as before the reduction. This is in fact recognized by the Attorney-General of Saskatchewan in his submission that the amount required to pay off a mortgage after the statutory reduction has taken place is the amount of the *reduced principal,* together with an amount for interest equal to the amount which would have been earned had there been no reduction in principal. Such a result can be reached only on the basis that it is the principal in fact outstanding which bears interest at the higher rate, for otherwise if the proviso could be construed as continuing to attach interest to the amount of the statutory reduction, interest hereon would never cease to accrue and its running could only be put an end to by actual payment in money of the amount of the "reduction". Such a construction would render the legislation completely nugatory and it is not to be considered that the legislature had in mind any such result.

The submission of the Attorney-General is thus put in his factum:

> The amount required to pay a mortgage or indebtedness under an agreement for sale is the full amount of the interest owing to the date of payment, having no regard to the provisions of paragraph 3 of section 6 (2), together with the full amount of the principal, less the deduction provided for in that paragraph. The amount of the deduction is determined by the following formula: A deduction is made from the principal with respect to each crop failure year occurring in the year 1944 and in every subsequent year, consisting of a percentage of the principal outstanding on September 15th of each crop failure year (after taking into account previous deductions), which is either four per cent. or the same percentage as the *rate of interest stipulated in the mortgage* or agreement, whichever is greater.

In my opinion the above submission does not pay sufficient regard to the language of the statute. The

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statute does not say that the reduction of principal is to be at the contract rate. It provides that the reduction is to be by the *same* percentage

> "as that at which interest will accrue immediately after the said date on the principal *then* outstanding."

In other words, as the rate of interest which the principal outstanding must earn is increased that increased rate is the rate by which the reduction is governed and not the contract rate. This necessitates a somewhat difficult and cumbersome calculation but the statute so provides.

The effect of the statute will be found to be that it wipes out an amount of debt somewhat larger than the annual interest, while professing not to interfere with the amount of the interest. Whether or not this is to do indirectly what may not be done directly need not be considered. The statute in fact effects an increase in the *rate* of interest which, in my opinion, is beyond the power of the legislature of the province to do. While the matter of conditions in contracts within the province is no doubt a matter for the provincial legislature: *Citizens Insurance Company* v. *Parsons* (1); *Workmen's Compensation Board* v. *Canadian Pacific Railway Company* (2), contractual interest is the subject matter of exclusive Dominion legislative power under section 91 (19) of the *British North America Act;* the *Lethbridge* case (3).

In my opinion the legislation here in question is not in its pith and substance legislation within section 95 as being with relation to agriculture nor within any of the heads of section 92 but is legislation with relation to interest and governed by the principle of the above decision. To quote from the judgment of Viscount Caldecote L.C. (3):

> In so far as the Act in question deals with matters assigned under any of these heads to the Provincial Legislatures, it still remains true to say that the pith and substance of the Act deals directly with "interest" and only incidentally or indirectly with any of the classes of subjects enumerated in Section 92. Even if it could be said that the Act relates to classes of subjects in Section 92, as well as to one of the classes in Section 91, this would not avail the appellants to protect the Provincial Act against the Interest Act of 1927, passed by the Dominion Parliament, the validity of which, in the view of their

(1) (1881) 7 A.C. 96.
(2) [1920] A.C. 184.
(3) [1940] A.C. 513, at 531.

Lordships, is unquestionable. Section 2 of the Interest Act is as follows: "except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon * * *" Dominion legislation properly enacted under Section 91 and already in the field must pravail in territory common to the two parliaments.

This language is in my opinion equally appropriate in the case at bar.

Reliance was placed by counsel supporting the legislation upon the decision of the Privy Council in *Ladore* v. *Bennett* (1), and that of the Court of Appeal of British Columbia in *Day* v. *Victoria* (2), approved of in the *Lethbridge* case (3). I would distinguish both these decisions. They are dealt with in the *Lethbridge* case (3) at pages 532 and 533, where it is pointed out that the legislation in question in each case was legislation in relation to a matter within section 92, while any provisions with regard to interest were incidental.

The jurisdiction allocated to Parliament under any of the heads of section 91 is "notwithstanding anything in this Act". I cannot think that because the particular contracts here in question are limited to those affecting farm lands this renders the legislation in its true nature and character any the less legislation with relation to interest or not in conflict with the provisions of section 2 of the *Interest Act*.

As already mentioned, while the direct attack upon the section upon the ground mentioned was limited to paragraph three, it was contended that if that paragraph were *ultra vires* then the whole section must fall to the ground as it could not be severed, even assuming that the remainder of the section were valid. In my opinion this contention is well taken. The provisions of section 6, in my opinion, constitute a code by which upon the happening of the event there described all the provisions of subsection (2) come into play. I do not think it can be presumed that the legislature intended to enact the provisions of paragraphs 1 and 2 of the sub-section without that included in paragraph 3. It is not therefore

(1) [1939] A.C. 468.
(2) [1938] 3 W.W.R. 161.
(3) [1940] A.C. 513.

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Kellock J.

necessary to consider any of the other objections urged against the legislation. I would answer question 1 as follows: "Section 6 is *ultra vires* as a whole." It is therefore not necessary to answer the second question.

Solicitor for the Attorney-General for Canada: *F. P. Varcoe.*

Solicitor for the Attorney-General for Quebec: *Guy Hudon.*

Solicitor for the Attorney-General of Saskatchewan: *Alex. Blackwood.*

Solicitor for the Attorney-General for Alberta: *H. J. Wilson.*

Solicitors for the Dominion Mortgage and Investments Association: *Leonard, Sinclair, Goodenough, Higginbottom* and *McDonnell.*

Applied Kaufman v. T.T.C., 80 C.R.T.C. 365

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*Feb 4
*May 13

AUSTIN J. MACLEOD, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THE SILVER GLADE ROLLER BOWL, THE SAID AUSTIN J. MACLEOD AND THE SAID SILVER GLADE ROLLER BOWL (DEFENDANTS) ..... } APPELLANTS;

AND

DORIS ROE (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Negligence—Person, while skating on roller skating rink, injured by fall caused by skate coming off—Claim for damages against operator of rink—Skates rented from operator and attached by his employee—Negligence alleged because toe straps not used in attaching skates—Extent of operator's duty—Sufficient that he acted in accord with general and approved practice.

Defendant operated a roller skating rink. Plaintiff rented from him, and was fitted by his employee with, a pair of roller skates. After about an hour of skating, a skate came off, causing plaintiff to fall

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

and be injured. She sued defendant for damages. She recovered judgment at trial, [1946] 2 W.W.R. 482, on the finding that the skate came off because of negligence in defendant's employee in not using a toe strap to attach it securely to her shoe. That judgment was affirmed by the Appellate Division, Alta., [1946] 3 W.W.R. 522. Defendant appealed to this Court.

The evidence was (as found in this Court) that the skates kept and supplied by defendant were the product of a well known manufacturer, were standard in the roller skating amusement business, were regularly examined by competent employees of defendant, that the skate in question was examined immediately after the accident and found to be in perfect condition; that the usual method of attaching the skates to the shoes was adopted in this case; that the use of toe straps was not a standard method; defendant supplied toe straps on deposit of 10 cents, which was repaid on return of the straps, and a notice to that effect was above defendant's ticket window.

Held: Defendant's appeal should be allowed and the action dismissed.

Per the Chief Justice and Kerwin and Estey JJ.: Even if by the use of toe straps the skates might (according to certain evidence) have been made safer for skating, it was sufficient for defendant to show, as was done, "that he had acted in accord with general and approved practice" (*Vancouver General Hospital* v. *McDaniel*, 152 L.T. 56, at 57-58). (*Per* Estey J.: In the absence of express provisions in the contract of hiring, the law implied an obligation on defendant to provide skates that at the time of hiring were reasonably safe for the purpose of skating. The fact that defendant made toe straps available did not establish that they were necessary in order to ensure reasonable safety in skating where the shoes, as here, were well adapted for that purpose, and, therefore, did not establish an obligation on defendant to supply them to all patrons; to require toe straps in addition to standard equipment would impose on defendant a greater obligation or a higher standard of care than that which the contract of hiring imposed).

Per Rand and Kellock JJ.: In furnishing and fastening the skates, defendant did not undertake that under no circumstances would they become loose or come off; the obligation assumed, at its highest, did not go beyond furnishing and attaching skates which could be used with reasonable safety if ordinary and usual skill and care were exercised by the skater. There was no evidence that, either in the general experience of roller skating or in the opinion of persons who had closely observed its practice, the absence of toe straps rendered the skates less than reasonably safe for use. Further, assuming a duty to have toe straps used or offered for use, there was no evidence that defendant was responsible for their absence; the question was, not whether plaintiff knew that they could be obtained, but rather, did defendant take reasonable steps to bring the fact of their availability to his patrons' notice; and, considering the necessary mode of carrying on such a business, he had done so. Moreover, there was nothing to make it appear that plaintiff, under any circumstances, would have used toe straps; and the finding at trial in effect required defendant to include them as part of the primary equipment; but

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the only evidence bearing on that was against that conclusion; the skates were complete without toe straps, for which in fact they were not designed, and the wide general use of the skates without them was, in the record of this case, convincing evidence that they were not necessary to any safety in use which a patron had a right to look for.

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which (Ford J.A. dissenting) affirmed the judgment of O'Connor J. at trial (2) in favour of the plaintiff for damages for injury suffered by her when she fell while skating on the defendants' roller skating rink. The trial judge found that she fell and was injured because one of her skates came off, and that that happened because of negligence of the defendants' employee, who fitted her with the skates, in not using a toe strap to attach securely the skate to her shoe.

The plaintiff cross-appealed, to the Appellate Division (which dismissed the cross-appeal) and to this Court, for an increase in the amount of general damages awarded.

S. Bruce Smith K.C. for the appellants.

Sydney Wood K.C. for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—On Sunday, February 4th, 1945, the respondent, Doris Roe, was roller skating in a rink operated by the appellant, Austin MacLeod, carrying on business under the name of the Silver Glade Roller Bowl, in the city of Edmonton. One of her skates became loose, causing her to fall. Her action to recover damages occasioned by this fall was upheld by the trial judge, Mr. Justice O'Connor, and, on appeal, by the Appellate Division of the Supreme Court of Alberta, with Mr. Justice Ford dissenting.

The facts fall within a narrow compass. The respondent had attended the appellant's rink a number of times previous to the occasion in question but was still a novice at roller skating. On Sunday evenings the respondent

(1) [1946] 3 W.W.R. 522; [1947] 1 D.L.R. 135.

(2) [1946] 2 W.W.R. 482; [1947] 1 D.L.R. 135, at 135-141.

charged no admission fee but rented roller skates for twenty-five cents to those who desired them, and they were thereupon at liberty to make use of the rink. The respondent paid the required fee, and a pair of roller skates, suitable to the size of her shoes, were handed to her and were put on by one of the skate boys employed by the appellant. The skates thus supplied, together with the other skates kept by the appellant, are the product of a well-known manufacturer and are known as Chicago skates. The evidence is clear that these skates are standard in the roller skating amusement business, and that the usual method of attaching the skates to the shoes was adopted in connection with the respondent. William A. Magark, who has had considerable experience in and around roller skating rinks and who, on the night in question, was floor manager for the appellant, so testified, and his evidence was uncontradicted. The sole of the shoe is placed on a flat piece of the metal part of the skate and a clamp at either side is securely fastened and tightened by means of a worm screw. The heel fits snuggly into the back of the skate and is held in position by a leather strap attached to the skate and running through either the first or second crossing of the shoe lace.

While other questions were investigated at the trial, the only fault found by the trial judge and the Court of Appeal against the appellant is that while the usual method was adopted in connection with the respondent, a strap should have been used to hold the toes of each foot tightly against the skate. Toe straps were at one time used by the appellant but, as it was found that many school children took the straps, the practice was adopted of charging ten cents as a deposit for each pair, which deposit would be repaid upon the return of the straps. The use of toe straps is not a standard method. The evidence is that all of the appellant's skates were regularly examined by competent employees of the appellant and that the skates furnished the respondent were examined immediately after the accident and found to be in perfect condition. The skates not being defective, the appellant cannot be made liable for the injuries suffered by the respondent even if, according to the evidence of George

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Wade, called on behalf of the respondent, they might have been made safer for roller skating. To use the words of Lord Alness, speaking for the Judicial Committee, in *Vancouver General Hospital* v. *McDaniel* (1): "A defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice." This principle was adopted by this Court in a case from the province of Quebec: *The London & Lancashire Guarantee & Accident Company of Canada* v. *La Compagnie F. X. Drolet* (2).

The appeal should be allowed and the action dismissed with costs throughout. The cross-appeal of the respondent as to the quantum of damages should be dismissed without costs.

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

RAND J.—The essential question here is, what did the appellant undertake in furnishing the skates and fastening them to the respondent's shoes? Certainly not that under no circumstances would they become loose or come off; that possibility is too intimately bound up with their use, in which the state or quality of the shoes, combined with the manner in which they are used, depending again upon the skater, might all play a part in loosening them.

I do not think the obligation assumed, at its highest, goes beyond furnishing and attaching skates which can be used with reasonable safety if ordinary and usual skill and care are exercised by the skater; that the management will do for a reasonably careful patron what that patron would do, and in the rink here has the privilege of doing and in some cases does, in the way of equipping himself with skates. Admittedly those furnished are and for years have been standard throughout the United States and Canada and no negligence in screwing down the clamps is suggested.

But O'Connor J., at trial, held that, in addition to the clamps and as a reasonably necessary safeguard, straps should have been used or should have been offered to the respondent. To this I think there are two answers:

(1) (1934) 152 L.T. 56, at 57-58; [1934] 3 W.W.R. 619, at 623.

(2) [1944] S.C.R. 82.

there was no evidence that, either in the general experience of roller skating or in the opinion of persons who have closely observed its practice, the absence of straps rendered these skates less than reasonably safe for use; nor, assuming such a duty, was there evidence that the appellant was responsible for that absence. Right above the ticket window was a notice that straps were available on the deposit of 10 cents, and they were used by a few skaters. The question is not whether this young woman of 23 years of age actually knew or did not know that straps could be obtained; the question is, did the management of the rink take reasonable steps to bring the fact of their availability to the notice of its patrons; and, considering the necessary mode of carrying on a business of this nature, which has not only a financial interest to the proprietor, but meets the wholesome desires of a large proportion of young people of the community, I should say that it had clearly discharged that duty. There is, moreover, nothing whatever to make it appear that the respondent, under any circumstances, would have used straps, and the finding in effect requires the management to include them as part of the primary equipment. But the only evidence bearing on this is against that conclusion. The skates are complete without straps, for which, in fact, they are not designed, and nowhere in the United States or Canada are straps used more than occasionally or otherwise than as a special safeguard. So far as the evidence shows, they might be considered to bind the feet or otherwise lessen the freedom of skating; the fact that the almost universal use of the skates is without them is, in the record of this case, convincing evidence that they are not necessary to any safety in use which the patron has a right to look for. I think in the circumstances we must accept the standard so established rather than the individual opinion of any judge.

The appellant, somewhat of a novice, had attended the rink six or seven times in the course of a month or so, and on the evening in question had been on the floor almost an hour before the accident. A friend, who had skated with her all evening, testified that a few seconds before the accident she had remarked that her skates felt

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"funny" on her, to which it was suggested that the skates be checked, but that she said she would make another round. The respondent admits having written her friend about a statement of the latter to that effect. O'Connor J. was not satisfied the remark was made, not because of untruthfulness in the witness, but because of a tendency to "desire to please counsel" and of a resulting discrepancy in relation to the exact spot on the floor where the words were passed.

But I do not place my conclusion on any action or conduct of the respondent; I put it on the absence of proof of any failure in fulfilling the undertaking of the appellant. The injury was very painful, no doubt, and it calls out the utmost sympathy; but that circumstance cannot justify our placing a responsibility for the misfortune where it does not belong.

I would, therefore, allow the appeal and dismiss the action, with costs throughout. The cross-appeal should be dismissed without costs.

ESTEY J.:—The appellants (defendants) own and operate at Edmonton, Alberta, a roller skating rink known as the Silver Glade Roller Bowl. On February 4th, 1945, the respondent (plaintiff), a young lady twenty-three years of age, rented from and was fitted by the appellants' servants and agents with a pair of roller skates. After about an hour of skating one of the skates came off, causing her to fall and suffer serious injuries, damages for which she asks in this action.

The Appellate Division of the Supreme Court of Alberta, Mr. Justice Ford dissenting, affirmed the judgment of the learned trial judge in favour of the respondent (plaintiff).

The respondent pleaded that the appellants' servants and agents were negligent in several particulars, but at the trial they were in effect reduced to two: (1) The said skates were improperly secured to the shoes of the respondent by the appellants' employees; (2) The appellants failed to attach any adequate apparatus to the toe of the respondent's shoes properly to ensure that the said skates were secure.

The learned trial judge found:

> After the plaintiff had skated about an hour and while she was skating, one of her skates came off and she fell on the floor. No skater was down in front of her or cut in ahead of her. No one bumped or tripped her. Lotawski, who was skating with the plaintiff, felt a kick on her ankle, and heard a clank like a loose skate. Wade, who was skating 12 feet behind the plaintiff, and who picked her up, saw the loose skate.
>
> * * *
>
> I find the plaintiff fell and was injured because her skate came off while she was skating, and her skate came off because the defendants had negligently failed to securely attach it to her shoe with a toe strap. The plaintiff was injured by the negligence of the defendants.

The appellants' employees affixed the roller skates to the respondent's shoes by using the equipment supplied with the skates as purchased, namely, an ankle strap that passes through a hole for that purpose in the metal part of the skate and then around the ankle of the patron, and toe clamps which are so made as to fit over the sole of the patron's shoe and then tightened by a key. The respondent when asked: "And they were tightly and properly affixed to your shoes that evening, weren't they?" replied: "Yes."

The learned trial judge made no finding of negligence in respect to the use or adjustment of this equipment by the appellants' employees in fitting the roller skates to the respondent's shoes, and the respondent's contention that the learned judge erred in this respect is not supported by the evidence.

The main issue concerns the finding of the learned trial judge that in addition to the ankle straps and toe clamps the appellants failed to use toe straps in affixing the skates to respondent's shoes.

The roller skates equipped with ankle straps and toe clamps supplied by the appellants were purchased from an established and well known manufacturer thereof. So equipped they have been and still are used in many rinks throughout Canada and the United States. They were inspected twice a week by the floor manager and once a week by the boys oiling them. The particular skate that came off on this occasion was inspected immediately after respondent's fall and found to be in good condition. No repair was made thereto and it was apparently put back for immediate use.

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The respondent, after being so fitted, skated for about an hour, when, as she stated: "all of a sudden the skate came off and I fell over". Respondent was then asked: "You do not know why it came off, do you?" and replied: "No". Nor is there any evidence as to why it came off. There is no evidence that the standard equipment, which includes the ankle strap and toe clamps but not the toe straps, was not reasonably sufficient, nor is there evidence that toe straps at any time or place have been regarded as part of the standard equipment.

Magark who had four and a half years' experience, first as assistant manager and later as floor manager in Vancouver and Edmonton, and who was floor manager at appellants' rink on the night in question, but who at the time of the trial had left the appellants' employment and returned to Vancouver, stated that the skates were satisfactory and safe with standard equipment, and further that "it is a very popular skate all through America."

All of the witnesses, including the respondent, knew roller skates came off from time to time and for various reasons. Sometimes the shoes were not adapted for the affixing of roller skates thereto or, if adapted, they were worn to the point that the soles were weakened and would give and thereby work out of the toe clamps, or that the ankle straps became loose for different reasons including that of the skater's foot colliding with the side or wall of the rink or other solid substance with sufficient force to loosen the ankle strap, or that the skater had fallen and in the course of getting up had loosened the ankle strap or worked the sole out of the toe clamps. Magark deposed:

Q. Do they ever come off while a person is skating regularly without some sort of a knock or a bump?

A. It has been known but it is very rare.

He explained in the course of his evidence that there is usually something in the shoe, skate or conduct of the skater which causes the skates to come off. The respondent's shoes were well adapted for roller skating and, as previously intimated, no reason is given as to why respondent's skate came off.

At the rink the appellants supplied toe straps and made that fact known by a sign over or near the skate wicket,

stating that these straps were available without charge upon a deposit of 10 cents to ensure their return. Why they were supplied was left as a matter of inference and upon the whole of the evidence it would seem that they were for patrons whose shoes were not reasonably adapted for roller skating or had become so far worn as to weaken the sole. They were used by several of the patrons, how many or what percentage of those skating at the rink was not indicated. The respondent, who had been at the rink about half a dozen times before, had neither noticed the sign relative to the availability of toe straps nor had she noticed others obtaining, using or returning the toe straps.

Wade, who was called as a witness for the respondent and who had had considerable experience in roller skating, said that it was commonly known that the toe straps were available on a deposit of 10 cents and that many used them. He himself had used them before he obtained his own equipment. If the toe straps were "put on tight", he said, it was practically impossible for the skates to come off. He further deposed:

Q. Have you seen skates come off people's feet as they were skating?
A. Yes.
Q. Could you observe any reason why those skates would come off?
A. It would be a matter of theory if I did. I presume the strap must have come loose.

Mr. Wade here implies that if the skates came off when affixed with standard equipment the ankle strap must have worked loose, presumably for some of the reasons already mentioned. He does not express an opinion here nor elsewhere throughout his evidence that the toe strap is essential for reasonable safety. He goes no further than to say that if the toe straps are put on tight it is quite impossible for skates to come off.

The duties and obligations between the parties hereto are determined by the contract of hiring under which the respondent obtained the skates from the appellants. In this case a fee was paid by the respondent when the appellants made the skates available. There were no express provisions concerning the issues here involved, and in such circumstances the law implies an obligation upon the appellants to provide skates that at the time of

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hiring are reasonably safe for the purpose of skating. Halsbury, 2nd Ed., Vol. 1, p. 757; *Algoma Steel Corporation* v. *Dubé* (1); *Hyman* v. *Nye* (2).

The appellants cited among other authorities *McDaniel* v. *Vancouver General Hospital* (3). A patient at the Vancouver General Hospital claimed damages for having developed small pox within the incubation period after leaving the hospital. It was alleged that this was due to the negligence of the hospital in not segregating the small pox patients, and further in permitting the plaintiff to be treated by nurses who were also treating small pox patients. The Privy Council held that the hospital was not liable because it had followed general and approved practice. Lord Alness, delivering the judgment of the Privy Council, stated at p. 623:

> A defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice.

That statement appears particularly apt and concludes the case in favour of the appellants because the appellants were not found negligent in the use of the standard equipment but were alleged to be negligent in that they did not add an extra safety precaution in the form of toe straps.

Throughout so much has been made of the failure of the appellants to use the toe straps that it may be appropriate to note the observation of Lord Thankerton in *Glasgow Corporation* v. *Muir* (4).

> The court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened or that witnesses in the witness box are prone to express regret, ex post facto, that they did not take some step, which it is now realized would definitely have prevented the accident.

The fact that the appellants provided these toe straps, either for the reasons above mentioned or merely for those patrons who desired to take extra precautions, does not establish that they are necessary in order to ensure reasonable safety in skating where the shoes, as here, were well

(1) (1916) 53 Can. S.C.R. 481.
(2) (1881) 6 Q.B.D. 685.
(3) [1934] 3 W.W.R. 619; 152 L.T. 56.
(4) [1943] A.C. 448 at 454.

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adapted for that purpose, and, therefore, does not establish an obligation upon appellants to supply them to all patrons.

With the greatest respect for the majority of the judges in the courts below, who hold a contrary opinion, it would appear that to require, in addition to standard equipment, the toe straps, would impose upon the appellants a greater obligation or a higher standard of care than that which the contract of hiring imposed.

The respondent's cross-appeal that the damages awarded at the trial should be increased was dismissed at the hearing of this appeal.

The appeal should be allowed and the respondent's action dismissed, with costs throughout. The cross-appeal should be dismissed without costs.

Appeal allowed and action dismissed, with costs throughout. Cross-appeal dismissed without costs.

Solicitors for the appellants: *Smith, Clement, Parlee & Whittaker.*

Solicitors for the respondent: *Wood, Buchanan & Campbell.*

WM. WRIGLEY JR. COMPANY LIMITED ..... APPELLANT;

AND

THE PROVINCIAL TREASURER OF MANITOBA ..... RESPONDENT.

1946

*Nov. 6, 7.

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*Feb. 4

*April 22, 23.

*June 18.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Income tax—Company, with head office and manufacturing plant in Ontario, selling in Manitoba—Assessed for income tax in Manitoba—Question whether, from profits assessed, company entitled to deduction of allowance for profits on its operations in Ontario—The Income Taxation Act, R.S.M. 1940, c. 209, s. 24—"Net profit or gain arising from the business" of the Company in Manitoba.

*PRESENT at hearing on Nov. 6, 7, 1946, were Hudson, Taschereau, Rand, Kellock and Estey JJ. Subsequently Hudson J. died, and on Feb. 4, 1947, the Court required a reargument, which took place on April 22, 23, 1947, before Rinfret C.J. and Taschereau, Rand, Kellock and Estey JJ. On June 18, 1947, judgment was delivered.

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WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

By s. 24 (1) of *The Income Taxation Act*, Man., R.S.M. 1940, c. 209, "the income liable to taxation under this Part of every person residing outside of Manitoba, who is carrying on business in Manitoba, * * * shall be the net profit or gain arising from the business of such person in Manitoba". By s. 24 (2), the section applies to a joint stock company carrying on business in Manitoba and which has not its head office in Manitoba.

Appellant, a joint stock company manufacturing and selling chewing gum, had its head office and manufacturing plant in Ontario. It had a warehouse and office in Manitoba. Manufactured goods were shipped to the warehouse in Manitoba where they were stored and, on orders received and accepted there, were distributed to appellant's customers in Manitoba and certain other provinces. The selection and the credit rating of the jobbers to whom the Manitoba office might make sales, the book-keeping, collecting of accounts, and the general direction and control of the business were all dealt with exclusively at the head office in Ontario.

Appellant was assessed for income tax for the years 1936, 1937, 1938 and 1939, under Manitoba statutary provisions not materially different from provisions now contained in said Act, on all the net profits from sales made from appellant's Manitoba office. Appellant claimed a deduction of an allowance for profits on its operations in Ontario, as not being profits on gain arising from its business in Manitoba.

Held (Rand and Kellock JJ. dissenting): Appellant was entitled to deduction of an allowance for profit on the cost of manufacture in Ontario. (Judgment of the Court of Appeal for Manitoba, 53 Man. R. 213, reversed, and judgment of Major J., *ibid,* restored).

Per the Chief Justice and Taschereau J.: The manufacturing profits were made in Ontario and cannot be said to have arisen from appellant's business in Manitoba. The selling in Manitoba cannot have the effect of imparting, for taxing purposes in Manitoba, profits earned in the initial operations in Ontario which made the goods ready for sale. "Arising from the business * * * in Manitoba" in s. 24 means "what is attributable to the business in Manitoba" or "profits derived from sources in Manitoba"; and the manufacturing profits made in Ontario are not so attributable or so derived. (Cases reviewed).

Per Estey J.: In the light of the authorities (discussed) and the taxing power of Manitoba, s. 24 must be construed that the tax is imposed only on the net profit arising out of that portion of the business which a non-resident carries on in Manitoba. Activities and operations other than contracts for sale constitute a carrying on of business and produce or earn income, and therefore, while the income may be realized through the sale, it does not entirely arise from the sale. In the present case, the manufacturing operations in Ontario are a carrying on of business which contributes to appellant's income and the income should be apportioned accordingly. (Other sections of the Act discussed as to their bearing on the construction of s. 24).

Per Rand J., dissenting: Construing s. 24 with other sections of the Act, the net profit or gain "arising from" the business in Manitoba is the entire profit; "arising from" is not intended to be the equiva-

lent of "earned"; the legislative assumption is a business embracing the necessary elements to a profit and the whole profit realized upon the sale is the profit dealt with.

Per Kellock J., dissenting: Construing s. 24 with other sections of the Act, the legislative intent is that in any case where there is a carrying on of business within the Province by reason of the habitual making of contracts of sale therein, s. 24 applies to make taxable the entire profit arising from such sales, without any apportionment, (16 & 17, Vict. (Imp.), c. 34, and decision thereunder, discussed; those decisions are pertinent and the principle of them is applicable).

APPEAL by Wm. Wrigley Jr. Company Limited (a company, incorporated under the Dominion *Companies Act,* with head office and manufacturing plant in Ontario and licensed to do, and doing, business in Manitoba) from the judgment of the Court of Appeal for Manitoba (1) which, reversing the judgment of Major J. (2), affirmed (Trueman J.A., and Dysart J.A. (*ad hoc*), dissenting) the assessments made against the appellant for income tax for the years 1936, 1937, 1938 and 1939, under Manitoba statutory provisions not materially different from provisions now found in *The Income Taxation Act,* R.S.M. 1940, c. 209. The main question in the appeal had to do with the interpretation of s. 24 of said Act.

The material facts of the case and the question in dispute are stated in the reasons for judgment in this Court now reported and are indicated in the above headnote.

Everett Bristol K.C. for the appellant.

G. L. Causley K.C. for the respondent.

The judgment of the Chief Justice and Taschereau J. was delivered by:

TASCHEREAU J.—This litigation arises out of the interpretation of section 24 (1) of *The Income Taxation Act* of the province of Manitoba.

This section reads as follows:—

The income liable to taxation under this Part of every person residing outside of Manitoba, who is carrying on business in Manitoba, either directly or through or in the name of any other person, shall be the *net profit or gain arising from the business of such person in Manitoba.*

(1) 53 Man. R. 213; [1945] 3 W.W.R. 305; [1945] 4 D.L.R. 463; [1945] C.T.C. 299.

(2) 53 Man. R. 213, at 216-221; [1943] 3 W.W.R. 49; [1943] 4 D.L.R. 548; [1943] C.T.C. 131.

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The appellant company has its head office in the city of Toronto, Ontario, and carries on business in the province of Manitoba. For the purpose of the Act, the appellant company is deemed to be residing outside of Manitoba, in view of subsection 2 of section 24, which enacts that a joint stock company not having its head office in Manitoba, will be subject to subsection 1 of section 24.

The appellant company manufactures chewing gum, and while the manufacturing plant is located in Ontario, it has a warehouse and a distributing organization in the city of Winnipeg, Manitoba. After the goods have gone through the manufacturing processes in Ontario, they are shipped to the Winnipeg warehouse where they are stored and distributed to the appellant's customers in Manitoba, Saskatchewan and Alberta. All orders from those three provinces are received in Winnipeg, and are filled by that office out of that stock.

For the fiscal years 1936, 1937, 1938, 1939, the Provincial Treasurer of Manitoba has assessed the appellant for income tax purposes, on all the net profits from the sales of gum, made from the Winnipeg office, in the three above mentioned provinces. The company claims that it is entitled to an allowance as profit on the actual cost of manufacture; in other words, that factory profits are deductible because *they are not profits or gain arising from the company's operations in Manitoba.*

The matter was heard before Mr. Justice Major in the Court of King's Bench in Manitoba, who ruled that these manufacturing profits were deductible, but the Court of Appeal (Messrs. Justices Trueman and Dysart (*ad hoc*) dissenting) allowed the appeal and affirmed the decision of the Minister.

The contention of the respondent is briefly that the profits or gain of the company arise from the sales, and as the sales were made in Manitoba, within the time provided in the Act, the assessments are properly made.

A preliminary observation, as to sections 3 and 24 of the taxing statute, is essential.

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Section 3 is drafted in the following terms:—

For the purposes of this Part, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, *as the case may be whether derived from sources within Manitoba or elsewhere;* and includes the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including * * *

In view of this language, it would seem that the legislature intended to tax profits whether derived from sources within Manitoba or *elsewhere,* but section 24 deals particularly with persons residing outside of Manitoba, carrying on business in Manitoba, and says that the income liable to taxation shall be the net profit or gain arising from the business of such person *in Manitoba.*

I have no doubt that the definition of the word "income" in section 3, and which includes profits derived from sources outside of Manitoba, does not apply to section 24, where the tax is limited on the net profit or gain arising from *the business in Manitoba.*

The same point arose in *International Harvester Co. of Canada, Ltd.* v. *The Provincial Tax Commission* (1) and in that case Sir Lyman Duff, dealing with a similar statute, said at page 331:—

It is clear, I think, that the effect of the words "net profit or gain arising from the business of such person in Saskatchewan" in section 21*a* is, for the purpose of that section, to delete from the definition of income in section 3 the words "or elsewhere".

It is, therefore, section 24, taken independently of section 3, that must be examined for the purpose of determining this case. If the profits arise where the sales are made then the assessments are valid, but if the manufacturing profits are deductible in computing the gain made in Manitoba, and on which the tax is imposed, this appeal must succeed.

This question of allowances of manufacturing profits for provincial income tax purposes is by no means a new

(1) [1941] S.C.R. 325.

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one. In *International Harvester Co. of Canada, Ltd.* v. *The Provincial Tax Commission* (1) the same argument made by the present respondent was also considered by this Court. The International Harvester Company carried on the business of manufacturing and selling agricultural machinery, and had its head office at Hamilton, Ontario, where the manufacturing business was carried on. The company sold its products in Saskatchewan as well as in other parts in Canada, and it was admitted by all parties that the central management and control of the company, as in the present case, were at the head office in Ontario.

The Commissioner of Income Tax for Saskatchewan made assessments upon the company in respect of its income for each of the years 1934 to 1936 inclusive, without allowing for manufacturing profits. The charging section in Saskatchewan was similar to the one enacted by the legislature of Manitoba, and which we have now to consider.

The business of the company in Saskatchewan was the making of contracts of sale by its agents, and the International Harvester Company therefore claimed that it was entitled to an allowance for manufacturing profits, which did not arise from the business of the company in Saskatchewan. The then Chief Justice of Canada, Sir Lyman Duff, with whom concurred Davis and Taschereau JJ. said:

> It is not the profits *received* in Saskatchewan that are taxable; it is the profits arising from its business in Saskatchewan, not the profits arising from the company's manufacturing business in Ontario and from the company's operations in Saskatchewan taken together, but the profits arising from the company's operations in Saskatchewan.

The judgment of Sir Lyman Duff was a dissenting judgment, but Rinfret, Crocket, Kerwin and Hudson, JJ., who took an opposite view on some other points of the case, did not in any way contradict the opinion of Chief Justice Duff on that particular point. Although not a binding pronouncement, this expression of opinion is, I believe, the logical interpretation to be given to that part of the Saskatchewan statute, which is identical to section 24 of the Manitoba Act.

(1) [1941] S.C.R. 325.

The respondent has cited the following passage of Mr. Justice Kerwin in the case of *Firestone Tire and Rubber Co. of Canada, Ltd.* v. *Commissioner of Income Tax* (1).

> The manufacture in Ontario of the appellants' goods, however necessary to the existence of its business, does not earn income. The goods are manufactured for the purpose of sale and the income is earned when the goods are sold and all the income, therefore, was earned within British Columbia.

In that case, the Firestone Tire and Rubber Co. of Canada, Ltd., having its head office at the city of Hamilton, had no office or any employees in the province of British Columbia. Its sales, in that province, were made through an independent firm, and the majority of this Court held that the contract between the parties was not one of agency, but one of sale, and, therefore, it was held that the Firestone Tire and Rubber Co. Ltd. was not liable to income tax in British Columbia.

The *Income Tax Act* of British Columbia, R.S.B.C. 1936, Chap. 280, provides:—

> 3. (1) To the extent and in the manner provided in the Act and for the raising of a revenue for Provincial purposes:
>
> (*a*) All income of every person resident in the Province and *the income earned within* the Province of persons not resident within the Province shall be liable to taxation.

It may be first of all pointed out that the judgment of Mr. Justice Kerwin, with whom Mr. Justice Hudson concurred, was a minority judgment, but moreover, Mr. Justice Kerwin in his reasons said that the entire scope of the British Columbia Act is quite different from that of the Saskatchewan Act, and that, therefore, the decision in *International Harvester Co. of Canada Ltd.* v. *The Provincial Tax Commission* (2) did not apply in the Firestone case. In Saskatchewan a tax is imposed on "the net profit or gain *arising from the business* of such person in Saskatchewan", while in the British Columbia Act a tax is imposed on "all income of every person resident in the Province and the *income earned within the Province* of persons not resident within the Province".

(1) [1942] S.C.R. 476 at 494-495. (2) [1941] S.C.R. 325.

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In his reasons for judgment in the *International Harvester* case (1), Sir Lyman Duff further says at page 331:—

> The profits of the Company are derived from a series of operations, including the purchase of raw material or partly manufactured articles, completely manufacturing its products and transporting and selling them, and receiving the proceeds of such sales. The essence of its profit making business is a series of operations as a whole. That part of the proceeds of sales in Saskatchewan which is profits is received in Saskatchewan, but it does not follow, of course, that the whole of such profits "arises from" that part of the Company's business which is carried on there within the contemplation of section 21 *a*; and I think such a conclusion is negatived when the language of this section is contrasted with that of other sections of the Act.

Sir Lyman Duff cites the case of *Commissioners of Taxation* v. *Kirk* (2). In that case the income tax statute of New South Wales charged within income tax, income "derived from lands of the Crown held under lease or licence" in New South Wales, and income "arising or accruing" from "any other source in New South Wales". The statute provided that "no tax shall be payable in respect of income earned" outside New South Wales. The company whose income came into question in that case was a mining company owning and working mines in New South Wales, the crude ore being there converted for the most part into concentrates. Almost the whole of the ore so treated was sold and the contracts for sale were made outside New South Wales. The Supreme Court of New South Wales held, following a previous decision in *In re Tindal* (3), that the whole of the income included in the proceeds of sales was earned and arose at the place where the sales were made and the proceeds of the sales received, and that, consequently, no part of such proceeds was taxable as income in New South Wales. The Judicial Committee reversed this judgment and, at pages 592 and 593 (2), their Lordships said:

> Their Lordships attach no special meaning to the word "derived", which they treat as synonymous with arising or accruing. It appears to their Lordships that there are four processes in the earning or production of this income: (1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages. The first

(1) [1941] S.C.R. 325.
(2) [1900] A.C. 588.
(3) (1897) 18 N.S.W.L.R. 378.

process seems to their Lordships clearly within sub-s. 3, and the second or manufacturing process, if not within the meaning of "trade" in sub-s. 1, is certainly included in the words "any other source whatever" in sub-s. 4.

So far as relates to these two processes, therefore, their Lordships think that the income was earned and arising and accruing in New South Wales * * * This point was, if possible, more plainly brought out in *Tindal's* case (1) * * * The question in that case, as here, should have been what income was arising or accruing to Tindal from the business operations carried on by him in the Colony.

The fallacy of the judgment of the Supreme Court in this and in *Tindal's* case (1) is in leaving out of sight *the initial stages,* and fastening their attention exclusively *on the final stage* in the production of the income.

This reasoning, I think, applies in the present case. When the goods of the appellant company reach Winnipeg, they have also gone through a series of processes or operations which make them ready for consumption. It is in these first stages that the manufacturing profits are made, and I fail to see how it can be said that they have "arisen from the business of the appellant in Manitoba". It is quite true that the goods are sold in Manitoba, but the business of selling and collecting the sales price in Manitoba, which is the final stage of a series of operations, cannot have the effect of importing for taxing purposes in Manitoba, profits earned in the initial stages in the province of Ontario, as a result of manufacturing operations.

I fully agree with Mr. Bristol when he suggested that "arising from the business" means "what is attributable to the business in Manitoba" or "profits derived from sources in Manitoba". The manufacturing profits made in Ontario are surely not attributable to the operations in Manitoba, and they are not derived from sources in Manitoba.

In order to accept the conclusions of the respondent, it would be necessary to say that the law taxes profits "derived from contracts entered in Manitoba" and I find myself unable to so construe section 24.

I, therefore, come to the conclusion that the appellant is entitled to an allowance as profit on the actual cost of manufacture and I would, therefore, allow the appeal and restore the judgment of Mr. Justice Major, with costs throughout.

(1) (1897) 18 N.S.W.L.R. 378.

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Rand J.

RAND J. (dissenting)—The transactions in Manitoba, constituting admittedly a business carried on there, were these: the receipt and warehousing at Winnipeg of merchandise, the acceptance and fulfilment of orders received from approved jobbers in the three prairie provinces through distribution by shipment or delivering of the goods called for; general superintendence of the business in those provinces, including coordinate direction over the field representatives canvassing the prairies; and the keeping of all proper records of the business so done. The expenses at Winnipeg were met by cash received from the head office at Toronto. The price for the goods was remitted by the purchasers direct or through the Winnipeg office to Toronto where all commercial accounts were kept. The travelling representatives were under general instruction from headquarters and paid direct from there. The question is, what was the net profit or gain "arising from" the business so conducted?

The relevant provisions of the taxing Act are as follows:

3. For the purposes of this Part, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Manitoba or elsewhere; * * *

4. The following incomes shall not be liable to taxation hereunder:

(*v*) Income earned by a corporation or joint stock company with its head office in Manitoba (other than a personal corporation) in that part of its business carried on outside of Manitoba.

(1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of * * *

(4) Where a corporation or joint stock company with its head office in Manitoba, other than a personal corporation, carries on business outside of Manitoba, no losses incurred in respect to that part of its business shall be deducted or taken into account in calculating the amount of income earned in Manitoba.

9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person * * *

(*d*) who, not being resident in Manitoba, is carrying on business in Manitoba during such year;

24. (1) The income liable to taxation under this Part of every person residing outside of Manitoba, who is carrying on business in Manitoba, either directly or through or in the name of any other person, shall be the net profit or gain arising from the business of such person in Manitoba.

(2) This section shall apply to a taxpayer which is a corporation or joint stock company carrying on business in Manitoba and which has not its head office in Manitoba.

25. The income liable to taxation under this Part of every person residing outside of Manitoba, who derives income for services rendered in Manitoba, otherwise than in the course of regular or continuous employment, for any person resident or carrying on business in Manitoba, shall be the income so earned by such person in Manitoba.

26 (1) Where a non-resident person produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves or constructs, in whole or in part, anything within Manitoba and exports the same without sale prior to the export thereof, he shall be deemed to be carrying on business in Manitoba and to earn within Manitoba a proportionate part of any profit ultimately derived from the sale thereof outside of Manitoba.

(2) The minister shall have full discretion as to the manner of determining such proportionate part.

27A. (1) Any non-resident person soliciting orders or offering anything for sale in Manitoba through an agent or employee, and whether any contract or transaction which may result therefrom is completed within Manitoba or without Manitoba, or partly within and partly without Manitoba, shall be deemed to be carrying on business in Manitoba and to earn a proportionate part of the income derived therefrom in Manitoba.

(2) The minister shall have full discretion as to the manner of determining such proportionate part.

It is agreed that section 24 is the applicable provision, but it can be seen at once that the first consideration raised is that of the meaning of certain words and expressions used both in that and the other provisions. We have "arising from", "derived from", "earned". Others of analogous import appear in the cases cited to us: "accruing from", "accruing from any source", "produced in". Primarily, to "earn" income or profit is, I should say, to expend the effort or exertion which creates the value to be exchanged; profit is "realized" if and when that value is converted into money or, in a practical business sense, into debt, in an amount greater than the cost of producing it. "Arising from", "derived from" and "accruing from" I take to be equivalents; they are applicable to a defined source; and in the case of a business, where used without more, it is on the assumption that the "business" includes factors essential in substance to producing profit. In the present case, the sales in Manitoba are obviously the final step in an overall business embracing manufacture and sale; but for the purposes of Manitoba, they and their clustered elements are a segregated and distinct business of themselves. The only difference between them and ordinary

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commercial trading is that in the latter case the goods are bought and they enter the business with their value therein so created; the essential factors are purchase, possession and sale; here, value is produced instead of purchased out of Manitoba, brought there and localized for the same purpose. In the statutory conception, ownership, possession, and disposal of the goods in Manitoba furnish the foundation of the taxable business there conducted. Not every "business" can be said to possess all factors required for the production of profit within the localization. It may, though self-contained, be but an intermediate process; for some, at least, of such cases section 26 makes provision; in them the legislature taxes either the process or a potential profit deemed annexed to it, on the basis of that portion of ultimate profit attributable to it. If, therefore, there is in a business from which profits must "arise", a sufficient basis in fact for the legislative assumption, as I think the case here, jurisdiction to tax the entire profit, on that apart from any other ground, is established; in the absence of modifying language in the context, the profit "arising from" that business is the entire profit; and the cost to that point, even though a manufacturing cost, determines the amount of it.

But the question remains whether by the provisions of the statute as a whole such a meaning is modified to point clearly to another subject-matter of tax or basis of determining the taxable profit. Does it appear that the words "arising from" are intended to be the equivalent of "earned" and the basis of the tax, that share of the profits from the company's entire operations—where, as here, they consist of a connected series—completed by the Manitoba transactions, which the value added to the goods by the operations in Manitoba bears to the total value produced? The different conceptions are sufficiently defined and the difficulty is one of legislative meaning only.

The provisions as a whole make it, I think, indisputable that the distinction suggested between "arising from" and "earned" was fully appreciated. Section 26,

to *earn* within Manitoba a proportionate part of any profit ultimately *derived from* the sale thereof outside of Manitoba,

seems to put that beyond question. The contention is that the converse of the effect of this unambiguous language was intended in section 24, but I am unable to agree with it. The expression "arising from" in section 24 carries the same signification as "derived from" in 26; in each case there is assumed a business embracing the necessary elements to a profit and in each the whole profit realized upon the sale is the profit dealt with.

It is argued that *Commissioners of Taxation* v. *Kirk* (1) is against that view. There again the question was one of the particular language used, and, as put by Lord Davey, it was

> whether any part of these profits were earned or (to use another word also used in the Act) produced in the Colony.

He treats "derived" as synonymous with "arising" or "accruing" but he does not extend that equivalence to "earned" or "produced". It was the four processes there that earned or produced the income. Section 27 declared that no tax should be payable in respect of income earned outside the Colony, and what Lord Davey was concerned to ascertain was what income was earned within the Colony. In such a context "arising" or "accruing" was referrable to the distributed income attaching to the process of production carried out in New South Wales and his statement

> Nor is it material whether the income is received in the Colony or not if it is earned outside

applies whether it is wholly or partly earned outside. The "earning", the work resulting in the creation of value, is the proper measure of the share of total profit to be annexed to the particular process wherever it may be carried out.

The many other authorities brought to our attention are of value only in clarifying the subject-matter and the terms employed; to ascertain the intention of the legislature from the language used is in each case an individual problem for which we can generally look for but small assistance from principle or analogy.

I would, therefore, dismiss the appeal with costs.

(1) [1900] A.C. 588.

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Kellock J.

KELLOCK J. (dissenting)—The appellant Company has its head office and factory in Toronto and an office and warehouse in Winnipeg. Its business is the manufacture and sale of chewing gum. At the factory ingredients for the finished article are purchased and stored, manufactured and packaged ready for sale. Shipments are then made from Toronto to Winnipeg, where a stock is carried for distribution in Manitoba, Saskatchewan, Alberta and a part of Northwestern Ontario. The Winnipeg branch receives the orders taken by jobbers in these areas, accepts and fills them and bills the purchasers, copies of the invoices being forwarded to the head office. Payment is made, not to the Winnipeg branch, but directly to the head office.

The assessments in question on this appeal are in respect of the appellant's fiscal periods ending in the years 1936 to 1939, inclusive. For the legislation governing, it is convenient to refer to R.S.M. 1940, cap. 209. It was not contended that there is any material difference between this and the earlier statutes which are applicable. Section 3, so far as material, defines "income" as

> the annual net profit or gain * * * directly or indirectly received by a person from * * * any trade, manufacture or business * * * whether derived from sources within Manitoba or elsewhere * * *

The persons who are made liable to taxation on income thus defined are set out in section 9, the relevant part of which is as follows:

> 9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person * * *
>
> (*d*) who, not being resident in Manitoba, is carrying on business in Manitoba during such year;
>
> tax at certain rates.

The combined effect of these two provisions purport, in the case of a non-resident carrying on business in Manitoba, to make such person liable to taxation in Manitoba in respect of his whole income. However, special provision is made for the case of a non-resident who carries on business in Manitoba by section 24 (1), which reads as follows:

> The income liable to taxation under this Part of every person residing outside of Manitoba, who is carrying on business in Manitoba, either directly or through or in the name of any other person, shall be the net profit or gain arising from the business of such person in Manitoba.

This subsection is, by subsection 2, made applicable to a company whose head office is without the province. The question for determination on this appeal is the proper construction of the words "the net profit or gain arising from the business of such person in Manitoba".

Appellant submits that, while it has only one profit, that profit, to quote its factum, "must be deemed to have arisen in all stages of the company's operations" and "must be apportioned on some basis to arrive at the taxable income in Manitoba". Reliance is placed upon the decision of the Privy Council in *Commissioners of Taxation* v. *Kirk* (1) and the dissenting judgment in *International Harvester* v. *The Provincial Tax Commission* (2) (Sask.). It is said that the net profit or gain "arising from the business" in Manitoba means the net profit arising from the appellant company's "operations" in Manitoba. Appellant also invokes sections 26, 27 and 27A, as showing a legislative intent to apportion profit on the basis contended for. For the respondent it is contended that the whole of the net profit arising from contracts of sale made in Manitoba are taxable, while profit arising from contracts made elsewhere are not taxable.

Before turning to a consideration of the authorities, it is essential first to consider the particular legislation which is here in question. In the statute one finds that section 24 is followed by a group of sections, 26 to 28, inclusive, grouped under the heading "Income from *Operations* in Manitoba". These sections are as follows:

26. (1) Where a non-resident person produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves or constructs, in whole or in part, anything within Manitoba and exports the same without sale prior to the export thereof, he shall be deemed to be carrying on business in Manitoba and to earn within Manitoba a proportionate part of any profit ultimately derived from the sale thereof outside of Manitoba.

(2) The Minister shall have full discretion as to the manner of determining such proportionate part.

27. (1) Any non-resident person, who lets or leases anything used in Manitoba, or who receives a royalty or other similar payment for anything used or sold in Manitoba, shall be deemed to be carrying on business in Manitoba and to earn a proportionate part of the income derived therefrom in Manitoba.

(2) The Minister shall have full discretion as to the manner of determining such proportionate part.

27A. (1) Any non-resident person soliciting orders or offering anything for sale in Manitoba through an agent or employee, and whether any

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contract or transaction which may result therefrom is completed within Manitoba or without Manitoba, or partly within and partly without Manitoba, shall be deemed to be carrying on business in Manitoba and to earn a proportionate part of the income derived therefrom in Manitoba.

(2) The Minister shall have full discretion as to the manner of determining such proportionate part.

28. Nothing in the three last preceding sections shall in any way affect the generality of the term "carrying on business" used elsewhere in this Part.

It is admitted that appellant is carrying on business in Manitoba within the meaning of section 24. The question is, what is the "business" in Manitoba the net profit arising from which is taxable? Is the line to be drawn horizontally, as appellant contends, by apportioning some notional profit to all of the operations of the appellant which culminate in the sale of its product, the part apportioned to the later operations actually performed within the province alone being taxable, or does the statute indicate, as respondent submits, that the line is to be drawn vertically as between the profit arising from contracts of sale made within and those made without the province? It is quite clear from section 24 itself that the entire net profit arising from the business carried on in Manitoba is taxable. The only question is, what is "the business"? Under section 26 any one of a number of particular operations is made to constitute the carrying on of business and there is express provision for apportioning profit to such operations. It is also significant that the section expressly excludes sale, and it would seem that the intention of the legislature is thereby indicated that where sale takes place within the province, that is a carrying on of business within the meaning of the statute without the necessity for any express provision to that effect, as the legislature evidently thought was necessary in the case of operations which do not culminate in sale. The same theory is exhibited by section 27A. I think it follows, therefore, that in any case where there is a carrying on of business within the province by reason of the habitual making of contracts of sale therein, section 24 applies and the entire profit arising from such sales is taxable and there is no apportionment.

Were section 24 absent from the Act, section 27A would apply to the appellant in respect of orders solicited in Manitoba. That section isolates the solicitation of orders

or the offering of anything for sale in Manitoba from other operations and constitutes this a carrying on of business in Manitoba for the purposes of the section. The greater, however, is made to include the less by the provisions of section 24, and, as the operations of the appellant go beyond what is described in section 27A, I think section 24 is the section which applies to the appellant. Counsel for the appellant agrees with this construction.

Turning to the English legislation, 16 and 17 Victoria, cap. 34, section 2, Schedule D, makes provision for taxation "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from * * * any * * * trade * * * exercised within the United Kingdom".

For my part, I cannot follow counsel for the appellant in his argument that: "the annual profits or gains arising or accruing to any person * * * from any trade exercised within the United Kingdom" differs in meaning from "the annual profits or gains arising or accruing to any person from the trade (or business) of such person in the United Kingdom", had the statute been so expressed as is the case with the Manitoba legislation here in question. To my mind, therefore, the decisions under the Imperial statute are pertinent. It is to be observed that that statute does not indicate what constitutes the exercise of a trade within the United Kingdom. Two questions therefore arise in any given case namely, (1) whether there is a trade exercised or carried on within the United Kingdom from which profits arise; and (2) what are the profits which are made subject to tax.

In *Erichsen* v. *Last* (1), the appellants were a foreign company domiciled in Copenhagen, having three marine cables connecting with the United Kingdom at different points. They accepted messages in the United Kingdom for transmission to various countries over their own cables and the cables of others. It was held that they were exercising a trade in the United Kingdom and chargeable to income tax on the profits arising from the contracts made within the United Kingdom. Any apportionment of profit such as is here contended for was negatived.

(1) (1881) 8 Q.B.D. 414.

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As to the first question, Brett L.J. said at p. 418:

The only thing that we have to decide is whether, upon the facts of this case, this company carry on a profit earning trade in this country. I should say that wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, *even though everything to be done by them in order to fulfil the contracts is done abroad.*

At p. 420 (1) Cotton L.J. said:

* * * and in my opinion when a person habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business.

This was approved by Lord Watson in *Grainger* v. *Gough* (2).

As to the second question, Brett L.J. said at p. 419 (1):

Then from what is the duty to be collected? It is from the profit accruing to this company from the trade which they carry on in England, namely, the making such contracts, and that profit is the difference between the sum the company receive and what it costs to earn that sum. There is no difficulty about that. It is immaterial whether the company have expended in this country or abroad what it properly can be said to cost them in order to earn the money which they so receive, but such expense, and nothing more, must be deducted in order to get the profit.

At p. 420 (1), Cotton L.J. said:

Then as to the question on what profit the company are to pay? The question is, what profit they make by the business carried on here, which is contracting to send messages to various parts of the world. It is, in my opinion, the sum received, after deducting everything which the company pay for the purpose of performing their contract. If part is performed by the company themselves, they cannot deduct anything in respect of a profit supposed to have been earned by them in the course of such performances. They can, of course, deduct all expenses, including their own expenses, and sums paid to other companies, but they cannot deduct a profit which is imaginary and has no real existence.

Under the same legislation in question in the above cited case, on the other hand, it was held by the House of Lords in *Grainger* v. *Gough* (2), that the solicitation of orders in the United Kingdom by an agent on behalf of a wine merchant carrying on business in France would not fall within the statute, no contracts being made in England. In that case Lord Davey, at page 345, said:

Now, what does one mean by a trade, or the exercise of a trade? Trade in its largest sense is the business of selling, with a view to profit, goods which the trader has either manufactured or himself purchased.

(1) (1881) 8 Q.B.D. 414.
(2) [1896] A.C. 325, at 340.

It was held also in *Sulley* v. *Attorney General* (1) that where an American firm carried on business in New York consisting in the resale there of goods purchased on their account in England by one of the partners who resided in England did not constitute the exercise of a trade in the United Kingdom within the meaning of the legislation. As stated by Lord Watson in *Grainger's* case (2) at page 341:

> One reason assigned for the decision was that the firm's transactions here did not involve any profits or gains, which were wholly dependent upon the resales effected by the firm on the other side of the Atlantic.

In *Maclaine* v. *Eccott* (3), Viscount Cave L.C. expressed the principle thus at page 432:

> I think it must now be taken as established that in the case of a merchant's business, the primary object of which is to sell goods at a profit, the trade is (speaking generally) exercised or carried on (I do not myself see much difference between the two expressions) at the place where the contracts are made. No doubt reference has sometimes been made to the place where payment is made for the goods sold or to the place where the goods are delivered, and it may be that in certain circumstances these are material considerations; but the most important, and indeed the crucial, question is, where are the contracts of sale made?

It would appear that the use of the phrase, "a merchant's business" was not intended to exclude from the application of the principle, businesses which include the production of the article sold as distinct from mere purchase. All of the members of the House approved of the dissenting judgment of Lord Dundas in *Crookston* v. *Furtado* (4), where the company concerned was the owner of phosphate mines, the product of which it sold in the United Kingdom. See also *Werle & Co.* v. *Colquhoun* (5).

In my opinion, the principle of the above decisions is applicable to section 24 of the legislation here in question. I am further of opinion that the legislation, including sections 26, 27 and 27A, was drawn with that principle in view. Although a different opinion with respect to somewhat similar legislation is expressed in the dissenting judgment in the *International Harvester* case (6), already referred to, I cannot, with respect, accept it, for the reasons set forth above. That opinion was founded upon *Kirk's* case (7) but Lord Davey, who was a party to the judgment

(1) (1860) 5 H. & N., 711.
(2) [1896] A.C. 325.
(3) [1926] A.C. 424.
(4) 1911 S.C. 217.
(5) (1888) 20 Q.B.D. 753.
(6) [1941] S.C.R. 325.
(7) [1900] A.C. 588.

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in *Grainger* v. *Gough* (1) in which *Erichsen* v. *Last* (2) was approved, said, in relation to the New South Wales *Income Tax Act*, 1895, with which the Privy Council was concerned in *Kirk's* case (3), at page 593:

> The learned judges refer to some English decisions on the Income Tax Acts of this country, which in language, and to some extent in aim, differ from the Acts now before their Lordships.

In *Kirk's* case (3) their Lordships were concerned with two companies, each incorporated under the law of the Colony of Victoria and having its head office and board of directors in that Colony. Each company conducted mining operations on leasehold lands held from the Crown in New South Wales, where each had an office and a mine manager. It is stated by Lord Davey, who delivered the judgment of their Lordships, that neither company made any contracts for sale in New South Wales. In addition to the mining of the ore the greater part of the ore was converted into a merchantable product in New South Wales.

The legislation in question in that case, so far as material, provided by section 15 for income tax in respect of all incomes:

> 1. Arising or accruing to any person wheresoever residing from any profession, trade, employment or vocation carried on in New South Wales * * * 3. Derived from lands of the Crown held under lease or licence issued by or on behalf of the Crown. 4. Arising or accruing to any person wheresoever residing from any kind of property * * * or from any other source whatsoever in New South Wales not included in the preceding subsections.

It was also provided by section 27, subsection 3, that:

> No tax shall be payable in respect of income earned outside the Colony of New South Wales.

It was held by the Board that there were four processes in the earning or production of the income of the companies: (1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale. It was pointed out that the word "trade" no doubt primarily means traffic by way of sale or exchange or commercial dealing, but that it may

(1) [1896] A.C. 325.
(2) (1881) 8 Q.B.D. 414.
(3) [1900] A.C. 588.

have a larger meaning so as to include manufacture. Confining the word to its literal meaning, their Lordships asked why in the case before them the income was not derived mediately or immediately from lands of the Crown held on lease under subsection 3 or from some other source in New South Wales under subsection 4, and they held that the question must be answered in the affirmative even if the manufacturing process did not come within the meaning of trade within subsection 1.

If subsection 1 of the statute in question in *Kirk's* case (1) be examined, it will be found, in my opinion, to be indistinguishable from the English legislation already referred to. If, therefore, the language and the aim of the English legislation was considered by the Privy Council to differ from the New South Wales legislation, as above pointed out, it can only be because of the presence of subsections 3 and 4 of section 15 and subsection 3 of section 27. In my opinion, as section 24 of the legislation here in question, like Schedule D of the United Kingdom statute, stands alone, there is nothing upon which any apportionment of profit over the various operations of the appellant company can be based. It seems to me that when the legislature intended to provide for an apportionment of profits to operations they did so expressly in sections 26, 27 and 27A. The fact that there is no similar provision in section 24 is not only significant but, in my opinion, conclusive.

Appellant points to the provisions of clause (*v*) of section 4, which exempts from taxation

> income earned by a corporation or joint stock company with its head office in Manitoba (other than a personal corporation) in that part of its business carried on outside of Manitoba.

I see no basis for applying this provision to a company such as the appellant whose head office is without the province. Section 24 deals with that kind of case.

I would dismiss the appeal with costs.

ESTEY J.—The appellant is a Dominion company manufacturing and selling chewing gum, with head office and manufacturing plant in the province of Ontario. It admits that it is carrying on business in Manitoba and as such

(1) [1900] A.C. 588.

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is liable for the payment of income tax for the years 1936 to 1939 inclusive under the provisions of *The Income Taxation Act*, being R.S.M. 1940, c. 209 (a consolidation of earlier statutes in which the sections material hereto are unchanged). The question in this appeal is the basis or principle upon which this income tax should be computed.

The appellant contends that, while the profit is realized only when the goods are sold, under section 24 this profit should be distributed or apportioned to all of its operations leading up to and culminating in the sale, that the amount so apportioned to the business in Manitoba is "the net profit or gain arising from the business" of the appellant in Manitoba.

The respondent submits that the business of the company in Manitoba is the selling of gum, that no profit or gain arises from any prior operations of the company and therefore the full profit or gain arises out of the sale in Manitoba. This profit is therefore taxable as "the net profit or gain arising from the business" of the appellant in Manitoba.

The learned trial judge accepted the appellant's contention. His judgment was reversed in the Appellate Court, Mr. Justice Trueman and Mr. Justice Dysart (*ad hoc*) dissenting.

There is no dispute as to the facts. The appellant has its head office and manufacturing plant in Ontario. It maintains an office and a warehouse in Manitoba. Orders are received, accepted, and the gum shipped and invoiced from its premises in Manitoba to jobbers in Western Ontario, Manitoba, Saskatchewan and Alberta. The selection and the credit rating of the jobbers to whom the Manitoba office may make sales, the bookkeeping, the rendering and collecting of accounts and the general direction and control of the business are all matters dealt with exclusively at head office in Ontario. It is clear that the contracts of sale for the gum are made in Manitoba.

The parties hereto are in agreement that the liability of the appellant is under section 24 of the Act and that the determination of the issue in this case depends upon the construction of that section.

Section 3 of *The Income Taxation Act*, R.S.M. 1940, c. 209, reads in part as follows:

3. For the purposes of this Part, "income" means the annual net profit or gain * * *from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Manitoba or elsewhere; * * *

Section 9 (1) (*d*) reads as follows:

There shall be assessed, levied and paid upon the income during the preceding year of every person

* * *

(*d*) who, not being resident in Manitoba, is carrying on business in Manitoba during such year;

* * *

a tax at the rates applicable * * *

"Income" is defined in section 3, and section 9 is the charging section. It is common ground that if sections 3 and 9 were the only provisions with respect to non-residents, the statute would purport to tax a non-resident carrying on business in Manitoba upon the net profit or gain derived from sources within Manitoba or elsewhere. Such a provision applicable to non-residents would give rise to obvious constitutional issues. That fact was, no doubt, the essential reason why section 24, which applies specifically to non-residents, was enacted.

Section 24 reads as follows:

24. (1) The income liable to taxation under this Part of every person residing outside of Manitoba, who is carrying on business in Manitoba, either directly or through or in the name of any other person, shall be the net profit or gain arising from the business of such person in Manitoba.

(2) This section shall apply to a taxpayer which is a corporation or joint stock company carrying on business in Manitoba and which has not its head office in Manitoba.

Throughout the hearing of this appeal, and in many of the cases, particularly the earlier ones, it was emphasized that where the contracts of purchase and sale were made business was carried on. Even in those cases it was pointed out that such was not the only test, and it is now recognized that business may be carried on by a person in different places and by operations quite apart from the making of contracts. Moreover, under section 24 the business of

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the non-resident may be wholly or partially carried on in Manitoba. The legislature of Manitoba, no doubt, had both of these factors in mind in enacting section 24 and providing thereby that the

> income liable to taxation * * * shall be the net profit or gain arising from the business of such person in Manitoba.

In this case the appellant carries on the business of manufacturing and selling gum. The fact that it manufactures in one and sells in many provinces does not in any way detract from the fact that it conducts but one business. Its business is not that of a manufacturer and then that of a wholesaler or jobber, but that of manufacturing and selling gum. Its business is a unit and every operation contributes to the ultimate profit or loss. That the profit is realized but once and only through the medium of the sales is admitted, but that does not determine the meaning of the words in section 24 as to what is the net profit or gain arising from the business of the appellant in Manitoba.

The several sections of the statute discussed at the hearing are phrased to cover special circumstances. Sections 26, 27 and 27A are phrased upon the assumption that the activities and operations there enumerated on the part of non-residents do not constitute a carrying on of business. Some of them would not and in a given case under any heading there might be a doubt. These sections declare not only that the non-resident who engages in the specified activities or operations shall be deemed to be carrying on business in Manitoba, but also that the non-resident shall be deemed "to earn a proportionate part of the income derived therefrom". The legislature is here legislating to create in certain cases that which for purposes of taxation exists in fact in other cases. That this was the view of the legislature is evidenced by the provisions of section 28, which avoids any conflict between section 24 and sections 26, 27 and 27A. In effect it provides that when the non-resident is in fact carrying on business in Manitoba the provisions of section 24 apply. In these circumstances, if any conclusion may be drawn to assist in the construction of section 24, it is that the legislature is by these sections providing that the specific circumstances dealt with shall

be "deemed to be" that which in fact exists elsewhere in the statute. The legislature was here creating statutory fictions. (*Hill* v. *East and West India Dock Co.* (1)) and were therefore making the provisions as complete and full as possible.

Then by section 4 (*m*) (prior to 1940 amendment), dealing with a company having its head office in Manitoba, the "profits earned by a corporation * * * in that part of its business carried on at a branch or agency outside of Manitoba" "shall not be liable to taxation". It would follow that, in order to come within the exemptions, the company must be carrying on business in fact outside of Manitoba. The phrase "in that part of its business" is significant, and the section as phrased must contemplate apportionment as regards a resident company.

The Saskatchewan statute dealt with in *International Harvester Co. of Canada, Ltd.* v. *The Provincial Tax Commission* (2) is for all practical purposes identical except that the Saskatchewan Act contained an additional provision for the adoption of regulations setting up a method for the determination of the tax if the information necessary to compute the income of any taxpayer was not available to the commission. The commission, acting under such regulations, determined the tax. Litigation followed in which the issues raised by the company included the constitutional validity of both the statute and the regulations. These regulations, it was contended, were invalid because they involved the imposition of a tax upon income arising from the company's business outside of Saskatchewan. The majority of this Court affirmed the judgment of the Court of Appeal in Saskatchewan and held the regulations valid because it was not the intention of either the statute or the regulations to exceed the taxing powers of the province, and if in this particular case the tax as computed exceeded that which would be valid *qua* tax, it was valid *qua* penalty imposed upon the taxpayer who did not furnish the required information. In the course of his judgment my lord the Chief Justice (then Rinfret, J.), with whom Crocket and Kerwin JJ. agreed, stated at pp. 351-352.

(1) (1884) 9 App. Cas. 448, at 455. (2) [1941] S.C.R. 325.

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It was next argued that, even if the Acts are constitutional or the regulations are *intra vires*, yet in their operation in the present case they have the effect of taxing profits or gains which did not arise from the business of the appellant in Saskatchewan.

* * * In an endeavour to transform that objection into a question of law, appellant's counsel stresses the point to the extent of saying that the application of the regulations necessarily includes in the assessment manufacturing profits said to have arisen exclusively outside Saskatchewan, i.e., at the head office of the appellant in Hamilton, Ontario, where the central management and control of the appellant abide (*De Beers Consolidated Mines* v. *Howe* (1); *Commissioners of Taxation* v. *Kirk* (2)).

Such, in my view, was not the purpose of the Acts of Saskatchewan or of the regulations made thereunder and applied in the present case. The Commissioner, in making each assessment, intended to tax exclusively the profits and gains arising from the business of the appellant in Saskatchewan.

Mr. Justice Hudson's conclusions were in accord, but Chief Justice Duff (with whom Davis and Taschereau JJ. agreed) dissented on the basis that (p. 334):

* * * under the regulation the subject of income tax is that part of the sales in Saskatchewan which is profit; that is to say, the whole of the profit received in Saskatchewan * * * I humbly think that this is a procedure wholly inadmissible under the Statute. Nowhere does the Statute authorize the Province of Saskatchewan to tax a manufacturing company, situated as the appellant company is, in respect of the whole of the profits received by the company in Saskatchewan. It is not the profits received in Saskatchewan that are taxable; it is the profits arising from its business in Saskatchewan, not the profits arising from the company's manufacturing business in Ontario and from the company's operations in Saskatchewan taken together, but the profits arising from the company's operations in Saskatchewan.

In the Court of Appeal of Saskatchewan (3), Chief Justice Turgeon construed the corresponding section in the Saskatchewan statute as applied to the business of a corporation carrying on business in provinces other than Saskatchewan to mean "only the net profits arising from that part of the business of the corporation which is carried on in Saskatchewan." It would appear that the reasons of all the learned judges in this Court were agreed in principle with that statement. The majority of the learned judges had in mind specifically "manufacturing profits" as indicated by the foregoing quotation from my lord the Chief Justice (then Rinfret, J.) but construed the regulations as not to include them, while the minority, because in their opinion they did, held them *ultra vires*.

(1) [1906] A.C. 455 (H.L.).
(2) [1900] A. C. 588 (P.C.).
(3) [1940] 2 W.W.R. 49.

In *Commissioners of Taxation* v. *Kirk* (1), the Privy Council considered the provisions of the *Land and Income Tax Assessment Act*, 1895, of New South Wales. The respondent companies were incorporated in the State of Victoria and had their head offices at Melbourne in the latter state. In 1897, the year in question, the companies carried on mining operations in New South Wales, but the contracts for sale of their product were all made outside of New South Wales. Lord Davey, speaking for the Privy Council, at p. 592 stated:

> The real question, therefore, seems to be whether any part of these profits were earned or (to use another word also used in the Act) produced in the Colony.

He then analyzes the business as follows:

> It appears to their Lordships that there are four processes in the earning or production of this income—(1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages.

The Supreme Court of New South Wales had decided that there was no income derived or arising or accruing in New South Wales, basing their decision upon one of their earlier cases, *Tindal's* case (2). Lord Davey, in referring to that case, speaks as follows:

> The fallacy of the judgment of the Supreme Court in this and in *Tindal's* case (2) is in leaving out of sight the initial stages, and fastening their attention exclusively on the final stage in the production of the income.

The Privy Council based their decision upon the words in section 15 (3), "derived from lands of the Crown held under lease", and the words in section 15 (4), "arising or accruing * * * from any other source whatsoever in New South Wales", and then, referring specifically to the four processes in the earning or production of income, stated:

> The first process seems to their Lordships clearly within sub-s. 3, and the second or manufacturing process, if not within the meaning of "trade" in sub-s. 1, is certainly included in the words "any other source whatever" in sub-s. 4.

The problem in the *Kirk* case (1) was to determine whether income was derived or was arising or accruing (words which were treated as synonymous by the Privy

(1) [1900] A.C. 588. (2) (1897) 18 N.S.W. L.R., 378.

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Council) in New South Wales. An analysis of the business carried on disclosed that income was derived and therefore taxable under the provisions of the statute in New South Wales. This case is important because of the analysis of the business and that, notwithstanding contracts of sale were not made in New South Wales, the Privy Council held that income was derived from the initial process within New South Wales, which process, with subsequent operations, produced the product that, when sold, realized the income.

In *Commissioners of Taxation (N.S.W.)* v. *Meeks* (1), Mr. Justice Isaacs stated:

> Now, the question in the special case in *Kirk's* case (2) as Lord Davey is careful to point out in the opening sentence of the judgment, was whether the companies had *any* income in 1897 taxable in New South Wales—and not whether *all* the income arising from their contracts was taxable in the State * * * Then, after referring to *Tindal's* case (3) he says: "The question in that case, as here, should have been what income was arising or accruing to Tindal from the business operations carried on by him in the Colony"—that is, what apportionment should be made attributable to New South Wales. And it is because the Privy Council divide the operations of the company into those operations which are carried on in the State, and those which are not, that the observation is made that the fallacy of the Supreme Court judgment existed in leaving out of sight the initial stages, and fastening their attention exclusively on the final stage in the production of the income.

The *Kirk* case (2) is of particular significance because the judgment of the Privy Council was written by Lord Davey who was one of their Lordships in *Grainger & Son* v. *Gough* (4), and, referring specifically to that and the case of *Sulley* v. *Attorney-General* (5), he states that:

> * * * these cases do not appear to their Lordships to have much to do with a case such as the one before them, where a business is admittedly carried on in this country.

He was also one of their Lordships in *San Paulo (Brazilian) Ry. Co.* v. *Carter* (6), with regard to which he states at p. 594 (1):

> It would have been difficult to say in that case that the profits or income were not to some extent, at any rate, earned in Brazil.

(1) (1915) 19 C.L.R. 568, at 582.
(2) [1900] A.C. 588.
(3) (1897) 18 N.S.W. L.R. 378.
(4) [1896] A.C. 325.
(5) (1860) H. & N. 711.
(6) [1896] A.C. 31.

Then with respect to the authorities in Great Britain generally, at p. 593 he states:

> The learned judges refer to some English decisions on the Income Tax Acts of this country, which in language, and to some extent in aim, differ from the Acts now before their Lordships. The language used in the English judgments must of course be understood with reference to the cases then under consideration.

In *Underwood Typewriter Co.* v. *Chamberlain* (1), the Underwood Typewriter Company was a Delaware corporation seeking recovery of a tax paid under protest in the State of Connecticut. Connecticut imposed a tax of 2 per cent. upon the net income of the corporation earned during the preceding year from business carried on within the state. The head office of the company was in the City of New York but all its manufacturing was done in Connecticut and it had a branch for selling in Connecticut as well as in other states. A number of questions were raised, including one that it imposed a tax upon the income arising from business conducted beyond the boundaries of the state. Mr. Justice Brandeis stated at p. 120.

> The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State * * * There is, consequently, nothing in this record to show that the method of apportionment adopted by the State was inherently arbitrary, or that its application to this corporation produced an unreasonable result.

It would, therefore, appear that where statutory limitations are imposed upon the taxing authorities, the principle of apportionment has been approved, as evidenced by the foregoing cases.

A number of British decisions were cited and it was pointed out that there was a similarity in the language of Schedule D of the Imperial Income Tax Act, 1853 (16 & 17

(1) (1920) 254 U.S. Sup. Ct. Rep. 113.

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Vict., c. 34), with that of section 24 of the Manitoba statute, both of which impose a tax upon the non-resident. Schedule D of the Imperial Act reads in part:

> * * * the annual profits or gains arising or accruing to any person * * * although not resident within the United Kingdom, from any * * * trade * * * exercised within the United Kingdom.

The same provision was enacted in Schedule D, 1 (*a*), of the *Income Tax Act, 1918.*

Once under the foregoing provision it is established that a non-resident is exercising a trade in Great Britain, the annual net profits or gains arising or accruing therefrom are taxable and they are not concerned whether these profits are earned within the boundaries of Great Britain or elsewhere, and therefore the apportionment of the profits earned in Great Britain or elsewhere is never an issue. There are no constitutional limitations upon the taxing power of Parliament in Great Britain.

In *San Paulo (Brazilian) Ry. Co.* v. *Carter* (1), the issue was whether the resident company should pay a tax, as provided by section 5, 16 & 17 Vict., c. 34, under the first or the fifth case. If the trade was carried on wholly or partly within Great Britain the tax was imposed under the first case, but if exclusively outside of Great Britain under the fifth case. There the resident company operated a railway in Brazil, and, apart from the control and direction, all the work and the profits were earned in Brazil. It was held, however, that the fact that the control and direction existed in Great Britain that the company was carrying on business in Great Britain and therefore taxable under the first case.

These authorities establish that activities and operations other than contracts for sale constitute a carrying on of business and, further, that these respective activities and operations produce or earn income, and therefore, while the income may be realized through the sale, it does not entirely arise from that one activity or operation.

Moreover, it is clear that a taxing authority, in order to impose an income tax, must have either the person or the source, in this case the business, within its jurisdiction.

(1) [1896] A.C. 31.

The Income Tax Acts, however, themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there.

Colquhoun v. *Brooks* (1), *Smidth & Co.* v. *Greenwood* (2).

Operations that have been held to constitute a carrying on of business and which contribute to the income are in this case outside of Manitoba.

Then from the statute itself it appears, both with respect to residents who are carrying on business outside of the province, and with respect to non-residents who are carrying on business in the province, that a separation or segregation of that business carried on within the province is contemplated. Section 24, in the light of the foregoing authorities and the taxing power of Manitoba, must be construed so that the tax is imposed only on the net profit arising out of that portion of the business which a non-resident carries on in the province of Manitoba.

The judgment of the learned trial judge should be restored and the appeal allowed with costs throughout.

Appeal allowed and judgment of the trial judge restored, with costs throughout.

Solicitors for the appellant: *White, Bristol, Gordon, Beck & Phipps* and *Williams, Dilts, Baker, Laidlaw, Shepard & Hamilton.*

Solicitor for the respondent: *R. B. Baillie.*

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(1) (1889) 14 App. Cas. 493, *per* Lord Herschell at 504.

(1) [1921] 3 K.B. 583, at 594.

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*June 2, 3, 4.
*June 18.

JOSEPH TAYLOR.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Trial—Evidence—Charge of murder—Alleged misdirection in trial judge's charge to jury—Provocation (Cr. Code, R.S.C. 1927, c. 36, s. 261; reduction of murder to manslaughter)—"Insult"—Drunkenness of accused as matter for consideration with regard to his acting on the "wrongful act or insult"—Onus of proof as to defences of drunkenness, provocation.

Conviction of appellant of the murder of his wife was affirmed by the Court of Appeal for Ontario, [1947] O.R. 332, Roach J. A. dissenting (holding there should be a new trial) on grounds, (1) that there was misdirection and non-direction in the trial judge's charge to the jury with reference to the defence of provocation, as a result of which the full theory of the defence with respect to provocation was not stated by him to the jury; (2) that he erred in his charge by telling the jury several times that the burden of proof lay upon the accused to satisfy them with respect to his defences of drunkenness and of provocation by a preponderance of evidence, and, though at other times in the charge he gave a correct statement of the law as to the onus of proof, yet it could not be concluded with certainty that the jury must have had a proper understanding of it. Appellant brought an appeal to this Court, based on those dissents, and also, by leave granted under s. 1025, *Cr. Code*, on the ground that the decision appealed from conflicted with that of the Court of Appeal for Saskatchewan in *Rex* v. *Harms*, 66 Can. Crim. Cas. 134 on the following point: assuming the facts permitted the jury to find that they were "sufficient to deprive an ordinary person of the power of self-control" under s. 261 (2), *Cr. Code*, may the jury, in deciding whether or not the provocation did in fact produce a passion that led to the fatal act, take into account the actual condition of the accused in respect to drunkenness.

At the trial appellant gave evidence, which included evidence of words spoken between himself and his wife and, after a certain answer by his wife, a slap by her on his head, and that he did not remember what happened after that until he was trying to pick her up from the floor.

Held: The conviction should be set aside and a new trial held.

Per The Chief Justice and Kerwin J.: Both grounds of said dissent were rightly taken.

As to the first ground: Under s. 261 (3), *Cr. Code*, it was for the jury to say "whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received". The jury were entitled to believe the whole, or part, or

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

none, of appellant's testimony; if they accepted the whole, they were at least entitled to consider the wife's answer in connection with the slap; if they accepted only the evidence as to the conversation between appellant and his wife, they were entitled, in view of the word "insult" in s. 261, to consider whether that was sufficient to deprive an ordinary person of the power of self-control; and these matters were not put to the jury.

As to the second ground: Reading in its entirety what the trial judge said to the jury, it is impossible to say that there was no error; the jury did not have such a clear and correct direction as the accused was entitled to; and under all the circumstances it could not be said that there was no substantial wrong or miscarriage of justice.

The third ground of appeal should not have effect. Should a jury find that what was complained of was sufficient to deprive an ordinary person of the power of self-control, then, in deciding whether the accused was actually so deprived, they are not entitled to take into consideration any alleged drunkenness on the part of the accused. *Rex.* v. *Harms* (*supra*) disapproved on this point.

Per Taschereau and Kellock JJ.: Appellant should succeed on the first ground of said dissent and also on the third ground of appeal. If the jury believed appellant's evidence, his wife's act of slapping him, which was wrongful in itself, was also, against its verbal background (in a meaning which it was open to the jury to give to the words spoken), an "insult", within the meaning of that word in s. 261 (2). It was (under s. 261 (3)) for the jury to find (1) as to the sufficiency of the particular wrongful act or insult to cause an ordinary person to be deprived of self-control, and (2) whether appellant was thereby actually deprived of his self-control. In finding on the latter question the jury should consider the effect on appellant's mind of the intoxication to which he was subject at the time, if they should find he was intoxicated to any degree. *Rex* v. *Harms* (*supra*) approved.

As to the erroneous direction several times to the jury as to onus with respect to drunkenness and provocation, and the effect of this upon the jury in view of correct statements of the matter to the jury at other times: As there is to be a new trial, it is sufficient to refer to *Woolmington* v. *Director of Public Prosecutions*, [1935] A.C. 462, at 481 and 482, where the trial judge's duty on such matter is clearly defined.

Per Estey J.: As to the first ground of said dissent: The conversation and the slap (of appellant's evidence thereon was believed by the jury) would, under all the circumstances, constitute evidence of a "wrongful act or insult" within the meaning of s. 261. An insult may be effected by either words or acts or a combination of both. Appellant's wife's words and her act were so closely associated that their meaning and effect could only be determined by considering them together and in relation to all the surrounding circumstances. It was a misdirection to charge the jury in such a way that their consideration was directed to the slap alone.

As to the third ground of appeal: If the jury found the "insult" of such a nature as to be "sufficient to deprive an ordinary person of the power of self-control", then, in considering whether the accused "acted upon it on the sudden and before there had been time for his

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passion to cool", the jury might consider any facts in evidence that might have influenced the accused to act or not to act upon it, including his consumption of liquor and its effect upon him. (The view taken on this point in *Rex v. Harms, supra,* approved)

Whether the effect of the trial judge's repeated misdirection to the jury as to onus of proof was corrected in their minds by his correct statements of the law at other times in his charge, it was not necessary to determine, as a new trial must be had on other grounds above. (The law as to burden of proof in criminal trials stated, with explanatory discussion thereon, and reference to the *Woolmington* case, *supra,* at p. 481).

APPEAL by the accused from the judgment of the Court of Appeal for Ontario (1) dismissing (Roach J. A. dissenting) his appeal from his conviction, at trial before Chevrier J. and a jury, on a charge of murder. The appeal was on grounds of the dissent taken by Roach J. A. (who held there should be a new trial), and also on a ground raised by leave granted under s. 1025 of the *Criminal Code* (R.S.C. 1927, c. 36). The said grounds are stated in the reasons for judgment in this Court now reported and are indicated in the above headnote.

G. A. Martin K.C. and *W. A. Donohue* for the appellant.

W. B. Common K.C. and *W. M. Martin K.C.* for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—The appellant was convicted of the murder of his wife and that conviction was affirmed by the Court of Appeal for Ontario with Mr. Justice Roach dissenting on the ground that there was misdirection and non-direction in the charge of the trial judge with reference to the defence of provocation as a result of which the full theory of the defence with respect to provocation was not put by him to the jury. This is the only ground of dissent stated in the formal judgment, but in his reasons, Mr. Justice Roach also dissented on the ground that the trial judge erred in his charge by telling the jury several times that the burden of proof lay upon the accused to satisfy them with respect to his defence of drunkenness and of provocation by a preponderance of evidence. Although this second ground does

(1) [1947] O.R. 332; 88 C.C.C. 281.

not appear in the formal judgment, this Court is entitled to look at the reasons of the dissenting judge: *Reinblatt* v. *The King* (1).

The appellant appeals from the Order of the Court of Appeal based on these two dissents. By leave of Mr. Justice Rand, granted under section 1025 of the *Criminal Code,* the appellant also appeals on the ground that the decision *a quo* conflicts with the decision of the Court of Appeal for Saskatchewan in *Rex* v. *Harms* (2) on the point whether, assuming the facts permitted the jury to find that they were sufficient to deprive an ordinary person of the power of self-control under section 261 (2) of the *Criminal Code,* the jury, in deciding whether or not the provocation did in fact produce a passion that led to the fatal act, might take into account the actual condition of the accused in drunkenness. Mr. Justice Rand treated what was said in this respect by the Chief Justice of Ontario for the majority of the Court of Appeal, not as a mere dictum but as laying down a proposition by which that Court would be subsequently bound. It is open to the Court to come to a contrary conclusion but, upon consideration of the reasons of the Chief Justice, it would appear that he meant his remarks upon the subject to be treated as laying down a binding rule.

As there should be a new trial, I mention only such circumstances as are necessary for a determination of the three questions thus raised. At the trial, the appellant testified that, some days before the night his wife received the injuries from which she died, he warned her never to be alone with one Holmes because of something the appellant had witnessed between Holmes and Mrs. Morgan. There was evidence that throughout that night and evening the appellant had been drinking at several places before returning with his wife and Holmes to his own home. At some stage, the appellant's wife went out of the house. The appellant testified: that, being alone in his house, he heard the sound of a motor car which he stated he recognized as being Holmes' motor car; that his wife shortly thereafter came in the house and when he asked her "Where have you been?", she did not answer; that he said, "You have been out with Harry Holmes", to

(1) [1933] S.C.R. 694. (2) (1936) 66 C.C.C. 134.

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which she replied "So what? Harry Holmes is all right",— which, he testified, meant to him that she thought Holmes a better man than he, and when asked in what respect, he answered, "Well, that would depend on how a woman judged a man"; he further testified that when he said to her "You have been out with Harry Holmes", he meant that as an accusation of misconduct; upon being asked at the trial what happened after his wife answered "So what? Harry Holmes is all right", he replied, "She walked over to me and slapped me a good one on the side of the head", he said that he did not remember what happened after that until he was trying to pick his wife up from the floor.

As to both drunkenness and provocation, the trial judge several times charged the jury correctly as to the onus remaining throughout upon the Crown to prove a charge of murder beyond a reasonable doubt, but on several occasions he put it as if there were an onus on the accused to make out such a case of drunkenness or provocation as would reduce the crime charged from murder to manslaughter. This was misdirection: *Woolmington* v. *Director of Public Prosecutions* (1), and the first general proposition stated by Viscount Simon in *Mancini* v. *Director of Public Prosecutions* (2).

Woolmington's case (1) is concerned with explaining and reinforcing the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and, consequently, that if, on the material before the jury, there is a reasonable doubt, the prisoner should have the benefit of it.

Finally, after the jury had been out for three hours, they came in and the foreman addressed the judge:—

In your address to the jury, you spoke in regards to provocation as regards to the sobriety item, and you spoke of drunkenness as a second item, and it is the end of your remarks. In other words, summarizing your address, you pointed out that we should take all the facts into consideration. Well, we need some guidance in regard to combined provocation and drunkenness.

The trial judge replied in part as follows:—

Well, gentlemen, if you are satisfied beyond a reasonable doubt the accused is the one who killed Rita Taylor, then you have provocation and drunkenness to look after. If he was provoked to the point that I have indicated, and you are satisfied beyond a reasonable doubt that there was then provocation, that provocation would reduce that to manslaughter.

(1) [1935] A.C. 462. (2) [1942] A.C. 1, at 11.

It is true that he proceeded to state the matter in terms that could not be objected to, but in view of the conflicting directions in his charge before the jury retired and of the error in the first part of his answer upon their return,

> If he was provoked to the point that I have indicated, and you are satisfied beyond a reasonable doubt that there was then provocation, that provocation would reduce that to manslaughter.

I am forced to the conclusion that the jury did not have such a clear and correct direction as the accused was entitled to. Reading the charge in its entirety and particularly the whole of the trial judge's answer to the foreman's question, I find it impossible to say that there was no error. Mr. Justice Roach was, therefore, right in his second ground of dissent, and under all the circumstances I cannot say that there was no substantial wrong or miscarriage of justice.

I now turn to Mr. Justice Roach's first ground of dissent. The criminal law for Canada on the subject of provocation is set out in section 261 of the *Criminal Code.*

> 261. Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.
>
> 2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.
>
> 3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.
>
> 4. The illegality of an arrest shall not necessarily reduce an offence of culpable homicide from murder to manslaughter, but if the illegality was known to the offender it may be evidence of provocation.

Except for a few immaterial variations, this is the same as section 176 of the Draft Code prepared by the Criminal Code Commission of 1878-79 in England, which section is set out in the third volume of Stephen's History of the Criminal Law in England at page 81. A Bill was prepared for enactment to carry out the provisions of the Draft Code and that part of the Commission's report relating to

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the provisions of the Draft Code and of the Bill dealing with provocation is set out in Taschereau's Criminal Code at page 156:—

> There is no substantial difference between the provisions of the Draft Code and the Bill dealing with provocation, though the language and arrangement differ. Each introduces an alteration of considerable importance into the common law. By the existing law, the infliction of a blow, or the sight by the husband of adultery committed with his wife, may amount to provocation which would reduce murder to manslaughter. It is possible that some other insufferable outrages might be held to have the same effect. There is no definite authoritative rule on the subject, but the authorities for saying that words can never amount to a provocation are weighty. We are of opinion that cases may be imagined where language would give a provocation greater than any ordinary blow. The question whether any particular act falls or not within this line appears to us to be pre-eminently a matter of degree for the consideration of the jury.

The Bill was never enacted into law and in England, therefore, the matter is still dealt with at common law. It is in the light of these circumstances that the decisions of the House of Lords in *Mancini's* case (1) and in *Holmes* v. *Director of Public Prosecutions* (2) must be read.

In the enunciation of the second general proposition in the *Mancini* case (1) it is said:—

> If the evidence before the jury at the end of the case does not contain material on which a reasonable man could find a verdict of manslaughter instead of murder, it is no defect in the summing-up that manslaughter is not dealt with.

That may be taken as generally true in Canada in the sense that in order to raise a question of manslaughter there must be some foundation for it at the trial. That is true also in so far as provocation is concerned, subject to the express terms of section 261 of the *Code*. Earlier in the *Mancini* case (1) (at p. 10), Viscount Simon had stated:—

> In that view [i.e., that Mancini's story was rejected] the only knife used in the struggle was the appellant's dagger, and this followed Distleman's coming at him and aiming a blow with his hand or fist. Such action by Distleman would not constitute provocation of a kind which could extenuate the sudden introduction and use of a lethal weapon like this dagger, and there was, therefore, on the assumption that the appellant's evidence was rejected, no adequate material to raise the issue of provocation.

The position at common law is again set forth in *Holmes'* case (2), at page 597:—

> If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable

(1) [1942] A.C. 1. (2) [1946] A.C. 588.

jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter.

Thus at common law the House of Lords has declared that it is the province of the judge to decide whether there is any evidence of provocation proper to be dealt with by the jury, but for Canada subsection 3 of section 261 of our *Code* provides:—

> Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact.

This is not to say that in a proper case the trial judge should not draw the jury's attention to the nature of the provocation and the mode of resentment and ask them to consider whether the latter bears a reasonable relation to the provocation, but the subsection clearly enacts that it is not the province of the judge to decide such matters.

The Chief Justice of Ontario considered that the wife of the appellant repudiated the latter's implied accusation, and continues:—

> In the circumstances I am strongly of the opinion that her words and conduct in so doing did not constitute provocation within section 261. They were the answer to be expected from a woman of any spirit to an unfounded charge of infidelity made by a husband who himself had been so occupied with his drink that he did not know even where she was. In my opinion there was no evidence to go to the jury in this case that would support the plea of provocation set up by the appellant.

The issue, however, was raised, so that it cannot be said that there was no foundation for it, and the meaning to be ascribed to the wife's equivocal answer to the appellant's query, taken in conjunction with the slap, was for the jury. As is pointed out in the extract from the report of the English Criminal Code Commission set out above:—

> The question whether any particular act falls or not within this line appears to us to be pre-eminently a matter of degree for the consideration of the jury.

And the matter is thus put by Sir Lyman Duff, speaking for this Court in *The King* v. *Manchuk* (1):—

> We think it was a question for the jury whether (*a*) the acts relied upon as constituting provocation were calculated to deprive an ordinary

(1) [1938] S.C.R. 18, at 21.

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man of self-control to such an extent as to cause an attack upon Mrs. Seabright of such a character as that delivered by the accused.

Viscount Simon stated in the *Holmes'* case (1) at page 600 that it was not necessary to decide whether there were any conceivable circumstances accompanying the use of words without actual violence, which would justify the leaving to a jury of the issue of manslaughter as against murder, but continued:—

> It is enough to say that the duty of the judge at the trial, in relevant cases, is to tell the jury that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter, and that in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime. When words alone are relied upon in extenuation, the duty rests on the judge to consider whether they are of this violently provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly.

The wording of our Code, however, is "any wrongful act or insult", and the word "insult", as generally understood and as defined in standard dictionaries, includes language as distinct from acts: *Rex* v. *Krawchuk* (2). The reason for the recommendation of the English Criminal Code Commission is expressed as follows:—

> We are of opinion that cases may be imagined where language would give a provocation greater than any ordinary blow.

and our Code follows the Draft Code and Bill.

The jury were entitled to believe the whole, or part, or none, of the accused's testimony. If they accepted it in its entirety, they were at least entitled to consider the wife's answer in connection with the slap, and, if they accepted only the evidence relating to the conversation between the appellant and his wife, they were entitled, in view of the word "insult", to consider whether that was sufficient to deprive an ordinary person of the power of self-control. These matters were not put to the jury, and the first ground of dissent by Roach J. A., is, therefore, well taken.

I pass to the conflict between the decision of the Court of Appeal in this case and that of the Court of Appeal for Saskatchewan in the *Harms* case (3). The argument, that the jury should have been directed that if they came to the

(1) [1946] A.C. 588.
(2) (1941) 75 C.C.C. 219.
(3) (1936) 66 C.C.C. 134.

conclusion that what was complained of was sufficient to deprive an ordinary person of the power of self-control, they then, in deciding whether the appellant was actually so deprived, must consider the alleged drunkenness of the appellant, cannot, in my view, prevail. It is important to refer again to subsection 2 of section 261 of the Code:—

2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

The criterion is the effect on an ordinary person. It is true that a trial judge must at some stage ask the jury whether the accused was actually deprived of the power of self-control by the provocation which he received, because there may be cases where, because of evidence of ill-will before the provocation or other circumstances, it would be open to the jury to find that the accused did not so act. However, in coming to a conclusion on that point, the jury is not entitled to take into consideration any alleged drunkenness on the part of the accused. In my opinion, the matter is tersely and correctly put by Roach J. A., when he says that the argument on behalf of the appellant is tantamount to saying

the act or insult on which I rely would have caused an ordinary man to lose his self-control but not me. The only reason I lost my self-control was because I was drunk.

The decision on this point in the *Harms* case (1) cannot be supported.

The appeal should be allowed, the order of the Court of Appeal and the conviction set aside, and a new trial directed.

The judgment of Taschereau and Kellock, JJ., was delivered by

KELLOCK J.—The appellant was convicted on a charge of murdering his wife. His appeal to the Court of Appeal for Ontario was dismissed, Roach J. A. dissenting. This appeal comes to this Court on two questions of law pursuant to section 1023 of the *Criminal Code,* namely, alleged misdirection in regard to provocation and alleged misdirection and non-direction with respect to the burden of proof. There is a further question raised pursuant to

(1) (1936) 66 C.C.C. 134.

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leave granted under section 1025, as to alleged conflict between the judgment in appeal and the decision of the Court of Appeal of Saskatchewan in *Rex* v. *Harms* (1). Mr. Common submits that, notwithstanding the leave, this last point is not open as there is in fact no conflict. It will be convenient to consider this point first.

The way the matter is put is that the basis of the judgment in appeal is that there was no evidence of provocation and therefore anything said in relation to the decision in the *Harms* case (1) was *obiter*. While in the judgment of the majority it is stated, not once but twice, that there is no evidence of provocation, the point arising in the *Harms* case (1) is dealt with as a distinct ground of appeal and is decided adversely to the appellant. I think, therefore, that the point was a ground of decision and that conflict has been shown accordingly.

Provocation is governed by section 261 of the Code. By subs. 1, the provocation with which the section deals is sudden provocation, and the offender also must himself have acted "upon the sudden". By subs. 2 "any" wrongful act or insult *may* be provocation if of such a nature as to be sufficient to deprive an *ordinary person* of the power of self-control but only if *the offender* acts thereon. The question, however, as to whether or not there is any evidence is for the court, but, subject to that, it is provided by subs. 3 that the above two matters are both questions of fact for the jury, namely:

(1) the sufficiency of the particular wrongful act or insult to cause an ordinary person to be deprived of self-control, and

(2) whether the accused was actually deprived of his self-control by such act or insult.

To appreciate the matters in controversy, it is necessary to state shortly the relevant facts. I quote from the reasons for judgment of Roach J. A. in the Court of Appeal:

> Rita Taylor was the wife of the accused. Together they resided in a residence which was originally intended as a summer cabin, but which, due to a housing shortage, was occupied the year round, at a place called Baxter's Beach on the Canadian shore of the St. Clair River a few miles outside the city of Sarnia. The accused was employed as a labourer at a foundry in or near the city of Sarnia.

(1) (1936) 66 C.C.C., 134.

On Friday, November 29th, he quit work at noon and went to his home. In the afternoon he and his wife went into the city of Sarnia where he, at least, did some shopping and later they went together to the beverage room of a local hotel. There an orgy of drinking commenced which was not concluded until somewhere around midnight out at Baxter's Beach.

In the hotel the accused met a man called Holmes, and he joined the accused and his wife at the latter's table in the beverage room. The accused did not have a motor car; Holmes did. Towards the end of the afternoon Holmes suggested that he would drive the accused and his wife to their home at Baxter's Beach. Before leaving the city, however, and shortly before 6 o'clock, Holmes and the accused went to a local wine shop and purchased between them four bottles of cheap wine. Then Holmes drove the accused and his wife to their home at the beach where all three proceeded to drink the wine. Early in the evening a neighbour called Goodwin from a nearby cabin joined them. While he was present, and about 9 o'clock, the appellant and his wife got into an argument and they went into an adjoining bedroom. There is some evidence of scuffling in the bedroom. The appellant emerged from that room and said that he had given his wife a few "rabbit punches". The accused states that the argument developed as a result of the wife's intoxicated condition, and his insistence that she should go to bed. Whatever were the nature of the "rabbit punches" the wife was not perceptibly hurt. She remained in the bedroom and the three men went to Goodwin's cabin, where the fourth and last bottle of wine was consumed. Some little time later and while the men were still there, the appellant's wife came over to Goodwin's cabin and joined them. The wine having been exhausted, Holmes and the appellant and his wife drove in Holmes' car to a bootlegger's place where they drank beer. Leaving the bootlegger's place they returned to the appellant's cabin, apparently, about 11 o'clock or a little later, bringing with them three bottles of beer. Holmes and the appellant went into the cabin but the wife apparently remained outside in the car. Holmes and the appellant finished the beer and Holmes left about midnight.

The appellant stated in evidence that the next he recalls was when he awoke and found himself on his bed dressed only in a new suit of underwear which he had purchased that afternoon. He had no recollection of having put on that underwear. He states that he was awakened by the cold; he got up and realized that his wife was not there.

When Holmes arrived at his car he found the wife half asleep—in a doze in the back seat. There was some conversation between them which was not admissible in evidence, but as a result of which Holmes and the wife drove around the country-side over a circuitous route and returned to the neighbourhood of the accused's cabin about one o'clock. They stopped on the highway about a quarter of a mile from the Taylor cabin. There the wife got out and walked home.

I should here interject that the appellant swore in evidence that some days earlier he and his wife had some conversation about Holmes, during which conversation he told her never to be alone with Holmes because of an "incident" he had seen take place between Holmes and a Mrs. Morgan who lived in a nearby cabin. Mrs. Morgan was a Crown witness and on cross-examination she said that sometime earlier she had told both Taylor and his wife that Holmes had tried to get "fresh" with her and to have sexual intercourse with her.

As to what happened when the wife arrived at the cabin in the early hour of the morning in question, we have only the appellant's word.

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In the evidence he stated that he heard the noise from Holmes' car. He identified that noise as coming from Holmes' car because of the fact that apparently the car was lacking a muffler and made a terrific noise. Realizing that his wife was not in the cabin, he concluded that she was with Holmes. His evidence of what happened on her return is most important, and is as follows: "Q. What, then, was your reaction on hearing this car, realizing that your wife was away from the cabin? A. I was getting a little mad, sir. Q. Now, what happened after that? A. My wife came in the back door. I went out in the kitchen. I said, 'Where have you been?' I got no answer. I said, 'You have been out with Harry Holmes.' Her answer to that was, 'So what? Harry Holmes is all right.' Q. Now, what did that convey to you, Mr. Taylor? A. She thought him a better man than me. Q. In what respect? A. Well, that would depend on how a woman judged a man. Q. What did you mean by saying to her, 'You have been out with Harry Holmes?' Was it an accusation you were making against her? A. It was. Q. Was it an accusation of misconduct with Holmes? A. It was. Q. And her answer was, 'So what? Harry Holmes is all right.' Is that right? A. That is right, sir. Q. What happened after that? A. She walked over to me and slapped me a good one on the side of the head. Q. Now, Mr. Taylor, do you know what happened from there on? A. I do not, sir. Q. What was the next thing that you remember? A. I was trying to pick my wife up, and I didn't have the strength. Q. Have you any consciousness of the passage of time between that last incident of the slap and the time you tried to pick your wife up? A. I had not, sir."

In the interval during which he swore he had no recollection of what was happening, there can be no doubt that he caused his wife most serious and grievous bodily injuries. He broke a chair over her head or body, and probably struck her head with his fists. The attack can best be described as maniacal.

Sometime about one-thirty o'clock that morning the accused came to one of the nearby cabins and aroused the occupants. They got up and went with the accused to his cabin where they found the wife on the floor with frightful injuries to her head and bleeding profusely. A doctor was called and later an ambulance and the wife was rushed to the hospital. She died the following afternoon as a result of her injuries.

In these circumstances, the first question which arises is, what is the matter in evidence upon which, if believed, the accused was entitled to rely as constituting provocation within the meaning of the statute. The learned trial judge in his charge, upheld by the majority below, directed the jury that they could consider only the slap in the face and not what was said by the deceased wife, taking the view that, as to the words spoken, the point was covered by the decision of the House of Lords in *Holmes* v. *Director of Public Prosecutions* (1). Roach J. A. was of opinion that the *Holmes* case (1) had no application and that:

In my opinion it was grave error to instruct the jury in that fashion and the result was that the whole theory of the defence was not put to

(1) [1946] A.C. 588.

the jury. The theory of the defence was not that the accused was provoked within the meaning of s. 261 by the mere slap; the theory was that he was thus provoked by the slapping coupled with the words spoken almost contemporaneously therewith and all the surrounding circumstances.

As to the *Holmes* case (1), it is first to be observed that it is not a decision under a statute but upon the common law. The actual decision that the words spoken in that case, namely, the confession of the wife that she had been unfaithful, standing by themselves did not amount to provocation, does not apply, in my opinion, to the case at bar. The words spoken by the deceased were not the same as the words in question in the *Holmes* case (1), and, moreover, they do not stand by themselves. Further, the statement of Viscount Simon that

> in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime,

i.e. from murder to manslaughter, requires to be placed against the language of the statute "any insult", and, so viewed, cannot in my opinion, be a correct statement under the Code. They were not intended to be.

In the present case, the husband said to the wife "You have been out with Harry Holmes". At the least that amounted to a statement that she had disregarded his injunction given previously, but it was also open to the jury to interpret it as an accusation of misconduct with Holmes. On the answer of the wife "So what? Harry Holmes is all right", in my opinion, it was open to the jury to believe that "So what?" meant either "Even if that be so" or "It is so, what are you going to do about it?" or "There's nothing you can do about it". "Insult" is defined in "The Oxford English Dictionary" *inter alia,* as

> an act, or the action, of attacking or assailing; an open and sudden attack or assault without formal preparations; injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect; an affront; indignity.

In my opinion the act of slapping, which was wrongful in itself, was also, against its verbal background, an insult. I therefore agree with Roach J. A. on this branch of the case.

Coming to the second question, the learned trial judge refused to direct the jury that the fact that the accused

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was intoxicated to such degree, if any, as they might find, was a matter which they might consider in determining whether or not *the accused*

was actually deprived of the power of self-control by the provocation which he received.

All the members of the Court of Appeal considered that there was no error in this respect, the view of the majority being that any such direction would be in conflict with the decision of the House of Lords in *Director of Public Prosecutions* v. *Beard* (1). This view was not accepted by the Court of Appeal for Saskatchewan in the *Harms* case (2). That Court regarded the *Beard* case (1) as approving the direction of Baron Parke in *Rex* v. *Thomas* (3), which was applied in the *Harms* case (2). That direction was as follows:

> But drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober.

In support of the judgment in appeal Mr. Common submits that the third proposition laid down by Lord Birkenhead in *Beard's* case (1) is in conflict with the direction of Parke B. That proposition, to be found at p. 502, is as follows:

> 3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

For my part I am unable to see anything in the language which is in conflict with the law as laid down in *Rex* v. *Thomas* (3). The third proposition in *Beard's* case (1) draws the line between drunkenness of such a nature that capacity to form the necessary intent is absent, and drunkenness of a lesser degree. A person doing an act resulting in death while drunk to the greater extent, is guilty of manslaughter only, whether provoked or not. If drunk to the lesser degree, the same act may be reduced from murder to manslaughter if committed under provocation as defined in section 261. Intent in the last mentioned

(1) [1920] A.C. 479.
(2) (1936) 66 C.C.C. 134.
(3) (1837) 7 C. & P. 817, at 818-820.

case is present at the time, because there is no lack of capacity, and it cannot be said that a person free from alcohol who acts in passion due to provocation lacked intent *at the time* although then deprived of his self-control due to the passion which has been provoked. In *Woolmington's* case (1), Viscount Sankey, L.C., said at 482:

> When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was *either* unintentional *or* provoked.

Lack of intention, then, is not an element in the application of section 261, and therefore the third proposition in *Beard's* case (2) does not apply to it. In truth the proposition deals and deals only with drunkenness as a *defence* and not with the aspect under consideration in *Rex* v. *Thomas* (3). I am unable to find anything in Lord Birkenhead's reference to *Rex* v. *Thomas* (3) which throws doubt upon the soundness of that decision, and I find it still cited as an authority in the Hailsham Edition of Halsbury, Vol. 9, p. 439, as well as in Russell on Crime, the 9th Edition, p. 39. In Stephen's Digest of the Criminal Law, p. 231, Art. 317, the following is stated:

> Provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received; and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to *all other circumstances* tending to show the *state of his mind.*

If intoxication to any degree is a circumstance which may tend to affect the mind of a person, and it is generally agreed it is, then, if Stephen J. be right, the jury must consider the effect on the mind of the offender of the intoxication to which he was subject at the time if they find he was intoxicated to any degree. That the proposition as stated by Stephen J. correctly states the common law is established by the fact that it was cited with approval by the House of Lords in *Mancini* v. *Director of Public Prosecutions* (4). The statement in the judgment of Viscount

(1) [1935] A.C. 462.
(2) [1920] A.C. 479.
(3) (1837) 7 C. & P. 817, at 818-820.
(4) [1941] 3 All E.R. 271, at 277.

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Simon on the same page as to the relationship between the mode of resentment and the provocation reserved is not, under the Code, a matter of law, but a matter to be considered by the jury when determining whether or not the accused acted as he did by reason of the provocation. As put by Stephen J. in the passage already quoted,

> regard must be had to the nature of the act by which the offender causes death.

In my opinion, therefore, the *Harms* case (1) was rightly decided. It is admitted, this being so, that the charge cannot be supported on this branch of the case.

If the jury be directed to disregard any degree of intoxication to which they may believe the accused was subject at the time, the result will be that the question which they will be considering is whether the accused, if he had not been intoxicated, would have acted on the provocation, instead of the question directed by the statute, namely, whether the accused in his then actual state of mind so acted.

There remains the question as to the admittedly erroneous direction of the learned trial judge to the jury, repeated on several occasions, as to the matter of onus with respect to both drunkenness and provocation. There was considerable argument as to the effect of this upon the jury in view of the fact that upon other occasions the learned trial judge stated the matter correctly. In view of the fact that there is to be a new trial, it will perhaps be sufficient to say that the duty of a judge presiding at a criminal trial with respect to this matter is clearly defined in *Woolmington's* case (2) at pages 481 and 482. If the law as there laid down is followed at the new trial, as no doubt it will be, there should be no further difficulty on this point.

I would allow the appeal and direct a new trial.

ESTEY J.—The accused, convicted for the murder of his wife, appealed to the Court of Appeal for Ontario. At his trial, apart from contending that he had not committed the offence, he pleaded drunkenness and provocation as separate grounds for reducing the offence to manslaughter. The majority of the Court of Appeal affirmed the con-

(1) (1936) 66 C.C.C. 134. (2) [1935] A.C. 462.

viction, but Mr. Justice Roach dissented on the basis that the learned trial judge had misdirected the jury as to what constituted evidence of provocation and as to the burden of proof both with respect to drunkenness and provocation.

This appeal is taken under section 1023 of the *Criminal Code* upon those points raised in the dissenting judgment and on a further point as a consequence of leave granted under section 1025 of the *Criminal Code* on the basis of possible conflict between the decision of the majority of the Court of Appeal in this case and that of the Saskatchewan Court of Appeal in *Rex* v. *Harms* (1).

The evidence disclosed that the accused, his wife and Harry Holmes had been drinking downtown in the afternoon of November 29, 1946, that in the late afternoon they had all gone to the home of the accused in Harry Holmes' car. Harry Holmes remained there and all three continued drinking. During the evening they visited two homes and returned to the home of the accused around 11 o'clock. Sometime thereafter the accused fell asleep on his bed. When he later awoke, he was alone in the house.

In a few minutes he heard a car upon the road and from its noise concluded it was the car of Harry Holmes. As he had warned his wife not to be alone with Harry Holmes, this made him a "little mad". In a few minutes his wife came in the back door, and to his inquiry as to where she had been she made no reply. He then, as he deposed, accused her of improper conduct in these words: "You have been out with Harry Holmes". Her reply was: "So what? Harry Holmes is all right" and with that he says "she walked over to me and slapped me a good one on the side of the head." He deposed that as to what followed he had no recollection. Harry Holmes deposed that after the accused went to sleep, he went out to his car and found Mrs. Taylor there, that she refused to get out of the car and that as a result they drove around for some time and then she went home and he continued to his home.

At about 1.30 a.m. the accused called at his neighbour, Morgan's, for assistance. Mr. and Mrs. Morgan went at once to his home where they found Mrs. Taylor unconscious and bleeding as a result of a brutal attack, as a consequence of which she died later the same day.

(1) (1936) 66 C.C.C. 134.

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With deference to the learned judges who hold a contrary opinion, it would appear that the conversation and the slap here deposed to, if believed, would under all the circumstances constitute evidence of a "wrongful act or insult" from which the jury might find provocation within the meaning of section 261 of the *Criminal Code*.

His Lordship charged the jury that the slap in the face alone could be considered as evidence of provocation and that the foregoing words and their implication of immorality did not constitute evidence of provocation and must be disregarded in the consideration of that issue. This direction is based on statements similar in effect in the decisions at common law, more recently discussed in *Holmes* v. *Director of Public Prosecutions* (1), where it would appear that even at common law there is some qualification to the general statement that mere words cannot constitute evidence of provocation.

We need not here, however, discuss the precise statement of the common law. Parliament, in enacting section 261 of the Criminal Code, has declared the law with respect to provocation in Canada:

261. (Provocation) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

2. (What is provocation) Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

3. (Question of fact) Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

4. (Illegal arrest) The illegality of an arrest shall not necessarily reduce an offence of culpable homicide from murder to manslaughter, but if the illegality was known to the offender it may be evidence of provocation.

Under this section, when there is evidence of "any wrongful act or insult" it is for the jury to determine whether it is

of such a nature as to be sufficient to deprive an ordinary person of the power of self-control.

(1) [1946] A.C. 588.

If, therefore, there is any evidence of any wrongful act or insult, this must be submitted to the jury in such a fair and complete manner that the jury will appreciate the law and the evidence in relation to that issue.

Under this section 261 an insult may constitute provocation, and an insult may be effected by either words or acts or a combination of both. In the case at bar, the words of Mrs. Taylor and her act were so closely associated that their meaning and effect can only be determined by considering them together and in relation to all the surrounding circumstances. This evidence adduced by the accused himself may or may not be true, but that is entirely a question for the jury. The only concern of the appellate court is the right of the accused to have his defence, so far as it is supported in the evidence, fairly and fully placed before the jury. It was, with respect, a misdirection to segregate the slap from the words and direct the jury that the slap alone should be considered in determining whether there was sufficient provocation within the meaning of section 261.

If the jury found that this insult was

> of such a nature as to be sufficient to deprive an ordinary person of the power of self-control,

then that insult was in this case provocation. If and when the jury found such provocation, it was then their duty under section 261 to consider whether the accused acted "upon it on the sudden" and before there had been time for his passion to cool, or, as stated by Chief Justice Duff in *The King* v. *Manchuk* (1):

> We think it was a question for the jury * * * whether in fact the accused was by reason of what occurred deprived of his self-control to such a degree; and in his attack * * * was acting upon such provocation on a sudden and before his passion had time to cool * * *

In determining this question whether the accused acted on the sudden upon this provocation, the jury must consider the conduct of the accused himself as distinguished from the conduct of the ordinary man. Upon this question or issue the jury may consider any facts in evidence that may have influenced the accused to act or not to act upon that provocation already found by them. His consumption of liquor and its effect upon him may be taken into con-

(1) [1938] S.C.R. 18, at 21.

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sideration upon the second question where his own conduct is under consideration, but not upon the first question where the standard is that the wrongful act or insult must be such as to deprive an ordinary person of the power of self-control in order to constitute provocation.

That was the view expressed in *Rex* v. *Harms* (1). It was submitted at the hearing that *Director of Public Prosecutions* v. *Beard* (2) was contrary to *Rex* v. *Harms* (1). In the *Beard* case (2), the House of Lords was considering the defence of drunkenness as evidence of inability to form the intent essential in the crime of murder. Drunkenness in relation to its effect upon the action of one who had suffered provocation within the meaning of the law was not an issue nor was it discussed further than a mere reference thereto. *Rex* v. *Thomas* (3), cited in support of the reasons in *Rex* v. *Harms* (1), is mentioned along with certain other authorities in the *Beard* case (2) where the Lord Chancellor, in referring particularly to these cases, states at p. 497:

> The judgments however in these cases diverged into topics not specifically helpful in the matter now under debate.

With geat respect, I do not find the suggested conflict between the *Beard* (2) and the *Harms* (1) cases.

The charge of the learned trial judge relative to drunkenness sufficient to render the accused unable to form the intent essential in the crime of murder was not questioned before this Court further than with respect to the burden of proof both as to the defence of drunkenness and provocation. It was contended, as Mr. Justice Roach held, the learned trial judge had instructed the jury that the burden of proof rested upon the accused to prove either of these defences by a preponderance of evidence. The learned judge pointed out that this burden upon the accused was not so great as to require that he prove his drunken condition beyond a reasonable doubt, but he repeated at different times in the course of his charge that the accused must prove either of these defences by preponderance of evidence. With respect, this constituted a misdirection.

(1) (1936) 66 C.C.C. 134.
(2) [1920] A.C. 479.
(3) (1837) 7 C. & P. 817.

However, about as often as this direction was given, it was offset by a correct statement that throughout the entire trial the burden rested upon the Crown to prove the accused guilty beyond a reasonable doubt. Whether, therefore, the effect of the misdirection upon this point was corrected in the minds of the jury we need not here determine, as a new trial must be had upon the basis already discussed with respect to provocation. It is sufficient to emphasize that, apart from the defence of insanity and a statutory provision with respect to the burden of proof, the burden of proof rests always and throughout the entire case upon the Crown to prove the guilt of the accused beyond a reasonable doubt. The evidence favourable to the accused, either as found in the evidence adduced by the Crown or adduced on his own behalf, may be sufficient to raise a reasonable doubt in the minds of the jury. The position is that if after all the evidence, both for the Crown and the defence, has been seriously considered, the jury is unable to conclude that the evidence establishes the guilt of the accused beyond a reasonable doubt, then he is entitled to a verdict of not guilty.

In *Woolmington* v. *The Director of Public Prosecutions* (1), Lord Sankey at p. 481 states:

> * * * it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

See also *Mancini* v. *Director of Public Prosecutions* (2).

In the result, a new trial must be held. The appeal is allowed.

Appeal allowed; conviction set aside, and new trial directed.

Solicitors for the appellant: *Donohue & Maher.*

(1) [1935] A.C. 462.

(2) [1942] A.C. 1.

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*May 22

HARRY DANLUCK (PLAINTIFF).....APPELLANT;

AND

MARTIN BIRKNER AND ANOTHER (DEFENDANTS) .....} RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Injury to patron of betting establishment—Fall from second storey when trying to escape police raid—No stairway leading from doorway—Liability of occupier of premises—Question of patron being invitee not pertinent issue under circumstances—Patron bound to use reasonable care for own safety.

The appellant was on the second floor of a building where "club rooms" were operated as a betting establishment. Sound of a buzzer indicated a police raid. The appellant became excited, ran to a screen door which was fastened by a hook, unhooked it, shoved it open and stepped out; and, since there was no stairway, he fell and suffered serious injuries. The appellant's action for damages was maintained by the trial judge; but the Court of Appeal held that the appellant could not recover, on the ground that he was on the premises, not lawfully, but for a criminal purpose, and that respondents owed him no duty that a court of justice would recognize to provide against such an emergency. Upon appeal to this Court,

Held that the judgment of the Court of Appeal should be affirmed but on different grounds than those upon which that Court proceeded. —Assuming that the appellant was an invitee upon the premises of the respondents and that a duty was owed to him by them, it was incumbent upon the appellant to use reasonable care for his own safety. The duty on the part of the respondents towards the appellant cannot be extended to include responsibility, in the circumstances surrounding the manner in which the appellant used the premises in making his exit.

APPEAL from the judgment of the Court of Appeal for Ontario (1), reversing a judgment of the Supreme Court of Ontario, Le Bel J. (2) and dismissing an action of the appellant for damages for injuries suffered in a fall from premises occupied by the respondents.

J. A. Kennedy for the appellant.

G. A. Martin K.C. and *Ralph Sweet* for the respondent.

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Kellock and Estey J.J.

(1) [1946] Ont. R. 427; [1946] 3 D.L.R. 172.

(2) [1945] O.W.N. 822.

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DANLUCK v. BIRKNER ET AL.

The judgment of the Court was delivered by

KELLOCK J.:—This appeal was dismissed on the hearing without calling upon counsel for the respondents but we intimated that we must not be taken as approving the grounds upon which the Court below proceeded. Assuming without deciding that Mr. Kennedy is right in his contention that the appellant was an invitee upon the premises of the respondents, and that they were under the duty toward him which that relationship cast upon them, it was incumbent upon the appellant to use reasonable care for his own safety.

On the alarm being given, the appellant, believing that a raid by the police was in progress, became excited, as did the other inmates, and in order to avoid arrest ran to the screen door which, according to the finding below, with which we agree, was fastened by a hook. The appellant unhooked the door, shoved it open and stepped out, apparently without looking, on the assumption that the door led to a stairway on the outside of the building of which the premises here in question form a part. There was a stairway on the outside of the building which the appellant had casually observed previously, but it did not lead to the door in question nor to any other door on that side of the building but to the rear of the upper part of the building on quite a different level. The appellant had never used the stairway in question and even if, as found by the learned trial judge, he was justified in believing that the doorway led to the stairway, we think that this action must fail. We do not think that the duty on the part of the respondents toward the appellant even as invitee can be extended to include responsibility in the circumstances surrounding the manner in which the appellant used the premises in making his exit. The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. Kennedy.*

Solicitor for the respondents: *Gerald McHugh.*

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*Mar. 10, 11.
*Jun. 10.

H. A. BROWN AND MARGARET BROWN (PLAINTIFFS). } APPELLANTS;

AND

B AND F THEATRES LIMITED (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Theatre—Person paying for its privileges—Dangerous premises—Unlocked door leading to basement stairway—Injury resulting from fall—Unusual danger created by owner—Reasonable care to prevent injury—Subsequent negligence of the injured person—Whether ultimate negligence—Relationship arising out of contract between owner and patron—Jury's findings—Construction of—Apportionment of liability.

The female appellant, after passing through a brightly lighted lobby, entered the foyer of the respondent's theatre, intending to go to the ladies room. In the foyer, a narrow corridor, the lights were dimmed, and, proceeding along the wall at her left, she opened an unlocked door, which she thought was leading to the waiting room, but which led to a stairway into the basement. The appellant fell down the stairs and was injured. In an action for damages, the jury found that the injuries were caused by an unusual danger consisting in the unlocked door and that the respondent failed to use reasonable care to prevent injury from that danger because of an inadequate sign on the door, and of lack of "facilities to fasten door in a safe and secure manner." The jury further found that the appellant did not use reasonable care for her own safety in that she did not use proper caution in proceeding after opening the door. The degree of contribution to the accident was found to be 90% against the respondent and 10% against the appellant. Judgment was directed accordingly by the trial judge. The appellate court reversed that judgment and dismissed the action, holding that the finding against the appellant established a case of ultimate negligence by reason of which she must be taken to be the author of her own injuries.

Held that the appeal to this Court should be allowed and the judgment at the trial be restored. The doctrine of ultimate negligence does not apply under the circumstances of this case.—There was evidence upon which the finding of the jury against the respondent could have been made.

Per The Chief Justice and Kerwin, Rand and Estey JJ.:—The danger in the door was not because it was unlocked, but because it opened in effect into a pit; and the finding of negligence against the respondent is a finding that the conditions in the theatre were such as to invite a patron using ordinary care to mistake the door into the basement for that into the ladies' room and to draw him into the vortex of danger behind the door. The finding of negligence on the part of the appellant cannot be taken to supersede the negligence on the part of the respondent.

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

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Per The Chief Justice and Kerwin, Rand and Estey JJ.:—The facts in this case raised more than the ordinary question of the duty owed by a proprietor of premises towards an invitee.—The appellant paid a consideration for the privileges of the theatre, including that of making use of the ladies' room. There was a contractual relation between her and the theatre management that exercising prudence herself she might enjoy those privileges without risk of danger so far as reasonable care could make the premises safe.

Per Kellock J.:—The finding of negligence against the respondent was that the thing, which was the effective cause of the appellant getting beyond the door at all, was the invitation created by the surroundings. The force of that invitation, when acted on as it was, continued to operate up to the point of injury although aided by the appellant's own negligence. These two negligences cannot be separated so as to conclude that the negligence of the appellant was of such a character that that of the respondent became mere narrative.

Judgment of the Court of Appeal ([1946] O.R. 454) reversed.

Greisman v. *Gillingham* ([1934] S.C.R. 375) applied.

Francis v. *Cockrell* (L.R. 5 Q.B. 184) approved.

APPEAL from a judgment of the Court of Appeal for Ontario (1), reversing a judgment of Hope J. entered in favour of the appellants on the findings of a jury in an action for damages.

David J. Walker K.C. for the appellants.

G. W. Adams K.C. and *R. B. Burgess* for the respondent.

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

RAND J.:—The appellant, Margaret Brown, was injured by falling down a stairway in a theatre in Toronto. After passing through a brightly lighted lobby, she entered the foyer, intending to go to the ladies' room. This was on the left of the entrance and was indicated by a short electric sign 7′ high facing her as she turned. In the foyer, a narrow corridor, the lights were dimmed; and, proceeding along the wall at her left, she opened what she took to be the door to the waiting room. A fire extinguisher 2′ long and 4′ from the floor hung on the wall next to the left side of the door; and at the right side was a post or panel 7″ wide, projecting about 4″ out from the wall; the door, 31″ wide, swinging toward the left, on which the word "Private" was printed in faint letters, was between three

(1) [1946] O.R. 454; [1946] 3 D.L.R. 194.

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Rand J.

and four feet in front of the sign and led to a stairway into the basement. The platform or landing was about 24" deep and the door must have swung somewhat before the edge would be brought into view. Immediately inside on the wall at the right and on a level with her eyes, was a light which, on her story, momentarily blinded her. The entrance to the ladies' room was separated from this door by the post or panel.

On these facts, the jury made two findings (paraphrased):

(1) That the injuries to the plaintiff were caused by an unusual danger on the defendant's premises of which the latter knew or ought to have known, consisting in the unlocked door; and that the defendant failed to use reasonable care to prevent injury from that danger because of an inadequate sign on the door, of lack of additional protection on the unlocked door, and because there were not proper facilities to fasten the door in a safe and secure manner.

(2) That Mrs. Brown did not use reasonable care for her own safety in that she did not use proper caution in proceeding after opening the door.

It was further found that the degree of contribution to the accident of the defendant was 90% and Mrs. Brown 10%.

At the trial, judgment was directed in accordance with these percentages of responsibility. On appeal, it was held that the finding against Mrs. Brown established a case of ultimate negligence by reason of which she must be taken to be the author of her own injuries, and the action was ordered dismissed. Laidlaw J. A. was also of the opinion that no breach of duty was shown on the part of the defendant.

I think the only question in this Court is whether or not the conclusion of ultimate negligence can stand. I have no doubt whatever that there was evidence upon which the finding against the respondent could have been made.

As was pointed out by Roach J.A., the danger in the door was not because it opened, but because it opened in effect into a pit; and the finding that the negligence of the respondent was responsible for the injury is a finding that the conditions in the theatre were such as to invite a patron using ordinary care to mistake the door into

the basement for that into the ladies' room and to draw her into the vortex of danger behind the door.

The finding of negligence on the part of Mrs. Brown was taken to supersede that, and the question is whether it does. What the jury had in mind was this: that the invitation which drew Mrs. Brown into the staircase was one which persisted in its influence upon her to the end; but at the same time, notwithstanding that continuing influence and in spite of it, she should have exercised more caution. They conceived the original negligence of the defendant and that later of the appellant to be operative up to and including the injury; and the small percentage of responsibility attributed to the latter was obviously due to their view that there was little blame to be charged against her because she was at all times under the impulsion of the false invitation; she relied on that invitation and did not look, and the jury thought her slightly to blame because she did not look. *Greisman* v. *Gillingham* (1).

The principle of *Davies and Mann* (2), which the Court below purported to apply, is, I think, this: where a situation of danger to person or property is brought about by the negligence of a person which at a critical moment he is unable in fact to counteract or relieve, then if, at that moment, another party, exercising a care with which he is chargeable, could have avoided that situation, he is held to be the sole cause of the damage resulting from his failure to do so, whether to the one or the other, and it is of no significance whether he became aware or merely should have become aware of the predicament with which he became involved.

But in such a case there is not, in the conduct of the person whose negligence was subsequent in time, any element of inducement or influence by the other; and where that is present, obviously a distinction must be made. The continuing effect on the conduct of the former of the latter's earlier action becomes a circumstance significant to the final result; that conduct becomes in fact a consequence of the prior negligence. In such circumstances, to find that the last act is likewise negligent is simply to say that, in spite of the misleading inducement, acting on it was culpable.

(1) [1934] S.C.R. 375.

(2) [1842] 10 M. & W. 546.

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Rand J.

That conception appears to have been in the mind of Greer L.J. in *The Eurymedon* (1), where he states a rule in these words:

> If the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not have otherwise made, then both are equally to blame.

He treats that as a corollary of another rule:

> But if the negligence of both parties to the litigation continues right up to the moment of collision, whether on land or on sea, each party is to blame for the collision and for the damage which is the result of the continued negligence of both.

I take the words "equally to blame" to import joint contribution to the result and not necessarily the degree of responsibility. These rules embody the notion of the actually and not wholly unreasonably operating elements in the conduct of both parties persisting to the end, as being determinative of responsibility. The same idea is contained in the language of Viscount Birkenhead in his speech in the case of *S. S. Volute* (2), in which he says:

> And while no doubt where a clear line can be drawn, the subsequent negligence is the only one to look at, there are cases in which the two acts come so closely together and the second act of negligence is so mixed up with the state of things brought about by the first act, that the party secondly negligently * * * might * * * invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

The case has been treated as raising the ordinary question of the duty owed by a proprietor of premises towards an invitee. I think I should observe, however, that this is not merely a case of such invitation as was present in *Indermaur* v. *Dames* (3). Here, Mrs. Brown paid a consideration for the privileges of the theatre, including that of making use of the ladies' room. There was a contractual relation between her and the theatre management that exercising prudence herself she might enjoy those privileges without risk of danger so far as reasonable care could make the premises safe. Although the difference in the degree of care called for may not, in the circumstances here, be material, I think it desirable that the distinction between the two bases of responsibility be kept

(1) [1938] P. 41, at 50.
(2) [1922] 1 A.C. 129, at 144.
(3) (1867) L.R. 2 C.P. 311.

in mind: *Maclenan* v. *Segar* (1), following *Francis* v. *Cockrell* (2). In *Cox* v. *Coulson* (3), Swinfen Eady L.J. said:

> The defendant must also be taken to have contracted to take due care that the premises should be reasonably safe for persons using them in the customary manner and with reasonable care:

citing *Francis* v. *Cockrell* (2).

I would, therefore, allow the appeal and restore the judgment at the trial, with costs throughout.

KELLOCK J.:—The duty owing by the respondent to the female appellant is governed, in my opinion, by the decision in *Francis* v. *Cockrell* (2), discussed by McCardie J. in *Maclenan* v. *Segar* (1).

In my opinion the answers of the jury are not to be construed as a finding of ultimate negligence on the part of the female appellant. The negligence found against each of the parties came so close together as to make applicable the principle expressed by Viscount Birkenhead, L.C., in *The Volute* (4). I see no ground for distinguishing or failing to apply that principle to the facts of this case: *Greisman* v. *Gillingham* (5). This is the principle underlying the decision of Riddell J.A. in *Blair* v. *City of Toronto* (6).

I do not think that the failure of the jury, after having their attention called to it, to make any specific finding with respect to the lighting beyond the door affects the finding of negligence against the respondent that the thing which was the effective cause of the appellant getting beyond the door at all was the invitation created by the surroundings. The force of that invitation, when acted on as it was, continued to operate up to the point of injury although aided by the appellant's own negligence. For my part I do not see how it is possible to so separate the two so as to come to the conclusion that the negligence of the appellant was of such a character that that of the respondent became mere narrative.

(1) [1917] 2 K.B. 325; (1917) 86 L.J. K.B. 1113.
(2) (1870) L.R. 5 Q.B. 184.
(3) [1916] 2 K.B. 177, at 181.
(4) [1922] 1 A.C. 129, at 144.
(5) [1934] S.C.R. 375.
(6) (1927) 32 O.W.N. 167.

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Kellock J.

Leave to appeal having now been granted by the Court of Appeal for Ontario to the appellant's husband, I would allow the appeal of both appellants with costs here and below.

Appeal allowed with costs.

Solicitors for the appellants: *David J. Walker.*

Solicitors for the respondent: *Smily, Shaver, Adams, De Roche and Fraser.*

MAJOR v. BEAUPORT
1951 S.C.R. 60

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*May 26
*Jun. 18

LAURIER SAUMUR (PETITIONER).....APPELLANT;

AND

RECORDER'S COURT (QUEBEC) AND OTHERS (RESPONDENTS) .....} RESPONDENTS;

AND

THE ATTORNEY-GENERAL FOR QUEBEC (MIS-EN-CAUSE).

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

Appeal—Jurisdiction—Habeas Corpus—Distribution of pamphlets in streets —Municipal by-law—Condemnation of fine or imprisonment—"Provincial crimes" are "criminal matters"—No distinction in case of a "municipal enactment"—Construction of the word "criminal" in section 36 of the Supreme Court Act.

The appellant was charged before the Recorder of the city of Quebec with having illegally distributed pamphlets without previously having obtained written permission of the chief of police, in violation of the provisions of a municipal by-law. The appellant pleaded that he was a minister of a religion (Witnesses of Jehovah) and was not bound by the by-law; but he was found guilty and condemned to pay a fine of $100, with an alternative of three months in jail. The appellant did not pay the fine, was committed to gaol and then applied for a writ of *habeas corpus*. The judgment of the Superior Court, dismissing the petition, was affirmed by a majority of the appellate court. Special leave to appeal to this Court was granted by the appellate court (1). The respondent, the city of Quebec, moved to quash the appeal for want of jurisdiction.

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

Held: The motion should be allowed and the appeal quashed.

Jurisprudence is well settled that there are "provincial crimes", over which the various legislatures of the Dominion have jurisdiction, and that they are "criminal matters" within secton 36 of the *Supreme Court Act*.

In re McNutt (47 Can. S.R. 259); *Mitchell* v. *Tracey* (58 Can. S.C.R. 640); *The King* v. *Nat Bell* ([1922] 2 A.C. 128); *The King* v. *Charles Bell* ([1925] S.C.R. 59); *Chung Chuck* v. *The King* ([1930] A.C. 244) and *Nadan* v. *The King* [1926] A.C. 482) foll.

Quebec Railway Light and Power Co. v. *Recorder's Court of Quebec* (41 Can. S.C.R. 145) and *Segal* v. *City of Montreal* ([1931] S.C.R. 460) not applicable.

The appellant's contention, that these decisions do not apply because they refer to "provincial crimes" and that this case does not deal with any of them but with a "municipal enactment" imposing a fine or imprisonment, cannot be upheld.

The word "criminal" as used in section 36 of the *Supreme Court Act* cannot be considered as meaning "criminal law", as assigned to the Dominion by the B.N.A. Act, but must be considered in the sense that it is "not civil".

The characteristics of a civil process cannot be found in this case.—The proceedings in the courts below are of a "penal nature", that is to say, "criminal for the purposes of the *Supreme Court Act*", and no appeal lies to this Court, which is a statutory court and whose jurisdiction is therefore limited.

(1) Reporter's note:—See *Barry* v. *Recorder's Court* and *Attorney-General of Quebec* (Q.R. [1947] K.B. 308.)

MOTION to quash for want of jurisdiction an appeal from a decision of a majority of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Boulanger J. and dismissing a petition for a writ of *habeas corpus*.

E. Godbout for motion.

L. E. Beaulieu K.C. for Attorney-General for Quebec.

W. G. How contra.

The judgment of the Court was delivered by

TASCHEREAU J.—The respondent the city of Quebec moves to quash the appeal of the appellant for want of jurisdiction.

The appellant was charged before the Recorder of the city of Quebec with having illegally distributed pamphlets,

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SAUMUR v. RECORDER'S COURT (QUEBEC) ET AL AND ATTORNEY GENERAL FOR QUEBEC

Taschereau J.

without previously having obtained the written permission of the chief of police of the city, in violation of the provisions of by-law 184 of the said city.

This by-law reads as follows:—

It is, by the present by-law, forbidden to distribute in the streets of the city of Quebec any book, pamphlet, booklet, circular, tract whatever without having previously obtained for so doing the written permission of the chief of police.

The defendant pleaded to the charge that he was a minister of a religion (Witnesses of Jehovah) and was not bound by the by-law. The Recorder however found the appellant guilty and condemned him to pay a fine of $100 and costs, with an alternative of three months in gaol, as provided by the by-law. The appellant did not pay the fine and was committed to gaol, but he then applied for a writ of *habeas corpus* with *certiorari* in aid. Mr. Justice Boulanger dismissed the petition for *habeas corpus,* and his judgment was confirmed by the Court of King's Bench, Mr. Justice Galipeault dissenting.

On the 21st of April, 1947, the Court of King's Bench granted special leave to appeal, but in the formal judgment we read the following "considérant":—

Considering that in view of said decisions, although there may be some doubt as to the jurisdiction of the Supreme Court of Canada to hear the appeal asked for by appellant, it is not within the province of this Court to determine the jurisdiction of the Supreme Court of Canada.

In its motion to quash, the respondent, the city of Quebec (supported by the Attorney General of the province of Quebec), alleges that the matter in controversy is criminal, quasi criminal or penal, and that under section 36 of the *Supreme Court Act,* there is no appeal to this Court in proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a "criminal charge". The point that falls to be determined by this Court is whether the *habeas corpus,* which has been dismissed by Mr. Justice Boulanger, is the result of a civil or criminal process.

It is now well settled that there are "provincial crimes", over which the various legislatures of the Dominion have jurisdiction, and that they are *"criminal matters"* within section 36 of the Act.

In *In re McNutt* (1), it was held by three of the six judges (Sir Chs. Fitzpatrick, Davies and Anglin) that a trial and conviction for keeping liquor for sale contrary to the provisions of the *Nova Scotia Temperance Act* are proceedings on a "criminal charge", and no appeal lies to the Supreme Court of Canada from the refusal of a writ of *habeas corpus* to discharge the accused from imprisonment on such conviction.

At page 261, Sir Charles Fitzpatrick C.J. said:—

It was on the appellant to shew that we have jurisdiction, and he referred us to section 39 (*c*) of the *Supreme Court Act* which provides for an appeal "from the judgment in any case of proceedings for or upon a writ of *habeas corpus* * * * not arising out of a criminal charge". In other words, the statute gives an appeal when the petitioner for the writ is detained in custody on a process issued in a *civil matter.*

In *Mitchell* v. *Tracey* (2), it was held by this Court that the opinions of the three above mentioned justices in the *McNutt* case (1) should be followed, and this Court refused to hear an appeal on a writ of prohibition to restrain a magistrate from proceeding on a prosecution for violation of the provisions of the *Nova Scotia Temperance Act,* because it did arise out of a *criminal charge* and was not a *civil matter.*

In *The King* v. *Nat Bell* (3), it was said by Lord Sumner speaking for the Judicial Committee:—

Their Lordships are of opinion that the word "criminal" in the section and in the context in question is used in contradistinction to "civil" and "connotes a proceeding which *is not civil in its character*". *Certiorari* and prohibition are matters of procedure, and all the procedural incidents of this charge are the same whether or not it was one falling exclusively within the legislative competence of the Dominion Legislature, under section 91, head 27.

In *The King* v. *Charles Bell* (4), it was held:—

The proceeding in this case does not fall within the civil jurisdiction of this Court under section 41 (*b*) of the *Supreme Court Act,* but it is a *"criminal cause"* within the meaning of the exception in section 36 of the Act.

At page 66 of the same case, Anglin C.J. said:—

Whenever a statute imposes a penalty by way of punishment for non-observance of a behest which it enacts in the public interest and the prescribed penalty is made enforceable by criminal procedure, these proceedings fulfil the two conditions connoted by the word "criminal" as used in s. 36 of the *Supreme Court Act. Clifford* v. *O'Sullivan* (5).

(1) (1912) 47 Can. S.C.R. 259.
(2) (1919) 58 Can. S.C.R. 640.
(3) [1922] 2 A.C. 128, at 168.
(4) [1925] S.C.R. 59.
(5) [1921] 2 A.C. 570, at 580.

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That the question to be determined in such a case as this is merely as to whether the original proceedings are civil or criminal in form is shown by the following at page 64:—

> But, although a civil liability might be imposed, if Parliament provides for its enforcement by a proceeding in its nature criminal, that that proceeding would be a criminal cause within the purview of s. 36 of the *Supreme Court Act* would seem to follow from the judgment of the English Court of Appeal in *Seaman* v. *Burley* (1). Lord Esher, in holding that a judgment on a case stated by justices on an application to enforce payment of a poor-rate by warrant of distress was a judgment in a criminal cause or matter within s. 47 of the *Judicature Act,* said, at page 346:
>
> "It seems to me that the question is really one of procedure. The question is whether the proceeding which was going on was a criminal cause. That it is a question of procedure may be easily seen by taking the case of an assault. An assault may be made the subject of civil procedure by action, in which case there may be an appeal to this court; or it may be made the subject of criminal procedure by indictment, in which case there cannot be such an appeal. This seems to me to be contrary to the argument employed by the counsel for the appellant to the effect that the question depends upon whether the origin of the proceeding, i.e., the matter complained of, is in its nature criminal or not. In each case the thing complained of is the same, namely, the assault; but there is or is not an appeal to this court according as the procedure to which recourse is had is civil or criminal. Therefore, assuming the contention that the rate is a debt to be well founded, which I do not admit, nevertheless, if the legislature have enacted that it may be recovered or enforced by criminal procedure, there can be no appeal to this court."

In *Chung Chuck* v. *The King and the Attorney General for Canada,* (2), it was decided that a prosecution under a statute of British Columbia, whereby a person summarily convicted of the offence thereunder is liable to a penalty and imprisonment, and consequent proceedings by way of *habeas corpus, certiorari,* or stated case, raising the question whether the statute is *ultra vires,* are *criminal matters* for the above purpose. In that case, the Judicial Committee followed the decision of *Nadan* v. *The King* (3).

In this latter case, the Privy Council had said dealing with section 1025 of the Criminal Code of Canada:—

> Section 1025 is expressed to apply to an appeal in a criminal case from "any judgment or order of any court in Canada" and this expression is wide enough to cover a conviction in any Canadian court for breach of a statute, whether passed by the legislature of the Dominion or by the legislature of the province.

(1) [1896] 2 Q.B. 344.
(2) [1930] A.C. 244.
(3) [1926] A.C. 482.

In the same case, it was held:—

An appeal, in respect of a charge of violating a public law for which imprisonment could be imposed, is an appeal in a criminal case, although the statute violated is a *provincial one.*

It has been submitted by Mr. Howe, acting for the appellant, that these decisions do not apply because they refer to *"provincial crimes"*, and in the present instance, we have not to deal with one of those crimes, but with a *municipal enactment* imposing a fine and in default of payment an imprisonment. I cannot agree with this contention, and I am of opinion that the matter from which arises the *habeas corpus* is *not civil in its character,* and that, therefore, this Court has no jurisdiction. The word "criminal", as used in section 36 of the *Supreme Court Act,* cannot be considered as "criminal law", as assigned to the Dominion of Canada by the B.N.A. Act, but must be considered in the sense that it is *not civil.*

Two other cases have been cited. The first is the case of *Quebec Railway Light and Power Co.* v. *Recorder's Court of the city of Quebec* (1). In that case the Quebec Railway Company operating a tramway in the city of Quebec, was fined for having violated the following provisions of a city by-law:

The cars shall follow each other at intervals of not more than five minutes, except from eight o'clock at night to midnight, during which space of time they shall follow each other at intervals of not more than ten minutes.

The Company had a writ of prohibition issued which was quashed by the Superior Court and the appeal before this Court was dismissed.

The second case is the case of *Segal* v. *City of Montreal,* (2). In that case, Segal's petition for a writ of prohibition had been dismissed by the Court of King's Bench and the judgment was confirmed by this Court. Segal had been brought before the Recorder's Court on a complaint that he was unlawfully doing business as a canvasser without having previously obtained a licence and was fined.

In both cases this Court heard the appeals on writs of prohibition, but obviously the question of the jurisdiction of the Court was not raised by either party nor by the

(1) (1908) 41 Can. S.C.R. 145. (2) [1931] S.C.R. 460.

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Court itself, and therefore the question was not discussed, and these two cases cannot be cited as authorities in support of the appellant's contention.

It has been further argued that this Court should entertain the present appeal because it has been submitted, and the judgment of Mr. Justice Galipeault of the Court of King's Bench is based on that point, that the by-law upon which the appellant has been convicted is *ultra vires* of the powers of the provincial legislature and of the city of Quebec. I do not think that this submission may be allowed to prevail, because whether or not the by-law is *intra* or *ultra vires*, it remains that the original question raised before the Recorder, and of which the petition for *habeas corpus* is merely an incident of procedure, is not civil, and it is only in such a case that this Court has jurisdiction. (*Vide Chung Chuck* v. *The King*, (1), where the statute was attacked as being *ultra vires*).

I am forced, therefore, to come to the conclusion that the characteristics of a civil process cannot be found in the proceedings in the courts below, that they are of a "penal nature", that is to say, "criminal" for the purposes of the *Supreme Court Act*, and that no appeal lies to this Court, which is a statutory court and whose jurisdiction is therefore limited.

The motion should be allowed, and the appeal quashed.

Motion allowed and appeal quashed.

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*Feb. 24, 25
*Jun. 10

ARSÈNE DIONNE AND LUDGER DIONNE (PLAINTIFFS) ..... } APPELLANTS;

AND

MADAWASKA COMPANY AND EDOUARD LACROIX (DEFENDANTS) } RESPONDENTS.

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

Contract—Guarantee—Renewal note—Novation—Imputation of payments —Joint and several creditors—Prescription—Interruption by giving of continuing guarantee—Evidence—Onus—Arts. 2227, 2230, 2239 C.C.

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

(1) [1930] A.C. 244.

The appellants claimed from the respondents jointly and severally the sum of $20,000 upon a note signed by them. The facts of the case are lengthy and complicated; and reference is made to detailed statement contained in the judgments now reported. The note was deemed to represent, pursuant to the terms of a deed passed concurrently, one-half of the amount due to the appellants by one B. P., principal shareholder of a company which had tendered for the construction of a municipal aqueduct, such amount to be ascertained on completion of the works, when the contract would have been wound up. The appellants, contending that the amount due them was in excess of $40,000, claimed the full amount of the note. The respondents pleaded *inter alia*: (1) that the original note and its renewal were prescribed; (2) that novation had been effected and the original amount due was consequently discharged; and (3) that payments made by B. P. should have been imputed totally against the note as being the older debt. The respondents also contended that the onus was on the appellants to show the loss incurred in the execution of the contract. The appellants' action was maintained by the Superior Court, but was dismissed by the appellate court.

Held: The appeal is allowed and the appellants' action is maintained for a sum of $11,158.18, being half of $22,316.37, which was the final amount owed by the respondents.

Held that prescription does not run as long as a creditor holds a guarantee or security given to him by the debtor.—*Per* The Chief Justice and Kerwin, Taschereau and Kellock JJ.—A note dated in 1936, given to renew another dated in 1931, would therefor be prescribed in 1941, unless there are found causes interrupting or delaying the prescription. In this case, in 1931, concurrently with the signing of the original note, a contract of guarantee was signed by two of the parties thereto whereby one of them transferred *inter alia* shares, for an amount of $15,000, of a certain company to secure the payment of the debt for which the note was given and of another debt. Now, it was only in 1941, when the affairs of the aqueduct works had been finally wound up, that these shares were returned to the debtor by the creditor: therefor, the prescription of the notes began to run only from that date. Moreover, though the guarantee was given to one of the appellants only, because the other appellant was a joint and several creditor with him, all the acts interrupting or delaying the prescription towards the former have the same effect towards the latter. (Arts. 2230 and 2239 C.C.)

Per The Chief Justice and Kerwin, Taschereau and Kellock JJ.:—Novation was not effected by the renewal in 1936 of the original note, as otherwise the debt represented by that note would have been extinguished.—It is true that B. P. was the signer of the original note and the endorser of the renewal note, but the debt represented by the first note has not been renovated by the second. In order that novation be effected, there must appear, besides any change made in the original obligation, some acts of the parties showing the will to extinguish it and to replace it by a new one.—Novation is not presumed and there must be an evident intention of effecting it; the will of the parties not to make the new obligation coexisting with the old one must appear clearly from the deed or its circumstances; in case of doubt, the original obligation remains in force; in this case, the

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creditor kept possession of the first note; the net result of its renewal is that the amount of the first note cannot be recovered until the date of maturity of the second note.

Per The Chief Justice and Kerwin, Taschereau and Kellock JJ.:—Under the general provisions of the law, payment must be imputed upon the debt which the debtor has the greatest interest in paying and, if the debts are of the same nature and equally onerous, the imputation must be effected upon the oldest debt. However, these principles apply only when there are several debts but a single debtor and a single creditor. Consequently, if the debtor gives security to guarantee both the payment of a note due to one creditor and the claim of another creditor against a company of which the payee of the note was a shareholder, the fact that the note was earlier in date than the claim should not be taken into consideration. Legal imputation does not apply in such a case (Arts. 1158 et seq. C.C.), as, while there are several debts and one debtor only, there are also two creditors: the Company and one of its shareholders. These parties, both creditors of B. P. but having different claims under the law, were holding jointly the same security for the guarantee of their respective claims; and the amount resulting from the conversion of the security into money cannot be subjected to any preference. Both creditors must, according to the ratio of their claims, divide between them the proceeds of the security, in the absence of some agreement in the matter.

Per The Chief Justice and Kerwin, Taschereau and Kellock JJ.:—The construction company issued in May 1931 a cheque for $4,000 payable to one E. R. and in December next paid to the appellants a sum of $4,563.93. The trial judge expressed doubt as to the legality of the appropriation of the amount of $4,000. *Held*: The onus was on the appellants to establish that the payment of $4,563.93 had been made in settlement of a valid and legal claim. Otherwise, if such proof is lacking, that payment must be applied on account of a promissory note, which was the only debt for which the appellants were creditors on the date of the payment.

Per Rand J.:—The agreement entered into by the parties in 1933, wherein the note of $20,000 sued upon was mentioned, by implication in fact provides that the note shall run as a continuing maximum obligation for one-half of the ultimate sum, on completion of the works, found due from B. P. to the appellants, which in the circumstances would represent part of the loss on the contract, less what B. P. himself might pay on it, and that consequently it became payable in March. 1941, when the affairs of the construction company had been wound up.

Per Rand J.:—The note of 1936 did not supersede that of 1931 either in intention or because B. P.'s liability was changed from that of a maker to that of an endorser, and, consequently, the original debt or liability did not cease to exist in 1936. The reasonable inference from the circumstances is that the second note was taken, *ex abundantia cautela,* not in substitution for, but additional to, the first. The earlier note continued therefore, subject to the operation of prescription until 1941. But even if there were a substitution, on both notes B. P. was in fact a surety to the construction company and, either as maker or endorser, his obligation to the appellants vis-à-vis the respondents remained unaffected.

Per Rand J.:—The onus of proving the fact of a loss in carrying out the reservoir contract, which loss was a condition of the respondents' liability under the agreement of 1933, did not lay on the appellants, when the circumstances in which the note of 1933 was given are considered, and more specially where the appellants had nothing to do with the direction of the construction company and had no control over the disbursement of moneys.

Per Rand J.:—The securities given by B. P. in 1931 should, under the language of the agreement, be appropriated proportionately to the debts owed by him, to wit the one represented by the note given to the appellants and the one represented by a loan made to B. P. by the respondent company.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Laliberté J., and dismissing the appellants' action, by which they claim $20,000 on a promissory note.

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.

André Taschereau K.C. and Renault St. Laurent for the appellants.

M. L. Beaulieu K.C. and *A. Labrèque* for the respondents.

The judgment of the Chief Justice and of Kerwin, Taschereau and Kellock JJ. was delivered by

TASCHEREAU J.: Les appelants réclament des défendeurs-intimés conjointement et solidairement la somme de $20,000. La Cour de première instance leur a donné gain de cause, mais leur action a été rejetée par la Cour du Banc du Roi.

Les faits qui ont fait naître ce litige sont assez compliqués et peuvent se résumer ainsi. Au cours du mois d'avril 1931, la Compagnie de Construction de Québec, dont un nommé Béloni Poulin était le principal actionnaire et administrateur, a fait parvenir à la cité de Québec une soumission pour la construction d'un réservoir municipal. Cette soumission devait être accompagnée d'un dépôt de $30,000, et comme la Compagnie ne disposait pas des fonds requis, les appelants V. Dionne et Fils ont fourni ce montant en

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escomptant un billet de $30,000 à la Banque Royale du Canada, succursale St-Georges de Beauce. Quelques mois plus tard, soit le 21 juillet 1931, la Compagnie de Construction, Rodolphe Marcotte, Alfred Gagnon et Béloni Poulin ont conjointement et solidairement signé un billet promissoire payable à demande, à l'ordre de V. Dionne et Fils, au montant de $30,000 et portant intérêt au taux de 6 p. 100. Ce billet, qui devait servir à garantir les avances faites par V. Dionne et Fils, fut remis par ces derniers à la Banque Royale du Canada.

Au mois d'août de la même année, la Compagnie a obtenu de la cité de Québec le contrat pour la somme de $458,507.35, et la Canadian General Insurance Company déposa entre les mains d'un officier autorisé de la cité de Québec une police de garantie pour assurer la fidéle exécution du contrat. L'un des défendeurs, M. Edouard Lacroix, beau-frère de Béloni Poulin, a lui-même garanti la compagnie d'assurance contre toutes pertes qu'elle pourrait subir.

C'est la Banque Royale du Canada qui a fourni à la Compagnie les fonds nécessaires à l'exécution des travaux, et les trois lettres de garantie suivantes ont été données à la Banque Royale:

18 août 1931	$75,000
16 mars 1932	$50,000
19 octobre 1932	$75,000

L'un des appelants, Ludger Dionne, associé de la firme V. Dionne et Fils, a signé ces trois lettres de garantie de même que Béloni Poulin et Rodolphe Marcotte. Alfred Gagnon n'a signé que les deux premières.

Quelques jours après la signature de la première lettre de garantie, Béloni Poulin et Rodolphe Marcotte ont, le 20 août 1931, signé devant le notaire Crépeau un document en vertu duquel ils ont conjointement et solidairement garanti Ludger Dionne jusqu'à concurrence d'une somme de $105,000, contre toutes pertes qu'il pourrait faire comme résultat de la première avance de $30,000 et de la première lettre de garantie au montant de $75,000. Par cet acte, Béloni Poulin a hypothéqué en faveur de Ludger Dionne certains immeubles et lui a transporté également d'autres

valeurs et créances. Il est cependant important de noter ici que c'est la société V. Dionne et Fils qui a avancé le premier $30,000 qui devait accompagner la soumission pour la construction du réservoir, que c'est Ludger Dionne personnellement qui a signé les lettres de garantie et que, cependant, les hypothèques et transports consentis par Béloni Poulin pour garantir le paiement des deux créances sont en faveur de Ludger Dionne personnellement. Je reviendrai plus tard sur ce point.

Or, après la signature de tous ces documents, et alors qu'on entrevoyait la fin des travaux du réservoir, ainsi que la probabilité d'une perte assez substantielle, Edouard Lacroix, l'un des défendeurs, emprunta de V. Dionne et Fils, le 7 février 1933, pour le bénéfice de deux compagnies dont il est propriétaire, la Madawaska Company et la Port Royal Pulp & Paper Company, la somme de $83,000. Un contrat fut signé à cet effet, et évidemment en considération de ce prêt, la Madawaska Company a signé en faveur de V. Dionne et Fils un billet au montant de $20,000, payable le 1er septembre 1933 et endossé personnellement par Edouard Lacroix. Dans l'acte relatif au prêt de $83,000, on trouve la clause suivante:

> En outre, la Madawaska Company donne auxdits V. Dionne et Fils un billet daté de ce jour au montant de vingt mille piastres ($20,000) qui sera payable sans intérêt le 1er septembre prochain. Ce montant représentant un prêt fait à Béloni Poulin par la Madawaska Company, et étant donné auxdits V. Dionne et Fils en acompte sur ce que ledit Béloni Poulin leur doit et étant censé représenter la moitié du montant dû auxdits V. Dionne et Fils lorsque toutes les affaires du réservoir seront réglées.
>
> Il est compris que si cette dette était moindre que $40,000 ce billet ne sera dû que pour la moitié de cette dette, ladite Madawaska Company n'étant pas obligée de payer plus que le billet de $20,000.

Les demandeurs prétendent que, Béloni Poulin étant débiteur des demandeurs V. Dionne et Fils en un montant supérieur à $40,000, ils ont droit de réclamer des défendeurs conjointement et solidairement ladite somme de $20,000.

Ce document ne constitue pas un cautionnement destiné à garantir la dette de Béloni Poulin à V. Dionne et Fils. Sa lecture démontre plutôt que les défendeurs ont assumé l'obligation de payer le montant dû par Béloni Poulin "lorsque toutes les affaires du réservoir seront réglées". D'où il

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résulte que la discussion des biens de Poulin n'est pas nécessaire et que la seule preuve de la dette de Poulin envers les demandeurs rend la créance des demandeurs exigible.

La première question qui se pose est donc de déterminer le montant de la dette de Béloni Poulin due à V. Dionne et Fils, lors de la signature de ce document, telle qu'établie lors du règlement des "affaires du réservoir". Pour la complète intelligence de la cause, il importe en premier lieu de distinguer les deux dettes de Poulin.

La première est celle qui est représentée par le billet de $30,000 qu'il a signé conjointement et solidairement avec d'autres, à l'ordre de V. Dionne et Fils, le 21 juillet 1931, payable à demande et portant intérêt au taux de 6 p. 100, et qui a été donné aux appelants pour garantir les $30,000 qu'ils avaient prêtées à la Compagnie de Construction, lors de la soumission faite par cette dernière pour la construction du réservoir.

La seconde de ces dettes est constituée par la créance de la Banque Royale du Canada au montant de $195,500, garantie par Ludger Dionne personnellement, Béloni Poulin, Rodolphe Marcotte et Alfred Gagnon, créance que les demandeurs ont payée partiellement et dont ils sont devenus cessionnaires en 1941. Ce montant de $195,500 était dû à la Banque à la date du 7 février 1933, quand la Madawaska Company et Edouard Lacroix ont assumé l'obligation de participer dans les pertes, jusqu'à concurrence de $20,000.

Cette dette de $195,500, et pour laquelle Ludger Dionne était personnellement responsable, fut payée à la Banque de la façon suivante: Le 12 août 1931, la Compagnie de Construction a transporté à la Banque Royale du Canada tous les montants qui lui étaient dus par la cité de Québec, et en vertu de ce transport, les divers acomptes reçus par la Banque ont été appliqués à la réduction de la dette de la Compagnie de Construction et ne contribuaient pas au paiement du billet de $30,000 dû à V. Dionne et Fils. Il s'ensuit que, déduction faite de tous ces paiements transmis par la cité de Québec, il est resté dû à la Banque $70,667.60 pour avances à la Compagnie de Construction, et cet autre montant de $30,000 plus $15,722.80 d'intérêts ($45,722.80), formant un grand total de $116,390.40.

Le 15 mars 1941, V. Dionne et Fils ont payé à la Banque Royale du Canada le billet de $30,000, sur lequel ils avaient antérieurement payé les intérêts, plus la somme de $70,667.60, et ont obtenu pour ce dernier montant une quittance avec subrogation contre ceux qui avaient signé les lettres de garantie à la Banque Royale du Canada, et dont Béloni Poulin. Il résulte de toutes ces diverses transactions, qu'à cette date du 15 mars 1941, un montant de $116,390.40 était dû à V. Dionne et Fils.

Quelque temps plus tard, soit dans le mois d'avril 1941, il y eut des pourparlers de règlement entre Ludger Dionne et Béloni Poulin. Béloni Poulin a alors payé à V. Dionne et Fils, cessionnaires de Ludger Dionne, $47,300 comme conséquence des transports qu'il avait consentis à Ludger Dionne. Ce montant de $47,300 ne fut appliqué à aucune dette en particulier, de sorte que Béloni Poulin est resté débiteur d'une somme de $69,090.40.

Il me semble impossible d'admettre que les appelants puissent baser leur réclamation contre les défendeurs en soutenant que Béloni Poulin leur devait à eux comme cessionnaires de Ludger Dionne. Il est bien vrai qu'en mars 1941 ce dernier a cédé tous ses droits à V. Dionne et Fils et que lors des paiements faits à la Banque, ils ont obtenu une quittance avec subrogation contre Béloni Poulin, mais l'obligation des défendeurs de payer ne s'étend pas jusque là. En vertu de l'écrit du 7 février 1933, les défendeurs se sont obligés de payer ce que Béloni Poulin devait à V. Dionne et Fils, à la date où l'écrit a été signé, malgré que la détermination de ce montant ne devait se faire que lorsque les affaires du réservoir se règleraient. Or, à cause de divers procès, ce n'est qu'en 1941 que les affaires du réservoir ont été réglées, et qu'on a pu déterminer le montant dû par Béloni Poulin à la date du 7 février 1933. Tous les droits acquis par les appelants subséquemment à cette date ne peuvent servir de base pour établir la dette de Poulin vis-à-vis les demandeurs, et rendre ainsi exigible une créance conditionnelle que ces derniers avaient contre les défendeurs. Ce que Béloni Poulin devait à la date du 7 février 1933, à part le billet de $30,000, il le devait à Ludger Dionne personnellement, et les transports subséquents faits par Ludger Dionne à V. Dionne et Fils ne peuvent augmenter les obligations des défendeurs.

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L'action des demandeurs ne repose pas seulement sur le billet de $20,000 qui constituerait une preuve *prima facie* de la dette due par les défendeurs, mais elle est la résultante de l'effet combiné de ce billet et de l'écrit du 7 février. Les deux ne font qu'un tout et doivent nécessairement être lus ensemble. La Cour Supérieure et la Cour du Banc du Roi ont cru que la preuve, qui incombait aux demandeurs de prouver que l'argent avancé par la banque a été exclusivement employé aux travaux de construction du réservoir, est insuffisante. Etant donnée l'opinion que j'ai exprimée à l'effet que la dette due par Béloni Poulin pour les fins de la présente réclamation ne peut être celle résultant de la cession de créance, il devient inutile de discuter cette question.

Mais, en ce qui concerne la créance de $30,000 et intérêts, que les appelants font valoir contre Béloni Poulin, la situation me semble bien différente. Cette créance existait certainement à la date du 7 février 1933, et les véritables créanciers sont bien les demandeurs dans la présente cause, le billet ayant été fait payable à leur ordre. De plus, la preuve établit clairement de quelle façon cet argent a été employé.

Les intimés soutiennent, cependant, que ce montant n'est pas dû par Béloni Poulin, et ils invoquent en premier lieu un moyen résultant de la prescription. Comme nous l'avons vu précédemment, ce billet a été signé le 21 juillet 1931 par la Compagnie de Construction de Québec, Alfred Gagnon, Béloni Poulin et Rodolphe Marcotte. Le 14 juillet 1936, ce même billet qui était demeuré impayé a été renouvelé, mais il a été signé par la Compagnie de Construction de Québec Limitée et endossé avec renonciation au protêt par Rodolphe Marcotte, Béloni Poulin et Alfred Gagnon. Apparemment, ce billet devait être prescrit en 1941, et à moins qu'on y trouve quelques causes qui ont interrompu ou suspendu la prescription, celle-ci était acquise lors de la signification de l'action.

Nous avons vu précédemment que, le 20 août 1931, Béloni Poulin et Rodolphe Marcotte ont donné des garanties à Ludger Dionne, et dans l'acte reçu devant M. le notaire Crépeau on y voit les clauses suivantes:

Attendu que la susdite compagnie (La Compagnie de Construction de Québec Limitée) a obtenu en la cité de Québec un contrat pour la cons-

truction d'un réservoir et *que ledit Ludger Dionne a garanti jusqu'à concurrence d'une somme de trente mille piastres ($30,000) envers la ville de Québec pour la parfaite et entière exécution du susdit contrat.*

Attendu que la susdite compagnie a besoin d'un certain crédit à la banque pour financer cette entreprise et que ledit Ludger Dionne s'est porté garant pour la susdite compagnie à la Banque Royale du Canada à St-Georges-Est, Beauce, et ce jusqu'à concurrence d'une somme de *soixante-quinze mille piastres* ($75,000).

Par la faveur des présentes lesdits Béloni Poulin et Rodolphe Marcotte *garantissent personnellement et conjointement et solidairement ledit Ludger Dionne* pour toute la somme totale, soit cent cinq mille piastres ($105,000) ou partie d'icelle que tous les intérêts sur icelle et déclarent affecter et hypothéquer les immeubles ci-après décrits, savoir:

(Liste des immeubles hypothéqués:)

Ledit Béloni Poulin déclare en outre céder et transporter *audit Ludger Dionne quinze mille piastres ($15,000) de parts* qu'il détient dans la Compagnie St-Georges Woollen Mills et il s'engage de signer les transferts des susdites actions en faveur dudit Ludger Dionne.

Pour donner suite à cette entente signée par toutes les parties, Béloni Poulin a remis à Ludger Dionne lesdites actions qui, comme on peut le voir par l'acte lui-même, garantissaient *et l'avance de $30,000* et un premier montant de $75,000 prêté à la Compagnie de Construction de Québec par la Banque Royale du Canada, sur la force de la lettre de garantie signée par Ludger Dionne.

Or, ce n'est qu'en 1941, quand les affaires du réservoir ont été réglées, que Ludger Dionne a remis les parts en question à Béloni Poulin, et il s'ensuit donc que pendant ce temps, la prescription des billets n'a pas couru. Il est un principe admis et reconnu par la jurisprudence et par les auteurs, que la prescription ne court pas tant qu'un créancier détient un gage que lui a remis son débiteur.

Dans *La Banque du Peuple* v. *Huot* (1), la Cour de Revision a décidé que:

Le fait pour un débiteur, qui a donné un gage à son créancier pour assurer le paiement de sa dette, de laisser ce gage en la possession du créancier, constitue une reconnaissance constante et incessante de son obligation qui en interrompt la prescription, tant que le créancier conserve la possession du gage.

L'article 2227 du Code Civil se lit ainsi:

La prescription est interrompue civilement par la renonciation au bénéfice du temps écoulé et par la reconnaissance que le possesseur ou le débiteur fait du droit de celui contre lequel il prescrivait.

(1) (1897) Q.R. 12 S.C. 370.

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L'article correspondant du Code Napoléon est l'article 2248 qui est au même effet:

La prescription est interrompue par la reconnaissance que le débiteur ou le possesseur fait du droit de celui contre lequel il prescrivait.

Dalloz, Répertoire Pratique, n° 322, à la page 174, commentant cet article 2248, dit:

La reconnaissance tacite peut encore résulter * * * lorsque le débiteur fournit une caution ou donne un gage au créancier. (Troplong, t. 2, No. 618; Laurent, t. 32, No. 129; Huc, No. 402; Baudry-Lacantinerie et Tissier, No. 530.)

Baudry-Lacantinerie, 3e éd., vol. 25, n° 530, dit à la page 395:

Les principaux faits d'où peut s'induire la reconnaissance tacite sont le paiement fait par le débiteur qui est en voie de prescrire d'une partie de sa dette à titre d'acompte, le paiement par le débiteur des intérêts de sa dette, la demande qu'il fait d'un délai pour le paiement, l'offre et à plus forte raison la dation de sûretés, telles qu'une caution, un gage, une hypothèque.

Vu la décision de cette Cour dans *Paré* v. *Paré* (1), il y a lieu de faire certaines réserves, en ce qui concerne l'hypothèque.

Planiol et Ripert, Droit Civil, vol. 12, n° 112, page 113, disent aussi:

Tant que le créancier gagiste reste nanti, sa créance n'est pas soumise à la prescription, le fait du débiteur de laisser le gage entre ses mains constituant de sa part une reconnaissance tacite permanente du droit du créancier, qui interrompt à tout instant la prescription. La solution contraire aboutirait à ce résulat inadmissible, que le débiteur, après prescription de la dette, pourrait réclamer la restitution du gage sans payer ce qu'il devait.

La remise de ses parts de la St-Georges Woollen Mills par Béloni Poulin à Ludger Dionne a donc constitué une garantie continuelle, une reconnaissance de sa dette et la prescription n'a donc pas couru.

On objecte cependant que la remise de ce gage a été faite à Ludger Dionne personnellement, et qu'en conséquence V. Dionne et Fils qui étaient les bénéficiaires du billet, ne peuvent invoquer à leur profit cette reconnaissance.

Evidemment, cet acte, par lequel des garanties sont données à Ludger Dionne, n'est pas rédigé dans les termes les plus appropriés, et il eut été préférable que les faits eussent été relatés tels qu'ils se sont produits. Mais il n'en reste pas moins vrai que Béloni Poulin *reconnaît l'existence de la dette de $30,000* qu'il doit aux demandeurs, et que pour

(1) (1894) 23 Can. S.C.R. 243.

en assurer le paiement il donne des actions en gage à Ludger Dionne, qui est précisément l'un des associés de la firme V. Dionne et Fils, et l'un des créanciers solidaires du billet de $30,000. Tous les actes interruptifs ou qui suspendent la prescription vis-à-vis Ludger Dionne, ont le même effet vis-à-vis Arsène Dionne, l'autre associé de V. Dionne et Fils. L'article 2230 C.C. est clair sur ce point:

Tout acte, qui interrompt la prescription à l'égard de l'un des créanciers solidaires, profite aux autres.

Et l'article 2239 C.C. dit:

Les règles particulières, concernant la suspension de la prescription quant aux créanciers solidaires et à leurs héritiers, sont les mêmes que celles de l'interruption dans les mêmes cas expliqués en la section précédente.

Les intimés ont également soutenu que le renouvellement du billet du 14 juillet 1936 a opéré une novation et que la dette représentée par le premier billet n'existe plus. Le double résultat de l'extinction du premier billet remplacé par le second serait d'abord que le gage donné pour garantir le premier billet de $30,000 n'aurait pas garanti le second, et que la prescription sur le dernier n'aurait pas été interrompue. De plus, le second billet ayant été consenti en 1936 et représentant une dette novée, n'existait pas à la date du 7 février 1933, et ne peut pas, en conséquence, être pris en considération pour déterminer le montant de la dette des défendeurs.

Je ne crois pas que cette prétention soit fondée. Il est vrai que Béloni Poulin est signataire du billet du 21 juillet 1931, et qu'il apparaît comme endosseur sur le renouvellement du 14 juillet 1936, mais la dette représentée par le premier n'a pas été novée par le second. Pour que la novation existe il faut, qu'en dehors du changement apporté dans l'obligation primitive, apparaissent les volontés des parties de l'éteindre pour la remplacer par la nouvelle. La novation ne se présume pas, l'intention de l'opérer doit être évidente, et la volonté de ne pas faire coexister la nouvelle obligation avec l'ancienne doit résulter clairement de l'acte ou de ses circonstances. En cas de doute, l'obligation initiale subsiste. En certains cas, le renouvellement d'un billet opérera novation, et particulièrement s'il y a remise du billet originaire, mais lorsque l'intention expresse n'apparaît pas, et que le créancier, comme dans le

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cas qui nous occupe, conserve la possession du billet antérieur, l'obligation primitive n'est pas éteinte, et coexiste avec la seconde. Alors, l'effet du renouvellement est que le montant du premier billet ne peut être recouvré tant que l'échéance du second n'est pas arrivée.

De nombreux jugements à cet effet ont été rendus dans la province de Québec, et je ne citerai que celui de M. le juge Stein dans la cause de *Allaire* v. *Gagnon* (1). Dans cette cause, les billets originaires signés par Gagnon et Ouellette avaient été renouvelés par des billets signés par d'autres, et endossés par Gagnon et Ouellette. Les premiers billets avaient même été remis aux créanciers. Il a été décidé qu'il n'y avait pas de novation, et ce jugement a été unanimement confirmé par la Cour du Banc du Roi (2). Les mêmes principes doivent s'appliquer à la présente cause et il s'ensuit donc que la dette de Poulin au montant de $30,000 subsiste, qu'elle n'est pas prescrite, et qu'elle existait à la date du 7 février 1933.

Les intimés ont prétendu que, comme résultat de l'imputation légale des paiements, le billet de $30,000 était éteint. Il est certain qu'en vertu des dispositions de la loi, le paiement doit être imputé sur la dette que le débiteur avait le plus d'intérêt à acquitter, et que si les dettes sont de même nature et également onéreuses, l'imputation se fait sur la plus ancienne. Mais cette règle ne trouve son application que lorsqu'il y a plusieurs dettes, mais un seul débiteur et un seul créancier.

Il est évident que les montants versés par la cité de Québec, en vertu du transport consenti par la Compagnie de Construction, devaient nécessairement servir à payer ce que la Compagnie devait à la Banque, et non pas à payer ce que Béloni Poulin pouvait devoir à V. Dionne et Fils ou à Ludger Dionne personnellement. Quant aux paiements faits par Béloni Poulin, la situation est différente et assez complexe, mais doit se solutionner de la façon suivante. Il est établi que lorsque, le 20 août 1931, Béloni Poulin a donné des gages et des hypothèques à Ludger Dionne, il entendait garantir, et le billet de $30,000 dû à V. Dionne et Fils, et le montant que Ludger Dionne pourrait devoir à la Banque Royale, en sa qualité de signataire d'une lettre de garantie, jusqu'à concurrence de $75,000. Quand en 1941,

(1) (1936) 43 R. de J. 1. (2) (1936) 43 R. de J. 105.

il a été convenu que Béloni Poulin paierait $27,000 pour libérer les garanties données, et une somme supplémentaire déterminée à $20,300, formant un grand total de $47,300, il payait partiellement et le billet de $30,000 plus les intérêts, et la créance que Ludger Dionne avait personnellement contre lui. Il est vrai que le billet de $30,000 est antérieur à l'autre dette, mais il ne peut dans ce cas y avoir d'imputation légale, suivant les articles 1158 et al. du Code Civil, car s'il y a plusieurs dettes et un seul débiteur, il y a aussi deux créanciers, dont l'un est V. Dionne et Fils et l'autre Ludger Dionne. Ces deux derniers, créanciers de Poulin et différents aux yeux de la loi, détenaient conjointement un gage pour garantir leurs créances respectives, et le montant de la réalisation de ce gage ne peut être soumis à aucune préférence. Les deux créanciers doivent, dans la proportion de leurs créances, se partager le produit du gage, vu qu'il n'y a eu aucune entente à ce sujet.

Il a été prouvé au cours de l'enquête que le 2 mai 1931 V. Dionne et Fils ont émis un chèque au montant de $4,000, fait payable à l'ordre de Emile Renaud. Le 22 décembre de la même année, la Compagnie de Construction a payé aux demandeurs une somme de $4,563.93. Le juge de première instance n'est pas satisfait de la légalité de l'emploi de cette somme de $4,000, et il incombait en effet aux appelants de démontrer à la satisfaction de la Cour que le paiement de $4,563.93, reçu de la Compagnie de Construction, était pour une considération légale. L'absence de cette preuve, dont les appelants avaient incontestablement le fardeau, ne peut conduire qu'à une seule conclusion, et c'est que ce paiement de $4,563.93 doit être appliqué en réduction du billet de $30,000, car à la date où le paiement a été fait, soit le 22 décembre 1931, il n'y avait pas d'autre dette, dont les demandeurs étaient créanciers.

Le billet de $30,000 portait intérêt au taux de 6 p. 100, et il n'est pas contesté que les intérêts se chiffrent au montant de $15,722.80, formant un total de $45,722.80. Le montant de $4,563.93 plus les intérêts au taux de 6 p. 100, depuis le 22 décembre 1931 au 9 juillet 1936, qui s'élèvent à $1,245.36, et au taux de 5 p. 100 depuis le 9 juillet 1936 au 15 mars 1941, se chiffrant à $1,068.43, forment un total de $6,877.72, qu'il faut déduire de $45,722.80, laissant une balance de $38,845.08. Enfin, l'intérêt sur ce dernier mon-

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tant jusqu'au 8 mai 1941, au taux de 6 p. 100 donne une somme globale de $39,189.89. Il est indifférent que l'intérêt soit accordé sur ce paiement de $4,563.93, ou déduit de la somme de $45,722.80. L'une ou l'autre des opérations donne le même résultat.

Il ressort de tout ceci que la dette totale est de $109,857.49, et il s'ensuit que la balance due par Béloni Poulin à V. Dionne et Fils sur le billet de $30,000 plus les intérêts, est de *$22,316.37*, soit $39,189.89 moins $16,873.52 qui est la proportion de la réalisation du gage applicable à la dette de $39,189.89. Cependant, vu les termes de l'écrit du 7 février, la moitié seulement de cette somme, soit $11,158.18 peut être réclamée des défendeurs conjointement et solidairement.

Il reste trois autres questions d'importance mineure à déterminer.

Les intimés ont cru voir dans l'arrangement intervenu entre les demandeurs cessionnaires des droits de Ludger Dionne et Béloni Poulin, le 5 mai 1941, un règlement complet et final qui éteignait totalement la dette de Béloni Poulin. Il est clair qu'il n'en est pas ainsi, car il a été stipulé à la même date du 5 mai qu'une quittance finale ne serait donnée à Béloni Poulin que lorsque les demandeurs auraient exercé tous leurs recours contre les obligés. Or, comme cet événement n'est pas arrivé encore, il n'y a pas eu de quittance finale. L'action prise contre les défendeurs, après cet arrangement du 5 mai, est précisément l'exercice de l'un de ces recours.

Comme autre moyen pour demander le rejet de l'action, les défendeurs se sont appuyés sur un écrit du 24 décembre 1934, signé par Ludger Dionne, et qui se lit ainsi:

V. Dionne & Fils

St-Georges, Beauce, 24 décembre 1934.

Si par suite d'une perte dans le règlement de la Construction du Réservoir de Québec, M. Edouard Lacroix est appelé à payer le billet de $20,000 qu'il m'a signé à cet effet, je m'engage, après que je serai complètement désintéressé de l'affaire, à lui transporter les droits que j'ai sur le ménage, le stock et le roulant, ainsi que $15,000 de parts de la St-George Woollen Mills Co., qui m'ont été donnés par M. Béloni Poulin en garantie.

Il est entendu que M. Lacroix devra remettre possession de ces valeurs à M. Béloni Poulin lorsque ce dernier le remboursera de ses déboursés.

(Signé) Ludger Dionne.

On a prétendu que les défendeurs ne peuvent être condamnés à payer le montant réclamé, à moins que les demandeurs offrent et consignent les dites actions de la St-George Woollen Mills et rétrocèdent les autres droits qu'ils se sont engagés à transporter. Les termes de cet écrit sont clairs. En premier lieu, il est signé par Ludger Dionne personnellement, et en second lieu, ce n'est que lorsque Ludger Dionne "sera complètement désintéressé de l'affaire" que son obligation prendra effet. Au moment où l'action a été instituée, il était encore le créancier d'un montant substantiel, et il n'était sûrement pas "désintéressé". Le terme de cette obligation, s'il arrive jamais, n'était pas arrivé en 1941, et le droit des demandeurs de réclamer n'était donc pas subordonné à la remise aux défendeurs de ces droits et actions.

Enfin, dans leur plaidoyer, les défendeurs allèguent que le billet du 7 février 1933, fait payable le 1er septembre de la même année, serait prescrit. Les termes mêmes de l'écrit qui accompagne le billet semblent suffisants pour disposer de cette prétention. L'obligation qu'ont assumée les défendeurs, de payer "la moitié du montant dû aux dits V. Dionne et Fils", ne doit se déterminer que "lorsque toutes les affaires du réservoir seront réglées". Or, comme les affaires n'ont été réglées qu'en 1941, il est évident que la prescription a été suspendue, et qu'elle n'a commencé à courir qu'à cette date, l'année même où l'action a été instituée.

Pour les raisons ci-dessus mentionnées, je suis d'opinion de maintenir le présent appel, et d'accueillir l'action jusqu'à concurrence de la somme de $11,158.18, soit la moitié du montant de $22,316.37 qui est la limite de l'obligation des défendeurs intimés. Les appelants auront droit aux intérêts sur ce montant depuis le jour de la signification de l'action, et aux dépens en Cour Supérieure et devant cette Cour. Les frais d'appel à la Cour du Banc du Roi seront payables par les appelants, car les intimés ont réussi à faire réduire de façon substantielle le montant de la première condamnation.

RAND J.: The material facts of this controversy are these. In the spring of 1931 the city of Quebec called for tenders for the construction of a reservoir. La Compagnie de

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Construction Limitée submitted a tender, accompanied by a required deposit of $30,000. The largest interest in the shares of the Construction company was owned by one Poulin, the managing director. The secretary was Marcotte. The Construction company was the successful tenderer, and a bond against performance was furnished by a surety company which was in turn guaranteed against loss by the respondent, Lacroix, a brother-in-law of Poulin. The money for the deposit of $30,000, obtained by discounting a note dated July 20th, 1931, with the Royal Bank of Canada, was furnished to the company by the firm of V. Dionne et Fils, appellants, who took by way of security a demand note dated July 21st, 1931, for the same amount signed by the Construction company, one Gagnon, a director, Poulin and Marcotte, and endorsed by the appellants to the bank as collateral to the instrument discounted. On July 14th, 1936, a new security note, taken evidently in view of the approaching 5-year limitation period, on which the Construction company was maker and Messrs. Poulin, Marcotte and Gagnon endorsers, was furnished to the appellants and likewise transferred to the bank. Ultimately the discounted note, on which interest was paid from 1931 to 1941 by the appellants, was taken up by them and, with the two collateral notes, returned to them by the bank.

For the further financing of the contract, three guarantees were in the course of 1931 and 1932 furnished to the bank executed by Messrs. Poulin, Marcotte, Gagnon and Ludger Dionne, a member of the appellant firm. These were for $75,000, $50,000 and $75,000 respectively and each covered any ultimate balance that might be owing by the Construction company to the bank at the completion of the contract. The final balance for which these guarantors became responsible was $70,667.60 as of March 15th, 1941. On that day the appellants, under an arrangement with Ludger Dionne, paid off the bank and took over whatever securities were held against the account.

The work on the reservoir was commenced in 1931 and was substantially completed by February 7th, 1933, when it had become apparent that a loss would be suffered. Shortly before that time, the respondent Lacroix, the

owner of all the shares of the respondent Madawaska company, approached the appellants for a loan of $83,000 for the benefit of that company and the Port Royal Pulp & Paper Company, likewise controlled by him. The former was to be advanced $60,000 and the latter $23,000. The negotiations issued in an agreement by which, in consideration of the loans, the Madawaska company and Lacroix were to assume one-half of the amount which Poulin should ultimately owe the appellants arising out of the obligations mentioned. The terms were reduced to writing and the clauses of the memorandum dealing with this feature are as follows:—

En outre, la Madawaska Company donne aux dits V. Dionne et Fils un billet daté de ce jour au montant de vingt mille piastres ($20,000) qui sera payable sans intérêt le 1er septembre prochain. Ce montant représentant un prêt fait à Béloni Poulin par la Madawaska Company, et étant donné aux dits V. Dionne & Fils en acompte sur ce que le dit Béloni Poulin leur doit et étant sensé représenter la moitié du montant dû aux dits V. Dionne & Fils lorsque toutes les affaires du réservoir seront réglées.

Il est compris que si cette dette était moindre que quarante mille piastres ce billet ne sera dû que pour la moitié de cette dette, la dite Madawaska Company n'étant pas obligée de payer plus que le billet de vingt mille piastres.

The note mentioned was signed by the Madawaska company, endorsed by Lacroix and delivered to the appellants and is that on which the action is based. It was at this time expected that the construction would be completed in September of 1933, but between delay in minor details and controversies over claims, including liens, asserted against the City, the matter was not finally concluded until March, 1941, when the settlement with the bank was made.

In 1931 Poulin and Marcotte under an agreement in writing with Ludger Dionne had furnished certain securities to cover, as I interpret the agreement, the $30,000 notes and the liability of Dionne on the first letter of indemnity for $75,000 against which Poulin had agreed to protect him; and in relation to the notes, Ludger Dionne must be taken to represent the appellants. On March 11th, 1941, the securities were transferred to the appellants and in April and May of the same year they were in part taken over by them and in part surrendered to Poulin for cash on a total valuation of $47,300.

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At that time the interest on the discounted note for $30,000 as reduced in 1936 to 5 per cent. by a collateral note, which had been paid annually to the bank by the appellants, amounted to $15,722.80, making a total liability of $45,722.80. The notes given by Poulin and the others as collateral bore interest at 6 per cent. to cover this but a question is raised as to the amount of interest which can be claimed against Poulin.

I think it clear that the agreement of February 7th, 1933, by implication in fact provides that the note of the respondents for $20,000 shall run as a continuing maximum obligation for one-half of the ultimate sum, on completion of the works, found due from Poulin to the appellants, which in the circumstances would represent part of the loss on the contract, less what Poulin himself might pay on it, and that consequently it became payable in March, 1941. In the original claim, the total sums paid by the appellants to the bank, namely $70,667.60, on account of the guarantees, and $45,722.80 on account of the principal and interest of the original loan, were asserted to represent that liability and loss; but I do not think the evidence permits us to connect that agreement with the indebtedness of Poulin arising out of the personal guarantee of Ludger Dionne to the bank. The former had been made with the appellants as a partnership; but the guarantees were signed by Dionne alone under an arrangement by which he became entitled to a large share of the net profits. The appellants cannot, therefore, resort to the deficit in operations for the purpose of ascertaining the debt of Poulin to them for the purposes of the agreement.

There remains the advance of $30,000 and its interest, both of which the collateral notes were intended to secure. It is argued that the agreement of 1933 provided for the assumption of one-half of the ultimate debt in respect of the obligations of Poulin existing at that time; that the note of 1936 superseded that of 1931 both in intention and because Poulin's liability was changed from that of a maker to that of an endorser; and that consequently that particular debt or liability had ceased to exist in 1936. But the reasonable inference from the circumstances here is that the second note was taken, *ex abundantia cautela,* not

in substitution for, but as additional to, the first. The original continued to be held by the bank and both were delivered to the appellants attached to the discounted note. Ordinarily in such case the later instrument is taken to operate as a conditional payment suspending action on the earlier until dishonour, here clearly before July, 1941, upon which its collateral character relates back to the beginning: *Noad* v. *Bouchard* (1); *Royal Bank of Canada* v. *Hogg* (2). The earlier note continued therefore, subject to the operation of prescription, until 1941. This disposes also of the second point; but even if there were a substitution, on both notes Poulin was in fact a surety in relation to the Construction company and whether he appeared as maker or as endorser with waiver of protest, his obligation to the appellants vis-à-vis the respondents remained unaffected.

The prescription of the first note as well as the second however seems clearly to have been interrupted by the possession by or on behalf of the appellants, as security, of the shares of stock given them by Poulin under the agreement of 1931. That such possession is an interruption under article 2227 of the Civil Code seems to be clear both from the French commentators and decisions of the courts of Quebec. For instance, Dalloz, Répertoire Pratique, n° 322, at page 174 says:—

> La reconnaissance tacite peut encore résulter: * * * de ce que le débiteur fournit une caution ou donne un gage au créancier. (Troplong, t. 2, No. 618; Laurent, t. 32, No. 129; Huc. No. 402; Baudry-Lacantinerie et Tissier No. 530;

Baudry-Lacantinerie, 3rd edition, vol. 25, no. 530, at page 395:—

> Les principaux faits d'où peut s'induire la reconnaissance tacite sont le paiement fait par le débiteur qui est en voie de prescrire d'une partie de sa dette à titre d'acompte, le paiement par le débiteur des intérêts de sa dette, la demande qu'il fait d'un délai pour le paiement, l'offre et à plus forte raison la dation de sûretés telles qu'une caution, un gage, une hypothèque.

Planiol & Ripert, Droit Civil, vol. 12, n° 122, page 113:—

> Interruption de la prescription de la créance garantie.—Tant que le créancier gagiste reste nanti, sa créance n'est pas soumise à prescription, le fait du débiteur de laisser le gage entre ses mains constituant de sa part une reconnaissance tacite permanente du droit du créancier, qui

(1) (1860) 10 L.C.R. 476. (2) (1929) 64 O.L.R. 653.

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interrompt à tout instant la prescription. La solution contraire aboutirait à ce résultat inadmissible, que le débiteur, aprés prescription de la dette, pourrait réclamer la restitution du gage sans payer ce qu'il devait.

This view was adopted in *La Banque du Peuple* v. *Huot* (1) and *McGreevey* v. *McGreevey* (2); the same rule was applied in *The Royal Trust Co.* v. *The Atlantic and Lake Superior Ry Co.* (3). The note, then, given in 1931 carries interest from that year until 1941 at the rate of 6 per cent. to produce an amount more than the interest actually paid. This interruption is not negatived by what, in the circumstances, we must take to be the case, the appropriation by the appellants of the proceeds of the securities to the indemnity liability, which under the agreement the creditor was entitled to make.

The main ground of resistance, which found support in the Court below, was that the note and agreement of 1933 together created an obligation on their part that was conditioned not only on the existence of an indebtedness of Poulin to the partnership but also on a loss in carrying out the reservoir contract; and that the onus lay on the appellants to prove the latter fact. But if we consider the circumstances in which the note was given, the ground of that contention disappears. Here was a construction of considerable magnitude virtually completed and the liabilities fixed. The financing had rested on the security of the partnership or one of its members and the only real protection to this was the personal obligation of Poulin and the property given by him in hypothec or pledge. Dionne was not a shareholder of the Construction company, and although he had bargained for a high percentage of the profits, he had nothing to do with the direction of the company, the contract or the reservoir work. No doubt it was loss on the latter that was in the minds of both the respondents and the appellants, but the reference to its completion in the 1933 agreement carries no further that general assumption. It is not suggested that the Construction company was at that time engaged in any other work, or that the particular account in the Royal Bank carried entries related to any other matter; and as to the actual expenditure made up to February, 1933, from what appears,

(1) (1897) 12 S.C. 370.
(2) (1891) 17 Q.L.R. 278.
(3) (1908) 13 Ex.C.R. 42.

Lacroix knew as much about it as Dionne. What are cried up are two or three items which are said to be misappropriations or to be outside of the range of the contract. Certainly if it can be shown that the appellants have received funds of the Construction company out of the bank credit set up, they must account for them. But it would be somewhat absurd to hold them to a responsibility for the disbursement of moneys over which, so far as it appears, except one item of $4,000 with which I shall deal, they had not the slightest control; and there is no evidence that any sum was actually spent for other purposes than what Poulin, whose entire financial substance seems to have been put at the risk of the venture, considered to be in the interest of the Construction company. At the highest, that is all that could be claimed on behalf of Lacroix. Moreover, the utmost implication of the evidence touches no more than a fraction of the $23,000 remaining after applying the securities to the operating loss.

But on May 2nd, 1931, Ludger Dionne, in the name of the appellants, drew a cheque on the Royal Bank of Canada at St. Georges payable to the order of Emile Renaud for $4,000. Under cross-examination, he admitted that this cheque was cashed and the money received by him, and that thereafter it came into the hands of another, who was named, to be used to influence members of the City Council of Quebec in relation to the award of the contract. It was stated by him on re-examination that these proceeds were actually used to pay the salary and travelling expenses of an employee of the Construction company and a receipt dated January 23rd, 1932, was produced in which a general acknowledgment of all moneys due purports to have been given. On December 22nd, 1931, the Construction company paid to the appellants the sum of $4,563.93 which is said to represent the return of the moneys so advanced. Laliberté J. at the trial remarks on this—:

> Le soussigné estime qu'il appartenait aux défendeurs qui avaient signé le billet P-1 d'établir, surtout après la production des pièces mises au dossier par la demande, ce qui constituait dans le compte de la banque de la Compagnie de Construction de Québec une dette illégale contractée par Poulin. La preuve permet au soussigné de déclarer que la défense a prouvé cependant à la satisfaction de la Cour qu'un montant de $4,000 a été retiré de la banque pour des fins illégales, savoir dans le but de l'appliquer à l'achat du vote de certains échevins. Rien dans la preuve

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ne permet cependant de conclure que ledit montant a été employé effectivement à cette fin plutôt que de rester entre les mains de certains intermédiaires.

It will be seen that it is not found that the proceeds were in fact applied to the salary and expenses mentioned. But the fact remains that the appellants received from the Construction company the sum of $4,563.93 for which it is not shown they gave a valid consideration. If it had been established that the original proceeds had been applied to the illegal purpose, and witnesses were available who might have shown the truth or falsity of the allegation, the question would arise whether that fact had not so tainted the whole dealings between Poulin and the appellants that no binding obligation existed between them. But in any event it was encumbent upon Dionne at least to satisfy the Court that the payment made to his firm in December was credited to a legal indebtedness, and in the absence of that proof, this money must be treated as a payment on account of the debt that had at that time been incurred, the $30,000 advance. The principal therefore of $4,563.93 with interest at 6 per cent. until July 14th, 1936, and at 5 per cent. thereafter until March 11th, 1941, must be deducted from the total of $45,722.80.

It was argued that the Madawaska company had no power to bind itself as surety. The language of the agreement "ce montant représentant un prêt fait à Béloni Poulin par la Madawaska Company" raises a serious doubt whether that is the true legal relation brought about: but as no evidence was offered to support the plea of *ultra vires,* this contention must be rejected.

It was then objected that Poulin was released from his liability to the partnership under the following document:

> St-Georges de Beauce, le 5 mai 1941.
>
> Nous, soussignés, V. Dionne & Fils, nous nous engageons à quittancer M. Béloni Poulin en ce qui regarde la construction du réservoir de Québec, lorsque nous aurons exercé nos recours contre les obligés dans cette affaire.

But assuming the engagement to be binding, this discharge is to be taken only when the firm has exercised its recourse against the other obligors. Admittedly, it is not a present release, and the reservation preserves the rights of sureties, if the respondents are such.

A final point remains: should the securities given by Poulin in 1931 be appropriated *pro rata* to the two debts? Whether the language stating the purpose of the note:—

ce montant représentant un prêt fait à Béloni Poulin par la Madawaska Company, et étant donné auxdits V. Dionne et Fils en acompte sur ce que ledit Béloni Poulin leur doit et étant sensé représenter la moitié du montant

has the effect of making the respondent a surety may be doubted; but I take it to preclude a surrender of any security in the hands of the appellants to another creditor of Poulin. It must, then, be attributed proportionately to the debt owing to the respondents and to that under the guarantee.

I would allow the appeal and reduce the amount of the judgment at trial to the sum of $11,158.18. The appellants should have their costs in the Superior Court and in this Court. The respondents should have their costs in appeal before the Court of King's Bench.

Appeal allowed with costs.

Solicitors for the appellants:
St. Laurent, Taschereau, St. Laurent & Gagné.

Solicitors for the respondents:
Morin & Morin.

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*May 7, 8.
*Jun. 18.

NAPOLÉON OUELLET, (DEFENDANT) ..... APPELLANT;

AND

ROBERT CLOUTIER ÈS-QUAL, (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Torts—Farm thrashing machine—Boy about ten years helping owner—Main belt disconnected but shaft continued revolving—Boy injured while trying to stop it—Owner not liable—No duty owed by him—Imprudent act voluntarily committed by boy—Danger probable or possible—Degree of caution required from owner—Contingencies when a prudent man should foresee danger—Evidence—Burden of proof—Art. 1053 C.C.

*PRESENT:—Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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M.C., a boy about ten years of age, was injured in the barn of the appellant, a farmer. The boy, already acquainted with that kind of operations, went to the appellant's farm to help him with his thrashing. He had not been invited but was not prevented doing so. He was asked to hold the bags to receive the grain, which was not a dangerous job. At the end of the day's work, the appellant removed the main belt running from the tractor to the thresher and two smaller belts in the machine itself; but the shaft of the drum continued to revolve under its own momentum. The boy, having tried without success to stop it with his hands, picked up one of the small belts and pressed it to the end of the shaft to slow it down, although called to by an employee to leave it alone. A momen later, the belt seemed to have been seized by the shaft and whirled around, and the boy's arm caught up in it was badly broken above the wrist. An action for damages brought by the respondent, in his quality of tutor to his minor son, was dismissed by the trial judge; but that judgment was reversed by a majority of the appellate court.

Held: The appeal should be allowed and the judgment of the trial judge restored.

Per Kerwin and Kellock JJ.:—Under all the circumstances of this case, there was not any duty owing by the appellant to the injured boy. More particularly the boy was not left alone at the time of the accident but there were three other men present who tried to stop him.—The accident happened in such a short time that there was no obligation on the appellant to have previously warned the boy or to have sent him away from the premises.

Per Taschereau, Rand, Kellock and Estey JJ.:—The respondent's claim must be decided under the terms of article 1053 C.C. and the burden of proof was upon him. The machine was not by itself dangerous. The boy was injured not on account of the nature of the work he was doing, but because he voluntarily committed an imprudent act which the appellant was not at fault in not foreseeing.

Per Taschereau, Kellock and Estey JJ.:—The fact that it was possible that an accident might occur is not the criterion which should be used to determine whether there has been negligence or not. The law does not require a prudent man to foresee everything *possible* that might happen. Caution must be exercised against a danger if such danger is sufficiently *probable* so that it would be included in the category of contingencies normally to be foreseen. To require more and contend that a prudent man must foresee any possibility, however vague it may be, would render impossible any practical activity.

APPEAL from a judgment rendered by a majority of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Boulanger J. and maintaining an action for damages brought by the respondent for injuries which his minor son sustained in an accident.

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

Alexandre Chouinard K.C. and *Louis A. Pouliot K.C.* for the appellant.

Louis P. Pigeon K.C. and *Geo. René Fournier* for the respondent.

KERWIN J.:—Marcel Cloutier, a boy of about ten years and five months of age, was injured in the barn of the appellant Ouellet, a farmer in the province of Quebec, in September, 1944. Although the boy did not give evidence at the trial and the trial judge did not, therefore, have an opportunity of observing his demeanour in the witness box, he was present in court. It is true that at that time he was more than a year older than at the time of the accident but, under all the circumstances, I do not know that the lack of the trial judge's opportunity to conclude from his appearance in the witness box as to his capacity is very important as an appeal court does not need a finding upon the boy's ability in order to dispose of the matter. I should add, however, that I do not adopt the view which it is contended the trial judge took that Marcel was under the care of Eugene Talbot.

According to his own admission, the boy had been at a thrashing before and, on this occasion, went with some employees of a neighbour of the respondent, Madame Fournier. These employees went to Ouellet's barn in order to assist the appellant with his thrashing. Without deciding, I am willing to accept the position of the boy, contended for by counsel, as doing work for the appellant. I cannot see that any duty owing by the appellant to the boy is enlarged by that circumstance as the boy certainly was not a trespasser. He was not left alone at the time of the accident but there were three other men present. It was suggested that because the boy saw the appellant remove the small belt from the shaft, he was justified in assuming that it would be safe for him to replace the belt while the shaft was still revolving of its own momentum. Everything happened in such a short time that I think

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there was no obligation on the defendant to have previously warned the boy or to have sent him away from the premises.

The appeal should be allowed and the trial judgment restored, with costs throughout.

The judgment of Taschereau and Estey JJ. was delivered by

TASCHEREAU J.: Le demandeur-intimé, en sa qualité de tuteur à son enfant mineur, a poursuivi Napoléon Ouellet et Joseph Ouellet, et leur a réclamé conjointement et solidairement la somme de $2,722. Il allègue dans son action que son fils mineur, Marcel Cloutier, âgé de 10½ ans, a été, le 21 septembre 1944, sérieusement blessé alors qu'il aidait les défendeurs à la mise en sacs du grain dans un moulin à battre, opéré par Napoléon Ouellet et propriété de l'autre défendeur Joseph Ouellet.

La Cour Supérieure présidée par M. le juge Boulanger a rejeté l'action, mais la Cour du Banc du Roi, infirmant ce jugement, a fait droit à l'appel et a maintenu l'action du demandeur ès-qualité pour la somme de $2,484.20. Devant cette Cour, seuls Napoléon Ouellet et l'intimé sont en cause.

L'accident qui fait la base de ce litige est arrivé alors qu'un jour de congé, Marcel Cloutier, fils mineur du demandeur, s'était rendu chez une dame Thomas Fournier pour aider un nommé Talbot à charroyer du bois. Avec tous les hommes de madame Fournier, l'enfant se rendit chez le défendeur pour lui aider à battre du grain, sans être invité à le faire, mais sans qu'on lui défende de s'y rendre. Le défendeur Napoléon dirigeait les opérations de battage, et c'est lui qui indiquait aux hommes le travail qu'ils devaient faire. Le jeune Marcel n'a pas reçu d'instructions particulières, mais, au cours de la journée, a fait des travaux divers, et, quelque temps avant que le travail ne prit fin, Talbot qui recevait le grain dans les sacs a demandé au jeune Marcel de faire ce travail qui, d'après la preuve, n'est pas un travail dangereux.

La machinerie était composée d'un tracteur qui fournissait la force motrice à la batteuse, et les deux étaient reliés l'une à l'autre par une courroie de transmission. Une autre courroie reliait également deux organes mobiles de la ma-

chine. Lorsque le travail, vers la fin de la journée, fut terminé, Napoléon Ouellet ordonna la fin des travaux et enleva la grande courroie reliant le tracteur à la batteuse, ainsi que les deux courroies plus petites qui partent de poulies à chaque extrémité de l'axe du batteur et actionnent le secoueur et le cribe ventilateur. Sous l'effet de la force acquise, le batteur continua cependant à tourner encore, et Marcel s'aventura de l'arrêter avec ses mains qu'il appuya sur la poulie de l'axe; mais, voyant qu'il ne pouvait réussir, il prit la courroie qui gisait à terre, l'appuya sur la poulie, mais malheureusement cette courroie s'enroula sur l'arbre, happa le bras droit de l'enfant qui fut fracturé au poignet.

Le demandeur ès-qualité prétend que cet accident est dû à la faute, à la négligence, à l'imprudence du défendeur Ouellet, en tolérant la présence du jeune enfant près de la machine à battre, qui serait une machine dangereuse et en n'ayant pas prévu l'imprudence de l'enfant qui accomplissait un acte dans l'ignorance totale du danger qu'il comportait.

Il est certain que la présente action ne repose pas sur l'article 1054 du Code Civil, mais que la demande ne peut être fondée que sur les dispositions de l'article 1053 C.C. Pour réussir, le demandeur ès-qualité doit nécessairement prouver la faute de l'intimé.

Ce dernier a-t-il manqué à un devoir quelconque? Je ne le crois pas. Il est incontestable que la présence du jeune Cloutier était tolérée dans la grange où se faisaient les travaux de battage et que même ce dernier a été autorisé à y participer. Mais, dans les circonstances, le fait de laisser ce jeune enfant, habitué à ce genre de travaux, aider les autres hommes ne présentait aucun danger. Je m'accorde avec M. le juge Pratte de la Cour du Banc du Roi qui a dit:

A la date de l'accident, Marcel était âgé de 10 ans et 5 mois. Fils d'ouvrier, vivant à la campagne, il avait l'habitude de participer aux travaux de la ferme quand il n'allait pas à l'école. D'une intelligence normalement développée, il avait dû acquérir les connaissances que prennent les enfants de la campagne au contact des choses de la ferme. Il ne saurait y avoir de doute là-dessus. Il n'est pas un enfant de la campagne, vivant sur une ferme ou fréquentant les cultivateurs à leur travail, qui n'ait pris part, même avant l'âge de 10 ans, à tous les travaux de la ferme, et qui ne connaisse le fonctionnement des machines agricoles

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même s'il n'a pas la dextérité ou la sûreté requises pour qu'on lui en confie la direction. Cela fait partie de son éducation. Marcel Cloutier avait déjà assisté au battage du grain; et s'il n'est pas établi qu'il connaissait en détail le fonctionnement de la batteuse, il savait, à n'en point douter, le danger que présente une roue ou un arbre de couche en mouvement.

Or, le défendeur connaissait Marcel; non seulement il l'avait déjà vu travailler avec les ouvriers de madame Fournier, mais l'enfant avait déjà assisté au battage chez lui. Le défendeur avait raison de croire que l'enfant en savait tout autant, sur les travaux de la ferme, qu'un fils de cultivateur. Peut-on dire alors qu'il a commis une faute en l'admettant dans la grange avec les ouvriers de madame Fournier qu'il accompagnait souvent et qu'il avait suivis ce jour-là? Non pas. Certes, s'il se fut agi d'un enfant inconnu, ou absolument étranger aux travaux de la ferme, le défendeur aurait été tenu d'exercer sur lui une surveillance étroite; mais dans le cas qui nous occupe, une telle mesure ne s'imposait pas.

La machine elle-même n'était pas dangereuse, et le travail confié au jeune homme ne l'exposait à aucun péril. S'il a été blessé, ce n'est pas à cause de la nature de son travail, mais bien parce qu'il a volontairement commis une imprudence, qu'on ne peut pas reprocher à Ouellet de ne pas avoir prévue. Cet enfant, normalement intelligent, a été par son imprudente activité l'auteur de sa propre mésaventure, en essayant, malgré que l'on eut tenté de l'en dissuader, d'arrêter par le moyen que l'on sait la poulie en mouvement. Il s'est exposé lui-même à un danger évident, qu'il avait pourtant l'âge voulu pour apprécier.

Il se peut qu'il était possible qu'un accident semblable arrivât. Mais ce n'est pas là le critère qui doive servir à déterminer s'il y a eu oui ou non négligence. La loi n'exige pas qu'un homme prévoie tout ce qui est *possible*. On doit se prémunir contre un danger à condition que celui-ci soit assez *probable*, qu'il entre ainsi dans la catégorie des éventualités normalement prévisibles. Exiger davantage et prétendre que l'homme prudent doive prévoir toute possibilité, quelque vague qu'elle puisse être, rendrait impossible toute activité pratique. (*Bacon* v. *Hôpital du St-Sacrement* (1); Savatier, Responsabilité Civile, tome 1, n° 163; Mazeaud, Responsabilité Civile, 2e éd. tome 2, p. 465; Demogue, Des Obligations, tome 6, n° 538, p. 576; Planiol et Ripert, Droit Civil, 1930, Des Obligations, tome 6, p. 531; *Volkert* v. *Diamond Truck Co.* (2); *Donoghue* v. *Stevenson* (3).

(1) (1935) 41 R.L.N.S. 497.
(2) (1939) Q.R. 66 K.B. 385; affirmed [1940] S.C.R. 455.
(3) [1932] A. C. 562.

Je suis en conséquence d'opinion que l'appelant n'a pas commis de faute en tolérant dans la grange la présence du fils de l'intimé, pas plus qu'en ne prévoyant pas l'imprudence que ce dernier a commise. On ne peut reprocher à l'appelant de ne pas avoir fourni les soins ordinaires qu'un homme diligent devait fournir dans des conditions identiques. (*L'Œuvre des Terrains de Jeux de Québec* v. *Cannon* (1), M. le juge Rivard à la page 114.)

L'appel doit être maintenu, l'action rejetée et le jugement de M. le juge Boulanger rétabli avec dépens devant toutes les cours.

RAND J.:—I see nothing in the evidence to support the case against the appellant. He is charged with fault in failing to exercise the care which, in the circumstances, a prudent man would have exercised to protect the young boy aged ten years and five months against the danger presented by the revolving shaft of the threshing machine. The boy had gone along to the barn with a group of four men sent over by a neighbour to assist in the threshing. Like a child of that age, he wanted to be in the work, and he was allowed to hold the bags into which the grain was poured by hand out of the containers into which it came from the machine; but he was in and out of the barn at will all day, and when near the machine would be in the presence of the workmen. Late in the afternoon, the appellant removed the main belt running from the tractor to the thresher on the left side and the small belt on the right side of the thresher connecting the main shaft with a smaller one, and set about to back the tractor out of the barn. At that moment, the shaft of the drum of about 2″ in diameter and projecting a few inches beyond the closed side of the drum was revolving under its own momentum, and three of the men were watching the teeth or arms of the shaft with the boy within five or six feet of them. All of a sudden, he picked up the small belt, about 1½″ in width and 5′ in length, and pressed it to the end of the shaft to slow it down. One of the men called out to leave it alone, but he answered: "Non, je l'arrête". A moment later, the belt seems to have been seized by the shaft and whirled around, and the boy's arm caught up in it was badly broken above the wrist.

(1) (1940) Q.R. 69 K.B. 112.

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I will assume that the end of the revolving shaft did present some degree of danger, but having regard to the fact that the boy was almost within reach of three men with whom he had come to the barn, that the shaft was merely running down, and that the boy was acquainted with the operations of the machine, I think it impossible to say that a reasonably prudent father would have taken any further step to guard against such a sudden and unexpected sortie. The appellant must show that the boy was surrounded with the care and foresight of such a person, and this I think he has done. Boys at farms, as part of their practical education as well as a satisfaction of their natural propensity to imitate their elders, assist at small jobs where they do not interfere with the work, and where the conditions are reasonably safe for them; and although the boy's father was not a farmer, he lived in a farming district and the boy spent a good deal of his spare time around the farms in the vicinity of his home, including the appellant's. He had the ordinary boy's discipline and dependability in these practical situations. But here was an impulsive act of wantonness indulged in a few moments before the last motion of the machinery would have been ended. Normally, in such circumstances, particularly the presence of the men, a boy of that age would not touch a revolving shaft, but certainly he would be expected to drop the belt instantly upon a sharp command to do so; and the injury suffered by him is due to that momentary wilfulness in disobedience.

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

KELLOCK J.:—Mr. Pigeon agrees that there is no difference between the civil law and the common law as to the principles applicable to such a case as the present. I proceed on the assumption contended for by the respondent that the infant was an employee of the appellant. In *Smith* v. *Baker* (1), Lord Herschell said at p. 362:

> It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

(1) [1891]) A.C. 325.

It is part of the obligation of the master that he shall warn the servant where the employment involves the use of machinery which may prove dangerous to the servant unless he is instructed with regard thereto, and instruction which reaches the standard of reasonable care in the case of an adult may not be sufficient in the case of a young person; *Young* v. *Hoffman Mfg. Co. Ld.* (1).

I do not think there was any fault on the part of the appellant in permitting the boy to be engaged at all as he was that day. The evidence shows that he had been engaged in doing much the same sort of thing the year before without incident.

The other ground of liability which is urged is that the appellant ought to have anticipated that what happened was just the sort of thing a young boy would be likely to do and that the appellant failed in his duty to warn against it.

It is to be observed in the first place that in the case at bar the boy was not injured during the course of any work which he had been engaged in during the day or which he had been called upon to do. He had not been called upon to operate any part of the machinery or to come in contact with it. Moreover, the machine was not, when properly used, a dangerous machine, and even if the end of the shaft, which continued in motion after the belts were thrown off, came into contact with anyone it would not have caused any injury as is shown by the fact that the boy said he first placed his two hands on it to try to stop it.

Nor was the boy left alone. There were three adult workmen near him at all times. I do not think it can be said that the appellant ought to have anticipated the combination of circumstances that the boy would take from the floor one of the belts lying there and apply it to the shaft without being observed by one of the workmen in time to prevent him. I think the principle applicable is to be found in the following authorities:

Mazeaud: Responsabilité Civile, 2e édition 1934, t. 2, no. 1597, p. 464;

Une simple possibilité vague de réalisation ne saurait suffire à exclure l'imprévisibilité.

(1) [1907] 2 K.B. 646.

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Demogue: Des Obligations, 7, 6, no. 538, page 576:

Le fait doit être assez probable pour qu'on doive se prémunir contre lui car on ne peut se prémunir contre tout ce qui est possible.

In *Glasgow Corporation* v. *Taylor* (1) Lord Sumner said at p. 67:

Where a question as to the care to be used arises between persons using as of right the place, where they respectively act, infancy as such on others to respect it, than infirmity or imbecility; but a measure of care is no more a status conferring right or a root of title imposing obligations on others to respect it, than infirmity or imbecillity; but a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operation.

As to the boy himself the learned trial judge says:

1. Selon son certificat de naissance, Marcel Cloutier est né à Québec, le 6 avril 1934. Il était donc âgé exactement de 10 ans, 5 mois et 15 jours à la date de l'accident. Les témoins sont unanimes à dire que c'est un enfant intelligent et éveillé. Le soussigné l'a vu en Cour au cours du procès et il s'est très bien tenu. Il n'a pas été entendu cependant, devant le tribunal, mais, en autant qu'on peut en juger à la lecture de sa déposition au préalable, il paraît, en effet, normalement intelligent, raisonnable et averti.

The present is not such a case as *Murphy* v. *Smith,* (2). There, while the plaintiff was injured in the course of doing an act which he had no right to do, he was observed and permitted to do the act by the employee in charge. This, had it been done by the defendant himself, would, in the opinion of the court in that case, have involved liability.

In *Lawson* v. *Packard Electric Company, Ltd.,* (3), the difference of opinion among the members of the court was as to whether operation of the machine causing the injury was within the scope of the instructions the plaintiff had received.

I do not think that the case *Bouvier* v. *Fee* (4), is of assistance here. In that case the machine was left unguarded and it was the breach of that duty upon which liability was founded.

I think the appeal must be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *Alexandre Chouinard.*

Solicitors for the respondent: *Fournier & Désilets.*

(1) [1922] 1 A.C. 44.
(2) (1865) 19 C.B. N.S. 361.
(3) [1907] 16 O.L.R. 1.
(4) [1932] S.C.R. 118.

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LAWRENCE DEACON.....APPELLANT;

*May 12, 13
14, 15

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal Law—Murder—Evidence—Crown witness declared adverse—Effect of cross-examination by Crown counsel on previous statement made police—Effect of cross-examination by Defence counsel on sketch attached to said statement—Whether admissible to test credibility, or evidence of content—Canada Evidence Act—Where witness declared adverse ss. 9 and 10 to be read together to make applicable proviso to s. 10—But proviso does not make that evidence which would not otherwise be evidence—S. 1014 of the Criminal Code —Charge to jury—Misdirection—New Trial.

The appeal was from the judgment of the Court of Appeal for Manitoba (1947) 55 Man. R. 1, dismissing (Adamson J. and Donovan J. dissenting) appellant's appeal from his conviction on a charge of murder. At the trial Helen Elizabeth Berard, a witness for the Crown, gave evidence contradictory to statements made previously by her to the police and at the inquest of the deceased. On motion of Crown counsel the trial judge declared her an adverse witness and Crown counsel thereupon cross-examined her on a previous statement, without making it an exhibit, which consisted of five pages written by the witness and an extra page on which appeared a sketch drawn by her showing the back of the head of a taxi driver to have a bald spot. (The taxi driver, with whose murder the accused was charged, did not have a bald spot.) The five pages and the sketch were not fastened together at the time of their inception. Counsel for the accused in cross-examining the witness showed her the sketch, which at the preliminary inquiry had been attached to the sheets containing the writing, but which he at the trial removed and handed to the witness. The trial judge ruled that the entire statement including the sketch should go in as an exhibit (14) filed by the defence. In charging the jury the trial judge said it was their duty keeping in mind his charge as to reasonable doubt, to establish if possible in which of the conflicting statements of the witness lay the germ of truth. The accused did not testify nor were any witnesses called on his behalf.

Held: The judgment appealed from and the conviction should be set aside and a new trial directed.

Per the Chief Justice and Kerwin, Taschereau and Estey JJ.: The prior self-contradictory statements of Crown witness Helen Elizabeth Berard, both sworn and unsworn, had no probative or evidential value as against the accused, and were not evidence of their content and could be used only to impeach the credit of the witness Berard, even though defence counsel cross-examined on them. The learned trial judge erred in going on the assumption that such prior self-contradictory statements were evidence of their content and inviting the jury to find "what germ of truth" there was in them.

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

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The said prior self-contradictory statements were not evidence of their content and the jury should have been so instructed, and not having been so instructed, it was not possible to say with confidence that without them the jury would have found a verdict of guilty.

There was an error at the trial for the reasons specified above in connection with exhibit 14, and it could not be said that there was no substantial wrong or miscarriage of justice, within section 1014 of the *Criminal Code*. The sketch and the written document being one document from the commencement, the effect of what Crown counsel had done was to make available the whole of it so that counsel for the accused became entitled to refer to the sketch, not mentioned by Counsel for the Crown; while the action of counsel for the accused had the effect of making the writing, as well as the sketch, an exhibit; but neither one could serve as evidence against the accused except, in so far as the witness adopted them as part of her testimony, and did not take the exhibit out of the category of something merely going to the creditibility of the witness and raise it to the status of something that as against the accused was to be taken as evidence of the truth contained in the writing.

Assuming that where a witness is declared adverse by the trial judge, sections 9 and 10 of the *Canada Evidence Act* should be read together so as to make applicable the last part of the proviso in subsection 1 of section 10:—

> "and that the judge, at any time during the trial may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit," this does not mean that the trial judge may make that evidence which would not otherwise be evidence. Target Tillson Birch (1924) 18 Cr. A.R. 26 at 28, 29 and the trial judge erred in directing the jury that they could treat the written part of exhibit 14 as evidence of the truth of what is therein stated Rex. *v.* Dibble (1908) 1 Cr. A.R. 155, A. White (1922) 17 Cr. A. R. 59, Rex *v. Francis & Barber* [1929] 3 D.L.R. 593. The decision in John Williams (1913) 8 Cr. A. R. 133 distinguished. There was nothing in the evidence given by the witness Berard at the preliminary inquiry as read into the record of the trial to show that she was a self-confessed perjurer. Douglas Walter Atkinson (1934) 24 Cr. A.R. 144 distinguished. Rex *v.* Kadeshevitz [1934] O.R. 213; 61 C.C.C. 193 and Rex *v.* Ferguson 83 C.C.C. 23 at 25 referred to.

Per Rand J.: The effect of counsel for the accused offering in evidence the sketch made by the witness Berard and cross-examining her thereon, was to introduce in evidence the written statement which accompanied the sketch and simply completed the evidence of the statement. It did not extend the statement's relevancy beyond credibility. The trial judge erred in holding that counsel for the accused, by putting the sketch in evidence, must be taken to have introduced the statement itself as substantive evidence on behalf of the accused, and in charging the jury that the incriminating facts contained in the statement were to be treated as having general testimonial character from which, and the rest of the evidence, the jury was to extract the truth. An error in such a vital matter cannot be held to have been unquestionably overborne by the rest of the case presented.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) dismissing (Adamson J. and Donovan J. dissenting) the appellant's appeal from his conviction, at trial before Major J. and a jury, on a charge of murder.

H. Walsh for the appellant.

A. A. Moffat K.C. and *J. H. Stitt* for the respondent.

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

KERWIN J.:—This appeal from a decision of the Court of Appeal for Manitoba (1) affirming the appellant's conviction on a charge of murder is based upon dissents by Adamson J. and Donovan J. The former would have set aside the conviction and ordered a new trial on the following grounds:—

1. That the prior self-contradictory statements of Crown witness Helen Elizabeth Berard, both sworn and unsworn (viz. exhibits 12, 13 and 14 and the inquest evidence), had no probative or evidential value as against the accused, and were not evidence of their content and could be used only to impeach the credit of the witness Helen Elizabeth Berard, even though defence counsel cross-examined on them.

2. The learned Trial Judge erred in going on the assumption that such prior self-contradictory statements were evidence of their content and inviting the jury to find "what germ of truth" there was in them.

3. That the said prior self-contradictory statements were not evidence of their content and the jury should have been so instructed, and not having been so instructed it was not possible to say with confidence that without them the jury would have found a verdict of guilty;

Donovan J. dissented on these grounds in substance, and also on other grounds but, furthermore, came to the conclusion that the accused should be acquitted. I cannot agree that there should be an acquittal but since, in my view, there was error at the trial for the reasons specified above in connection with exhibit 14, and I am unable to say there was no substantial wrong or miscarriage of justice within section 1014 of the Criminal Code, it follows that there should be a new trial, and I therefore refrain from discussing the evidence at length or the other grounds of dissent mentioned by Donovan J., with one exception.

Exhibit 14 consists of five pages of a statement written by the witness Berard and an extra sheet on which appears a sketch drawn by her showing the back of the head of

(1) (1947) 55 Man. R. 1.

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a taxi driver to have a bald spot. The taxi driver, with whose murder the accused was charged, did not have a bald spot. I take it from the evidence, as did also the Chief Justice of Manitoba, that the five pages containing the written statement of Berard, and the sketch, really formed one document from their very inception, although the various sheets were not fastened together at that time.

At the trial Berard, called as a witness by the Crown, was declared adverse by the trial judge under section 9 of the *Canada Evidence Act* and by leave of the judge, Crown counsel cross-examined her as to her previous written statement in exhibit 14 without making it an exhibit. Berard admitted having made this statement but said it had been written under fear of the police and denied the important part of it in which she placed the accused with her in the taxi at the time of the slaying. Counsel for the accused later showed her the sketch, which at the preliminary inquiry had been attached to the sheets containing the writing but which counsel for the accused at the trial removed and handed to the witness separately. This sketch and the written statement being one document from the commencement, the effect of what Crown counsel had done was to make available the whole of it so that counsel for the accused became entitled to refer to the sketch, not mentioned by counsel for the Crown, as possibly affecting the written part. Counsel for the accused put in the sketch as an exhibit and it is contended for the Crown that this made the writing an exhibit and that what was narrated therein was evidence of the truth thereof. While the action of counsel for the accused had the effect of making the writing as well as the sketch an exihibit, neither one could serve as evidence against the accused except, of course, in so far as the witness adopted them as part of her testimony at the trial.

The fact that the sketch was put in as an exhibit, and therefore the writing, does not take the exhibit out of the category of something merely going to the credibility of the witness and raise it to the status of something that as against the accused is to be taken as evidence of the truth of the statements contained in the writing. A contrary proposition would be entirely foreign to our criminal law.

Assuming that where a witness for the Crown is declared adverse by the trial judge, sections 9 and 10 of the *Canada Evidence Act* should be read together so as to make applicable the last part of the proviso in subsection 1 of section 10:—

> and that the judge, at any time during the trial may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit,

this does not mean that the trial judge in making "such use of it for the purposes of the trial as he thinks fit" may make that evidence which would otherwise not be evidence. This would appear to be so in principle and was the view of the Court of Criminal Appeal in *Target Tillson Birch*, (1).

The trial judge directed the jury that they could treat the written part of Exhibit 14 as evidence of the truth of what is therein stated. That this was wrong is made plain by all the text-books and such cases as *Rex* v. *Dibble*, (2), *A. White* (3), *Rex* v. *Francis & Barber*, (4). The decision of the Court of Criminal Appeal in England in *John Williams* (5), must be read with care. Apparently a witness gave the same testimony at the trial as on a previous occasion except that she gave a different date for certain important occurrences and it was held that the jury might consider that part of the previous testimony to which she agreed at the trial. There is nothing in this case that conflicts with the general proposition.

It was argued that on the authority of *Leonard Harris* (6), and *Douglas Walter Atkinson* (7), the jury should have been warned that the evidence of Berard was of no value. In the *Atkinson* case (7), a witness was stated by the Lord Chief Justice, at page 125, to be not only an accomplice in connection with charges against the accused of perjury and subornation of perjury but also herself a perjurer. That precise point does not arise here because there is nothing in the evidence given by Berard at the preliminary inquiry as read into the record of the trial to show that she was a self-confessed perjurer. So far as her testimony at the trial was shown to be contradictory to

(1) (1924) 18 Cr. A.R. 26, at 28, 29.
(2) (1908) 1 Cr. A.R. 155.
(3) (1922) 17 Cr. A.R. 59.
(4) [1929] 3 D.L.R. 593.
(5) (1913) 8 Cr. A.R. 133.
(6) (1927) 20 Cr. A.R. 144.
(7) (1934) 24 Cr. A.R. 123.

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the written statement in Exhibit 14, certain expressions in the Leonard Harris case do afford a basis for the argument of counsel for the present appellant. While it must be borne in mind that the appeal in that case was dismissed the Lord Chief Justice is reported to have said at page 149:—

> The learned judge directed the jury in the proper way, namely, that the effect of the previous statement taken together with the sworn statement was to render the girl a negligible witness and that the jury must consider whether the case was otherwise and by others made out.

As to this, I agree with Riddell J., in *Rex* v. *Kadeshevitz* (1), that that cannot be taken to correctly set forth the law. That is not to say that there may not be cases where it is advisable for a trial judge to point out a weakness in the Crown's case, particularly if it arises from the bad record of the principal Crown witness. It was so put, and not as a principle of law, by Chief Justice Robertson, speaking for the Court of Appeal for Ontario, in *Rex* v. *Ferguson* (2).

Because the trial judge in this case instructed the jury that Berard's statement in exhibit 14 might be taken as evidence of the truth of what was therein stated, the judgment appealed from and the conviction should be set aside and a new trial directed.

RAND J.:—This is an appeal from a conviction for murder. In the Court of Appeal there were dissents on a number of questions of law, but I do not find it necessary to deal with more than one.

The leading witness for the prosecution was, in the course of her testimony, declared to be hostile, and the Crown was permitted to cross-examine her in relation to a previous statement in writing she had of her own volition prepared and handed to the police. In that she purported to give an account of the murder of the driver of a taxi in which she and the accused had been riding, but out of which she had got or was getting when the fatal act was committed, an account which directly connected the accused with that act. Her evidence in court, bringing their movements generally to the scene of the death con-

(1) [1934] O.R. 213; 61 C.C.C. 193. (2) (1944) 83 C.C.C. 23 at 25.

sistently with the statement, diverged from it in representing the taxi carrying the accused to have left the scene and in introducing a new taxi in which the killing took place, of which she was, virtually, a witness. The statement signed by her was produced in court and the examination on it proceeded by reading it passage by passage to her, the whole of which the witness admitted having made. The document itself was not further offered in evidence or otherwise read to the jury. On cross-examination, counsel offered in evidence a sketch made by her representing the scene of her movements in the vicinity of the crime. This sketch, showing the roads with streetcar tracks along which the taxi had passed and she had afterwards fled, contained also a drawing of the back of a man's head with a bald spot on it which the witness stated to represent the head of the driver of the taxi in which she and the accused had been passengers. There was evidence that the slain man had no such baldness. It later appeared that the sketch had accompanied the statement which it was intended by the witness to illustrate when given by her to the police. The Crown thereupon took the position that by putting the sketch in evidence, counsel must be taken also to have introduced the statement itself as substantive evidence on behalf of the accused. The trial judge so held, and in the charge (and as well in the address of Crown counsel) the incriminating facts contained in the statement were treated as having general testimonial character, from which and the rest of the evidence the jury was to extract the truth.

That such statements generally are limited to credibility and cannot be used as evidence of the truth of the facts to which they relate, is well established: *Rex* v. *Dibble* (1), *Rex* v. *Harris* (2), *Rex* v. *Francis & Barber* (3). It is quite true that it may be difficult to dissociate the matters of such statements from the facts brought before the jury by the witness and to nullify the influence they may have on the minds of the jurors in dealing with the evidence as a whole; but anything short of this would expose a

(1) (1908) 1 Cr. A.R. 155.
(2) (1927) 20 Cr. A.R. 144.
(3) [1929] 3 D.L.R. 593.

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person to a fabricated account of events, too dangerous to risk. But the whole field of cross-examination, in the discretion of the court, is opened and the matters of the statement can thus be brought within the test of the testimonial response of the witness. This might be taken as a reason for leaving all the facts, including the statement, to the consideration of the jury, but the long experience of the courts is against it.

It is argued that the case of *Rex* v. *Harris* (1), in which a similar question arose has been disregarded in *Rex* v. *Kadeshevitz* (2); but what was there dissented from was the apparent language of Hewart, L.C.J. that in the presence of such a contradiction the sworn testimony in court of the witness must be treated as wholly nullified. The Court of Appeal for Ontario held that the testimony might be considered by the jury notwithstanding the contradiction; but it accepted the view that the contradictory statements themselves could not be treated as substantive evidence, available for all purposes.

The question here, then, is whether, in the circumstances, the effect of the course taken by counsel for the accused has been to enlarge the relevancy of the statement. As the whole of it was read in court in the hearing of the jury and as the sketch was an explanatory part of it, the introduction of the latter by the defence simply completed the evidence of the statement that had been brought out. It was counsel's right to have the entire statement so presented without extending its relevancy beyond credibility. The addition to the record of the statement itself brought nothing new to the proceedings, and must be considered in any view to be limited likewise to its original purpose.

It is urged by Mr. Moffatt that notwithstanding this impropriety, the remaining evidence as a whole was of such weight as to enable us to say that the jury must, under proper directions and acting judicially, have found the accused guilty. From that view, on this particular point, Adamson, J. A. (*ad hoc*) dissented, and with him I

(1) (1927) 20 Cr. A.R. 144. (2) [1934] O.R. 213; 61 C.C.C. 193.

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agree that the error in such a vital matter cannot be held to have been unquestionably overborne by the rest of the case presented.

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

Appeal allowed, conviction quashed and new trial directed.

Solicitors for the appellant: *McMurray, Greschuk, Walsh, Micay, Molloy, Denaburg and McDonald.*

Solicitor for the respondent: *J. O. McLenaghen.*

KENNETH GREEN AND GEORGE CONSTANTINE ..... APPELLANTS;

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*May 27

*June 18

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal Law—Speedy Trials of Indictable Offences by County Court Judge—Several Charges—Mixing Trials—Refusal to hear argument and deliver judgment at conclusion of each charge—Criminal Code, ss. 838, 839 and 857 (2).

The accused, appellants, were charged on a number of counts on which, following a preliminary hearing, they elected speedy trial under Part XVIII of the Criminal Code, R.S.C. 1927, c. 36. The crimes charged fell into four groups. Those in the first group arose out of the breaking and entering of premises in the township of York on the 23rd August 1945; in the second, out of an armed robbery in the city of Hamilton on the 26th August 1945; in the third, out of an armed robbery in the city of Toronto on the 16th September 1945; and in the fourth, out of an armed robbery in the city of Stratford on the 12th October 1945.

As to the first group, both the appellants and one Dobbie were jointly charged on counts 1, 2 and 3. As to the second, the appellant Green alone was charged on count 7 and 8. As to the third, the appellant Constantine and one Hiscox were jointly charged on counts 4 and 5, and as to the fourth, both appellants were charged on count 6.

The accused Dobbie did not appear for trial.

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

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Counsel for the accused at the opening of the trial, requested that each charge be tried separately, but acceded to the suggestion of the Court, that those offences which arose out of the same set of circumstances should be tried together. The trial of the appellants on counts 1, 2 and 3 was then proceeded with, and when all the evidence had been heard, counsel for the accused, asked the Court to hear argument and deliver judgment before proceeding to hear the evidence on any of the other counts. The trial judge refused and stated that he would hear the evidence on all the charges and then give counsel an opportunity to present argument on all of them before he would deliver judgment. All the evidence was then heard on count 6, then on counts 7 and 8 and finally on counts 4 and 5.

At the conclusion of all the evidence on all the charges, the trial judge heard argument on all the charges and then reserved judgment. Four days later he delivered judgment and found the appellants guilty on counts 1, 3 and 6 and not guilty on count 2; the appellant Green guilty on counts 7 and 8; the appellant Constantine and the accused Hiscox not guilty on counts 4 and 5, and sentenced the appellants to 14 years imprisonment on each charge, sentences to be concurrent.

On appeal to the Court of Appeal for Ontario, the convictions on counts 1 and 3 were quashed and a new trial directed, but the appeal against the conviction of the appellants on count 6, and that of the appellant Green on counts 7 and 8 were dismissed.

It was contended on appeal to the Appeal Court of Ontario, that the trial judge erred in mixing the trials by refusing to hear argument and deliver judgment at the conclusion of the evidence on each charge or group of charges, where two or more were tried together; and by reserving judgment until he had heard all the evidence on all the charges.

This submission was not accepted by the appellate court, who followed its own previous decision in *Rex* v. *Bullock* (1); that decision being in conflict with the decision of the Court of Appeal of Nova Scotia in *The Queen* v. *McBerney* (2), application to appeal to this Court was granted under section 1025 of the *Criminal Code*.

Held, affirming the judgment of the Court of Appeal for Ontario, [1947] O.R. 264; [1947] O.W.N. 325; [1947] 3 D.L.R. 32, the appeal should be dismissed. Nothing should detract from the salutary rule that everything should be done to avoid even the appearance of prejudice in the mind of the convicting judge against the prisoner arising out of facts developed in a later prosecution, and, therefore the ordinary practice should be followed that one case should be disposed of, so far as the verdict is concerned, before entering upon the consideration of another. Irrespective of s. 838 of the *Criminal Code*, by which the judge may adjourn the hearing, it should not be laid down (as a rule of law) that a judge must acquit or convict in all cases before proceeding with another charge against the same accused; or must announce his decision on one count against two accused before proceeding with the trial of one of them on other counts. There may be cases where it is necessary to do so because an accused might, on the

(1) 6 O.L.R. 663; 8 Can. Cr. Cas. 8.

(2) 29 N.S.R. 327; (1897) 3 Can. Cr. Cas. 339.

subsequent trial, plead autre fois acquit or autre fois convict, and in no case may a judge convict a person on one charge by reason of evidence heard on the trial of another charge but, if it appears that these rules have not been infringed, then the convictions should not be set aside.

The joinder in a single charge sheet of several counts on which an accused has been committed for trial on a single information is permitted, *The King* v. *Deur* [1944] S.C.R. 435 and by section 857 (2) of the *Criminal Code,* which appears in Part XIX but which, by section 839, is made applicable to the formal statement and trial under Part XVIII, the Court, if it thinks it conducive to the ends of justice to do so, may direct that the accused shall be tried upon any one or more of such counts separately, subject to the proviso therein expressed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) insofar as that judgment affirmed convictions of the appellants on charges of armed robbery by his Honour Judge Parker sitting in the County Judges' Criminal Court of the County of York at the City of Toronto.

Gordon W. Ford and *Charles L. Dubbin* for the appellants.

W. B. Common, K.C. for the respondent.

The judgment of the Court was delivered by

KERWIN J.—Leave to appeal from a decision of the Court of Appeal for Ontario was granted on the ground that it conflicted with the judgment of the Supreme Court of Nova Scotia en banco in *The Queen* v. *McBerny* (2). That case decided that where a judge tries a charge without a jury under the Speedy Trials clauses of the *Criminal Code,* it is not competent for him to postpone his decision on a first charge against an accused until he has heard the evidence on several other charges against the same party and to then decide the question of guilt in all. In the judgment appealed from, the matter is treated as one for consideration in each particular case and not as a rule of law of general application.

(1) [1947] O.R. 264; [1947] 3 D.L.R. 32.
(2) 29 N.S.R. 327; (1897) 3 Can. Cr. Cas. 339.

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Of the other decision referred to, *Hamilton* v. *Walker* (1) was distinguished in the subsequent case of *Regina* v. *Fry* (2) where it appeared from an affidavit filed on behalf of the justices that in adjudicating in each of several cases tried before them they applied to that case the evidence given in reference to it and no other, and that the evidence given in the second case in no way influenced their decision on the first. The decision of the Court of Appeal for Ontario in *Rex* v. *Bullock* (3) followed the *Fry* case. The British Columbia Court of Appeal in *The King* v. *Iman Din* (4), divided equally on the question.

Nothing should detract from the salutary rule that everything should be done to avoid even the appearance of prejudice in the mind of the convicting judge against the prisoner arising out of facts developed in a later prosecution, and, therefore, the ordinary practice should be followed that one case should be disposed of, so far as the verdict is concerned, before entering upon the consideration of another. I do not attach any importance to section 838 of the Code by which the judge may adjourn the hearing. Irrespective of that section, it should not be laid down that a judge must acquit or convict in all cases before proceeding with the trial of another charge against the same accused, or as in the case before us, announce his decision on one count against two accused before proceeding with the trial of one of them on other counts. There may be cases where it is necessary to do so because an accused might, on the subsequent trial, plead autrefois acquit or autrefois convict, and in no case may a judge convict a person on one charge by reason of evidence heard on the trial of another charge but, if it appears that these rules have not been infringed, then the convictions should not be set aside. It is not without importance in disposing of the matter to bear in mind that the joinder in a single charge sheet of several counts on which an accused has been committed for trial on a single information is permitted: *The King* v. *Deur* (5) and that by section 857 (2), which appears in Part XIX

(1) [1892] 2 Q.B. 25; 56 J.P. 583; 67 L.J. 135.
(2) (1898) 19 Cox C.C. 135.
(3) 6 O.L.R. 663; 8 Can. Cr. Cas. 8.
(4) 18 Can. Cr. Cas. 82.
(5) [1944] S.C.R. 435.

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but which, by section 839, is made applicable to the formal statement and trial under Part XVIII, the Court, if it thinks it conducive to the ends of justice to do so, may direct that the accused shall be tried upon any one or more of such counts separately,—subject, of course to the proviso therein expressed.

In view of the evidence given in connection with counts 6, 7 and 8 and the reasons of the trial judge, the rules set out above have not been violated and the appeals should, therefore, be dismissed.

Appeal dismissed.

Solicitor for the appellant Green: *Joseph Sedgwick.*

Solicitor for the appellant Constantine: *Kimber & Dubbin.*

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*Apr. 24, 25.
*Oct. 7.

ROBERT C. AULD (DEFENDANT) .....APPELLANT;

AND

AUSTIN A. SCALES (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND (IN BANCO)

Landlord and tenant—Claim for possession of land—Lease—Construction of Covenants—Lease for term certain with proviso for continuation from year to year—Whether lessee entitled to perpetual renewal—Option to purchase contained in lease—Breach of covenant—Wartime Prices and Trade Board Order 108, sections 16 and 24 (2)—Notice to quit invalid—No statement as to circumstance in respect of which notice given—Whether notice effective to terminate option—Whether terms of lease offending rule against perpetuities—Perpetuities Act, 1940, P.E.I., c. 46.

A lease of certain lands for a term of ten years, dated August 1, 1926, "provided * * * that at the expiration of the * * * term * * * this demise * * * shall at the option of the * * * lessee continue as a demise * * * from year to year * * *." The lease also granted the lessee the privilege, after the expiration of the ten year term, of terminating the tenancy upon giving to the lessor notice in writing. The lease further prohibited assignments and sub-leases without leave, provided for re-entry by the lessor if rent in arrear for two years and also gave the tenant an option to purchase the premises "during the continuance of the (ten year) term

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

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or the continuation thereof." In January, 1943, the respondent gave to the appellant notice to quit; and, in August, 1944, an action was instituted for possession on the ground that after the expiration of the period of ten years the appellant became a tenant from year to year, which tenancy could be determined by a simple notice of termination. At a later stage of the action, after the appellant had pleaded Order 108 of the Wartime Prices and Trade Board, the respondent further contended that the appellant had, prior to the giving of the notice, committed a breach of the covenant not to assign without leave and that such a breach had the effect of removing the case from the operation of the Order. By section 16 (4), no notice to vacate may be given except if "the tenant is * * * breaking the conditions of his lease." By section 24 (2), it is provided that "in case of default in payment * * * nothing in this Order contained shall be deemed to preclude a landlord * * * from giving any notice to vacate or demand for possession in accordance with the law of the province * * * ". Before trial, certain questions of law (19 M.P.R. 408) were by agreement between the parties submitted for adjudication; and Campbell C.J. (19 M.P.R. 429) determined these points of law in the main in favour of the respondent. This decision was affirmed by the appellate court.

Held: The defendant's appeal to this Court should be allowed.

Per The Chief Justice, Taschereau and Kellock JJ. The respondent contended that, while by section 16 default in payment of rent gives a landlord a right to terminate the tenancy only at its expiration by a specific form of notice, yet by section 24 (2) the same act of default takes the tenancy out of the operation of the regulation altogether. *Held*: The regulations are to be construed as a whole; and a rational interpretation may be given to section 24 (2) by construing it to mean that if, by provincial law, a right is given to the landlord *by reason of default in payment of rent,* that right is preserved to him, and it is the same where there is "a breach of a covenant other than a covenant to pay rent". If by provincial law there is afforded to the landlord a right to give a notice to vacate or demand possession on that ground or to take proceedings for recovery of possession founded thereon, then he is not limited by the provisions of section 16 in the exercise of that right.—In the present case it is not pretended that there is available to the respondent by the law of the province any right to recover possession because of the alleged breach of covenant. Accordingly, as the notice did not "state the circumstances in respect of which it was given", it did not comply with the provisions of section 16 and is nugatory.

Per The Chief Justice, Taschereau and Kellock JJ.:—The respondent also contended that, even if the notice to quit was ineffective to terminate the occupancy of the appellant, it none the less terminated the option to purchase because such option should be considered as entirely outside the scope of the regulations. *Held*: This contention cannot be accepted. The lease provides that the lessee "shall at all times during the continuance of the term or the continuation thereof" have the right to purchase and, the notice to quit being ineffective, it follows that the tenancy continued and the option was exercisable according to its plain terms.

Per The Chief Justice, Taschereau and Kellock JJ.:—The respondent further contended that a tenancy from year to year, unless terminated by notice, is capable of going on indefinitely and that, consequently, as the period of time for the operation of the option was entirely indefinite, it was void. *Held:* The option to purchase was valid and did not offend the rule against perpetuities. "The person for the time being entitled to the property subject to the future limitation", namely the respondent as owner, may destroy the option by terminating the lease by due notice in accordance with the relevant law without "the concurrence of the individual interested under that limitation", namely the appellant or those claiming under him,—*London and South Western Ry. Co.* v. *Gorman* (20 ch. D. 562, at 581).

Per Rand J.:—The respondent has not brought himself within the Order for the reason that the notice to vacate did not, as required by sub. 5 of s. 16, state the reason for giving it.—Also, under section 24 (2), a breach of covenant *ipso facto* does not take the entire lease outside of the application of the Order. Otherwise there would not appear to be any purpose in providing sub. (4) (*a*) of s. 16, unless it is said that in all cases a notice must be given; and then the same objection would arise in this case, that a proper notice had not been given.—Further the respondent's contention, that the option to purchase was void because it might be exercised beyond the period of the rule against perpetuities, should not be assented to. A sufficient answer to such contention is that the option could be terminated by either party by the requisite notice. As the lease was in force when the tender of the money was made, the lessee has brought himself within the terms of the option.

Per Estey J.:—A lease would contain a right of perpetual renewal only if such an intention is clearly expressed; and the language used must import both renewal and perpetuity. But, in this case, the terms indicate a clear intention to create a tenancy from year to year. Also, its provisions show a similar intention that the lease shall continue until its termination rather than it should be renewed by the lessee in each year.—The notice to quit was invalid as a notice to vacate under the Order, because it did not contain the requirements of s. 16 (4).—Express language must be found in section 24 (2) so that the breach of a covenant not to assign, transfer or sublet would remove entirely the effect of the Order and restore provincial law for all purposes: it ought not to be implied.—Therefore, the lease is valid and subsisting and, by its express terms, the option to purchase was outstanding.—An option contained in a lease, where either by its express terms or by operation of law the right remains in the lessor or owner of the property to terminate both the lease and option, does not involve an infraction of the provisions of the provincial *Perpetuities Act.*

APPEAL from the judgment of the Supreme Court of Prince Edward Island (*in banco*) (1) affirming a judgment of Campbell C.J. (2), which had determined, in favour of

(1) (1946) 19 M.P.R. 406, at 419; [1947] 1 D.L.R. 760.
(2) (1946) 19 M.P.R. 406; [1946] 3 D.L.R. 613.

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the lessor (respondent), points of law and equity arising in an action by the lessor to recover possession of leased premises.

No trial of any issues of fact has taken place and no evidence has been adduced.

W. E. Bentley K.C. and *M. M. MacIntyre* for the appellant.

H. F. McPhee K.C. for the respondent.

The judgment of The Chief Justice and of Taschereau and Kellock JJ. was delivered by

KELLOCK J.:—By an indenture of lease dated August 1, 1926, the respondent leased to the appellant certain lands for a term of ten years at a rental of $12.00 per annum,

provided always that at the expiration of the ten year term hereby demised this demise and everything contained herein shall at the option of the said lessee continue as a demise of the said premises to the said lessee from year to year thereafter at the same yearly rent herein reserved and subject to the same terms and conditions contained herein. Provided, further, that after the expiration of the said ten year term hereby demised the said lessee shall have the privilege of terminating this lease upon giving to the lessor twelve months' notice in writing and upon conforming with the other conditions and stipulations contained herein.

The lease also contained a covenant against assigning or subletting without leave and further provided for re-entry by the lessor if the rent should be in arrear for two years. It also provided as follows:

And that the lessee shall at all times during the continuance of the said term or the continuation thereof have the right, privilege and option of purchasing the said premises from the lessor on payment from him, the lessee to the lessor, of the price or sum of three hundred dollars.

On January 12, 1943, the respondent gave to the appellant notice in writing to quit and deliver up possession of the demised premises on August 1st following. On August 7, 1944, this action was instituted for possession clearly on the theory, as shown by the statement of claim, that after the expiration of the period of ten years the appellant became a tenant from year to year, which tenancy could be determined by a simple notice of termination. It was not until a later stage of the action, after the appellant had pleaded Order 108 of the Wartime Prices and Trade Board, that the respondent took the position that the appellant

had, prior to the giving of the notice, committed a breach of the covenant not to assign without leave and that Order 108 therefore did not apply.

Section 16 (1) of that Order provides that if a landlord wishes to terminate a lease he may give

> due notice to vacate in writing in accordance with the provisions of this Part * * * and no notice to vacate shall be given except in accordance with the provisions of this Part.

In the circumstances here relevant clause (*d*) provides for notice of at least three months. By subsection 4 no notice to vacate may be given except by reason of certain circumstances, one being

> that the tenant is in default in payment of rent or is breaking the conditions of his lease,

and the notice is required to state the circumstances in respect of which it is given.

On the assumption that he will be able to prove the alleged breach at the trial the respondent submits that the mere fact of such a breach removes the case from the operation of Order 108 and that therefore he was entitled to terminate the tenancy by the notice which he gave.

To consider the soundness of this contention it will be convenient to examine what would be its effect, if, instead of the particular breach of covenant here alleged, there had been default in payment of rent. Under the provisions of section 16 (1) the landlord could in such circumstances have given a notice in writing, which by ss. 2, "unless the lease provides for longer notice" would have had to be a three months' notice terminating at the end of the term, and the notice must have specified non-payment of rent as the reason for its having been given. This last requirement is emphasized by s.s. 5.

By section 24 (2) it is provided that

> in case of default in payment * * * nothing in this Order contained shall be deemed to preclude a landlord * * * from giving any notice to vacate or demand for possession in accordance with the law of the province * * * or from taking any proceedings available to a landlord under the law of any province to recover possession.

Under the construction contended for by the respondent, while by section 16 default in payment of rent gives a landlord a right to terminate the tenancy only at its

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expiration by a specific form of notice, yet by section 24 (2) the same act of default takes the tenancy out of the operation of the regulation altogether. The regulations are to be construed as a whole and, if possible, effect much be given to all the parts. Section 24 (2) operates by way of exception. To give effect to respondent's contention would make the exception "eat up the rule"; *Ferrand* v. *Hallas, Land and Building Company* (1). I think that a rational interpretation may be given to section 24 (2) which will not have that effect by construing it to mean that if, by provincial law a right is given to the landlord *by reason of default in payment of rent,* that right is preserved to him. It follows that the same is true where there is "a breach of a covenant other than a covenant to pay rent." If by provincial law there is afforded to the landlord a right to give a notice to vacate or demand possession *on that ground* or to take proceedings for recovery of possession founded thereon, then he is not limited by the provisions of section 16 in the exercise of that right.

In the case at bar it is not pretended that there is available to the respondent by the law of Prince Edward Island any right to recover possession because of the alleged breach of covenant. Accordingly, as the notice given does not comply with the provisions of section 16 it is nugatory. I have considered the question on the basis that the respondent's construction as to the nature of the tenancy as a tenancy from year to year is correct.

It is next contended that even although the notice given by the respondent was ineffective to terminate the occupancy of the appellant, it nonetheless terminated the option to purchase. It is said that the rental regulations do not purport to do more than control certain aspects of the relationship of landlords and tenants as such; that an option to purchase is collateral to that relationship and should therefore be considered as entirely outside the scope of the regulations. This contention found favour below but, with respect, I am unable to accept it. The lease provides that the lessee

shall at all times during the continuance of the said term or the continuation thereof

(1) [1893] 2 Q.B. 135, at 144-5.

have the right. The notice to quit was either effective to terminate the tenancy or it was not. Being ineffective, in my opinion, under the governing law, i.e., the law authorized by Parliament, it follows that the tenancy continued and the option was exercisable according to its plain terms.

It is next contended that the terms of the lease with respect to the option offend the rule against perpetuities as the option, like all other terms of the lease,

> shall respectively enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators and assigns, respectively.

The rule in the province of Prince Edward Island is embodied in a statute known as *The Perpetuities Act*, 4 Geo. VI, cap. 46. I do not read it as differing from the rule as it is understood apart from statutory provisions.

It is said on behalf of the respondent that a tenancy from year to year, unless terminated by notice, is capable of going on indefinitely, and that consequently, as the period of time which was set for the operation of the option here in question was entirely indefinite it is void.

In *London and South Western Railway Company* v. *Gomm*, (1) Jessel M. R. approved of certain passages from Lewis on Perpetuities, one of which is as follows:

> In other words, a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; *and which is not destructible by the persons for the time being entitled to the property subject to the future limitation*, except with the concurrence of the individual interested under that limitation.

Applying the above to the case at bar, it is clear in my opinion, that the option to purchase does not offend against the rule.

> The person for the time being entitled to the property subject to the future limitation,

namely the respondent as owner, may destroy the option by terminating the lease by due notice in accordance with the relevant law without

> the concurrence of the individual interested under that limitation,

namely the appellant or those claiming under him.

The respondent relies upon the decision of Russell J., as he then was, in *Rider* v. *Ford* (2). That case was decided without any reference to the *Gomm* case (3) or the

(1) (1882) 20 Ch. D. 562, at 581
(2) [1923] 1 Ch. 541.
(3) (1882) 20 Ch. D. 562.

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principle set forth therein and as will be noted at p. 546 of the judgment, upon the admission of the defendant's counsel that the rule against perpetuities rendered the option to purchase void unless it could be read as giving only an option to the defendant personally or to an assignee of the defendant but exercisable only during the defendant's life.

Much as one hesitates not to follow any decision of Russell J., I do not think the decision is in accordance with principle. It was not followed in *McMahon* v. *Swan* (1). I think the reason why no question with regard to perpetuity can arise on limitations subject to an estate tail, provided they are such as must take effect during the existence of that estate, or immediately on its determination, equally applies in the circumstances here present. I refer to the judgment of Strong J. in *Ferguson* v. *Ferguson* (2).

I think, therefore, that the appeal must be allowed with costs here and below.

RAND J.:—This appeal has to do with a purported termination of a lease and the validity of an option to purchase contained in it.

The lease was subject to the Wartime Prices & Trade Board Order No. 108, the pertinent provisions of which are s. 16, ss. (2), (4), (5) and s. 24, ss. (2). These are as follows:

16 (2) Subject to the provisions of subsection (3) of section 17 and to the provisions of section 24 of this Order, every notice to vacate given by or on behalf of a landlord shall be in writing and, unless the lease provides for a longer notice, the length of the notice.

* * *

(4) Subject to the provisions of subsection (3) of section 17 of this Order, no notice to vacate any commercial accommodation shall be given except by reason of one or more of the following circumstances: (as amended by Order No. 211)

(*a*) that the tenant is in default in payment of rent or is breaking the conditions of his lease;

(5) Subject to the provisions of subsection (12) of this section, any form of notice to vacate shall be sufficient if it is in writing, requires vacation on the proper day and states the reason for the notice in accordance with this Order, and contains or is accompanied by the required undertaking. (As amended by Order No. 211).

* * *

(1) [1924] V.L.R. 397.
(2) (1878) 2 Can. S.C.R. 497, at 516.

24. (2) In the case of default in payment of rent or breach of a covenant other than a covenant to vacate, nothing in this Order contained shall be deemed to preclude a landlord or some authorized person on his behalf from giving any notice to vacate or demand for possession in accordance with the law of the province in which the commercial or housing accomodation is situated or from taking any proeedings available to a landlord under the law of any province to recover possession of any commercial or housing accommodation situated in such province. (As amended by Order No. 173).

Even if the word "conditions" in ss. (4) (*a*) is interpreted as meaning "provisions", a doubtful construction, so that the paragraph includes a violation of any of the terms of the lease, the respondent has not brought himself within the order for the reason that the notice to vacate which was one in the usual form did not as required by ss. (5) state the reason for giving it.

But it is argued that under s. 24 (2) a breach of covenant *ipso facto* takes the entire lease outside of the application of the order. The introductory language to 24 (1) is "Notwithstanding anything contained in this Order" and the subsection deals with the case of a lease which contains a provision for termination in the event of a sale. I doubt that those introductory words can be held to apply to ss. (2) but even if they do, what ss. (2) contemplates is a right given by the law of the province, including in that expression the valid terms of the lease, to repossession arising on a breach of a covenant and the subsection permits such proceedings to be taken on the basis of the breach as the law may allow.

If the mere non-payment of rent or breach of a covenant is to take the lease outside of the order, there would not appear to be any purpose in providing ss. (4) (*a*) unless it is said that in all cases a notice must be given; and then the same objection would arise here, that a proper notice had not been given.

The object of the order is to prevent trafficking in the possession of lands except for good cause. The general prohibition against terminating a lease by notice is qualified by the specific circumstances which by the order are considered sufficient justification for waiving the prohibition; but it leaves to the provincial law the determination of the circumstances under which a right of entry shall arise from the non-payment of rent or the breach of a

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covenant, except to vacate. In each case, what is contemplated is a right to possession. If this were not so, a breach of covenant, no matter how trivial and notwithstanding that it gave rise to no right to enter, would remove the lease from the order and enable the lessor to give the ordinary notice to quit, which would either conflict with ss. (4) (*a*) or give a much greater privilege for such a breach than for that of a condition in the true sense.

The respondent then was bound in giving such notice as he gave to bring himself within 16 (4) (*a*) which he did not or proceed to a recovery of possession under a right arising from the default alleged which the provincial law did not give him. He was, in the action taken, outside what both the order and the provincial law deemed necessary, and the notice was therefore a nullity.

Then there is the question of the term of the lease on which the validity of the option to purchase may depend. The language of limitation is this:

> The Lessor doth hereby demise and lease unto the Lessee * * * To have and to hold the said lands and premises hereby demised for the term of ten years to be computed from the day of the date of these presents. Yielding and paying therefor yearly and every year in advance during the term hereby demised or any continuance thereof the sum of Twelve Dollars ($12.00), the first yearly payment to be due and payable on the First day of August, A.D. 1926. Provided always at the expiration of the ten-year term hereby demised, this demise and everything contained herein shall at the option of the said Lessor continue as a demise of the said premises to the said Lessee from year to year thereafter at the same yearly rent herein reserved to, subject to the same terms and conditions contained herein. Provided, further, that after the expiration of the said ten-year term hereby demised, the said Lessee shall have the privilege of terminating this lease upon giving the Lessor twelve months' notice in writing and upon conforming with the other conditions and stipulations contained herein.

It is then covenanted that

> if at any time the aforesaid rent is in arrears for a space of two years, the Lessor may re-enter, and that the Lessee shall at all times during the continuance of the said term or the continuation thereof have the right, privilege and option of purchasing the said demised premises from the said Lessor on payment from him, the Lessee, to the Lessor of the sum or price of $300.

I agree with the contention of the respondent that the term is for ten years absolutely and thereafter in a "continuation" of that term as a year to year tenancy, terminable

by the Lessee on a twelve months' notice in writing. Whether that length of notice is obligatory on the lessor, I do not find it necessary to determine. On this branch of the argument, the objection to the option was that as it might be exercised beyond the period of the rule against perpetuities it was void, but to this I cannot assent. The rule is aimed against the tying up of real property pending the vesting of an estate upon a happening which is contingent. But that consideration in policy is absent when the owner of the estate over which the contingent power hovers is able himself at any time to terminate that power. In the classical presentation of the rule by the late Professor Gray the point is suggested that although the lessor in such a case is at liberty, by a proper notice, to destroy the option, it nevertheless involves an onerous condition upon him, namely, that he give up what may be a profitable lease. But if he desires to continue the lease and therefore has no wish either to occupy the land himself or to dispose of it, his only object would be to get rid of an obligation into which he had freely entered, an object which I cannot think can make action to achieve it onerous. With any other object in view, the termination of the lease is a necessary part of its accomplishment.

The point was dealt with in *McMahon* v. *Swan* (1), where the terms of the lease presented an identical question, and it was there held that it was a sufficient answer to the contention of perpetuity that the option could be terminated by either party by the requisite notice.

As the lease then was in force when the tender of the money was made, the lessee has brought himself within the terms of the option. I would, therefore, allow the appeal, and direct a decree of specific performance in accordance with the practice of the court below. The appellant should have his costs throughout.

ESTEY J.:—The appellant contends that the agreement dated the 1st day of August, 1926, and made between the parties hereto is a lease with a perpetual right of renewal after the expiration of the first ten years, rather than a lease from year to year as contended by the respondent,

(1) [1924] V.L.R. 397.

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and as held by the Appellate Court of Prince Edward Island in affirming a judgment of the learned Chief Justice of that province.

After providing for a term of ten years from the date thereof, the lease continues:

* * * provided always at the expiration of (the) ten year term hereby demised this demise and everything contained herein shall at the option of the said lessee continue as a demise of the said premises to the said lessee from year to year thereafter at the same yearly rent herein reserved and subject to the same terms and conditions contained herein: provided further that after the expiration of the said ten year term hereby demised the said lessee shall have the privilege of terminating this lease upon giving to the lessor twelve months' notice in writing and upon conforming with the other conditions and stipulations contained herein * * *

At the conclusion of the ten year term the tenancy continued by tacit agreement, and in fact the appellant is still in possession.

On January 12, 1943, the respondent, through his attorney, served the following notice:

I hereby as agent and attorney for and on behalf of Austin A. Scales, your landlord, give you notice to quit and deliver up to him on the 1st day of August, 1943, possession of the premises situate at Freetown, P.E.I., which you hold off him as tenant under a lease in writing bearing date the 1st day of August, 1926.

On August 30, 1943, the appellant tendered and respondent refused $12 as rent for the year ending August 1, 1944.

The respondent, as landlord, on August 7, 1944, brought this action for recovery of possession of the leased premises. Questions of law were raised upon the pleadings and these were submitted for decision prior to trial. The judgment of the learned Chief Justice in favour of the respondent upon these points was affirmed in the Appellate Division and from this judgment this appeal is taken.

The appellant's submission that this lease contains a right of perpetual renewal can only be supported if such an intention is clearly expressed: *Swinburne* v. *Milburn* (1); 20 Halsbury, 2nd ed., p. 154, para. 167. The language used must import both renewal and perpetuity, e.g. "renewable forever", *Clinch* v. *Pernette* (2); "thereafter forever", *Consumers Cordage Co. Ltd.* v. *St. Gabriel Land & Hydraulic Co. Ltd.* (3); "including the covenant for

(1) (1884) 9 App. Cas. 844.
(2) (1895) 24 Can. S.C.R. 385.
(3) [1945] S.C.R. 158.

renewal", *Re Jackson and Imperial Bank of Canada* (1). The lease in question contains no such words. On the contrary, the words

> shall at the option of the said lessee continue as a demise of the said premises to the said lessee from year to year thereafter

contained in the first proviso quoted above indicate a clear intention to create a tenancy from year to year: 20 Halsbury, 2nd ed., p. 123, para. 136. A lease from year to year differs from that with a perpetual right of renewal in that the former continues until terminated by notice, while the latter terminates at the end of the term unless renewed. This distinction is emphasized in *Gray* v. *Spyer*, (2), where the lease was construed to contain the right of perpetual renewal notwithstanding the use of the words "from year to year". There, however, the tenant was required to give one month's notice of his intention to continue his tenancy in each year. It was this obligation to give the notice that was emphasized by the learned judges in the Appellate Court. Warrington L.J. at p. 33:

> If the tenant failed to give the notice exercising his option, the tenancy would, in my opinion, determine at the expiration of the then current year * * *

Scrutton L.J. at p. 39:

> If I am simply to construe the words of the agreement, it seems to me to contemplate a year's tenancy, continuing from year to year, at the tenant's will expressed one month before the end of each year. But the continuation depends, not on a grant, but on an agreement to grant if the tenant so requires. In other words, the agreement is to continue at tenant's option the tenancy from year to year.

The same observations distinguish the case of *Northchurch Estates Ltd.* v. *Daniels* (3), where the lease was for a period of one year certain with an option in the tenant to

> renew the tenancy from year to year on identical terms and conditions as hereinafter stated, notice of such intention to renew the tenancy to be given in writing on or before December 25 in each year.

Evershed J. held this to create the right of a perpetual renewal. At p. 526 he stated:

> The language used includes the phrase "the option to renew the tenancy from year to year", and it says further that notice of that intention is to be given on or before Dec. 25 *"in each year"*. Those words seem to me to be very strong indications indeed that what was in the

(1) (1917) 36 D.L.R. 589.
(2) [1922] 2 Ch. 22.
(3) [1946] 2 All. E.R. 524.

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minds of the parties was that, so long as the tenant exercised his option within the time stated, he could go on from year to year *ad infinitum* renewing his tenancy.

The lease in this litigation specifically provides at the option of the lessee for its continuation as a demise from year to year, for termination thereof on the part of the lessee, and in the event of non-payment of rent, on the part of the lessor (what notice for other reasons might be given by the lessor we are not here called upon to determine). These provisions show a clear intention that the lease shall continue until its termination rather than that it should be renewed by the lessee in each year.

The appellant stressed the presence of the words "continue", "continuance" or "continuation" as evidencing perpetuity. The word "continue" as used in the above quoted proviso does not import perpetuity but merely that upon the termination of a ten year period the lease shall continue as one from year to year. The words "continuance" and "continuation" as used are in accord with that view and contemplate that the option given to the lessee may be exercised but once. The phrase "any continuation", which appears once, while it ordinarily would import the idea of more than one exercise of the option, as here used and construed in relation to the other provisions, cannot be so regarded and even if so, it cannot outweigh the other specific provisions of the lease.

The notice to quit dated January 12, 1943, as above quoted, did not "state the circumstance or circumstances in respect of which it is given" as required by Order 108, s. 16 (4) of The Wartime Prices and Trade Board, and is, therefore, invalid as a notice to vacate under that order. Indeed, the respondent does not contend otherwise. His submission is, assuming a breach of covenant to assign, that by virtue thereof under the provisions of section 24 (2) of Order 108 the lease is no longer subject to that order, but is subject to provincial law only. Section 24 (2) reads as follows:

24. (2) In the case of default in payment of rent or breach of a covenant other than a covenant to vacate, nothing in this Order contained shall be deemed to preclude a landlord or some authorized person on his behalf from giving any notice to vacate or demand for possession in accordance with the law of the province in which the

commercial or housing accommodation is situated or from taking any proceedings available to a landlord under the law of any province to recover possession of any commercial or housing accommodation situated in such province.

The respondent, to use his own language,

claims his right of possession not because a right of re-entry accrued to him by virtue of the breach of covenant, but because the lease was terminated by virtue of the notice to quit given in conformity with provincial law.

This submission recognizes that a breach of the covenant not to assign, transfer or sublet does not provide under provincial law a basis for the giving of a notice "to vacate or demand for possession" unless the lease contains an express provision therefor or such a provision is found in the statute law of the province. *Crawley* v. *Price* (1); Foa, The Law of Landlord and Tenant, 6th ed., 367; Woodfall's Landlord and Tenant, 22nd ed., 189. There is no such provision in the lease nor is there any such provision in the statutory law of Prince Edward Island. Apart from one or other of these provisions a breach of covenant may give the landlord a right to damages or an injunction, but not a notice "to vacate or demand for possession" nor for proceedings to recover possession.

The effect, therefore, of respondent's contention would mean that though a breach of this covenant for which provincial law provides no right for the giving of a

notice to vacate or demand for possession * * * or * * * taking proceedings * * * to recover possession,

nevertheless, under the provisions of section 24 (2) the breach of that covenant would make the lease subject to provincial law and therefore the right to terminate the lease by the notice to vacate effective under provincial law as if Order 108 did not exist. That such a determination of the lease should not obtain under the circumstances of war was one of the purposes and objects of Order 108. That this purpose should now be defeated by such a breach must be found in clear and explicit language. Such is not to be found in section 24 (2). This subsection is an exception to the general terms of the order and neither its provisions nor its collocation indicate any such intention. On the other hand, such an intention could have been expressed easily and clearly. In the absence of express

(1) (1875) L.R. 10 Q.B. 302.

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language that the breach of such a covenant should remove entirely the effect of Order 108 and restore provincial law for all purposes, it ought not to be implied. The respondent referred to *Toronto General Trusts Corporation* v. *Sidney I. Robinson Fur Co.* (1), a decison under Order 315 where the language is quite different, and *Ogilvie* v. *Westergaard* (2), a decision under Order 294 which repealed Order 108, where the language is somewhat different.

It therefore follows that the lease is valid and subsisting, and therefore by its express terms the option to purchase was outstanding. The option reads as follows:

> And that the lessee shall at all times during the continuance of the said term or the continuation thereof have the right, privilege and option of purchasing the said demised premises from the lessor on payment from him to the lessor of the sum or price of three hundred dollars.

The lease also contains:

> And it is hereby declared and agreed that these presents and everything contained herein shall respectively enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators and assigns, respectively.

It is, however, contended by the respondent that this option is invalid under the *Perpetuities Act,* 4 Geo. VI, statutes of Prince Edward Island, c. 46. Section 2 reads as follows:

> 2. Notwithstanding any existing law or statute in force in this Province, the period during which the existence of a future estate or interest in any hereditament, right, profit, easement or other property, real or personal, may be suspended, and during which the rents, revenues, fruits, profits or income of any such real or personal property may be allowed to accumulate, either in whole or in part, may extend to, but must not exceed the life of a person or of the survivor of several persons born or en ventre sa mère at the time of the creation of such future estate or interest and ascertained for that purpose by the instrument creating the same, and sixty years to be computed from the dropping of such life or the minority of some person en ventre sa mère at the dropping of such life and ascertained for that purpose by such instrument.

This statutory provision embodies the principle that the "absolute power of alienation" should not be suspended beyond the period therein specified. It is designed to prevent the creation of executory interests, as Lord Macnaghten explains:

> * * * to arise at some future and indefinite period on a contingency which might or might not happen, and to impose on the land a fetter or

(1) [1946] 1 W.W.R. 137. (2) [1944] 2 W.W.R. 106.

burthen of indefinite duration which the owners for the time being * * * could not get rid of without the consent and concurrence of the persons entitled to such executory interest. *Edwards* v. *Edwards*, (1).

Then in Lewis on Perpetuity, p. 164, the definition of a perpetuity concludes with the words

which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation.

In dealing with this definition, Farwell J. in *In re Ashforth* (2), (1905 1 ch. 535, at p. 544, explains the word "destructible" as used in the above definition as follows:

The rule, however, was only to be applied to cases where it was really necessary in order to defeat remoteness, and, accordingly, Lord St. Leonards in *Cole* v. *Sewell* (3), points out that it has no application to remainders limited to arise after an estate tail, because they are destructible by barring such estate tail, and are no more open to objection than the estate tail itself; and this is the meaning of the reference to destructibility in the passage that I read above from Lewis on Perpetuity.

In Gray on The Rule Against Perpetuities, 4th ed., s. 203;

Thus a future interest if destructible at the mere pleasure of the present owner of the property is not regarded as an interest at all and the rule does not concern itself with it.

and s. 568, note 2:

When the owner of the present estate can destroy the future interest at his pleasure such future interest is not too remote.

In *McMahon* v. *Swan* (4), a lease for a period of five years which should continue thereafter until terminated by notice by either party contained an option to purchase. The option to purchase was held not to offend the rule against perpetuities because the tenant's interest could be terminated by the owner and therefore the option did "not restrain the free disposal of property beyond the period allowed by law."

The respondent relied upon *Rider* v. *Ford* (5), where, after the expiration of the specified term and while the tenancy continued as one from year to year, the lessee sought to exercise his option to purchase. The main point discussed was whether the option continued so long as the relationship of landlord and tenant continued, or whether

(1) [1909] A.C. 275, at 277.
(2) [1905] 1 Ch. 535, at 544.
(3) (1842) 4 D. & War. 1; S.C.
(4) [1924] V.L.R. 397.
(5) [1923] 1 Ch. 541.

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it expired at the end of the specified term. The rule against perpetuities was dealt with as follows at p. 546:

> Defendant's counsel admits that the rule against perpetuities must render invalid the option to purchase the freehold unless the agreement is read as giving only an option to the defendant personally, or to an assignee of the defendant, but only exercisable during the defendant's life.

The learned judge refused to so construe the agreement and therefore held the option to be inoperative and invalid because it offended the rule against perpetuities. It therefore appears that the specific point that we are considering was not raised as a matter for decision.

In *Tormey* v. *The King* (1), the lease was for a term of 30 years and continued thereafter as a tenancy from year to year. During the latter period the tenant sought to exercise the option to purchase and it was held, following *Rider* v. *Ford* (2), that the option was invalid as infringing upon the rule against perpetuities. Here again there does not appear to have been consideration given to the specific point we are discussing.

The respondent, Scales, as lessor and owner of the property, might in any year, after the expiration of the first ten years, under the provisions of this lease (apart from the emergency legislation imposed by the circumstances of war and which overrule the *Perpetuities Act*), by exercising his right to terminate the lease, effect a disposition of the property. It was within his power to make himself the sole owner and to dispose of all his rights without the concurrence of anyone. Therefore, there was never a time when, within the meaning of the statute, there existed a

> period during which the existence of a future estate or interest in any * * * property, real or personal, may be suspended

because the lessor as owner of the property might determine that suspension at his pleasure, and therefore he possessed the unfettered right to deal with the property at any time.

The fact that after the period of ten years this was a lease from year to year with the consequent right in the lessor to terminate it, distinguishes this case from many

(1) [1930] Ex. C.R. 178. (2) [1923] 1 Ch. 541.

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of those cited by counsel for the respondent, including *Woodall* v. *Clifton* (1), where the lease was for a specified period of 99 years and the option exercisable at any time during that term. So in *London & South Western Rly. Co.* v. *Gomm* (2), the time in which the right to request a reconveyance was unlimited; likewise in *Worthing Corporation* v. *Heather* (3), and *United Fuel Supply Co.* v. *Volcanic Oil & Gas Co.* (4).

An option contained in a lease, where either by its express terms or by operation of law the right remains in the lessor or owner of the property to terminate both the lease and option, does not involve an infraction of the foregoing statutory provision of the *Perpetuities Act* and therefore is valid.

The appeal should be allowed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *W. E. Bentley.*

Solicitor for the respondent: *W. Henry Noonan.*

McLELLAN PROPERTIES LIMITED....APPELLANTS;

AND

ANTOINE ROBERGE and L. D. ROBERGE ..... } RESPONDENTS.

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*May 19, 20, 21.

*Oct. 7

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Executor and Trustee's discretionary power to option and sell realty of Estate delegated by Power of Attorney—Agreement to option and sell executed by attorney—Whether agreement void or capable of ratification by Trustee—Memorandum in Writing, Statute of Frauds R.S.O. 1937 c. 146 s. 4—Absolute assignment, Conveyancing and Law of Property Act R.S.O. 1937 c. 152 s. 52.

Held: The appeal should be allowed with costs and the judgment of the trial judge restored.

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

(1) [1905] 2 Ch. 257.
(2) (1882) 20 Ch. D. 562.
(3) [1906] 2 Ch. 532.
(4) (1911) 3 O.W.N. 93.

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Per the Chief Justice and Taschereau and Estey JJ.:—The option here negotiated is not a contract "void" as being illegal in the strict sense. It does not therefore involve an act on the part of an attorney which cannot be ratified by the principal. The trustee had a full and complete knowledge of not only the existence but the terms and details of the option, was in possession of such before the acceptance of the option and personally instructed his solicitor from there on. It was not a breach of trust on his part to grant a general power of attorney, and if the attorney has effected an agreement, as in this case, which is not void and which the trustee in his judgment deems in the interest of the trust estate, there would appear to be nothing in reason or principle why it should not be ratified and the estate enjoy the benefit thereof.

The ratification of the giving of the option by the trustee related back to the date thereof and became his act as if he had given the same in person, and was therefore a sufficient memorandum signed by the party to be charged to satisfy the requirements of the Statute of Frauds.

Per Kerwin and Kellock JJ.:—Before the acceptance of the offer to sell, the executor took the position toward W. (the purchaser) that there was an offer which the latter could accept. The letters signed by the executor's solicitor, taken with the documents to which they refer, satisfy the Statute of Frauds.

"Absolute" is used in the Conveyancing and Law of Property Act, R.S.O. 1937 c. 152 in contradistinction to "by way of charge only." Hughes *v.* Pump House Hotel Company (1902) 2 K.B. 190.

APPEAL by the Plaintiff from the judgment of the Court of Appeal for Ontario (1) allowing the defendants' appeal from the judgment of Mackay J. (2) decreeing specific performance of an alleged agreement for the sale of land.

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

J. R. Cartwright, K.C. and *R. M. Willes Chitty, K.C.* for the appellant.

A. G. Slaght, K.C. for the respondents.

The judgment of the Chief Justice and of Taschereau and Estey JJ. was delivered by

ESTEY J.:—This is an action for specific performance on behalf of the purchaser of real property situated at Kirkland Lake, Ontario. Georgianna Roberge, late of said Kirkland Lake, owned the property in question. By her

(1) 1946 O.R. 379; 1946 2 D.L.R. 729.

(2) 1945 O.W.N. 771; 1946 1 D.L.R. 77.

will she named her son Antoine Roberge, her executor and trustee and after directing the payment of her debts she devised and bequeathed to him her property, both real and personal, in trust for the use of her husband L. D. Roberge, during his life and thereafter to sell, convert and distribute according to the terms of the will.

The will was proved on the 23rd day of August 1943. Antoine Roberge, then of Kirkland Lake, but who at all times material hereto resided at or near Flint in the State of Michigan, was appointed executor. On September 17th 1943, in the State of Michigan Antoine Roberge executed a general power of attorney to his father, L. D. Roberge, who remained at Kirkland Lake, empowering the latter to act on his behalf in his capacity as executor of his mother's estate, and empowering him to purchase, rent, sell, etc., the real estate, or any interest therein, and to execute all necessary instruments in connection therewith. Acting under this power of attorney, L. D. Roberge on May 10th 1944, entered into an agreement entitled "Option to Purchase" with A. I. Wright whereby he gave to Wright an irrevocable offer to purchase the property on or before the 10th day of June 1944.

On May 30th 1944, Antoine Roberge was at Kirkland Lake and he and his father called upon Wright. The sale was then discussed and they were informed by Wright that he was selling the property to McLellan Properties Limited on whose behalf he had arranged a mortgage and an extension of the lease to the Metropolitan Stores. He assured Antoine Roberge that they had raised the necessary money. Antoine Roberge suggested that St. Aubin was solicitor for the estate and his own personal solicitor and that they might meet at his office and give instructions for the preparation of documents. That afternoon at three o'clock they met at St. Aubin's office, and after some conversation, it was suggested that there was no use of all remaining and Antoine Roberge "instructed Mr. St. Aubin to go ahead, contact Mr. Lillico", solicitor for Wright and McLellan Properties Limited, "and get the matter closed out".

On June 7th 1944, Lillico by letter made certain requisitions with regard to the title. These were subject of

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personal discussions and correspondence extending from June 7th to June 15th, when Lillico advised that his client was prepared to waive the requisition relative to the beneficiaries executing the transfer of the property and that Wright was assigning his agreement of purchase to the McLellan Properties Limited. Then followed some correspondence between Lillico and St. Aubin relative to the transfer, the requirements of the Local Master of Titles, and details leading to the conclusion of the transaction.

On July 3rd 1944, Lillico wrote a letter to St. Aubin reading as follows:

Dear Sir: Re: Roberge.

You have advised us on a number of occasions by telephone that your clients do not intend to complete the contract for the sale of the Roberge Premises, being lot 19, plan M. 15 Temiskaming, and to confirm such telephone conversation by letter, but to date no such letter has been received by us.

This letter is to advise you that our clients are prepared to close out the contract and complete the purchase of the property, and if necessary to take action in court to enforce specific performance of the contract.

May we hear from you by return mail?

Yours truly,
L. A. Lillico.

and St. Aubin on the same day wrote the following letter to Lillico:

Dear Sirs: Re: Georgianna Roberge Estate et al.

Referring to the alleged offer to sell and acceptance thereof and the alleged assignment to McLellan Properties Limited, I am instructed by the executor of the will to notify you that he will not proceed further with this matter for the following reasons (among other reasons):

1. L. D. Roberge had no power to execute the said offer of sale on behalf of this estate, and the said offer of sale is a nullity;

or in the alternative,

2. The executor has, at this time, no power to sell the lands of this estate;

or in the alternative,

3. The vendor is unable and/or willing to remove the objections made you on behalf of the purchaser and/or his assignee. The vendor therefore rescinds the agreement herein.

Yours truly,
Alibert St. Aubin.

The correspondence was concluded by Lillico's letter dated July 4th to St. Aubin acknowledging the letter of the 3rd and including the following:

* * * that we are prepared to carry out the terms of the Agreement and to purchase your client's property, and there are no objections or requisitions on title which you have not satisfactorily answered or which we have not waived on behalf of our clients.

When at the expiration of the ten days specified by Lillico, in his second letter of July 3rd, St. Aubin did not intimate his intention to proceed with the completion of the transaction, this action was commenced by writ dated the 17th day of August, 1944.

The learned trial judge held that while as executor and trustee Antoine Roberge could not validly delegate to L. D. Roberge authority to option or sell, nevertheless, in this case Antoine Roberge by his conduct had adopted and ratified the agreement. He accordingly decreed specific performance.

The appellate court held that Antoine Roberge as executor and trustee could not delegate his powers to option or sell to L. D. Roberge, that the acts of L. D. Roberge under such authority were void, and therefore the option of May 10th 1944, was a nullity and neither the option nor the contract arising out of its acceptance could be adopted or ratified by Antoine Roberge as executor and trustee. Further, that there was no memorandum sufficient to satisfy the Statute of Frauds. The appellate court therefore reversed the judgment of the learned trial judge and dismissed the plaintiff's action.

The general rule forbidding a trustee, subject to certain exceptions, to delegate his duties as trustee is not questioned by the appellant. Its contention is rather that the option executed by L. D. Roberge, acting under the terms of the power of attorney from the trustee Antoine Roberge, was ratified and adopted by the latter. The trustee was at Kirkland Lake and became aware of and discussed the contents of the option with A. I. Wright before it was accepted on May 30th. The acceptance was by letter of the same date addressed to Antoine Roberge, and it was he, himself, who instructed the solicitor on behalf of the estate. In other words, in everything that happened after the giving of the option, the trustee took an active and dominating part. His conduct in discussing the terms of the agreement with A. I. Wright and going forward with the completion of the agreement would constitute a ratification or an adoption of what his attorney had initiated on his behalf.

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The appellate court, however, held that because what the attorney did was contrary to law, it was therefore a nullity and could not be ratified. In support of this view the appellant quotes Lewin on Trusts, 14th ed., p. 194:

> If the trust be of a discretionary character, not only is the trustee answerable for all the mischievous consequences of the delegation, but the exercise of the discretion by the substitute will be actually void.

The cases cited by the learned author support the view that such an agreement negotiated only by an attorney for a trustee cannot be enforced, but they do not justify a conclusion that the word "void" should in relation thereto be used in the sense that the attorney's act is so far a nullity that it cannot be ratified. Nor have we been referred to any authority which holds such an act to be a nullity in that sense.

In one of the cases cited by the learned author, *Bradford* v. *Belfield* (1) after refusing a decree for specific performance to compel a purchaser to take a title through a contract negotiated on behalf of the vendor by an assign from the heir of the trustee, the vice-chancellor stated at p. 271:

> But it is admitted that the defect will be cured, if the Court should be of opinion that, under the Will of N. P. Berry, the equitable fee passed to William Berry.

and at p. 272:

> * * * if it were left to me to decide, I should say that the Devise to William Berry has had the effect of curing the defect in the title. I do not, however, feel myself authorized to compel the purchaser to take the estate; but, as the question is, in fact, a legal one, it is my duty to send a case for the opinion of a court of law, as to the effect of the Devise to William Berry.

The general rule that one who accepts the position of trustee undertakes to perform personally those duties requiring the exercise of his discretion is subject to certain exceptions. A trustee by the terms of his appointment may be permitted to delegate some or all of those duties. Again, if in the circumstances it would be regarded as prudent for a person in the ordinary course of business to delegate the performance of those duties, a trustee is permitted to do so: *Speight* v. *Gaunt* (2). Further, a trustee may appoint an attorney to act on his behalf in another country: *Stuart* v. *Norton* (3); *Stickney* v. *Tylee* (4) and *In re Huntly* (5). These authorities illustrate the

(1) (1828) 2 Sim. 264 at 271 and 272.
(2) (1883) 9 A.C. 1.
(3) (1860) 14 Moo. P.C. 17.
(4) (1867) 13 Grant's Ch. 193.
(5) (1887) 7 C.L.T. Occ. N. 251.

general rule and the exceptions thereto founded upon the necessities of prudent business management. These and other authorities indicate that a delegation of authority, such as we are here concerned with, involves nothing in the nature of that illegality which renders an act void or a nullity in law. Salmond on Jurisprudence, 8th ed., 369; 7 Halsbury, 2nd ed., 147; Cheshire & Fifoot, Law of Contracts, 219. The option here negotiated is not a contract "void as being *illegal* in the strict sense": Pollock on Contracts, 12th ed., p. 254. It does not therefore involve an act on the part of an attorney which cannot be ratified by the principal within the meaning of the foregoing authorities.

It is a fair conclusion in this case, and indeed the contrary is not suggested, that the trustee, Antoine Roberge, had full and complete knowledge of not only the existence but the terms and details of the option. He was in possession of such before the acceptance of the option and personally instructed his solicitor from there on. That the option agreement is improvident from the point of view of the estate, or is in any way different from what the trustee would have insisted upon or even desired had he himself negotiated the option, is not suggested.

That certain duties may be carried out by a trustee through an attorney is well established, and therefore it was not a breach of trust on his part to grant a general power of attorney. If, however, the attorney, pursuant to that power, does something which the trustee should not delegate, it is unenforcible and in that sense invalid and it may be either void or voidable, depending upon its nature and character. If, therefore, the attorney has effected an agreement, as in this case, which is not void and which the trustee in his judgment deems in the interest of the trust estate, there would appear to be nothing in reason or principle why it should not be ratified and the estate enjoy the benefit thereof.

Every act, whether lawful or unlawful, which is capable of being done by means of an agent, except an act which is in its inception void, is capable of ratification by the person in whose name or on whose behalf it is done. Bowstead on Agency, 10th Ed., p. 33.

See also Wilshere on Law of Agency, p. 8; Lord Cranworth in *Spackman* v. *Evans* (1).

(1) (1868) L.R. 3 H.L. 171 at 194.

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Sir W. J. Ritchie, C.J., in the course of his judgment in *Merchants Bank of Canada* v. *Lucas* (1) states at p. 280:

> The Court of Appeal has since decided, in the case of *Barton* v. *London & North Western Ry. Co.* (2), that fraud or breach of trust can be ratified, but forgery cannot, and if so it is clear that this appeal must be dismissed.

The essential words in this quotation are from the language of Lord Justice Lindley in the *Barton* case and it may be suggested that the language of the learned judges in both of these cases is *obiter*. Statements, however, by such learned and eminent judges are entitled to the greatest weight, and may I add with respect that the statement appears to be in accord with both principle and authority.

The word "void" in the foregoing quotation from Bowstead on Agency is there used in the sense that what is purported to be done is in law a nullity. The illustrations selected by the learned author make this clear. In one he emphasizes the distinction with respect to what unauthorized acts on the part of a board of directors may, and may not, be ratified by the shareholders. If, though unauthorized, the act of the directors would be one which the company had power to do and which it might have done *qua* company, that may be ratified. If, on the other hand, the unauthorized act of the directors be *ultra vires* of the company, it cannot be ratified by the shareholders because if such an act had been done by the company *qua* company, it would have been a nullity.

The ratification of the giving of the option by Antoine Roberge as trustee relates back to the date thereof and becomes his act as if he had given the same in person. The trustee, Antoine Roberge, had he given the option in person might have directed L. D. Roberge as his attorney to sign the same. As Lindley, L.J. in *In re Hetling and Merton's Contract* (3), stated: "I have no doubt myself that a trustee can execute a deed by an attorney * * *". Antoine Roberge, as trustee, under the circumstances of this case ratified the giving of the option and the execution thereof by L. D. Roberge. It is therefore a sufficient memorandum signed by the party to be charged to satisfy the requirements of the Statute of Frauds.

(1) (1890) Cameron Can. S.C. Cas. 275 at 280.
(2) (1889) 62 L.T. 164.
(3) (1893) 3 Ch. 269 at 280.

Best C.J. stated in *MacLean* v. *Dunn* (1).

> It has been argued, that the subsequent adoption of the contract by Dunn will not take this case out of the operation of the statute of frauds; and it has been insisted, that the agent should have his authority at the time the contract is entered into. If such had been the intention of the legislature, it would have been expressed more clearly; but the statute only requires some note or memorandum in writing, to be signed by the party to be charged, or *his agent thereunto lawfully authorized;* leaving us to the rules of common law, as to the mode in which the agent is to receive his authority. Now, in all other cases, a subsequent sanction is considered the same thing in effect as assent at the time. *Omnis ratihabitio retrotrahitur et mandato æquiparatur;* and in my opinion, the subsequent sanction of a contract signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand, the party must trust to his agent; if it be given subsequently to the contract, the party knows that all has been done according to his wishes.

It was contended that the vendors had not satisfied all requisitions of title made by the purchaser's solicitor. This is not established, as evidenced by the purchaser's solicitor's letter above quoted.

The view of the learned trial judge that the plea of inequality was not established is supported by the evidence. In fact, throughout the conversations and correspondence the question of inequality or that the sale from the point of view of the estate was improvident was apparently not suggested nor was it supported by any evidence.

The appeal should be allowed with costs.

The judgment of Kerwin and Kellock JJ. was delivered by

KELLOCK J.:—The facts out of which this litigation arises are undisputed and are as follows: On May 9, 1944, the respondent, L. D. Roberge who was life tenant of the lands and premises here in question under the will of the late Georgianna Roberge, deceased, and who held a power of attorney with respect thereto from Antoine Roberge, executor of the last will of the deceased, interviewed one, A. I. Wright, a real estate agent in Kirkland Lake, Ontario, with regard to the said premises. Roberge told Wright that he was in financial difficulties because of the fact that the rents from the premises, after payment of outgoings, did not leave him sufficient for his maintenance. Roberge wanted Wright to assist in obtaining a new mortgage, but he also informed Wright that his family desired him to

(1) 1828) 4 Bing. 722 at 726; 130 E.R. 947 at 949.

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sell the property. The two men discussed a possible sale and Roberge said that he would like to sell if he could get a reasonable price and that at one time when things were somewhat better in Kirkland Lake he had been offered $60,000. Roberge was informed by Wright that the latter's commission on sale would be 5%. At Wright's suggestion Roberge went away to decide whether he wanted to sell or to have Wright obtain a new mortgage. In the meantime Wright undertook to "put out a few feelers". Wright then communicated with the appellant and learned that it would be interested if Roberge decided to sell.

The following day a further interview occurred between Wright and Roberge when the latter stated he desired to sell. On this occasion Wright suggested that Roberge drop his price from the figure of $60,000 mentioned the previous day, which was subject to the commission of 5%, to a net $55,000. Wright stated at this time that he would want an option for two weeks or a month. In the result Roberge agreed to an option in Wright's favour for two months at $55,000 and the agreement which took the form of an offer to sell, was drawn up and signed by Roberge as "Attorney for the Estate of the late Georgianna Roberge". The offer could be accepted on or before June 10th. Wright questioned Roberge as to his authority to sell and was assured that he had such authority.

Wright then advised appellants of the option price and the commission he would expect over and above that and arranged with them that if he could obtain a suitable mortgage and have the tenant, who occupied the premises in question and also adjoining premises belonging to the appellants, renew its lease, appellants would buy the premises for $55,000 and pay Wright $4,000 to cover his commission on the sale and his fee for arranging the mortgage and the renewal of the lease, making a total sum of $59,000 cash. Roberge was advised on May 22nd that a sale had been made for cash to the estate and a discussion took place as to investment of the purchase moneys. It was on this occasion that Roberge advised Wright that his son, the respondent Antoine, who lived in Flint, Michigan, was the executor of the estate.

Toward the end of May both the respondents called upon one of the officers of the appellant and told him that they understood the appellant was purchasing the property and that they were pleased but were sorry appellant had not dealt with them direct.

On May 30th the respondents visited Wright when the executor inquired whether Wright was sure the necessary money had been raised. Wright assured them that this was so, and that the Canada Permanent Mortgage Corporation had approved of the loan. Wright then suggested that they go to the solicitor for the appellant and close the matter but it was arranged instead, that they should go to the office of one, St. Aubin, whom Antoine Roberge said was solicitor for the estate. This appointment was kept and the appellant's solicitor, Mr. Lillico, also attended.

At this interview, L. D. Roberge stated that apparently he had signed something he had no authority to sign but the matter proceeded without further discussion of this point and Antoine Roberge instructed St. Aubin to "go ahead and get the matter closed out". Following this and on the same day Wright accepted the offer to sell by letter to the respondent Antoine Roberge, a copy being sent also to St. Aubin on the instructions of Antoine. From then on the solicitors dealt with the matter and considerable correspondence passed between them relating to the carrying out of the sale, until July 3, 1944, when the respondents refused to proceed further. The appellants having acquired an assignment from Wright and having given notice of the assignment, commenced the present action for specific performance. This was granted by Mackay J. but this judgment (1) was reversed by the court of appeal (2) which held that the executor could not in law delegate his power to sell and that the lack on the part of L. D. Roberge of any power to make a binding contract of sale made the alleged contract of sale null and incapable of ratification by the executor. The court held further than even if there were an agreement of sale or if the respondents were estopped from setting up its non-existence there was no sufficient note or memorandum in writing to satisfy the

(1) [1945] O.W.N. 771; [1946] D.L.R. Vol. 1 77.

(2) [1946] O.R. 379; [1946] D.L.R. Vol. 2 729.

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Statute of Frauds, the court being of opinion that the executor could not lawfully authorize another to sign a sufficient note or memorandum and that there was not a sufficient memorandum to be found elsewhere.

In the course of his judgment Laidlaw J. A., who delivered the judgment of the Court of Appeal (1) said:

> Is there a sufficient writing to be found elsewhere? There are two possible sources that might be suggested: First, the letter dated 3rd July, 1944, headed "Re: Georgianna Roberge Estate et al.", from Mr. St. Aubin, purporting to be written on instructions by the executor of the will to solicitors for Mr. Wright and the respondent. That letter refers expressly to the "alleged offer to sell and acceptance thereof", and sets forth the reasons the appellant Antoine Roberge will not proceed with the matter. It concludes, "The Vendor therefore rescinds the agreement herein." The contents of this letter may be properly read with the "offer to sell" and "acceptance thereof" for the purpose of satisfying the requirements of the statute, and that may be done notwithstanding that the letter repudiates liability on the contract: *Thirkell* v. *Cambi* (2). I am disposed to think that the letter referred to recognized that a contract had been made and that its terms were correctly stated in the offer to sell. But, again, it is not necessary to decide that question because, to make that letter effective in law, the respondent must show that Mr. St. Aubin was authorized to make an admission sufficient to bind the appellant Antoine Roberge to the contract set up by the respondent: *Thirkell* v. *Cambi* (2), at p. 595. Even if the appellant Antoine Roberge could lawfully authorize his solicitor Mr. St. Aubin (or any other person) to sign a writing sufficient to satisfy The Statute of Frauds—which, in my opinion, he could not do—I think there is no evidence in this case that he had done so. There is no evidence of any actual authority given to Mr. St. Aubin, and the necessary authority cannot be implied from the form or contents of the letter. On the contrary, his instructions were to repudiate the contract. " * * * the plaintiff cannot succeed unless he has affirmatively proved that the agent was authorized to sign a memorandum of the particular contract on which the plaintiff claims": *Thirkell* v. *Cambi* (2), per Eve J., at p. 599. This the plaintiff has failed to do.

I respectfully agree that St. Aubin's letter of July 3, 1944, is to be read with the offer to sell or option and its acceptance and in my opinion the letter recognizes that a contract had been made and that its terms were correctly stated in the option. It is not contended that these documents do not contain all the terms of the bargain come to.

It has already been pointed out that the executor had expressly instructed St. Aubin to carry out the contract and in pursuance of those instructions the latter had

(1) [1946] O.R. 379. (2) (1919) 2 K.B. 590.

conducted the correspondence with Lillico, his first letter of June 8, 1944, containing answers to requisitions on title made by Lillico. The last paragraph of that letter reads as follows:

> Should the purchaser not waive the requisition last mentioned my client will unfortunately have no other alternative but to rescind the contract as provided therein and shall not otherwise be liable to the purchaser except to return the deposit made, if any.

It is quite clear that parol evidence is admissible to identify "the contract" referred to, which is "the alleged offer to sell and acceptance thereof and the alleged assignment to McLellan Properties Limited" mentioned in the letter of July 3rd; *Cave* v. *Hastings* (1). The terms of the contract are therefore to be found in the option.

In *Thirkell* v. *Cambi* (2), there was no evidence of any authority from the defendant to the solicitor to make any admission to bind his client "to the contract set up" by the plaintiff. In *North* v. *Loomes* (3), however, Younger J. used language which, in my opinion, is applicable here. He said at p. 383:

> Mr. Taylor's instructions from the defendant were to complete, not to negotiate, a contract. It was an essential implication that he should, if and when necessary, affirm on behalf of his client the existence and validity, on his side, of the contract he was so instructed to carry out.

While it is true that a trustee may not delegate his power to sell, I see no reason why a trustee may not authorize an agent to sign on his behalf documents such as the letters which are here in question in the course of carrying out a sale which he himself has already made. As stated in Williams On Executors, 12th ed. 598, while executors cannot contract to sell by attorney

> this extends merely to the discretionary act. Having once exercised such discretion they may complete the transaction by attorney. For * * * trustees and personal representatives have never been bound personally to transact such business connected with the proper duties of their office, as according to the usual course of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through agents.

See also *In re Hetling and Merton's Contract* (4), per Lindley, L.J.

(1) (1881) 7 Q.B.D. 125.
(2) [1919] 2 K.B. 590.
(3) (1919) 1 Ch. 378.
(4) (1893) 3 Ch. 269 at 280.

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It is to be remembered that the acceptance of the offer to sell was made directly to the executor who personally had previously instructed his solicitor to carry out the contract. Before the acceptance of any offer to sell, therefore, the executor took the position toward Wright that there was an offer to sell which the latter could accept. This acceptance was given and the letters signed by St. Aubin, taken with the documents to which they refer satisfy the Statute of Frauds.

It is contended in the alternative by the respondent executor that he was entitled to rescind the contract and did rescind it by the letter of July 3rd on the ground that there were outstanding requisitions on title which the purchaser was insisting on. It is said the executor was unwilling to comply with these requisitions and that he rescinded the contract on account thereof in pursuance of its terms.

By letter of July 3 1944, written before the receipt of St. Aubin's letter of that date, Mr. Lillico, on behalf of the appellant, advised Mr. St. Aubin that his client was ready to complete. In fact appellant, while it had made certain requisitions, had never refused to complete if these were not complied with. The time for closing had not arrived on July 3rd when the respondents refused to go on. Respondents must fail on this point also.

Mr. Slaght further contended for the respondents that the appellant could not bring this action for the reason that while the assignment recited it was for valuable consideration, it was in fact voluntary. He argued that therefore the assignment was not an "absolute" assignment within the meaning of the *Conveyancing and Law of Property Act, R.S.O. 1937, c. 152.* This contention is not well founded. "Absolute" is used in the Statute in contradistinction to "by way of charge only". *Hughes* v. *Pump House Hotel Company* (1).

As to the point with respect to the so called "inequality" of the parties I agree with the judgment of the learned trial judge.

(1) (1902) 2 K.B. 190.

I would allow the appeal with costs here and below and restore the judgment of the trial judge.

Appeal allowed with costs and judgment of the trial judge restored.

Solicitors for the appellant: *Chitty, McMurtry, Ganong, Wright & Keith.*

Solicitors for the respondent Antoine Roberge: *Slaght, Ferguson, Boland & Slaght.*

Solictor for the respondent L. D. Roberge: *James Cowan.*

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out increased costs due to an increased wage rate (authorized by the National War Labour Board), stated that the matter would be "looked after" as soon as the formula for making accountable advances had been decided. On January 29, 1943, the Executive Secretary of the Board wrote to appellant that the Board had "approved a plan whereby operators who are operating at a loss may be reimbursed" and enclosed forms "F-4" to be completed and forwarded, on which was the Board's plan or formula, stating, *inter alia*, that "the maximum amount of subsidy paid is regulated" by the lesser of *(a)* profits not to exceed "standard profits" as ascertained under the *Excess Profits Tax Act* or *(b)* such amount of net taxable profits as shall be equal to 15 cents per net ton of coal produced or sold. Appellant completed and forwarded the forms, and on February 11, 1943, the Executive Secretary of the Board wrote to appellant that in the light of the statements therein and the seasonal nature of appellant's operations, "any question of subsidy should be deferred" until returns were received for the current financial year and until clarification of the situation in respect to standard profits, that in the meantime monthly submissions of forms should be continued, and that with respect to sales, "until a rate of subsidy, if any, is actually set no change need be made in your billing, and if a subsidy becomes payable", a back claim for additional amounts could be made. Appellant, besides forms covering certain months, sent, later, forms for the six months period now in question, covering, separately, the strip and deep seam operations. Appended to the minutes of a meeting of the Board on July 29, 1943, was a list of operators "receiving or authorized to receive F-4 assistance not authorized by individual minutes", which list included appellant, but with no amount set opposite its name. Though information on the forms was available to the Board before that date, it had not examined or "processed" the form statements. On December 9, 1943, in reply to a letter from appellant to the Executive Secretary of the Board, the Assistant Accountant, for the Accountant, of the Board, wrote that "we may assure you that the [Board] has authorized subsidy on your operations from the 1st of October, 1942", and, "to facilitate the computation of the correct amount of subsidy to which you are entitled", requiring a certified consolidated return. On March 3, 1944, the Chairman of the Board wrote to appellant that, "after making a careful review of the circumstances surrounding your claim for subsidy assistance, we have arrived at the conclusion that it would not be possible to justify a recommendation" for it. *Held:* The appeal should be dismissed. On the documents and facts in evidence, no contract or other ground for

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allowance of the claim was established. *Per* the Chief Justice and Taschereau and Estey JJ.: The deep seam operation was, on the evidence, undertaken by appellant entirely of its own volition and it was not shown that it was at any time continued in consideration of a promise that a subsidy would be paid. Though information as to the "stripping" and "deep seam" operations was asked for and supplied separately, yet (at least for the period in question) there was no suggestion that they would be treated separately in determining any question of subsidy. Appellant was not "operating at a loss" within the Board's said letter of January 29, 1943, and, on the basis of that letter, did not qualify for a subsidy. The statement in said letter of December 9, 1943, in the absence of evidence establishing either actual authority from the Board or that the writer was held out as one apparently having authority to make such communication, should not be accepted as an admission binding upon the Board. The Board's decisions would, as the evidence indicated, be recorded in the minutes of the Board, and could be adduced in evidence by production of the minutes or (under provision in said Order in Council) of a document signed by its Chairman. As to said list appended to the minutes of July 29, 1943, it was clear that no decision had been arrived at by the Board as to a subsidy to appellant; and no other minutes were produced mentioning appellant. The Board accepted appellant as an operator entitled to be considered for a subsidy. The Board's conduct was not that of a party contracting, but rather that of one endeavouring to determine whether appellant was, on the basis of the Order in Council and the plan, entitled to receive a subsidy. Appellant was throughout supplying information asked for with the intent and purpose of convincing the Board of its right to a subsidy under the Order in Council and plan. The essential elements of a contract were not present. *Per* Kerwin J.: The facts afforded no basis for appellant's claim. Clearly, on the evidence, there was no contract; and there was nothing in said Order in Council, the minutes of the Board, or the actions of any of its responsible officers, upon which appellant might base a claim to a subsidy based upon a statute or anything similar thereto. *Per* Rand J.: The opening of the deep seam was initiated by appellant and carried on until at least the early part of 1943 voluntarily and for its own purposes, with no inducing action by the Government or the then Fuel Administrator beyond the general exhortation for a country-wide increase in production. The statement in said letter of January 29, 1943, that the Board had approved a plan whereby "operators who are operating at a loss" might be reimbursed, meant, both in the plain and ordinary meaning of the language

CO-OPERATIVE *handling and marketing of wheat—Saskatchewan Co-operative Wheat Producers Ltd.—Contracts between company and members—Rights of members—Deducions by company, from returns from sale of wheat, for its activities and towards acquiring handling facilities—Claims for repayment, for interest, or for declaration as to rights—Alleged breach of trust—Claim that interest on claimant's deductions should be paid before payment of patronage dividends to later shareholders.*—Saskatchewan Co-operative Wheat Producers Limited, referred to *infra* as the "association", was incorporated in 1923 under the *Companies Act*, Sask., and its incorporation was confirmed by statute (Sask.) in 1924, c. 66. The main object was the co-operative handling and marketing of wheat for its members, grain growers in the province, each member buying a share for $1. Saskatchewan Pool Elevators Limited, referred to *infra* as the "Elevator Co.," was incorporated in 1925 under said *Companies Act* for purpose of acquiring elevator facilities and handling grain delivered to the association; its capital stock was owned by the association and the directors of each company were the same persons. Appellant delivered wheat to the association. Deliveries during 1924, 1925, 1926 and 1927 were under contract of December 27, 1923. Another contract was made on February 7, 1927, for deliveries for the five years following; but after the crop year of 1929-30, appellant (as were all others who had signed contracts) was released from his obligation to deliver wheat under it. Appellant ceased farming in 1938. Said contracts provided (as did contracts with other grain growers) for deductions by the association, from gross returns from sale of wheat, of expenses, of a "commercial reserve" to be used for purposes and activities of the association, and of an "elevator deduction" towards acquiring facilities for handling grain. Under said contracts the association deducted "commercial reserves" and "elevator deductions", crediting the amounts thereof in appellant's account. The last of said deductions were made out of the proceeds of the 1928 crop. Appellant claimed repayment of amounts so deducted, and interest thereon, or, alternatively, a judgment declaring his rights. On July 16, 1925, the directors of the association passed a resolution that elevator deductions should bear interest at 6 per cent. This was followed by statements forwarded from time to time by the association to the growers, showing the amount of elevator deductions and interest thereon, but stating that "the crediting of interest during the present contract, as well as the payment of interest on the certificates, is conditioned on the Pool Elevators having sufficient earnings, after taking care of expenses and depreciation, to provide for same." In 1929 the association issued two certificates, one setting out commercial reserves and the other setting out elevator deductions, taken under said contract of 1923. These certificates were under seal, and, as recommended by the directors, were approved by resolution of November 26, 1928, at the annual meeting of the association delegates. They were delivered to the growers who had signed said contract of 1923, and contained the following (the rate of interest mentioned on commercial reserves and elevator deductions being 5 and 6 per cent. respectively): "Interest from September 1, 1928, will be paid annually at the rate of * * * on the sums represented by this certificate which shall from time to time remain unpaid, provided, however, that the Company reserves the right to declare that a lower or other rate of interest, or no interest, shall be payable in any year or years, all interest payments shall be non-cumulative in effect." Interest was paid, on elevator deductions, from September 1, 1925, to August 31, 1930, and on commercial reserves, from September 1, 1927, to August 31, 1930. (In each case, interest for the year ending August 31, 1930, was not paid until 1941). Also it was stated in evidence that on the elevator deductions interest of 3 per cent. was paid for 1943 and would be paid for the next year. On September 17, 1931, the directors passed a resolution, referring to said certificates and to the association's indebtedness to the Government (hereinafter mentioned), that, as it must use all available funds in order to pay said indebtedness, in future no interest be declared or paid to the holders of such certificates, but that all interest earned by the moneys represented thereby be retained for the purpose of reducing said indebtedness or for any other proper association activity. Up to and including the crop year 1929-30, the association, when receiving the wheat, made an advance on account of the price to the grower. In 1929-30 this advance was followed by such a drop in the price of wheat that the advance was more than what was ultimately realized. The overpayment to the growers was treated as a loss to the association, which arranged for the Saskatchewan Government to pay its debts to the banks and accept repayment in amortized instalment payments, the last of which is payable in 1951. The assets of the association and the Elevator Company were given as security, as set out in statutes, 1931, c. 90, and 1932, c. 77. By s. 3 of the latter Act, "no person who * * * has or may hereafter acquire any right, title or interest in any elevator deduction or commercial reserve * * * shall be entitled to demand repayment of money which has been placed in any such deduction or reserve or to bring or continue action to enforce any right or interest in respect of such money or deductions or reserves, or any earnings thereof * * *," until the Government has been paid in full. After the crop year

CO-OPERATIVE—*Continued*

1929-30, the association abandoned the compulsory pool which it had operated, notified growers of release from their obligation to deliver wheat, and operated a voluntary pool, rendering the same services as theretofore to those growers who desired it, and it entered into business of buying and warehousing grain. "Patronage dividends" were paid to growers prior to 1930, and again in 1940 and in subsequent years. From 1940 these patronage dividends have been paid, to shareholders delivering wheat to the association, part in cash and part credited to their deduction accounts. The part so credited has been utilized by the association in arranging for repayments in certain cases, under which appellant, as having ceased farming, would qualify to benefit. Appellant contended that, with surplus funds available, interest should be paid on the commercial reserves and elevator deductions before payment of patronage dividends, which, he contended, were, in breach or repudiation of trust, being paid to later shareholders who had made no contribution to the deductions now in question but were getting the benefit of the facilities provided by these deductions and receiving patronage dividends on the same basis as those who became shareholders under the contracts of 1923 and 1927. *Held:* Appellant's claims for repayment of deductions and for interest were barred at this time by said s. 3 of c. 77, 1932. Also his action failed for further reasons as follows: *Per* Kerwin and Estey JJ.: The contracts with appellant contained no covenant to repay the deductions. The association received and utilized them within the terms of the contracts. There was no breach of covenant or of trust. The contracts contained no covenant to pay interest. As to the certificates, the provisio therein should not be disregarded as repugnant. Its language qualified, rather than destroyed, the covenant. That interpretation is the natural and reasonable one, and also accords with the conduct of the parties (which may be looked at to assist in construction). The resolutions of the association for payments of interest were mere expressions of intention. The association's method of paying patronage dividends without having first paid interest now claimed did not violate any trust. Its abandonment of the compulsory pool and its subsequent steps and operations were within its powers and at the same time maintained for those growers who desired it, through the voluntary pool, all the rights and advantages under their contracts. The commercial reserves and elevator deductions have been used within the terms of the contracts under which appellant authorized them. There being no breach of the association, and in view of its policies adopted and its unquestioned good faith, no purpose would be served in directing a declaratory judgment, which

could only be effective after the provincial government has been paid in full. This, according to the terms of agreement with that government, would not be until 1951, while under the association's present policy appellant may have received his repayments before that time. *Per* Rand and Kellock JJ.: The association was a corporate body with a nominal authorized capital, its effective capital being intended to be provided by the deductions under the contracts. That effective capital was committed to it for certain purposes and impressed with certain contractual and equitable duties; but administrative control over the funds for the purposes of the association was a condition of and a restriction upon each contributor's interest in the association, which interest was a fractional share in the subsidiary capitalization representing for this purpose the whole of the assets, the amount not being fixed, but fluctuating from time to time as the association's needs might require. The dealing with such interests consistently with the co-operative scheme was designed from time to time to maintain ownership of them in the hands of persons who were active participants in the association's business, and it was desirable as a policy that the interest of a contributor who had ceased to market his product through the association be taken over for transfer to a person participating. The interest of a contributor was not that of a debt. There was no failure of the primary purposes to which the money was to be applied; and no suggested breach of contractual or equitable obligation would amount to such a failure or give rise to any right to rescind the original transaction by winding up or otherwise; the relief in any such case would be confined to such modes of compelling a corporation to adhere to the objects for which it was created as might be open to the interested members. The contributions were made without express stipulation as to interest. The fundamental object of the enterprise would require that any distribution of interest must be only out of net returns; such limitation lies initially on any provision for interest. Assuming, but not deciding, that the certificates were an obligation rather than a declaration of intention, yet the mode of exercising the power reserved therein, consistently with the matter in which it appears, must be taken to be informal and, since it is not required to be communicated to the contributor, of a purely internal character; at most the certificate sets a standard of return to which the association should adhere but on which decision is not intended to be brought within a formal rigidity; the essential fact is the recognition of an obligation to distribute grounded in the circumstances of the contributions. The revocation need not be specific for each year or for a term of years. The circumstances

evidence of words spoken between himself and his wife and, after a certain answer by his wife, a slap by her on his head, and that he did not remember what happened after that until he was trying to pick her up from the floor. *Held:* The conviction should be set aside and a new trial held. *Per* The Chief Justice and Kerwin J.: Both grounds of said dissent were rightly taken. As to the first ground: Under s. 261 (3), *Cr. Code*, it was for the jury to say "whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received". The jury were entitled to believe the whole, or part, or none, of appellant's testimony; if they accepted the whole, they were at least entitled to consider the wife's answer in connection with the slap; if they accepted only the evidence as to the conversation between appellant and his wife, they were entitled, in view of the word "insult" in s. 261, to consider whether that was sufficient to deprive an ordinary person of the power of self-control; and these matters were not put to the jury. As to the second ground: Reading in its entirety what the trial judge said to the jury, it is impossible to say that there was no error; the jury did not have such a clear and correct direction as the accused was entitled to; and under all the circumstances it could not be said that there was no substantial wrong or miscarriage of justice. The third ground of appeal should not have effect. Should a jury find that what was complained of was sufficient to deprive an ordinary person of the power of self-control, then, in deciding whether the accused was actually so deprived, they are not entitled to take into consideration any alleged drunkenness on the part of the accused. *Rex.* v. *Harms (supra)* disapproved on this point. *Per* Taschereau and Kellock JJ.: Appellant should succeed on the first ground of said dissent and also on the third ground of appeal. If the jury believed appellant's evidence, his wife's act of slapping him, which was wrongful in itself, was also against its verbal background (in a meaning which it was open to the jury to give to the words spoken), an "insult", within the meaning of that word in s. 261 (2). It was (under s. 261 (3)) for the jury to find (1) as to the sufficiency of the particular wrongful act or insult to cause an ordinary person to be deprived of self-control, and (2) whether appellant was thereby actually deprived of his self-control. In finding on the latter question the jury should consider the effect on appellant's mind of the intoxication to which he was subject at the time, if they should find he was intoxicated to any degree. *Rex* v. *Harms (supra)* approved. As to the erroneous direction several times to the jury as to onus with respect to drunkenness and provocation,

and the effect of this upon the jury in view of correct statements of the matter to the jury at other times: As there is to be a new trial, it is sufficient to refer to *Woolmington* v. *Director of Public Prosecutions*, [1935] A.C. 462, at 481 and 482, where the trial judge's duty on such matter is clearly defined. *Per* Estey J.: As to the first ground of said dissent: The conversation and the slap (if appellant's evidence thereon was believed by the jury) would, under all the circumstances, constitute evidence of a "wrongful act or insult" within the meaning of s. 261. An insult may be effected by either words or acts or a combination of both. Appellant's wife's words and her act were so closely associated that their meaning and effect could only be determined by considering them together and in relation to all the surrounding circumstances. It was a misdirection to charge the jury in such a way that their consideration was directed to the slap alone. As to the third ground of appeal: If the jury found the "insult" of such a nature as to be "sufficient to deprive an ordinary person of the power of self-control", then, in considering whether the accused "acted upon it on the sudden and before there had been time for his passion to cool", the jury might consider any facts in evidence that might have influenced the accused to act or not to act upon it, including his consumption of liquor and its effect upon him. (The view taken on this point in *Rex* v. *Harms*, *supra*, approved). Whether the effect of the trial judge's repeated misdirection to the jury as to onus of proof was corrected in their minds by his correct statements of the law at other times in his charge, it was not necessary to determine, as a new trial must be had on other grounds above. (The law as to burden of proof in criminal trials stated, with explanatory discussion thereon, and reference to the *Woolmington* case, *supra*, at p. 481). TAYLOR v. THE KING. **462**

8.——*Murder—Evidence—Crown witness declared adverse—Effect of cross-examination by Crown counsel on previous statement made police—Effect of cross-examination by Defence counsel on sketch attached to said statement—Whether admissible to test credibility, or evidence of content—Canada Evidence Act—Where witness declared adverse ss. 9 and 10 to be read together to make applicable proviso to s. 10—But proviso does not make that evidence which would not otherwise be evidence—S. 1014 of the Criminal Code—Charge to jury—Misdirection—New Trial.*—The appeal was from the judgment of the Court of Appeal for Manitoba (1947) 55 Man. R. 1, dismissing (Adamson J. and Donovan J. dissenting) appellant's appeal from his conviction on a charge of murder. At the trial Helen Elizabeth Berard, a witness for the Crown, gave evidence contradictory to statements made previously by her to the police and at

the inquest of the deceased. On motion of Crown counsel the trial judge declared her an adverse witness and Crown counsel thereupon cross-examined her on a previous statement, without making it an exhibit, which consisted of five pages written by the witness and an extra page on which appeared a sketch drawn by her showing the back of the head of a taxi driver to have a bald spot. (The taxi driver, with whose murder the accused was charged, did not have a bald spot.) The five pages and the sketch were not fastened together at the time of their inception. Counsel for the accused in cross-examining the witness showed her the sketch, which at the preliminary inquiry had been attached to the sheets containing the writing, but which he at the trial removed and handed to the witness. The trial judge ruled that the entire statement including the sketch should go in as an exhibit (14) filed by the defence. In charging the jury the trial judge said it was their duty keeping in mind his charge as to reasonable doubt, to establish if possible in which of the conflicting statements of the witness lay the germ of truth. The accused did not testify nor were any witnesses called on his behalf. *Held:* The judgment appealed from and the conviction should be set aside and a new trial directed. *Per* the Chief Justice and Kerwin, Taschereau and Estey JJ.: The prior self-contradictory statements of Crown witness Helen Elizabeth Berard, both sworn and unsworn, had no probative or evidential value as against the accused, and were not evidence of their content and could be used only to impeach the credit of the witness Berard, even though defence counsel cross-examined on them. The learned trial judge erred in going on the assumption that such prior self-contradictory statements were evidence of their content and inviting the jury to find "what germ of truth" there was in them. The said prior self-contradictory statements were not evidence of their content and the jury should have been so instructed, and not having been so instructed, it was not possible to say with confidence that without them the jury would have found a verdict of guilty. There was an error at the trial for the reasons specified above in connection with exhibit 14, and it could not be said that there was no substantial wrong or miscarriage of justice, within section 1014 of the *Criminal Code*. The sketch and the written document being one document from the commencement, the effect of what Crown counsel had done was to make available the whole of it so that counsel for the accused became entitled to refer to the sketch, not mentioned by Counsel for the Crown; while the action of counsel for the accused had the effect of making the writing, as well as the sketch, an exhibit; but neither one could serve as evidence against the accused except, in so far as the witness adopted them as part of her testimony, and did not take the exhibit

out of the category of something merely going to the credibility of the witness and raise it to the status of something that as against the accused was to be taken as evidence of the truth contained in the writing. Assuming that where a witness is declared adverse by the trial judge, sections 9 and 10 of the *Canada Evidence Act* should be read together so as to make applicable the last part of the proviso in subsection 1 of section 10:—"and that the judge, at any time during the trial may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit," this does not mean that the trial judge may make that evidence which would not otherwise be evidence. Target Tillson Birch (1924) 18 Cr. A.R. 26 at 28, 29 and the trial judge erred in directing the jury that they could treat the written part of exhibit 14 as evidence of the truth of what is therein stated Rex *v.* Dibble (1908) 1 Cr. A.R. 155, A. White (1922) 17 Cr. A. R. 59, Rex *v. Francis & Barber* [1929] 3 D.L.R. 593. The decision in John Williams (1913) 8 Cr. A. R. 133 distinguished. There was nothing in the evidence given by the witness Berard at the preliminary inquiry as read into the record of the trial to show that she was a self-confessed perjurer. Douglas Walter Atkinson (1934) 24 Cr. A.R. 144 distinguished. Rex *v.* Kadeshevitz [1934] O.R. 213; 61 C.C.C. 193 and Rex *v.* Ferguson 83 C.C.C. 23 at 25 referred to. *Per* Rand J.: The effect of counsel for the accused offering in evidence the sketch made by the witness Berard and cross-examining her thereon, was to introduce in evidence the written statement which accompanied the sketch and simply completed the evidence of the statement. It did not extend the statement's relevancy beyond credibility. The trial judge erred in holding that counsel for the accused, by putting the sketch in evidence, must be taken to have introduced the statement itself as substantive evidence on behalf of the accused, and in charging the jury that the incriminating facts contained in the statement were to be treated as having general testimonial character from which, and the rest of the evidence, the jury was to extract the truth. An error in such a vital matter cannot be held to have heen unquestionably overborne by the rest of the case presented. DEACON v. THE KING **531**

9.——*Speedy Trials of Indictable Offences by County Court Judge—Several Charges—Mixing Trials—Refusal to hear argument and deliver judgment at conclusion of each charge—Criminal Code, ss. 838, 839 and 857 (2).*—The accused, appellants, were charged on a number of counts on which, following a preliminary hearing, they elected speedy trial under Part XVIII of the Criminal Code, R.S.C. 1927, c. 36. The crimes charged fell into four groups. Those in the first group arose out of the

INCOME TAX—*Continued*

trust estate to insure an annual income therefrom sufficient for payment of annuities outstanding and to hold the trust estate, including accumulations and additions by deaths of annuitants or otherwise, and to pay annually to certain nephews and nieces 60 per cent of the net annual income; and to invest the surplus of such annual income as part of the capital of the trust estate; and, by clause 36, upon the death of the last annuitant or the death of the testator's son's widow, whichever should last happen, the trustees were to hold the trust estate, with all accumulations and additions, upon trust to distribute 67 per cent thereof to certain individuals and to pay and convey the residue (33%) unto the Royal Trust Company "for the creation and establishment of a trust to be known as the Burns Memorial Trust", which it was to administer, and the net annual income therefrom it was to distribute annually in equal shares among The Father Lacombe Home at Midnapore, the Branch of the Salvation Army having its headquarters at Calgary, and three other objects which, after the testator's death, were settled, by schemes approved by an order of court, to be: a fund to be administered by the City of Calgary for the benefit of poor, indigent and neglected children; a fund to be administered for the benefit of widows and orphans of members of the Police Force (in one case) and of the Fire Brigade (in the other case) of Calgary. The testator died in 1937. Annuitants and said widow were alive in the years now in question. In each of the years 1938, 1939, 1940 and 1941, of the total net income of the estate, 60 per cent thereof was paid to said nephews and nieces and the remaining 40 per cent was transferred by book entry by the executors from the estate income account into the estate capital account; the executors made no segregation or allocation of said 40 per cent of the net income as between the individuals entitled ultimately to 67 per cent thereof under said clause 36 of the will and the Royal Trust Company to which was to be paid and conveyed eventually the remaining 33 per cent thereof under said clause 36. The question was whether said 33 per cent of 40 per cent of the net income of the estate in each of the years 1938, 1939, 1940 and 1941 was subject to income tax. *Held* (varying the judgment of Cameron D.J. in the Exchequer Court, [1946] Ex. C.R. 229): The income in question was taxable in the hands of the executors except two-fifths of the income (the proportion from which the Father Lacombe Home and the Salvation Army are ultimately to receive the income) for the years 1938 and 1939. (Rand and Estey JJ. dissented in part, holding that no part of the income in question was taxable except the income (the whole of it) for the year 1941.) *Per* the Chief Justice, Kerwin and Hudson JJ. (the majority of the court): Assuming that the five beneficiaries of the trust to be administered by the

INCOME TAX—*Continued*

Royal Trust Company are charitable institutions within s. 4*(e)* of the Act, that does not give a right of exemption from taxation in respect to the income now in question, as that income is not the income of any of them; they are not to receive it at any time but only the income on the capitalized sums from said company; the income now in question is not income to them at all within the scope of the Act, particularly s. 3, and is not "income accruing to the credit of the taxpayer" within s. 11(1). As to the Burns Memorial Trust, that is merely the name for a fund to be administered by said company; and said company is only a trustee; the income in question does not belong to it beneficially and it is not a charitable organization. As to the Father Lacombe Home and the Salvation Army, the income in question is not "accumulating in trust for the benefit of unascertained persons" within s. 11(2) of the Act. Those conducting the work of said institutions are bodies corporate and politic, included in "person" as defined by s. 2*(h)* of the Act, and they are ascertained; they are not trustees in any sense; each organization uses its funds generally to help the poor and afflicted but the income in question is accumulating in trust for their benefit (to the extent of their shares) and not for those under their care. As to the three other institutions which are to receive shares of the income from the Burns Memorial Trust, the income in question is "accumulating in trust for the benefit of unascertained persons" within said s. 11(2); those three institutions are merely trustees to apply the gifts for the benefit of other persons, who are "unascertained"; while the income in question is not income of such last-mentioned persons, it is income accumulating in trust for their benefit, since they are entitled to a share of the income thereon. As to the years 1940 and 1941, s. 11(4)*(a)*, as enacted in 1940, c. 34, "income received by an estate or trust and capitalized shall be taxable in the hands of the executors * * *" applies. It is a true charging provision, not requiring the aid of s. 11(4)*(c)* enacted in 1941 (c. 18), which was added *ex abundanti cautela*. (Respondent did not contend for application of the former s. 11(4) as it stood in 1938 and 1939.) In the result, two-fifths of the income in question (the proportion from which the Father Lacombe Home and the Salvation Army are ultimately entitled to the interest thereon) for the years 1938 and 1939 (only) is free from taxation. *Per* Rand J. (dissenting in part): Under the direction in the will to accumulate and capitalize the portion of the net income, intended for the five charities and, at the time provided, to pay over the whole of the capital, including the added increments, to the trustees of the Burns Memorial Trust to hold in perpetuity and to distribute the annual income, the accumulations never belong to nor come into possession of the charities;