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LAW REPORTS

Supreme Court of Canada

Editors

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

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

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

74731—1½

ERRATA

in Volume I of 1953

Page 41, at line 3 of Caption, "150" should read "1950".
Page 119, at line 8, read "Canada Steamships Company v. The King".
Page 177, at line 3 of Caption, "c.32" should read "s.32".
Page 205, fn. (1) should read (2).
Page 205, fn. (2) should read (1).
Page 229, at line 16, "Cardoza" should read "Cardozo".
Page 253, fn. (3) should read "[1946] S.C.R. 489".

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.

Dufresne v. *Lacasse* (not reported). Petition for special leave to appeal dismissed with costs, 13th October, 1953.

Labour Relations Board v. *L'Alliance des Professeurs* [1953] 2 S.C.R. 140. Petition adjourned until bills 19 and 20 in present session Quebec Legislature disposed of or until first petition day of Easter sittings with liberty to apply if bills disposed of before. Order in Council to extend stay of execution accordingly would be unnecessary if Supreme Court think fit to extend stay of execution, 24th November, 1953.

Lobster Point Realty v. *Pew* [1953] 1 S.C.R. 285. Petition for special leave to appeal granted, 24th November, 1953.

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between 22nd of December 1952, and the 17th of December, 1953, delivered the following judgments which will not be reported in this publication:—

Armstrong v. *Wasslen*, [1952] 2 D.L.R. 695, the appeal is allowed and the judgment at trial restored, 26 June 1953.

Bakal v. *Petursson*, [1953] 2 D.L.R. 151, appeal allowed in part, 6 October, 1953.

Campbell & Pound Ltd. v. *B. C. Co-op Seeds Assoc.*, [1952] 3 D.L.R. 476, appeal dismissed with costs, Kellock and Cartwright JJ. dissenting, 28th April, 1953.

Dawson v. *Oberton*, [1952] 6 W.W.R. (N.S.) 465, appeal dismissed with costs, 8 June, 1953.

Diamond Taxicab Assoc. v. *Minister of National Revenue*, [1952] Ex. C.R., 331, appeal dismissed with costs, 4 February, 1953.

Fera v. *Fera* (not reported), appeal dismissed with costs, 15 October, 1953.

Furness (Can.) Ltd. v. *Branson Ltd.* (not reported), appeal allowed and judgment below reduced, 6 October, 1953.

Gaudrault v. *Cote. Q.R.*, [1952] K.B. 709, appeal dismissed with costs, 24 September, 1953.

Hassard v. *Peace River Co-op Seed Growers*, [1952-53] 7 W.W.R., (N.S.) 118, appeal dismissed with costs, 6 October, 1953.

Highland Stock Farms Ltd. v. *Attorney General for Alberta*, (not reported) appeal dismissed with costs, 4 June, 1953.

Johnston National Storage Ltd. v. *Mathieson* (not reported) appeal allowed with costs, Kerwin J. dissenting, 30 March, 1953.

Kennedy v. *Minister of National Revenue*, [1952] Ex. C.R. 258, appeal dismissed with costs, 27 April, 1953.

Kingsway Transports Ltd. v. *Lapointe, Q.R.* [1952] K.B. 463, appeal dismissed with costs, 19 June, 1953.

Lacasse v. *Dufresne, Q.R.* [1952] K.B. 80, appeal allowed with costs, 15 April, 1953.

Lepine v. *Charbonneau, Q.R.* [1952] K.B. 479, appeal dismissed with costs, 17 March, 1953.

L'Heureux v. *Frenette, Q.R.* [1952] K.B. 405, appeal dismissed with costs, 25 November, 1953.

MacKenzie v. *Robar*, [1952] 2 D.L.R. 678, appeal allowed with costs, 22 December, 1952.

Maranda Desaulniers v. *Peckham, Q.R.* [1953] K.B. 163, appeal dismissed with costs, 19 October, 1953.

Queen, The v. *Morin* [1949] Ex. C.R. 235, appeal allowed with costs, 26 June, 1953.

Rudd v. *T.T.C.* (not reported) appeal allowed with costs, Kerwin and Estey JJ. dissenting, 26 June, 1953.

Russell v. *Shaffer* (not reported), appeal allowed with costs, 19 November, 1953.

St. Pierre v. *The Queen, Q.R.* [1951] K.B. 468, appeal dismissed, 17 June, 1953.

Ship "Tricate" v. *Deep Sea Tankers Ltd.* (not reported) appeal dismissed with costs, 28 April, 1953.

Triton S.S. Co. Ltd. v. *Ship "Paloma Hills"* (not reported) appeal dismissed with costs, 28 April, 1953.

Verdun, City of v. *Bourque, Q.R.* [1953] K.B. 330, appeal dismissed with costs, 14 December, 1953.

Western Canada Greyhound Lines v. *Lord*, [1951] 3 D.L.R. 694, appeal allowed with costs, Taschereau and Fauteux, JJ. dissenting, 30 March, 1953.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

A TABLE

OF THE

NAMES OF THE CASES CITED

IN THIS VOLUME

THE SUPREME COURT OF CANADA

Notice to Members of the Bar

I have been instructed by the Court to direct the attention of members of the bar to the provisions of Rule 30 of the Supreme Court, and more particularly to the last paragraph of that Rule which reads as follows:

Rule 30

Part 3.—A brief of the argument setting out the points of law or fact to be discussed, with a particular reference to the page and line of the case and the authorities relied upon in support of each point. When a statute, regulation, rule, ordinance or by-law is cited, or relied on, so much thereof as may be necessary to the decision of the case shall be printed at length, as an appendix to the factum, or ten copies of such statute, regulation, rule, ordinance or by-law may be filed for the use of the Court.

As early as 1910 the Court announced that thereafter an appropriate punishment to be inflicted upon solicitors for not printing in their factums statutes and rules relied on would be to disallow all costs of such factums. Solicitors filing factums which do not comply with the Rule are liable to suffer the same penalty.

PAUL LEDUC,
Registrar.

74729—A

Avis aux membres du barreau

La Cour m'a demandé d'attirer l'attention des membres du Barreau sur les dispositions de la Règle 30 des Règles de Pratique de la Cour Suprême, et en particulier sur les dispositions du dernier paragraphe de cette Règle, qui se lit comme suit:

Règle 30.—

Partie III.—Un exposé condensé indiquant les points de droit ou de fait à discuter, avec un renvoi particulier à la page et à la ligne du dossier ainsi qu'aux autorités invoquées à l'appui de chaque point. Lorsqu'une loi, règle ou ordonnance, un règlement ou statut est cité ou invoqué, il doit en être imprimé au long, comme appendice du factum, tout ce qui peut être nécessaire pour la décision de la cause, ou dix copies de cette loi, règle ou ordonnance, de ce règlement ou statut peuvent être produites à l'usage de la cour.

Déjà, en 1910, la Cour avait annoncé qu'à l'avenir, la pénalité infligée aux Avocats qui n'imprimeraient pas dans leurs factums les statuts ou les règles invoquées serait de leur refuser tous les frais relatifs à ces factums. Les Avocats produisant des factums qui ne se conforment pas à la Règle s'exposent à la même pénalité.

PAUL LEDUC,
Registraire.

IN RE ESTATE JOHN ROSS ROBERTSON

1953

*Feb. 9, 10, 11, 12
*June 8

CHARTERED TRUST COMPANY, Trustee of John Sinclair Robertson Estate, and Executor of Jessie Elizabeth Cameron Estate, and BARBARA ANN ROBERTSON, surviving Executrix of the will of Irving Earle Robertson, deceased ..... APPELLANTS;

AND

TRUSTEES OF THE ESTATE OF THE LATE JOHN ROSS ROBERTSON *et al* ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Executors directed to carry on business—Annuities to be paid out of net profits, surplus accumulated—Reserve set up for depreciation—Whether on sale of business such reserve an accumulation of profits under the Accumulations Act, R.S.O. 1950, c. 4.

R., a newspaper owner, by his will authorized his trustees to carry on the business and hold all the real and personal property connected therewith until sold. Out of the net annual income properly divisible as profits, annuities were to be paid to his widow and his two sons and the Hospital for Sick Children, the remainder, if any, to be invested and accumulated. Upon the death of the survivor of the widow and the two sons the business was to be sold and the proceeds and all the remainder of the residue of the estate was to be paid to the Hospital. R. died in 1918, and his widow in 1947, predeceased by the two sons. In carrying on the business the trustees set up a reserve for depreciation with respect to the plant and the buildings and upon the sale of the property the next of kin claimed such write-offs were subject to the provisions of the Accumulation Act and that the amount realized by the sale showed them to have been excessive to such an extent that the whole amount so written off should be considered as income to which they were entitled.

Held: The reserve was not an accumulation within the meaning of the Accumulations Act. *Re Crabtree* 106 L.T. 49; *Re Gardiner* [1901] 1 Ch. 697, followed. *In re Bridgewater Navigation Co.* [1891] 2 Ch. 317, distinguished.

Decision of the Ontario Court of Appeal [1952] O.R. 283, affirmed.

APPEAL by the personal representatives of the next of kin of the late John Ross Robertson from the order of the Court of Appeal for Ontario (1), (Laidlaw and McKay JJ.

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

(1) [1952] O.R. 283; 2 D.L.R. 594.

1953

IN RE ROBERTSON

CHARTERED TRUST CO. *et al* *v.* JOHN ROSS ROBERTSON TRUSTEES

dissenting), dismissing an appeal from an order of Gale J. (1), allowing an appeal by the Trustees for the Hospital for Sick Children, Toronto, and dismissing a cross-appeal by the representatives of the next of kin from an order of Macdonell J. of the Surrogate Court of the County of York made on the passing of accounts in the deceased's estate.

G. W. Mason, Q.C., Terence Sheard, Q.C., G. E. Hill, Q.C. and *A. B. Whitelaw* for appellants.

C. F. H. Carson, Q.C., A. S. Pattillo, Q.C., and *A. J. Macintosh* for the Trustees appointed by Hospital for Sick Children, respondents.

J. L. Stewart for Trustees of the Estate of John Ross Robertson, respondent.

G. T. Walsh, Jr., for The Queen Elizabeth Hospital for Incurables, respondent.

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

KELLOCK J.:—Under the will here in question the testator placed the residue of his estate in the hands of trustees upon trust "that my executors and trustees shall carry on the business of the Evening Telegram and for *that purpose* shall hold all the real and personal property connected therewith until the same shall be sold as hereinafter set out." It will be noticed that for the purpose of carrying on the business the testator makes no distinction between the real and personal property.

In paragraph 16 the testator directed that out of the "general income" of his estate, including "the net annual income properly divisible as profits" derived from the Telegram business, there should be paid certain annuities, including annuities in favour of his wife and his two sons and the Hospital for Sick Children. The testator further directed the remainder of such net annual income, if any, to be invested and the accumulated fund to be disposed of "as the remainder of my estate is disposed of."

By paragraph 22 he directed that upon the death of his widow and sons, the Telegram business, including the land and buildings, should be sold and that the proceeds and all the remainder of the residue of his estate should be paid

(1) [1951] O.R. 309; 3 D.L.R. 241.

to trustees for the Hospital for Sick Children, which institution, subject to any outstanding annuities, was to be entitled to the income, there being a gift over to other charities in certain contingent events.

The testator died on the 31st of May, 1918, and his widow on July 11, 1947, she having been predeceased by the two sons. By a judgment of the Supreme Court of Ontario in 1939, it was held that any accumulation of income under paragraph 16 of the will subsequent to twenty-one years from the date of the testator's death was prevented by virtue of the Accumulations Act, the income so affected being payable to the next-of-kin of the testator.

On the passing of the trustees' accounts subsequent to the death of the widow, it appeared that the trustees, in carrying on the business, had set up a reserve for depreciation with respect to plant and buildings and that the amounts credited to this reserve subsequent to the twenty-one year period up to the date of the death of the widow, amounted to some $770,970. The next-of-kin, in their "surcharge" claimed that the

> said sum of $770,970.23 so held in reserve by the trustees, should be credited to income account accruing to the tenants *pur autre vie* (the next-of-kin) and cannot be credited to capital account except to the extent that the trustees can show that part or all thereof is required to make good impairment of capital on the realization of the Evening Telegram business and can show that any such transfer to capital account is not contrary to the provisions of the Accumulation Act.

The appellants say that the amount written off over the period in question for depreciation is subject to the provisions of the Accumulations Act and that such amount has been shown, by reason of the price realized on the sale of the business, to have been excessive to such an extent that the whole amount of the write-offs should now be considered income to which the appellants are entitled.

As stated in their factum, however, the appellants

> do not suggest that the executors acted improperly in setting up a reserve for depreciation.

Nor do they

> impugn in any way the general accounting practice of setting aside out of profits an annual amount as a reserve for depreciation.

1953

IN RE ROBERTSON

CHARTERED TRUST CO. *et al* *v.* JOHN ROSS ROBERTSON TRUSTEES

Kellock J.

As pointed out by the learned judge of first instance,

> It is not suggested that the trustees acted improperly in setting up a reserve for depreciation *at the rates which they applied,* but it is claimed that in view of subsequent events and information now available, that we are now in a position to say what the real depreciation was, and that the amount deducted from income was unnecessary to preserve the capital assets.

The "subsequent events" to which the learned judge refers, and "the realization of the Evening Telegram business" referred to in the surcharge, are one and the same.

It may be observed at this point that the business was sold as a going concern, inclusive of the goodwill, and that there was no distribution of the purchase price with respect to any particular asset. The appellants rely on an appraisal of the physical assets obtained at the instance of the trustees for the purposes of sale indicating values of the physical assets considerably in excess of book values, less the depreciation reserve, as a basis for the contention that the price received reflects this excess.

On this assumption the appellants contend that, by a species of "relation back", the write-offs for depreciation were correspondingly excessive and, to that extent, constitute income of which they were deprived during the relevant period, which should now be recouped to them out of the proceeds of sale. The decision in *In re Bridgewater Navigation Company,* (1), is, in the first instance, relied upon.

In the *Bridgewater* case part of the profits had been carried to a "depreciation of steamers" reserve, which, on the sale of the undertaking of the company, was held to be income to which the ordinary shareholders were entitled as against the preference shareholders. In my opinion, the fund in question in the *Bridgewater* case was not at all, however, a true depreciation reserve such as is in question in the case at bar. The fund in the *Bridgewater* case may have had some elements of a depreciation reserve but it was much more than that. It is sufficient to refer to the judgment of Kay L.J., at p. 333, and particularly to his statement that the reserve was made

> not on account of any depreciation in fact, but to provide for the possibility of loss in case of the sale of the undertaking as a going concern, or the plant being brought under the hammer.

(1) [1891] 2 Ch. 317.

It seems clear from this, that far from being a depreciation reserve in the modern sense, the fund there in question was a contingent reserve set up against a fall in market value should the assets have to be sold either as a going concern or piecemeal by auction. Kay L.J., went on to point out that not only were

> the plant and works of the company being fully and efficiently maintained in good order and repair out of current revenue

but that "purchases of steamers" were charged against revenue.

At page 328 Lindley L.J., with whom Lopes L.J., agreed, said:

> As regards the depreciation fund, if the company chose, as in fact it did, to keep up the value of its plant, &c., and also to set apart some of its profits to meet unforeseen contingencies, such setting apart was not a *necessary proceeding in order to ascertain the divisible profits;*

I think these references are sufficient to make it clear that the "depreciation of steamers" fund was not a true depreciation reserve in the sense that that word is under consideration in the case at bar. The directors had used revenue for capital purposes, such as the purchase of steamers. The fund was not a reserve against the depreciation of the steamers but against the possibility of a fall in their market value.

In *Bishop v. Smyrna,* (1), to which the appellants also refer, where the decision in *Bridgewater* was followed, an investment made by the defendant company having fallen in value in the market, the amount of the depreciation was debited to revenue. In the liquidation of the company, when the value of the investment had again risen, it was held that the amount of the appreciation must be treated as revenue. The reserve, like the reserve in the *Bridgewater* case, was simply a reserve against a fall in *market value* and has no relation to a true depreciation reserve. This decision illustrates just what was involved in *Bridgewater's* case.

In my opinion the true nature of a depreciation reserve such as is involved in the case at bar, is illustrated in the decision of the Court of Appeal in *In re Crabtree,* (2). In that case the testator authorized his trustees to carry on

(1) [1895] 2 Ch. 596. (2) (1912) 106 L.T. 49.

1953

IN RE ROBERTSON

CHARTERED TRUST CO. *et al* *v.* JOHN ROSS ROBERTSON TRUSTEES

Kellock J.

his business during the lifetime and widowhood of his wife and to pay her "the profits arising from my business". The question arose as between the tenant for life and remainderman as to whether, in addition to the cost of repairs to the machinery, the trustees were entitled to deduct from the profits otherwise payable to the wife, an annual sum for depreciation of the machinery at a specified rate on its original value. It was held that this was a proper deduction. The trial judge, Swinfen Eady J., as he then was, said at page 50:

> But in the ordinary course of ascertaining the profits of a business where there is power machinery and trade machinery which is necessary in order to perform the work of the business, it is, in my opinion, essential that, in addition to all sums actually expended in repairing the machinery, or in renewing parts, that there should be also written off a proper sum for depreciation, and that sum ought to be written off before you can arrive at the net profits of the business, or at the profits of the business; and it is not profit until a proper sum, varying with the class of machinery, with the nature of the business, and with the life of the machinery, has been written off for depreciation.

This decision was affirmed by the Court of Appeal, the passage quoted above from the judgment of Swinfen Eady J., being expressly approved by Cozens-Hardy M.R., and Fletcher Moulton L.J. At page 51 the latter said:

> All the plant in a business has a lifetime which is longer or shorter in various cases. If a man starts some new mills he keeps them in working order, but if he acted on the supposition that there was consequently no loss of value, or that the machines were not wearing out, he would be deluding himself, and in time find himself much poorer than he expected.

Buckley L.J., said on the same page:

> The profits of this business are not ascertained until a sufficient sum has been deducted to meet the depreciation of the machinery.
>
> One of the witnesses in his affidavit referred to the saleable value of this machinery. That is not the right standard. Here it is the value of the machinery for the purpose of this business, not the saleable value.

It is of interest to observe that the witness McDonald, who testified on behalf of the respondents, gave the following answer in cross-examination:

> Q. Is it a fact that the purpose of the depreciation allowance is to make up the loss of capital in that sense?
>
> A. To make up the loss in value, not exchange value but loss in value *to a business* of the capital assets.

Apart from the question as to the proper rate or rates at which write-offs for depreciation in any particular case should be made, and in the case at bar there is no question

of that sort, such write-offs are, in my opinion, necessary and proper, and profits or income cannot be ascertained until such write-offs have been made. The theory of such write-offs is maintenance of capital. If there are no profits until after proper write-offs for depreciation have been made, the fact that ultimate realization produces a surplus over book values, a result dependent on market conditions at the time of sale, does not establish that, after all, there were additional profits.

I think, therefore, that the Accumulations Act has no application. There is, in my opinion, no accumulation in connection with a true depreciation reserve within the meaning of the statute. The reserve, as already pointed out, is, in theory, made to maintain value and not to add to it. In *In re Gardiner* (1), the will there in question directed a yearly sum out of the rents of leaseholds held for a term of more than twenty-one years from the testator's death to be applied in effecting and keeping on foot a policy of insurance to secure the replacement at the end of the term of the capital that would be lost through not selling the leaseholds. It was held that the Accumulations Act had no application. Buckley J., as he then was, said at page 699:

> What the testator has here directed is not, in my opinion, an accumulation within the Act. All that he has done is to direct that the property shall not be diminished.

After referring to the judgment of Lindley L.J., as he then was, in *Vine v. Raleigh* (2), he added:

> I understand him to mean because they simply keep up the property and do not add to it.

Apart from the fact that it may be resorted to at any time for the purposes for which it was set up, a depreciation reserve of the nature of that here in question is intended merely to keep up the initial value of the property and not to add to it. In my opinion, therefore, such a reserve is not within the statute.

I would dismiss the appeal with all costs to be paid out of the estate, the costs of the Trustees for Estate of John Ross Robertson to be taxed as between solicitor and client.

(1) [1901] 1 Ch. 697. (2) [1891] 2 Ch. 13 at 26.

1953

IN RE ROBERTSON

CHARTERED TRUST CO. *et al* *v.* JOHN ROSS ROBERTSON TRUSTEES

RAND J.:—It is agreed that the direction to carry on the newspaper business, under the conditions laid down, was valid and that the setting aside of the depreciation reserve in the manner and to the extent done was authorized and unobjectionable. These premises furnish the background to the interpretation of art. 16 of the will which reads:—

> 16. And upon the further trust out of the General income of my estate *including the net annual income properly divisible as profits derived from the Evening Telegram business* and the income derived from the purchase money thereof if and when the same shall be sold to pay the following sum, namely, . . .

I take that to mean that once each year when the "net annual income properly divisible as profits" derived from the business has been transferred to the general income account of the trustees, the latter, under the article, have no further interest in the income of the business for that year; and that it is only the residue of that general income remaining after payment of the specific bequests that is directed to be accumulated for the beneficiary mentioned in the last paragraph of the article. That this is what the language used means is, I think, unquestionable. If the accumulation of that residue of income had ended at twenty years and the business had then vested in another person, can there be any doubt that the beneficiary of the latter would have been entitled to every asset of the business including the reserve? How, then, can it make any difference that the statute intercepts the accumulation beyond twenty-one years or that the proceeds from the sale of the business rather than the business itself vest in the beneficiary? or that there is the same beneficiary in both cases?

Mr. Sheard's argument based on *In re Bridgewater Navigation Company* (1), is vitiated by the assumption contrary to the fact that the profits to be accumulated mean all profits of the business including those placed in the reserve which may ultimately be found to be in excess of the requirements for which they were set aside. In Bridgewater admittedly the common shareholders were entitled to all the divisible profits, and the decision was that that right extended to accumulated earnings undisposed of in the reserves on the winding up.

(1) [1891] 2 Ch. 317.

The remaining question is whether the Statute of Accumulations applies to the reserve. The latter is not an accumulation directed by the testator; it is authorized and is voluntary, not directed: it is subject at any time to be resorted to for appropriate application. An accumulation means not only a process in time but a process of maintenance from a beginning, that is, that money placed aside shall be kept intact until the end of a period. The reserve possesses no such character; it does not irrevocably bind any appropriation to it for any period at all; the funds are at all times free and available for the purposes of the business; and its character is quite outside the mischief aimed at by the statute. This conclusion is confirmed by the fact that it has not been shown that one dollar of the existing sum represents an actual retention in the fund beyond twenty-one years. Any other view would in reality declare that a direction to carry on a business in the full sense of the term could not extend beyond twenty-one years.

I would, therefore, dismiss the appeal with all costs to be paid out of the estate, including, in the case of the trustees of the Robertson estate, costs as between solicitor and client.

Appeal dismissed with costs.

Solicitors for the trustee of the Estate of John Sinclair Robertson, appellant: *Macdonald & Macintosh.*

Solicitors for the executors of the Estate of Jessie Elizabeth Cameron, appellants: *Bicknell, Cameron & Chisholm.*

Solicitors for the executrix of the will of Irving Earle Robertson, appellant: *Holmstead, Sutton, Hill & Kemp.*

Solicitors for the appointed trustees, respondents: *Blake, Anglin, Osler & Cassels.*

Solicitors for the Trustees, respondents: *Fraser, Beatty, Tucker, McIntosh & Stewart.*

Solicitors for Grand Lodge, A.F. & A.M., respondents: *Kilmer, Rumball, Gordon & Beatty.*

Solicitors for The Children's Aid and Infants' Homes of Toronto, respondents: *Borden, Elliott, Kelley, Palmer & Sankey.*

Solicitors for the Queen Elizabeth Hospital, respondents: *Clark, Gray, Baird & Cawthorne.*

1953

*Mar. 4, 5, 6
*May 8

IN RE FASKEN

DAVID FASKEN Jr. ..... APPELLANT;

AND

BELLE FASKEN and other collaterals, INEZ FASKEN, Administratix of the Estate of Alice Fasken, deceased, and Executrix of the Estate of Robert Fasken, deceased, THE OFFICIAL GUARDIAN, and the EXECUTORS and TRUSTEES of the last Will of David Fasken, deceased. ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Construction—Accumulations—Direction that accumulated income of Trust Fund be distributed in accordance with Ontario law relating to distribution of personalty upon an intestacy, among next-of-kin to be ascertained at date of distribution—Whether lineal descendant "next-of-kin"—The Devolution of Estates Act, R.S.O., 1950, c. 103, s. 29.

Testator by his will directed that the residue of his estate be set up as a trust fund from the income of which a specified sum was to be paid his son R. annually for life, all income not so required to be capitalized. Upon the son's death the fund was to be divided into as many shares as there should be children surviving him or issue of such children living at his death, one such share to be set aside "in respect of" each surviving child or deceased child leaving issue. No child or issue was to have any other or greater interest in any share than such as should be "expressly given" to him. Out of the net income each child to be of his share paid a certain sum per annum and each issue out of his share or equal part of a share the same sum. The excess income was to be added to the capital of the shares. On the death of any child of R. the son surviving him the share attributed to the child with any accumulated income was to go as he or she might by will direct and failing such direction, to the issue of such child in equal shares, and in default of issue the share with accumulated income to be added to the other shares, such additions to be treated as if they had at all times been a part of the original shares. Any part of the capital fund or accumulated income at any time undisposed of was to be distributed in accordance with the law of Ontario relating to the distribution of personal estate upon an intestacy among the next of kin to be ascertained at the date of such distribution. If any share or shares or any part of any share of the capital fund was not vested in some person or persons as the beneficial owner or owners at the expiration of 21 years less one day from the date of the death of the last survivor of the son and his child or children and the issue of such child or children born in the lifetime of the testator, such share or shares, part or parts, at the expiration of the said period,

*PRESENT: Kerwin, Rand, Kellock, Locke and Cartwright JJ.

was to vest in the person or persons who at that time was or were the person or persons for whose benefit the Trustees were authorized to make payments out of income derived from such share or shares or part or parts thereof. The Testator died in 1929 and upon the termination of the 21 year period from the date of his death s. 1 of *The Accumulations Act*, R.S.O. 1950, c. 4, applied to prevent further accumulation of income of the estate. The direction of the Court was sought as to whether the income so directed to be accumulated should go to a grandson David Fasken Jr., the sole surviving lineal descendant, or to the collateral next of kin of the testator.

Held: "Kin" or "kindred" is the equivalent of blood relationship; "next of kindred" defines its degree. Children are "next of kindred" in the ordinary sense of the words and in s. 29 of *The Devolution of Estates Act*, R.S.O. 1950, c. 103, children as kin, are dealt with first, and it is only if there are no children, meaning issue, that the word "next" is applied to the remaining kin. As held by the trial judge, the accumulated income should go to the grandson. *In re Natt; Walker* v. *Gammage* 37 Ch. D. 517, explained; *Withy v. Mangles* 8 E.R. 724; 10 C. & F. 215, followed.

Decision of the Court of Appeal [1952] O.R. 802, reversed.

APPEAL from the judgment of the Court of Appeal for Ontario (1), Roach J.A. dissenting, allowing an appeal from the judgment of Barlow J. (2) on a motion for the construction of the will of David Fasken, deceased.

J. D. Arnup, Q.C. and *R. A. Davies* for David Fasken Jr., appellant.

J. T. Weir for Inez Fasken as Administratrix of Estate of Alice Fasken, widow of the testator and as Executrix of the Estate of Robert Fasken, son of the testator, respondent.

H. P. Hill, Q.C. for the Official Guardian representing unborn issue of David Fasken Jr., respondent.

C. F. H. Carson, Q.C. and *Allan Findlay* for collaterals, respondents.

W. B. Williston and *J. W. Swackhamer* for executors and trustees, respondents.

The judgment of the Court was delivered by:—

RAND J.—This appeal raises a question of the interpretation of a will. The instrument was made in 1924 and the testator died in 1929. At the time of its making, the testator's only son, Robert, was alive and as well a grandchild, David Jr., the present appellant, then aged about eight years. The son died in 1934 and the testator's widow

(1) [1952] O.R. 802; 711. (2) [1952] O.W.N. 349.

1953

IN RE FASKEN

FASKEN v. FASKEN

Rand J.

in 1935. The son had married twice. To his first wife was born David Jr., and to the second a daughter who died unmarried in 1945. David Jr. has not married. The testator was survived also by four brothers and four sisters. At the time these proceedings were commenced, two of the sisters and thirty-three nephews and nieces, the survivors of deceased brothers and sisters, were living. The widow of Robert is also alive and a party to the appeal, both as executrix of the will of her deceased husband and as administratrix of the estate of the testator's widow.

The estate of the testator was very substantial. The will directed the income from a capital sum to his wife during her lifetime, and from another sum to two children of a deceased cousin, with the capital to their issue and with cross-limitations over of both income and capital: power was given the trustees in their discretion to advance capital to either of the children upon entering business or marriage.

The remainder of the estate as a fund was dealt with as follows. From its income, trustees were to pay to the son, Robert, during his lifetime, annually, such a sum as with his income from other sources should make up $30,000; all income not so required was to be capitalized.

Upon the death of Robert, the trustees were to divide the fund with all accretions into as many equal shares as there should be children of Robert surviving him or issue of such children living at his death, and to set aside one such share "in respect of" each surviving child or deceased child so leaving issue. No child or issue was to have any other or greater interest in any share than such as should be "hereinafter expressly given" to him. Each share or portion in case there were more than one issue was to be subject to a spendthrift provision.

Each child was to be paid out of the net income from his share the sum of $10,000 per annum and each issue out of his share or equal part of a share the same sum. Income beyond such payments was to be added to the capital of the shares. Special provisions were made for discretionary payments to persons under the age of twenty-one. The trustees were empowered also to advance "to or for the benefit of any person then entitled to the benefit from the income of a share or part any sum or sums out of the capital of the share or part."

Clause 16 dealt with the capital in these terms:—

On the death of any child of my said son Robert who survives my said son, the share of the said child shall, with any accumulated income thereon, go in manner as he or she shall by will or by deed or other appointment in writing made in his or her lifetime direct, and failing any such direction, to the issue of such child, in equal shares if more than one such issue, and in default of issue the said share, with accumulated income, shall be added to the other shares into which the capital fund was divided as hereinbefore directed, and such additions to be treated for all purposes as if they had at all times been a part of the original share to which such addition is added.

Clause 17 made corresponding provision for the shares or parts attributed to the issue of deceased children of Robert.

Clauses 18 and 19 contemplated the possibilities of undisposed property:—

(18) In case the said capital fund or any part thereof, or any accumulated income thereon, is at any time undisposed of beneficially by the preceding provisions hereof, whatever is so undisposed of shall be distributed in accordance with the law of the Province of Ontario relating to the distribution of personal estate upon an intestacy, among my next-of-kin to be ascertained as of the date of such distribution.

(19) Notwithstanding anything hereinbefore contained, I expressly direct that if by the provisions hereinbefore contained in respect of the said capital fund, and the income derived therefrom, any share or shares or part or parts of any share or shares of the said capital fund, or any of the income thereof, is or are not vested in some person or persons as the beneficial owner or owners thereof at the expiration of twenty-one years less one day from the date of the death of the last survivor of my said son Robert, and his child and children, and the issue of such child and children born in my lifetime, any and every such share or shares, part or parts of any share or shares of the said capital fund, and any of the income thereof not so vested by the provisions hereinbefore contained, shall, at the expiration of the said period of twenty-one years less one day, immediately and absolutely vest in and be transferred by my Trustees to the person or persons who is or are respectively at that time the person or persons for whose benefit my Trustees are authorized to make payments out of income derived from such share or shares or part or parts of a share or shares (any income in my Trustees' hands to go with the share or part of a share from which it is derived), and I give and bequeath the same accordingly.

The income has greatly exceeded the amounts to be paid and as from December 2, 1950, being twenty-one years after the death of the testator, the Accumulations Act has intervened, and the immediate question is in whom the excess income is now vested. Barlow J. held in favour of the appellant as the "next-of-kin" of the testator as at the expiration of the twenty-one years; the Court of Appeal,

1953

IN RE FASKEN

FASKEN v. FASKEN

Rand J.

with Roach J.A. dissenting, construed the expression "next-of-kin" in clause 18 to refer to collaterals and to exclude children, and in that situation the case comes before this Court.

It will be seen, at the outset, that the testator has endeavoured to confine both income and capital to descendants; clauses 16, 17 and 19 put this beyond doubt; and that fact becomes significant to the interpretation of clause 18.

The case for the respondents rests on the assumption that the connotation, as a compound word, of the verbal construct, "next-of-kin", which, as a word, is not recognized in any of the standard dictionaries, is to be identified with that of the expression "next of kindred" in s. 29 of the Devolution of Estates Act (R.S.O. 1950, C. 103) which, it is argued, does not include descendants. The language of the section is:—

> Except as otherwise provided in this Act the personal property of a person dying intestate shall be distributed as follows: one-third to the wife of the intestate and all the residue by equal portions among the children of the intestate and such persons as legally represent the children in case any of them have died in his lifetime and if there are no children or any legal representatives of them then two-thirds of the personal property shall be allotted to the wife, and the residue thereof shall be distributed equally to every of the next of kindred of the intestate who are of equal degree and those who legally represent them, and for the purpose of this section the father and the mother and the brothers and sisters of the intestate shall be deemed of equal degree;"

I find nothing whatever there which treats children as not being of kin or "next of kindred". "Kin" or "kindred" is the equivalent of blood relationship; "next of kindred" defines its degree. That children are not "next of kindred" in the ordinary sense of the words would be absurd and no one suggests it. That property left by a deceased person should pass to those of his blood is one of our deeply imbedded ideas; the question has been, to which of them? Naturally it would be to the nearest in blood, but not all in the same generation have always shared equally. In determining degrees we have followed the rule of the civil law, counting forward or back from the deceased. The limited meaning attributed to "next-of-kin" as derived from "next of kindred" results from the latter's position in the text of the section and its application to ascendants and

collaterals; but if, in construing the expression, the emphasis is placed, where it belongs, on the word "next", the appropriateness of its use in its plain meaning becomes apparent. As is seen, children, as kin, are dealt with first and it is only if there are no children, meaning issue, that the word "next" is applied to the remaining kin.

The Court of Appeal took *In re Natt; Walker* v. *Gammage,* (1) to establish the proposition that "next-of-kin" means next-of-kin other than lineal descendants. The point raised there before North J. was whether an undisposed share of the residue should be divided among four grandchildren *per stirpes* or *per capita.* The two children of the testator had died, and it was argued that the language of the section of the English statute,

> and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever.

which has its counterpart in the latter part of s. 29 of the Ontario Act, was the applicable provision. The contention of counsel for three of the grandchildren, the descendants of one child, interpreted this language to read as if the words "including the descendants of deceased children", appeared after the word "intestate" and before the phrase "and their legal representatives". It was in relation to this contention that North J., at p. 521, says:—

> But I think the true construction is, that the words "next of kindred" mean next of kindred exclusive of issue of the intestate.

This, if I may say so, appears to be obvious from the fact that the language is introduced by the expression "if there is no child", that is, in the sense of issue. The decision went on the application of the earlier language that "if there is no wife, then all such personal property shall be distributed equally among the children", including descendants of children, and held the distribution to be *per stirpes.* That this was the only point decided is the view taken in the standard text books on the subject. The broader question seems to me to be concluded by *Withy* v. *Mangles,* (2) affirming the judgment of Lord Langdale, M.R., reported in 49 E.R. 377.

(1) [1888] 37 Ch. D. 517.

(2) [1843] 8 E.R. 724; 10 C. & F. 215.

1953

IN RE FASKEN

FASKEN v. FASKEN

Rand J.

Clause 19, dealing with the possible application of the rule against perpetuities, is an overriding provision which must be read with clauses 16 and 17. It provides for the vesting of the capital while a beneficiary is in receipt of income. But it might be that all issue of the son should have died before the period mentioned without having appointed the capital.

The possible situations in which clause 18 would operate would include such a failure of issue and of appointment, and as well, the intervention of the Accumulations Act. In the former, the question raised would fall because of the absence of descendants. On the other hand, the limited period of accumulation must certainly have been present to the mind of the testator and, by the interpretation proposed, to exclude the children from this income when by clauses 16 and 17 the transfer to them of the capital by the trustees, either in their discretion or imperatively under clause 19, is provided for, involves a contradiction of the testator's clear intention.

Mr. Carson stresses the language of clause 13,

> But no child or issue of a deceased child or my said son shall have any other or greater interest in any share than such as is hereinafter *expressly given* to him or her.

Later in the same clause it is declared that,

> In every case, any right or interest *given in any share* shall be subject to the limitations of the clause hereinafter contained.

meaning the spendthrift provision.

The phrases "expressly given" and "given in any share" are intended primarily to rebut any implication that because, say, the income in whole or part of a share goes to a child or that the trustees have discretionary powers to advance any part of its capital, the share is intended thereby to be vested in the beneficiary although its immediate enjoyment is limited; the beneficiary is at any time to be entitled only to what the instrument clearly gives him and nothing more and the shares, in that sense, have so far a notional character. That purpose indicates the meaning to be attributed to "expressly given"; it means clearly given, and, as shown by the use of the word "given", makes the expression no stronger or weaker than if it had been

"really given". What the testator intended to make unmistakable was that there were to be no benefits by implication: except as to what was given, each share was to remain open.

There is nothing to show that "next-of-kin" has become a recognized locution signifying kin other than children, nor does the reference in clause 18 to the "law of the Province of Ontario" governing intestate estates supply it; and that clause, besides designating the beneficiaries, fixes the time for determining them: *Hutchison* v. *National Refuges for Homeless and Destitute Children* (1).

Since the language used, in its ordinary meaning, includes the testator's children, of whom the appellant is the sole representative, the onus is on those who seek to exclude him. Mr. Carson has left nothing unsaid in support of the view taken by the Appeal Court, but he has not raised a serious doubt in my mind of the soundness of Mr. Arnup's contention.

I would, therefore, allow the appeal and restore the order of Barlow J. All parties are entitled to costs in this Court and in the Court of Appeal out of the estate, those to the executors and trustees of the testator to be as between solicitor and client.

Appeal allowed.

Solicitors for the appellant: *Fraser, Beatty, Tucker, McIntosh & Stewart.*

Solicitors for the respondents: Belle Fasken et al: *Tilley, Carson, Morlock & McCrimmon.*

Solicitor for the Official Guardian: *P. D. Wilson.*

Solicitors for the respondents, the Executors and Trustees: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

Solicitor for Inez Fasken, respondent: *J. D. Arnup.*

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(1) [1920] A.C. 794.

1953

*Feb. 13, 16, 17
*June 8

IN RE THE ONTARIO LABOUR RELATIONS BOARD

TORONTO NEWSPAPER GUILD, Local 87, AMERICAN NEWSPAPER GUILD (C.I.O.) (APPLICANT) ..... } APPELLANT;

AND

GLOBE PRINTING COMPANY (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Certiorari—Labour Law—Powers and duties of Ontario Labour Relations Board—Certification of bargaining agent—Prior ascertainment of facts—Obligation to exercise judicial functions—The Labour Relations Act, 1948 (Ont.) c. 51—Regulations, 1948, ss. 7-10.

The appellant union as provided by *The Labour Relations Act, 1948,* applied to the Ontario Labour Relations Board to be certified as the bargaining agent for certain of the respondent's employees, alleging the majority of them to be members of its union in good standing. At a hearing before the Board counsel for the respondent sought to cross-examine the union secretary to show that since the filing of the application a number of the employees had resigned. On the ground that this matter was irrevelant, the Board refused permission and also refused to question the witness itself, to examine the documents filed, or to order a vote of the employees in question, and granted certification. Notwithstanding that s. 5 of the Act provides that orders, decisions and rulings of the Board shall be final nor shall the Board be restrained by certiorari or otherwise by any court, respondent applied by way of certiorari to quash.

Held: (Rand and Cartwright JJ. dissenting) That the Board had declined jurisdiction and that its order should accordingly be quashed. *The Queen v. Marsham* [1892] 1 Q.B. 371, followed. *Rex v. Murphy* [1922] 2 I.R. 190, distinguished.

Decision of the Court of Appeal for Ontario [1952] O.R. 345, affirmed.

APPEAL from a judgment of the Ontario Court of Appeal (1), dismissing an appeal from the order of Gale J. (2), quashing a certificate granted to the appellant by the Ontario Labour Relations Board.

F. A. Brewin, Q.C. and *J. H. Osler* for appellant.

C. F. H. Carson, Q.C., C. H. Walker, Q.C. and *Allan Findlay* for the respondent.

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*PRESENT: Kerwin, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

(1) [1952] O.R. 345; 102 C.C.C. 318; [1952] 2 D.L.R. 302.
(2) [1951] O.R. 435; 100 C.C.C. 301; [1951] 3 D.L.R. 162.

KERWIN J.—By leave of the Court of Appeal for Ontario, the Toronto Newspaper Guild, Local 87, American Newspaper Guild (CIO) appeals from a judgment of that Court affirming an order of Gale J. The latter had granted an application by the respondent Globe Printing Company by way of certiorari for an order bringing into the Supreme Court of Ontario and quashing a certificate of the Ontario Labour Relations Board dated July 20, 1950. That certificate recited that the appellant's application for certification as a bargaining agent had come on for hearing in the presence of representatives of the parties; that the Board had satisfied itself that the appellant was a trade union within the meaning of the Regulations made under *The Labour Relations Act, 1948,* of the Province of Ontario, that all employees in the respondent's Circulation Department, with certain named exceptions, constituted a unit appropriate for collective bargaining, and that a majority of such employees were members in good standing of the appellant. The Board then proceeded to certify that the appellant was the certified bargaining agent of such employees. While the Board's proceedings were attacked on various grounds stated in the notice of motion, in my view it is necessary to consider only one, i.e., that the Board had exceeded its jurisdiction.

It is important to emphasize immediately one matter referred to in the reasons for judgment of Chief Justice Robertson, speaking on behalf of the Court of Appeal. In the Province of Ontario certiorari may be granted upon a summary application by originating notice (Rule 622), and no writ of certiorari shall be issued but all the necessary provisions shall be made in the judgment or order (Rule 623), and a form of order (82) is provided in these words:—

"Upon the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (or counsel) for .

1. It is ordered that do send to the Registrar's Office at Osgoode Hall, Toronto (or as may be necessary) forthwith (or on the day of) the , with all things touching the same, as fully and entirely as they remain in his custody, together with this order, that this Court may further cause to be done thereupon what it shall see fit to be done."

1953

IN RE ONTARIO LABOUR RELATIONS BOARD

TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kerwin J.

There would appear to be no doubt that if in any case the Court considered that "all things touching the same, as fully and entirely as they remain in his custody" had not been sent, the Court could remit the return to the inferior tribunal for completion. In the present case no return was made because, as the Chief Justice points out, the original of the Board's certicate was deposited with the Registrar of the Court by officers of the appellant, apparently after the delivery of judgment by Gale J. Affidavits were filed on behalf of the respondent on its motion for certiorari and in addition to making a copy of the Board's certificate an exhibit, the affidavits set out what had occurred at the hearing. It should be taken that the affidavits and exhibit referred to constituted the record as if it had been formally returned by the Board. Certiorari will lie if the Board exceeded its jurisdiction, and I understand that proposition is not denied.

The Board was established pursuant to s-s. 1 of s. 2 of the Act, and by s-s. 2 thereof the Board was authorized to exercise such powers and perform such duties as might be vested in or imposed upon it by the Act or the regulations made thereunder. By s-s. 7, 8 and 9 of s. 3:—

(7) The Board and each member thereof shall have the power of summoning any person and requiring him to give evidence on oath before the Board and to produce such documents and things as may be deemed requisite for the full investigation of any matter coming before the Board and shall have the like power to enforce the attendance of witnesses and to compel them to give evidence and to produce documents and things as is vested in any court in civil cases.

(8) The Board and each member thereof may receive and accept such evidence and information on oath, affidavit or otherwise as in its or his discretion it or he may deem fit and proper whether admissible as evidence in a court of law or not.

(9) Subject to the approval of the Lieutenant-Governor in Council, the Board may make rules governing its procedure which are not inconsistent with the regulations and may by such rules provide for the taking of votes on the premises of employers during working hours.

By section 4:—

4. If in any proceeding before the Board a question arises as to whether,—

.....

(*h*) a person is a member in good standing of a trade union,

the Board shall decide the question and, subject to such right of appeal as may be provided by the regulations, its decision shall be final and conclusive.

No applicable right of appeal is provided by the regulations. S. 5 provides:—

5. Subject to such right of appeal as may be provided by the regulations, the orders, decisions and rulings of the Board shall be final and shall not be questioned or reviewed nor shall any proceeding before the Board be removed, nor shall the Board be restrained, by injunction, prohibition, mandamus, quo warranto, certiorari or otherwise by any court, but the Board may, if it considers it advisable to do so, reconsider any decision or order made by it and may vary or revoke any such decision or order.

Pursuant to the Act, regulations were made by the Lieutenant-Governor in Council. The appellant is a trade union as defined by regulation 1(1) (o), and under regulation 1(3) the Circulation Department of the respondent is a unit appropriate for collective bargaining. Regulation 3(1) provides:—

3. (1) Every employee has the right to be a member of a trade union and to participate in the activities thereof.

Paragraph 1 of regulation 4 reads in part:—

4. (1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization, shall participate in or interfere with the formation or administration of a trade union, or contribute financial or other support to it.

Regulation 7(1) provides:—

7. (1) A trade union claiming to have as members in good standing a majority of employees of one or more employers in a unit that is appropriate for collective bargaining may, subject to the rules of procedure of the Board and in accordance with this regulation, make application to the Board to be certified as bargaining agent of the employees in the unit.

and in accordance therewith the appellant filed with the Board an application to be certified as the bargaining agent of the employees (with certain exceptions) of the respondent's Circulation Department. Paragraphs 1, 2 and 4 of regulation 9 read as follows:—

9. (1) Where a trade union makes application for certification under these regulations as bargaining agent of employees in a unit, the Board, in determining whether the unit in respect of which the application is made is appropriate for collective bargaining, may, before certification, if it deems it appropriate to do so, include additional employees in, or exclude employees from, the unit, and shall take such steps as it deems appropriate to determine the wishes of the employees in the units as to the selection of a bargaining agent to act on their behalf.

(2) When, pursuant to an application for certification under these regulations by a trade union, the Board has determined that a unit of employees is appropriate for collective bargaining.

(a) if the Board is satisfied that the majority of the employees in the unit are members in good standing of the trade union; or

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kerwin J.

(b) if, as a result of a vote of the employees in the unit, the Board is satisfied that a majority of them have selected the trade union to be a bargaining agent on their behalf;

the Board may certify the trade union as the bargaining agent of the employees in the unit.

(4) The Board may, for the purposes of determining whether the majority of the employees in a unit are members in good standing of a trade union or whether a majority of them have selected a trade union to be their bargaining agent, make or cause to be made such examination of records or other inquiries as it deems necessary.

By regulation 11 the Board has power to revoke a certificate where in its opinion a bargaining agent no longer represents a majority of employees in the unit for which it was certified.

Pursuant to s. 3(9) of the Act, the Board made rules which were approved by the Lieutenant-Governor-in-Council. In accordance with these rules the application by the appellant for certification as a bargaining agent for the employees (with certain exceptions) in the respondent's Circulation Department said to number 80, was verified by affidavit, and notice of the filing of application was given to the respondent. Also in conformity with the rules the respondent filed its reply, verified by affidavit. In this reply, after giving as 93 the number of employees in the unit, claimed by the respondent to be suitable for collective bargaining, paragraph 11 stated:—

"11. Any other relevant facts:

The Respondent respectfully requests that the Board determine if the Applicant represents a majority of the Respondent's employees within the appropriate bargaining unit herein as members in good standing within the meaning of the Regulations of the Board.

The Respondent further requests that this Board direct and conduct a vote by secret ballot of said employees in order to conclusively determine if they desire to be represented by the Applicant in their collective dealings with the Respondent.

Rule 12 provides:—

12. After the expiration of the time for receiving a report or for filing reply, intervention or statement of objections, as the case may be, the Registrar shall serve a notice of hearing in form 17 upon each of the parties to the proceeding, not less than 7 clear days from the date fixed in the notice.

and in accordance therewith the Registrar gave the respondent the prescribed notice (Form 17) of the hearing of the appellant's application.

Under the regulations and rules the Board was therefore obliged to conduct a hearing upon that application and, when it had determined that the Circulation Department was appropriate for certified bargaining, then, by regulation 9(2) (*a*):—

(*a*) if the Board is satisfied that the majority of the employees in the unit are members in good standing of the trade union;

(*b*) . . . the Board may certify the trade union as the bargaining agent of the employees in the unit.

Disregarding paragraph (*b*), since the Board refused to order a vote as requested by the respondent, this means that the Board's jurisdiction to certify depended upon its being satisfied that the majority of the employees in the Circulation Department were members in good standing of the appellant Union. But the Board said that it was irrelevant whether certain individuals had resigned from the Union and it therefore declined to investigate that all important question. In proceeding to certify, it exceeded its jurisdiction and excess of jurisdiction has invariably been held to be a ground upon which a Superior Court could quash an order of an inferior tribunal.

We start with the proposition that when an administrative tribunal has been set up by a paramount legislative body it is the intention that such tribunal keep within the powers conferred upon it. In England and in Canada the decisions have been uniform that a Superior Court is invested with the power and duty of seeing that such a tribunal as the Ontario Labour Relations Board does not act without jurisdiction.

Although a case of mandamus, the decision and reasoning in *The Queen* v. *Marsham* (1), is instructive. The clerk to the Lewisham Board of Works having been called before a magistrate to prove the execution of certain works and the amount of an apportionment, the applicants desired to cross-examine him as to whether the whole sum expended was paving expenses. The magistrate agreed with the contention of the Board that the apportionment of their surveyor could not be questioned, and refused to allow the clerk to be cross-examined or substantive evidence to be given by the applicants upon the point. An ex parte application for an order nisi for a mandamus had been

(1) [1892] 1 Q.B. 371.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD

TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kerwin J.

refused by a Divisional Court but was subsequently granted by the Court of Appeal. Upon cause being shown, the Court consisting of Lord Halsbury L.C., Lord Esher M.R. and Fry and Lopes L.JJ., made the rule absolute. At page 375 Lord Halsbury stated that the act of the magistrate was not a mere rejection of evidence but amounted to a declining to enter upon an inquiry on which he was bound to enter. Lord Esher, at 378, having stated that the application for a mandamus was made upon the ground that the magistrate declined to exercise the jurisdiction given him by law, continues:—

> Now, the form in which he is said to have declined jurisdiction is, that he refused to hear certain evidence which was tendered before him, and it is suggested on behalf of the board that such refusal, at the most, only amounted to wrongful refusal to receive evidence, and not to a declining of jurisdiction. The distinction between the two is sometimes rather nice; but it is plain that a judge may wrongly refuse to hear evidence upon either of two grounds: one, that even if received the evidence would not prove the subject-matter which the judge was bound to inquire into; the other, that whether the evidence would prove the subject-matter or not, the subject-matter itself was one into which he had no jurisdiction to inquire. In the former case the judge would be wrongly refusing to receive evidence, but would not be refusing jurisdiction, as he would in the latter. Here the magistrate does not say that the evidence tendered would not prove the fact that the claim of the board included matters outside the statute; he has refused to hear the evidence, even though it would prove that fact; he has, therefore, declined jurisdiction.

The other two members of the Court concurred.

Lord Esher's judgment, I think, sets forth the test to determine whether there be, in any particular case, a mere rejection of evidence or a refusal of jurisdiction. There is nothing inconsistent in it and the judgment of the Judicial Committee in *Rex* v. *Nat Bell Liquors,* (1); but I might point out two things in connection with the latter. When the occasion arises, it may be necessary to read it in the light of the judgment of Lord Goddard, speaking on behalf of the King's Bench Division in *Rex* v. *Northumberland Compensation Appeal Tribunal* (2), affirmed by the Court of Appeal (3); and that we are not concerned with the applicability of the *Nat Bell* judgment to a motion "to quash a conviction, order, warrant or inquisition" as those words are used in s. 65 of the Ontario Judicature Act, R.S.O. 1950, c. 190.

(1) [1922] 2 A.C. 128. (2) [1951] 1 K.B. 711.
(3) [1952] 1 K.B. 338.

The decision in *Nat Bell* was that a conviction by a magistrate for an offence under the Alberta Liquor Act could not be quashed on the ground that the depositions showed that there was no evidence to support the conviction or that the magistrate had misdirected himself in considering the evidence. The decision in *Rex* v. *Murphy* (1), relied on by the appellant, is referred to in the *Nat Bell* case at 152 where it is said that it appears from the very full and able discussion of all the authorities therein:—

> To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all.

The Irish case is distinguishable because while there had been a refusal at a court-martial to allow cross-examination of two witnesses it was held that the court-martial had jurisdiction.

The judgment of the Judicial Committee in *Wilson* v. *Esquimalt Railway Co.* (2), was also relied upon by the appellant. There an action had been brought by the Railway Company to establish its title to coal and other minerals underlying certain lands on Vancouver Island and for a declaration that a grant authorized by the Lieutenant-Governor in Council of British Columbia was null and void. The latter was given power, if he was reasonably satisfied of certain conditions, to direct the issuance of the grant, and it was held by the Judicial Committee that a court of law, dealing with actions of the Executive, could not say that there was no evidence upon which it could be so satisfied. That conclusion was arrived at notwithstanding the fact that the Privy Council, while thereby disagreeing with the trial judge and the Court of Appeal for British Columbia, agreed with the majority of the latter that no complaint could be made of the circumstance that the Lieutenant-Governor in Council declined to adjourn the hearing before him in order to permit the Railway Company to cross-examine certain deponents. The decision on this last point was particularly relied upon by counsel for the appellant but it might be pointed out that it was only necessary that the Lieutenant Governor in Council be reasonably satisfied of the conditions specified.

(1) [1921] 2 I.R. 190. (2) [1922] 1 A.C. 202.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kerwin J.

Sections similar to s. 5 of the Act, although differing in form, have been enacted by legislative bodies from time to time but it is unnecessary to set forth the decisions in which they have been considered because, if jurisdiction has been exceeded, such a section cannot avail to protect an order of the Board; and I understood that to be conceded by counsel for the appellant. Since in my view the Board exceeded its jurisdiction, s. 4 of the Act, also relied upon by counsel for the appellant, does not assist him. Finally, it is stated in the Board's reasons, which I hold to be a part of the return, that the Board "further finds on the basis of the documentary evidence submitted by the parties." There is nothing to justify the suggestion that the Board, or any member thereof, was even purporting to act under the provisions of s-s. 7 or 8 of s. 3, or that they had any evidence other than the Union records placed before it by the appellant.

The appeal should be dismissed with costs.

RAND J. (dissenting): The complaint here is that the courts have exceeded their authority in setting aside an order of the Labor Board certifying a bargaining agent for a group of employees in Toronto. The immediate question involved a finding by the Board that the required number of persons employed within the unit were members of the applicant union. On the hearing, the employer raised the question of resignations made prior to the hearing but subsequently to the filing of the application, and on this he was denied the right to cross-examine a representative of the union who was present and had submitted undisclosed evidence to the Board. The reason given by the Board, after considerable argument, was that the matter proposed was irrelevant. During the discussion, counsel made a reference to the constitution of the union, implying that in some way it affected the issue raised. There had been placed before the Board, evidently, the application cards for memberships, but in accordance with its practice these were not shown to counsel for the employer. There may have been no objection to placing the constitution before the Board at the hearing, but it was neither asked for nor produced, nor did the Board in its decision refer to it.

By s. 4 of *The Labour Relations Act, 1948*, where a question is raised whether "a person is a member in good standing of a trade union", the Board shall decide it, and, subject to such right of appeal as may be provided by the regulations, its decision shall be final and conclusive. S. 7 authorizes the Lieutenant-Governor in Council among other things to make regulations generally for carrying out provisions of the Act into effect but no regulation has been passed giving a right of appeal.

S. 5 enforces this conclusiveness by providing that subject to any such right of appeal,

> the orders, decisions and rulings of the Board shall be final and shall not be questioned or reviewed, nor shall any proceeding before the Board be removed, nor shall the Board be restrained by injunction, prohibition, mandamus, quo warranto, certiorari or otherwise by any court;

but the Board may reconsider any decision or order made.

By s. 3 s-s. (3) each member of the Board must take an oath to execute his office "faithfully, truly and impartially" and that he will not, except in the discharge of his duties, "disclose to any person any of the evidence or any other matter brought before" the Board. By s-s. (8) the Board and each member of it "may receive and accept such evidence and information on oath, affidavit or otherwise as in its or his discretion it or he may deem fit and proper, whether admissible as evidence in a court of law or not."

S. 9 excludes certain classes of employees such as those engaged in farming, members of a police force and of a fire department within the meaning of certain statutes, and employees of municipal corporations, including school boards, having certain statutory powers.

Regulations were made and several of them bear upon the issue. By No. 9(2), upon an application for certification of a union as the bargaining agent of employees in a unit,

> (*a*) If the Board is satisfied that the majority of the employees in the unit are members in good standing of the trade union.

the Board may certify accordingly. Then, in (4) of the same regulation,

> The Board may, for the purposes of determining whether the majority of the employees in a unit are members in good standing . . . make or cause to be made such examination of records or other inquiries as it deems necessary.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD *v.* GLOBE PRINTING COMPANY

Rand J.

The statute provides in s. 3 s-s. (9) that

> Subject to the approval of the Lieutenant Governor in Council, the Board may make rules governing its procedure which are not inconsistent with the regulations . . .

Exercising this power, the Board promulgated, as rule 12, the following:—

> After the expiration of the time for receiving the report or for filing reply, intervention or statement of objections, as the case may be, the Registrar shall serve a notice of hearing in Form 17 upon each of the parties to the proceeding, not less than seven clear days from the date fixed in the notice.

This is the only reference in either the statute, the regulations or the rules, to a hearing.

S. 9 of the Act on its face contains the seeds of questions of law of some importance and set against s. 5, they present the appearance of conflicting provisions. The Board is admittedly a body with a limited jurisdiction, but a jurisdiction that, in many cases, depends upon the determination of questions of law as well as of fact. There is nothing in the Act expressly giving to the Board exclusive power to decide questions of law; but the writ of certiorari and other special remedies, for centuries the means provided for controlling unauthorized action by inferior bodies exercising the power of law, are forbidden.

How, then, are we to reconcile these apparent contradictions? Every such enactment, consciously or subconsciously, lies with a general and vague but nonetheless real scope of action within which the body created is contemplated and intended by the legislature to act; and the privative provision, s. 5, is designed to exclude the control of the courts within that area. In the absence of a clear expression to the contrary, we are bound by the principle that *ultra vires* action is a matter for the superior courts: the statute is enacted on that assumption. Any other view would mean that the legislature intended to authorize the tribunal to act as it pleased, subject only to legislative supervision: but that is within neither our theory of legislation nor the provisions of our constitution. The acquiescence of the legislatures, particularly during the past fifty years, in the rejection by the courts of such a view confirms the interpretation which has consistently been given to the privative clause.

The real controversy lies in the determination of the boundaries of that contemplated scope; and when, as today, administrative bodies are regulating civil relations which formerly were not within the cognizance of law at all, by what rule or standard are we to test the jurisdictional validity of their decisions? Certainly where the Board is at liberty to inform itself of matters of fact by any means, as it is here, and where it can act if "satisfied" of certain things and where its findings are declared to be final and judicial review excluded, I doubt that the test can be anything less than this: is the action or decision within any rational compass that can be attributed to the statutory language? It is significant here that neither the statute nor the regulations make any reference to a hearing; that step, as has been seen, arises only by way of implication from procedural rules. But assuming such a right, it has been entrusted with so many qualifying powers in the Board that its ordinary function has been virtually emasculated. It is reduced to an opportunity for each side to present its own evidence unilaterally and by its own means only; but even to that extent, in many respects, it is a disclosure to the Board only. There are, undoubtedly, matters affecting interests on which information privately obtained may be more accessible and quite as dependable as any disclosed at a hearing; and seeing that the Board is entitled to the presumption that it acts in good faith and according to the oath of each member, in the simple matter of finding facts, it must be little short of an act of bad faith that can justify a court's interference.

I am fully appreciative of the fact that the safety of permitting action based upon information gathered in the dark depends upon the integrity and the intelligence of those on whom the authority is conferred, and that such a method clashes with the lessons of our law's experience; the best means to truth remain those of open disclosure of the facts. Yet on both sides of these controversies we have the strongest insistence upon the secrecy of what is called "confidential" matter. We need not be warned of the dangers of a hugger-mugger procedure generally; the open public court is the citadel of our legal system. Authority to

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Rand J.

make decisions on matters undisclosed to both sides is the first step toward arbitrary judgment, the final stage of which, if allowed to be pursued, is dictation.

But decisions of this nature on matters of fact and erroneous rulings in the course of a hearing are not, under this statute, for the courts; it is to the legislature that complaints against them must be addressed. It is to no purpose that judicial minds may be outraged by seemingly arbitrary if not irrational treatment of questions raised: these views are irrelevant where there is no clear departure from the field of action defined by the statute.

I would, therefore, allow the appeal and restore the order of the Board with costs throughout.

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

KELLOCK J.: The facts out of which this appeal arises are as follows. On June 7, 1950, the appellant made application in writing, pursuant to regulation 7 under *The Labour Relations Act, 1948* (Ontario), to be certified as bargaining agent for certain employees of the respondent, the appellant claiming that

> the applicant union has a majority of the employees in the Circulation Department as members in good standing.

The regulations empower the board established under the Act to grant certification if "satisfied" that the majority of the employees in a "unit appropriate for collective bargaining" are members in good standing of an applicant trade union. By s. 4 of the statute it is provided that, if in any proceeding "before" the board a question arises as to whether

> (*h*) a person is a member in good standing of a trade union.

the board is to decide the question, such decision to be final and conclusive.

Certification affects substantial legal rights of both employer and employee. Regulation 10 reads:

> 10. Where a trade union is certified under the Act or these regulations as the bargaining agent of the employees in a unit
>
> (*a*) The trade union shall immediately replace any other bargaining agent of employees in the unit and shall have exclusive authority to bargain collectively on behalf of employees in the unit and to bind them by a collective agreement until the certification of the trade union in respect of employees in the unit is revoked;

(*b*) if another trade union had previously been certified as bargaining agent in respect of employees in the unit, the certification of the last-mentioned trade union shall be deemed to be revoked in respect of such employees; and

(*c*) if, at the time of certification, a collective agreement binding on or entered into on behalf of employees in the unit is in force, the trade union shall be substituted as a party to the agreement in place of the bargaining agent that is a party to the agreement on behalf of employees in the unit, and may, notwithstanding anything contained in the agreement, upon two months' notice to the employer terminate the agreement in so far as it applies to those employees.

The application was, as required by rule 3(2) of the rules made by the board, verified by the affidavit of the secretary of the appellant, and, as required by the rules, written notice of its filing was, on June 9th, duly given to the respondent by the registrar of the board.

By its reply, dated June 15th, the respondent requested the board to determine "if the applicant represents a majority of the respondent's employees within the appropriate bargaining unit as members in good standing".

Subsequently, on June 28th, the registrar caused to be served upon the board, pursuant to the rules, a notice of hearing of the application for July 12th. Rule 13 provides that

> where any person served with a notice of hearing fails to attend upon the hearing or any adjournment thereof, the Board may proceed in its absence.

The statute contains provisions which indicate the nature of the hearing to be conducted "before" the board. S. 3 provides that

> (7) The Board and each member thereof shall have the power of summoning any person and requiring him to give evidence on oath before the Board and to produce such documents and things as may be deemed requisite for the full investigation of any matter coming before the Board and shall have the like power to enforce the attendance of witnesses and to compel them to give evidence and to produce documents and things as is vested in any court in civil cases.
>
> (8) The Board and each member thereof may receive and accept such evidence and information on oath, affidavit or otherwise as in its or his discretion it or he may deem fit and proper whether admissible as evidence in a court of law or not.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kellock J.

In *Board of Education* v. *Rice*, (1), the House of Lords laid down principles which apply to a tribunal of the nature of that here in question. At page 182 Lord Loreburn L.C., said that in such cases the tribunal

> must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything.

After pointing out the power of the board there in question to obtain information in any way it thought best (a much wider power than the power provided by s-s (8) above quoted), the Lord Chancellor went on to state that in so doing it must always be upon

> giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view . . . But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

These principles were again affirmed in *Local Government Board* v. *Arlidge*, (2).

When the matter here in question came on for hearing on July 12th, the matter of the composition of the bargaining unit having been disposed of, the board proceeded to deal with the claim of the appellant to have a majority of the employees in its membership. Counsel for the appellant stated to the board that appellant claimed to have fifty-nine members and filed with the board a bundle of documents which he stated represented fifty-six members who had paid initiation fees or dues, and one other document stated to represent a member who had mailed a card to the secretary of the appellant without enclosing any money for initiation fees or membership dues, but who subsequently, on request of the secretary of the appellant, had sent the latter $1.00. Counsel further stated that the recording sheets of the applicant union for the month of June, 1950, showed fifty-eight members. The secretary of the appellant, who, as already mentioned, had taken the affidavit of verification of the petition, then made an unsworn statement concerning the document representing the member who had sent in his fee subsequently.

(1) [1911] A.C. 179. (2) [1915] A.C. 120.

The board thereupon requested counsel for the respondent to produce and file lists of employees in its circulation department, showing the occupational classification of individual employees, as required by a requisition previously sent by the registrar of the board to the respondent. Counsel for the respondent thereupon filed lists of employees of the department as of the 7th of June, 1950 and the 5th of July, 1950, as had been requested.

Counsel for the respondent then submitted to the board that the documents filed by counsel for the appellant did not show that the appellant represented a majority of members in good standing and that he wished to cross-examine the secretary of the appellant who had given evidence. In response to a question from the chairman as to the purpose of his submission and of the proposed cross-examination, counsel stated that he had information that a number of employees in the department in question had sent in their resignations as members of the appellant. The chairman stated, however, that "he saw no relevancy to resignations."

Some argument then took place by both counsel in which counsel for the respondent pointed out that to refuse the respondent the right to cross-examine was directly at variance with the board's practice, as previously followed, of checking the membership alleged by an applicant union, with the lists of the employer as of the date of the application for certification and as of the date of the hearing, and that since counsel for the respondent was precluded by previous rulings of the board in similar proceedings from himself examining the membership cards or other evidence filed by the appellant, the right to cross-examine, as asked, was vital in order to bring out the relevant and material facts.

Counsel for the appellant objected to any cross-examination of the union officials and submitted that the matter of resignations was irrelevant and that the documents which had been filed did represent members in good standing according to "the constitution of the applicant union". He, however, refused to deny receipt of resignations from membership in the union of employees in the circulation department, nor did the secretary to the appellant, who had given

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kellock J.

evidence, do so. The chairman of the board ruled against any cross-examination of the witness by counsel for the respondent.

Counsel for the respondent thereupon submitted that since the respondent was precluded by the board's own regulation from soliciting evidence from employees, if it wished to avoid being charged with interference with their rights under the regulations, and since the board had ruled against his right to cross-examine, a heavy onus lay upon the board to make a full and fair investigation in order to satisfy itself that a majority of the employees of the union were members in good standing of the appellant. Counsel submitted that the board itself should question the witness with respect to whose testimony cross-examination had been denied and should itself examine the documents filed. This was also objected to by counsel for the appellant and the board sustained the objection.

Counsel for the respondent then submitted that the board ought to make a full and fair investigation, including the examination of some or all of the employees of the company in the department concerned so that it might be satisfied that a majority of the employees were members in good standing of the appellant. Counsel for the appellant objected to any such investigation on the ground of delay. Counsel for the respondent then submitted that the issue could be resolved by secret ballot, as had been requested by the respondent in its reply.

All these facts are proved by the affidavit of counsel for the respondent. They are not denied and there is no other evidence. Counsel for the appellant in this court submitted that the court should not draw any inferences but should confine its consideration to facts explicitly stated in the affidavit.

The board did not take any secret ballot, and, so far as is disclosed by the record, made no inquiry or investigation beyond what appears above.

It may be observed with respect to the subject-matter of the proposed cross-examination of the appellant's witness, that subsequent to the hearing and prior to the 8th of August, counsel for the respondent was voluntarily furnished by an employee in the department in question with

nineteen certificates of post office registration which the employee instructed counsel were receipts for registered letters of resignation mailed to the secretary of the appellant between the 8th of June and the 10th of July, 1950. Counsel's instructions with respect to the existence of resignations upon which he had acted at the hearing in proposing to adduce evidence with respect to this matter, cannot, therefore, be considered as other than well-founded.

It is plain from this recital of facts that there was no "hearing" of the matter before the board for investigation within any reasonable interpretation of the word. There is nothing in either s-s. (7) or (8) of s. 3 remotely to suggest that a witness giving evidence before the board at a hearing which may not proceed *ex parte,* may give evidence without being liable to be examined by a party adverse in interest. The statute, in my opinion, proceeds upon the view that the hearing is to be a real hearing, fairly conducted as between the opposing parties whatever may be the issue which the board may be called upon to determine in particular circumstances.

In the case at bar it was impossible for the board to determine whether any one of the persons alleged to be members of the appellant was in fact a member in good standing if the board refused to enter upon the question as to whether or not, assuming membership to have originally existed, it had continued. This was the very obligation placed upon the board by the statute. By refusing to enter upon it, the board in fact declined jurisdiction. It is well settled that any order pronounced by an inferior tribunal in such circumstances is subject to the supervising jurisdiction of the superior courts, exercisable by way of certiorari.

The appellant refers to s. 5 of the statute which reads as follows:

> 5. Subject to such right of appeal as may be provided by the regulations, the orders, decisions and rulings of the Board shall be final and shall not be questioned or reviewed nor shall any proceeding before the Board be removed, nor shall the Board be restrained, by injunction, prohibition, mandamus, quo warranto, certiorari or otherwise by any court, but the Board may, if it considers it advisable to do so, reconsider any decision or order made by it and may vary or revoke any such decision or order.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kellock J.

The appellant, however, admits that this section would not deprive a superior court of jurisdiction "if there were a manifest defect of jurisdiction", but the appellant contends that a mere refusal to permit the cross-examination of a witness does not amount to a "manifest defect of jurisdiction". In support of this contention, reference was made to *Rex* v. *Murphy,* (1) where the refusal of a court-martial to permit cross-examination of two witnesses for the prosecution with respect to certain evidence given by them at a previous proceeding with relation to the accused, was held not enough to invoke the supervising jurisdiction of the court.

The principle laid down in the case just cited may for present purposes be taken as correct in circumstances such as were in question in that case, but the distinction between such a case and the case at bar is that the board here in question, having refused to permit the respondent to examine the documentary evidence filed by the appellant and having by its regulations and the interpretation which it had given them, prohibited the employer from himself inquiring among his employees with respect to union membership, effectively removed from the respondent by its ruling with respect to the proposed cross-examination its only remaining means of knowing what the case of the appellant was. Moreover, the board itself declined to enter into the inquiry which the statute laid upon it. Such arbitrary conduct is not within the principle of the case referred to but, in my view, makes applicable the principle of the decision in *The Queen* v. *Marsham,* (2).

In that case a district board of works had incurred expense under a statute in paving a street and sought to recover against an abutting owner his proportional share. The magistrate before whom the matter came refused to permit cross-examination of the clerk of the board as to whether the whole sum, the proportioned part of which was sought to be recovered from the defendant, included items other than purely paving expenses. It was held by the Court of Appeal that the act of the magistrate was not a mere rejection of evidence but amounted to a declining to

(1) [1921] 2 I.R. 190. (2) [1892] 1 Q.B. 371.

enter upon an inquiry upon which he was bound to enter. What is said by Lord Esher, M.R., at page 378, is pertinent:

> Now, the form in which he is said to have declined jurisdiction is, that he refused to hear certain evidence which was tendered before him, and it is suggested on behalf of the board that such refusal, at the most, only amounted to a wrongful refusal to receive evidence, and not to a declining of jurisdiction. The distinction between the two is sometimes rather nice, but it is plain that a judge may wrongly refuse to hear evidence upon either of two grounds: one, that even if received the evidence would not prove the subject-matter which the judge was bound to inquire into; the other, that whether he evidence would prove the subject-matter or not, the subject-matter itself was one into which he had no jurisdiction to inquire. In the former case the judge would be wrongly refusing to receive evidence, but would not be refusing jurisdiction, as he would in the latter. Here the magistrate does not say that the evidence tendered would not prove the fact that the claim of the board included matters outside the statute; he has refused to hear the evidence, even though it would prove that fact; he has, therefore, declined jurisdiction.

In the course of the argument in this court the possibility was suggested from the bench that the ruling of the board, excluding the subject-matter of resignation from consideration, might have proceeded upon the footing that under the union constitution any withdrawal of membership was ineffective at the time of the hearing.

Nowhere in the proceedings, below was such a point taken on behalf of the appellant, nor is it taken in the factum of the appellant in this court. It is, moreover, to be noted that the board itself was a party to these proceedings in both of the courts below. Neither the board nor the appellant saw fit to file any material but was content to have the case disposed of on the affidavit of counsel for the respondent before the board, and the appellant's position in this court, as already mentioned, is that no inferences should be drawn beyond what is expressly stated in the affidavit.

Had the union constitution contained any such clause, it is inconceivable that the matter would not have been referred to before the board itself or evidence with respect to the point been placed before the court in these proceedings. I do not think, therefore, that this court can be asked to assume anything in this respect. The evidence is that the board ruled that the subject-matter of resignation was quite irrelevant.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD

TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kellock J.

A provision such as s. 5 of the statute prohibits the court from questioning any decision which has been come to within the structure of the statute itself, but the statute does not endow the board with power to make arbitrary decisions. The legislature must be taken to have been quite familiar with the principles applicable to decisions of inferior tribunals when questioned in the courts. It has not used apt language if it intended, as it cannot be presumed to have intended, to place either of the parties to such a proceeding as that here in question in a position permitting of no relief no matter how arbitrary any particular decision of its creature, the board, may be.

In *The Queen* v. *Wood.* (1) a case of a conviction under a statute which provided that no "proceeding to be had touching the conviction of any offender against this Act, . . . shall be vacated, quashed, or set aside for want of form, or be removed or removable by certiorari or other writ or process whatsoever in any of the superior courts", Lord Campbell C. J., at page 59 said:

> As to the clause taking away the certiorari, we came to the conclusion that the justice had declined jurisdiction and therefore had not properly exercised it.

I would dismiss the appeal with costs.

CARTWRIGHT J., (dissenting): The facts out of which this appeal arises and the relevant provisions of *The Labour Relations Act, 1948,* Ontario, c. 51 and of the regulations and rules made thereunder are set out in the reasons of other members of the Court.

I understood counsel for the appellant to concede the power of the Supreme Court of Ontario in proceedings by way of *certiorari* to set aside the order of the Board if it appeared, (i) that it had failed to perform the duty, stated by Lord Loreburn L.C. in *Board of Education* v. *Rice* (2) to be, to "act in good faith and fairly listen to both sides", or (ii) that it had exceeded its jurisdiction, or (iii) that it had declined jurisdiction.

I am unable to say upon the record before us that the Board did any of these things. It is to be presumed until the contrary appears that the Board acted in good faith and

(1) (1855) 5 E. & B. 49. (2) [1911] A.C. 179.

in the case at bar bad faith is not suggested. What is complained of is that the Board refused to permit cross-examination or to receive or obtain for itself evidence all directed to establishing that between the date of the application for certification and the date of the hearing a number of employees of the respondent who had theretofore been members of the appellant had sent in their resignations and had consequently ceased to be "members in good standing". It is clear that before finally ruling that the fact of such resignations having been sent in was irrelevant to the question whether the senders were members in good standing the Board heard full argument from counsel for both parties. The ruling indicates that the Board reached the conclusion that a member who sent in his resignation during the stated period nonetheless remained a member in good standing at the date of the hearing. If this conclusion was right then the evidence tendered was irrelevant. It may well be that the conclusion was wrong; but that would, or might, depend upon the provisions of the constitution of the appellant which may or may not have been before the Board or upon the contents of the written applications for membership which were before the Board. Assuming, without deciding, that the ruling was wrong it appears to me to have been at the most a wrongful refusal to receive evidence and not a declining of jurisdiction. I respectfully accept as a correct statement of the law the passage from the judgment of Lord Esher M.R. in *The Queen* v. *Marsham* (1) quoted in the reasons of my brother Kerwin and applying it to the facts of the case at bar I think that the ground on which the Board refused to hear the evidence of resignations was the first ground mentioned by Lord Esher, i.e., that even if received it would not prove the subject matter into which the Board was bound to inquire, that is whether those who sent in their resignations ceased to be members in good standing.

I conclude, therefore, that no refusal to hear the parties, or excess of jurisdiction or declining of jurisdiction is made out and that effect must be given to the provisions of the Statute which render the decision of the Board final and forbid its review.

(1) [1892] 1 Q.B. 371 at 378.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD

TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Cartwright J.

While the above reasons appear to me to be sufficient to dispose of the appeal I wish to express my general agreement with the reasons of my brother Rand and I would dispose of the appeal as proposed by him.

FAUTEUX J.: If the controlling power of superior courts over inferior tribunals or administrative bodies performing judicial functions is to be operative in the cases where, in principle, it is conceded to exist, the superior courts must somehow or other be enabled to see that jurisdiction has not been exceeded or has not been declined. In what way they shall so see is not material, provided they do so see. In *Dempster* v. *Purnell*, (1) Tindal, C.J., at page 39, said:—

> I take the rule to be well established by the cases of *Moravia* v. *Sloper*, Willes, 30, and *Titley* v. *Foxall*, Willes, 688, that, where it appears upon the face of the proceedings that the inferior court has jurisdiction, it will be intended that the proceedings are regular; but that, unless it so appears, that is, if it appear affirmatively that the inferior court has no jurisdiction, or if it be left in doubt whether it has jurisdiction or not, no such intendment will be made.

There is no reason why the rule would not obtain in cases where the point as to jurisdiction is focussed to a declining of jurisdiction. In the present instance, it was mandatory for the Board, before concluding that the alleged members of the appellant trade union were in good standing in the union and ultimately that the union was entitled to be certified as bargaining agent of the unit concerned, to decide any question arising as to the particular matter. S. 4 of *The Labour Relations Act, 1948* makes that duty clear. The right of the parties to submit to the Board any such questions is implied and the obligation for the Board to determine them and, consequently, to deal with them judicially before reaching its conclusion on the ultimate point to which they are related, is expressed. On a consideration of the material admittedly showing what took place before the Board, I cannot convince myself that the latter did not decline jurisdiction as a result of its rulings on the various requests made at hearing by the respondent, all of them being directed to the contestation of the right of the appellant trade union to be certified as bargaining agent. In the perspective of all that took place, the ruling as to the evidence is, I think, as much, if not more, consistent with a

(1) (1841) 4 Sc. N.R. 30

declining of jurisdiction than with a wrongful refusal to receive evidence. Bad faith of the Board has not been suggested and only a misinterpretation of the law as to what its duty was may explain this substantive failure to adequately exercise its jurisdiction. The authorities are clear that jurisdiction cannot be obtained nor can it be declined as a result of a misinterpretation of the law, and that in both cases the controlling power of superior courts obtains, notwithstanding the existence in the Act of a *no certiorari* clause.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Jolliffe, Lewis & Osler.*

Solicitors for the respondent: *MacDonald & MacIntosh.*

1953

*Feb. 27
*Mar. 2, 3, 4
*June 8

IN THE MATTER OF THE ESTATE OF JOSEPH E. ATKINSON, deceased.

NATIONAL TRUST COMPANY LIMITED, Executor of the Estate of JOSEPH E. ATKINSON ..... APPELLANT;

AND

THE PUBLIC TRUSTEE, THE TRUSTEES OF THE ATKINSON FOUNDATION and THE OFFICIAL GUARDIAN ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Executors and Administrators—Compensation—Passing Accounts—Appeal from Surrogate Court Judge's Order—Jurisdiction of Court of Appeal—The Surrogate Courts Act, R.S.O. 150, c. 380, s. 31(1)—The Trustee Act, R.S.O. 1950, c. 400, s. 60(3).

Where pursuant to s. 60 (3) of *The Trustee Act*, R.S.O., 1950, c. 400, the judge of a surrogate court in the passing of the accounts of an executor of an estate, fixes the allowance to be paid such executor, and as provided by s. 31 (1) of *The Surrogate Courts Act*, R.S.O., 1950, c. 380, an appeal from such award is made to the Court of Appeal, that Court may direct further evidence to be taken before the Senior Master and upon its return, set aside the allowance made, and itself determine the amount to be paid.

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

1953

RE ATKINSON

NATIONAL TRUST CO. v. PUBLIC TRUSTEE et al

APPEAL from an Order of the Court of Appeal for Ontario (1), allowing an appeal by the Public Trustee from an Order of Barton J. of the Surrogate Court of the County of York on passing the accounts of the Executor of the will of Joseph E. Atkinson, deceased. The total value of the assets of the estate amounted to $12,200,624.20 and the period of administration was approximately three years. The amount allowed the executor was $375,000. The Court of Appeal ordered the amount of compensation reduced to the sum of $149,124.57. The executor appealed to this court on the ground that the Court of Appeal was not entitled to set aside the allowance made by the Surrogate Court Judge unless some error in principle was shown.

C. F. H. Carson, Q.C. and *Allan Findlay* for the executor, appellant.

J. J. Robinette, Q.C., L. H. Snider, Q.C. and *J. D. Pickup, Q.C.* for the Public Trustee, respondent.

G. W. Mason, Q.C. for the trustees of the Atkinson Foundation.

P. D. Wilson, Q.C. for the Official Guardian.

The CHIEF JUSTICE:—I agree with the reasons of my brother Kerwin.

The judgment of Kerwin and Estey, JJ. was delivered by:—

KERWIN J.:—In passing the accounts of the appellant as executor of the estate of Joseph E. Atkinson, a Surrogate Court Judge allowed it the sum of $375,000 as "a fair and reasonable allowance for (its) care, pains and trouble and (its) time expended in or about the estate" pursuant to s-s. 3 of s. 60 of *The Trustee Act*, R.S.O. 1950, c. 400. Since by the terms of Mr. Atkinson's will property was given for a charitable purpose, the Public Trustee was interested as appears from *The Charities Accounting Act*, R.S.O. 1950, c. 50, and in accordance with s-s. 9 of s. 72 of *The Surrogate Courts Act*, R.S.O. 1950, c. 380, notice of taking the

(1) [1952] O.R. 685.

accounts had been served upon him. The appellant had filed in the Surrogate Court a "Statement of Compensation" reading as follows:—

Probate Value	12,200,624.20	
3% on	12,200,624.20	366,018.72
Revenue Account		
5% on	467,805.67	23,390.28
		389,409.00
Fee Asked	$ 375,000.00	

On the date fixed for passing the accounts, the Public Trustee filed a statement of "Compensation estimated by the Public Trustee on basis of completed performance by Executor of its limited duties", in which he suggested that a lump sum, not exceeding $100,000, be awarded as compensation, and gave certain figures which it was stated would be useful in arriving at such an amount. At the very outset, therefore, it was apparent that there was a dispute as to the amount of the allowance to be fixed by the judge.

By s-s. (1) of s. 31 of *The Surrogate Courts Act*:—

31. (1) Any party or person taking part in the proceedings may appeal to the Court of Appeal from any order, determination or judgment of a surrogate court or a judge thereof in any matter or cause if the value of the property affected by such order, determination or judgment exceeds $200.

Acting under this provision the Public Trustee appealed to the Court of Appeal against the amount of the allowance fixed by the Surrogate Court Judge. After a lengthy argument, the Court deemed that it and counsel would be unduly restricted in the consideration and presentation of the questions raised by the paucity of the material then available. Accordingly, in pursuance of the powers conferred upon it by s. 27 of *The Judicature Act*, R.S.O. 1950, c. 190, it directed a reference to the Senior Master at Toronto to make such inquiries as might be deemed necessary to enable the Court, on further consideration, finally to dispose of the matter. Evidence was taken on six different days before the Master and the transcription thereof and the exhibits were returned to the Court of Appeal.

1953

RE ATKINSON

NATIONAL TRUST CO. v. PUBLIC TRUSTEE *et al*

Kerwin J.

The matter came on for further argument and consideration whereupon the Court of Appeal determined that a fair and reasonable allowance was $149,124.57.

The evidence need not be detailed as it is sufficiently summarized in the reasons for judgment of the Court of Appeal (1). In view of this evidence, which had not been presented to the Surrogate Court Judge, the Court of Appeal was in a much better position than he to fix the allowance. The matters to be considered in fixing such compensation have been established for some years by decisions of the Ontario Courts, including several in the Court of Appeal, and there is really no dispute as to what these matters are or that they are not proper. It was contended, however, that the Court of Appeal was not entitled to set aside the allowance made by the Surrogate Court Judge unless some error in "principle" was shown, by which could only be meant that the Surrogate Court Judge failed to apply one or more of the applicable matters. That contention is unsound. The parties admit that five per cent on the revenue account is correct but the dispute is as to the allowance to be made otherwise. If in that connection the Surrogate Court Judge proceeded upon a percentage basis, the Court of Appeal considered that basis to be an improper one, and in the circumstances of this case we agree. If, on the other hand, he merely fixed a total amount, the Court of Appeal decided that that amount was excessive, and we consider that it had not only the jurisdiction (which was not denied), but should exercise it. We think the Court of Appeal exercised that jurisdiction properly and we are unable to say that the amount fixed by it should be increased.

The appeal should be dismissed. Not as a precedent but under the circumstances, the order as to the costs of this appeal should be the same as the Court of Appeal made with respect to the costs of the appeal before it.

RAND J.:—The Court of Appeal, to enable itself to pronounce intelligently upon the appeal from the Surrogate Court, found it necessary to direct the taking of evidence in detail to show the work done by the Trustees, its significance, its results, and the responsibility attending it, for which the fee was allowed on the passing of the accounts

(1) [1952] O.R. 685.

at which no such enquiry had been made. The facts disclosed were subjected to a careful appraisal. Since this is a matter peculiarly within the judicial administration of the province, it would require something patently unjust, which I cannot say I find here, before I would venture to substitute my evaluation of the services rendered for that of the Court of Appeal. Standards of fees are essentially local, and those who are familiar with their application, influenced as it is by the total surroundings, are in much the best position to make that assessment. The administration of this power may, at times, tend to become mechanical, or there may be occasions when particular adjudications appear to be so; at such times the supervisory power of the Appeal Court is properly called upon to restore substance and reality to its exercise.

I would, therefore, dismiss the appeal. All parties will be entitled to costs out of the estate, those of the appellant to be as between solicitor and client.

LOCKE J.:—I have examined with care all of the evidence taken before the Senior Master pursuant to the Order of the Court of Appeal. It cannot be said that the Court has erred in stating the principles to be applied in determining the compensation of the executor and the amount awarded is that considered by all of the learned Judges to be fair and reasonable. I have come to the conclusion that in these circumstances the judgment from which the appeal is taken should not be disturbed and would dismiss the appeal.

I would allow the parties to this appeal their costs out of the estate, those of the appellant as between solicitor and client.

Appeal dismissed. Costs payable out of estate.

Solicitors for the appellant: *Tilley, Carson, Morlock & McCrimmon.*

Solicitor for The Public Trustee, respondent: *L. H. Snider.*

Solicitors for The Trustees of the Atkinson Charitable Foundation, respondents: *Mason, Foulds, Arnup, Walter & Weir.*

Solicitor for The Official Guardian, respondent: *P. D. Wilson.*

1953

*Feb. 24, 25, 26, 27
*June 8

THE LABOUR RELATIONS BOARD (B.C.)

AND

ATTORNEY GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA ..... APPELLANTS;

AND

CANADA SAFEWAY LIMITED..... RESPONDENT.

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Labour Law—Certiorari—Collective Bargaining—Labour Board's Jurisdiction—Power of Court to examine proceedings—Industrial Conciliation and Arbitration Act, R.S.B.C., 1948, c. 155, s. 2(1) "employee", exception (s)2(1)(a) "person employed in a confidential capacity"—ss. 2(4), 58(1).

The appellant applied under the *Industrial Conciliation and Arbitration Act*, R.S.B.C., 1948, c. 155, to the Labour Relations Board for certification as bargaining agent for certain office employees, the majority of whom were comptometer and power machine operators of the respondent. The latter opposed the application and upon the Board granting certification, sought by way of *certiorari* to quash the Board's decision and the certification. It contended that on the face of its decision the Board lacked jurisdiction in that it had found that with few exceptions the employees in question were employed in a confidential capacity within the meaning of the exclusionary clause in the definition of "employee" in s. 2 of the Act and that therefore they were not entitled to be included in any certification. Counsel for the Board argued contra that under ss. 2(4) and 58(1) whether a person is an "employee" within the meaning of the Act is a question to be determined by the Board and its decision shall be final. Farris C.J.S.C. heard the motion and ruled that a body of limited jurisdiction could not by an improper decision acquire jurisdiction and that the court had power to examine the proceedings to ascertain whether there was evidence before the Board to justify its decision. Having done so, he held that there was such evidence, and dismissed the application for the writ. His judgment was reversed by the Court of Appeal for British Columbia which held that the Board had erred in law in the construction it placed upon the relevant definition of "employee" and since the employees in question were employed in a confidential capacity, exceeded its jurisdiction in granting certification and that in consequence ss. 2(4) and 58 of the Act did not prevail to prevent the court from exercising its authority to review, in this circumstance, the decision of the Board as an inferior tribunal.

Held: That there was evidence before the Board to justify its conclusion that the comptometer and power machine operators were not employed in a confidential capacity within the meaning of s. 2(1)(*a*) of the Act.

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

Rinfret C.J. and Kellock J., dissenting, agreed with the conclusions of the court below.

Decision of the Court of Appeal for British Columbia, (1952-53) 7 W.W.R. (N.S.) 145 reversed, and judgment of Farris C.J.S.C., (1952) 6 W.W.R. (N.S.) 510, restored.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), allowing an appeal from the Order of Farris, Chief Justice of the Supreme Court of British Columbia (2), dismissing the respondent's motion for a Writ of *Certiorari*, and quashing a certificate of the Labour Relations Board.

C. W. Brazier and *R. J. McMaster* for the Retail, Wholesale and Department Store Union, Local No. 580, appellant.

L. H. Jackson for The Labour Relations Board (B.C.) and the Attorney General for British Columbia, appellants.

C. K. Guild, Q.C., for Canada Safeway Ltd., respondent.

THE CHIEF JUSTICE (dissenting): For the reasons stated by the Honourable the Chief Justice of British Columbia I would dismiss the appeal with costs.

KERWIN J.:—Pursuant to s-s. 1 of s. 10 of the *Industrial Conciliation and Arbitration Act* of British Columbia, R.S.B.C. 1948, c. 155, the appellant Union, a "labour organization" as therein defined, applied to the Labour Relations Board (British Columbia), established under the Act, for certification as the bargaining authority for those employees of the respondent Company employed as "office employees" (except department managers and outside salesmen), at the Company's distributing warehouses in Vancouver. So far as relevant, s-s. 1 of s. 10 is in these words:—

> 10. (1) A labour organization claiming to have as members in good standing a majority of employees in a unit that is appropriate for collective bargaining may apply to the Board to be certified as the bargaining authority for the unit in any of the following cases:—
>
> (*a*) Where no collective agreement is in force and no bargaining authority has been certified for the unit:

Subsection 1 of s. 12 enacts:—

> 12. (1) Where a labour organization applies for certification as the bargaining authority for a unit, the Board shall determine whether the unit is appropriate for collective bargaining, and the Board may, before certification, include additional employees in, or exclude employees from, the unit.

(1) (1952) 7 W.W.R. (N.S.) 145; 1 D.L.R. 48.
(2) (1952) 6 W.W.R. (N.S.) 510; 3 D.L.R. 855.

1953

LABOUR RELATIONS BOARD (B.C.) *et al* *v.* CANADA SAFEWAY LTD.

Kerwin J.

The Board determined that such employees "except those excluded by the Act and except those employed in the positions and in the classes of work listed on the back of this certificate" were a unit of employees appropriate for collective bargaining. On the back of the certificate appeared the following:—

Positions and classes of work excepted from the bargaining unit.
Managers;
Assistant Managers;
Managerial Secretaries;
Personnel Records;
Payroll Clerks;
Chief Accountant;
Accountant;
Supervisor of Comptometer Operators;
Supervisor of Power Machine Operators;
Pricing Department Clerk;
Advertising Clerk;
Bulletin Typist.

In the interpretation section of the Act, it is provided:—

Employee means a person employed by an employer to do skilled or unskilled manual, clerical, or technical work, but does not include:—

(*a*) A person employed in a confidential capacity or a person who has authority to employ or discharge employees:

(*b*) A person who participates in collective bargaining on behalf of an employer, or who participates in the consideration of an employer's labour policy:

(*c*) A person serving an indenture of apprenticeship under the "Apprenticeship Act":

(*d*) A person employed in domestic service, agriculture, horticulture, hunting or trapping:

An application for a writ of *certiorari* to the Chief Justice of the Supreme Court of British Columbia was heard as if a formal order had been issued by the Court and a return made by the Board. A question has been raised as to what should be considered generally as a return by a tribunal such as the Board but it need not be determined in the present case. The Court knows the Board's decision only from a copy of its certificate sent to the solicitor for the respondent, which was produced as an exhibit to an affidavit made by Mr. Theodore Smith on the respondent's behalf, and since it appears (and is admitted) that stapled thereto was a letter from the Registrar of the Board giving the reasons for the decision, I assume that in the present case the return includes not only the certificate but the reasons therefor. I further assume in favour of the respondent

that under the particular circumstances we may look at the records of the respondent, which were also made an exhibit to the affidavit, and at the affidavit itself to show what happened before the Board, since the deponent was cross-examined on that affidavit and such cross-examination is part of these proceedings. I am satisfied that on this evidence the Board and the Chief Justice of the Supreme Court of British Columbia came to the right conclusion on the important question whether those office employees of the respondent who are comptometer operators and power machine operators are persons employed in a confidential capacity within the meaning of exclusion (*a*) in the definition of "employee". This conclusion is arrived at without reference to the provisions of s-s. 4 of s. 2:—

(4) If a question arises as to whether a person is an employee within the meaning of this Act, the question shall be determined by the Board, and the decision of the Board shall be final.

The Board's reasons as contained in the letter enclosing a copy of its certificate to the solicitor for the respondent are as follows:—

A prime question for the decision here is the interpretation of "a person employed in a confidential capacity", (S. 2(1), I.C.A. Act). The employer argues that, with a few exceptions, all of the B.C. zone office staff are employed in a confidential capacity. That is to say that those employees are handling matters which are of a confidential nature in regard to the affairs of the employer.

In the strict sense this view would appear to rule out such employees from any proposed bargaining unit within the scope of the *Industrial Conciliation and Arbitration Act*. Can the considerations really rest there? It seems obvious that many employees of most employers are "confidential" to some and to varying degree. Is not then a further consideration required as to the degree and capacity of the confidential employment met with in this application?

Modern business practice and the emergence of large office organizations require a broad approach to this problem if the *Industrial Conciliation and Arbitration Act* is to be reasonably interpreted. Obviously one, or a few persons, could not be expected to deal with the mass of intimate information required in today's management office organization. Thus, nearly all employees in such an office handle, or have access to, confidential information. The Board's view is then, that the primary question for study is:— does this type of employment make persons so employed persons employed in a confidential capacity according to the Act, and thus rule them out from appointing a bargaining authority to act on their behalf in respect of wages and working conditions?

Many excellent cases and facts, pro and con, were provided by counsel in hearings on this application. The Board's opinion, after study of these cases and facts, and in particular the case of *Ford Motor Company*

1953

LABOUR RELATIONS BOARD (B.C.) *et al* *v.* CANADA SAFEWAY LTD.

Kerwin J.

of Canada, Limited, is that the question here resolves itself into a consideration of two classifications of employees which comprise the major portion of the staff employed, viz.—Comptometer Operators and Power Machine Operators.

It is the Board's opinion that while there is merit to the case presented by counsel for the employer, justification exists for the Board to grant certification for the unit applied for, less certain classifications. These latter are: (Then follows the list that appears on the back of the certificate).

The Board rules that certification will issue for a bargaining unit described as: all employees, less the aforementioned categories.

The Board accepted the statements as to what the operators did that appear in the respondent's records as explained by Mr. Smith but counsel for the respondent submitted the Board's reasons to a searching criticism. He pointed to the statement therein:— "Nearly all employees in such an office handle or have access to confidential information." Apparently, before the Board, counsel had used the word "handle" but I take it that by repeating the word, the Board did nothing more than adopt a convenient expression to cover the having access to confidential information. It was also pointed out that in the earlier part of its reasons the Board had stated that the respondent's argument that, with a few exceptions, all of the British Columbia zone office staff were employees in a confidential capacity would in the strict sense appear to rule out from any proposed bargaining unit within the scope of the Act all employees who were handling matters which were of a confidential nature in regard to the affairs of the employer. It was argued that this meant that while strict construction of the Act would, according to the Board, bring the operators within exception (*a*) to the definition of "employee", the Board gave some other construction not warranted by the provisions of the enactment. That is not the proper view to take of the reasons. The Board considered that the construction advanced on behalf of the respondent did not meet the proper test under the Act in relation to the operators in question, and with great respect to the members of the Court of Appeal who thought otherwise, I am of the same opinion.

Counsel for the respondent argued that those operators should be excluded as much as "Accountant; Supervisor of Comptometer Operators; Supervisor of Power Machine Operators;". I disagree because, in my view, the duties of accountants and supervisors comprise much more than

tabulating on machines information from various sources. An employee who had access to outgoing mail, because he was in a position to read all that was going out, or one whose duties might be to open incoming mail, could be said to have access to confidential information. It is in the same way and only to the same extent that the same could be said of the operators. On the other hand, accountants and supervisors would not merely put down figures and have them totalled but would collate the information from these figures with a view of presenting it, and making recommendations, if necessary or advisable, in connection therewith to a superior employee. The fact that an employee had access to confidential information does not mean that he was "employed in a confidential capacity."

It has not been overlooked that in its certificate the Board excepts "those included by the Act". These words appear in the printed form prepared for the purpose and should have been stricken out. However, in view of the last paragraph of the Board's reasons, and also of the fact that the real dispute is as to the operators, the words may be taken as merely surplusage, or as referring to employees who might otherwise possibly fall within exceptions (*b*) and (*c*) in the definition of "employee". The Board's certificate cannot, therefore, be treated as meaningless.

The appeal should be allowed and the judgment of the Chief Justice of the Supreme Court restored. The appellant Union is entitled as against the respondent to its costs of the appeal to this Court and of the appeal to the Court of Appeal. There should be no costs for or against the Board or the Attorney General of British Columbia.

TASCHEREAU J.:—I believe that the learned Chief Justice of the Supreme Court of British Columbia was right in dismissing the application of the respondent for a writ of *certiorari*.

I am of the opinion that there was sufficient evidence to justify the Board to come to the conclusion that certain comptometer operators and power machine operators, were not employed in "a confidential capacity" within the meaning of the Act, and that by virtue of s. 2(4) of the Act, its decision is final and is not open to review.

I would allow the appeal and restore the order of the trial Judge, with costs here and in the court below.

1953

LABOUR RELATIONS BOARD (B.C.) *et al* *v.* CANADA SAFEWAY LTD.

RAND J.:—The question in this controversy over the certification of a labour union in British Columbia as bargaining agent hinges on the interpretation to be given the exception, "a person employed in a confidential capacity". The company carries on a large system of grocery stores throughout the western provinces and it is with relation to the headquarters office staff in Vancouver of the British Columbia zone that the dispute arises. The persons concerned are twenty-four operators of comptometers, nine operators of power machines, six telephone operators and two duplicating machine operators.

Those in the first group are engaged in the preparation and assembly of all species of statistical and report material. What may be called the primary figures come to the central office from the warehouses, merchandising departments and retail stores in the zone, and are combined, consolidated or summarized in such detail and manner as the company requires. The data include all accounting particulars of the business done in each store, detailed to individual departments; the total operations of the zone in similar form and detail; and the usual statistical calculations in terms of unit volume, labour and return. In this matter appear, of course, prices, wages, bonuses, profits and other items that enter into the final result, elaborated in relation to warehouses, shops, service and all other activities of the business.

The power machines are used, among other things, to make out cheques to all employees except executives paid from the Vancouver office; for the preparation of the invoices of goods to the retail stores in the zone, of records showing cost prices, sale prices and profit margins throughout the zone, and of daily and quarterly reports of volume sales of individual commodities.

The duplicating machine operators reproduce the statistical returns already mentioned. They also distribute incoming and handle outgoing mail.

All of these employees are claimed to be within the exemption, but from the facts stated it is clear that the work done by them is simply the mechanical production of statements of the business, in more or less detail, and reduced to significant units. This is undoubtedly information which the company does not broadcast from the housetops; but the operators do nothing to or about it except to

transcribe it on paper for the use of others. Their work is basically instrumental although there is some consolidation and even, it may be, of calculation by them for the results tabulated. The disability urged arises through their exposure to that information, and the taint is said to disqualify even the clerks who handle the mail.

This condition is present more or less in every business and an employee is under a legal duty as a term of his employment to treat all such matters as the exclusive concern of the proprietor. But the question under the statute is not to be determined by the test whether the employee has incidental access to this information; it is rather whether between the particular employee and the employer there exists a relation of a character that stands out from the generality of relations, and bears a special quality of confidence. In ordinary parlance, how can we say that a person skilled to operate a comptometer and employed primarily because of that skill, who is presumably so fully occupied with the particular work of transcribing or consolidating, that the figures in general would mean little to him, is by that exposure converted into an employee with a "confidential" relation? Between the management and the confidential employee there is an element of personal trust which permits some degree of "thinking aloud" on special matters: it may be on matters in relation to employees, competitors or the public or on proposed action of any sort or description; but that information is of a nature out of the ordinary and is kept within a strictly limited group. In many instances it is of the essence of the confidence that the information be not disclosed to any member of any group or body of the generality of employees.

There is nothing of that sort here. With a large office of upwards of thirty-five employees engaged in similar occupation, the matter which they work into reports, so far as it is known to one of them, is of common knowledge throughout the office; what, practically, could prevent these employees from discussing it among themselves? and if so, what could prevent them from spreading it abroad except their duty not to do so? They occupy no exceptional position in office organization. Most of them are, at the present time, members of the union, and the objection urged is not their being members but that the certification of the union to represent them would open the floodgates of exposure of

1953

LABOUR RELATIONS BOARD (B.C.) *et al* *v.* CANADA SAFEWAY LTD.

Rand J.

the company's business chiefly to competitors. No such information would be used by any tribunal except by compelling the company to produce it or by permitting it to be disclosed by witnesses: but no evidence would be countenanced that had been obtained by a breach of duty. The feature a union would be interested in is the financial result of the business, and in this case that fact is published to the world. And what conceivable reason could there be to induce employees, because they happen to belong to a certified union, to pass this private information on to competitors of their own employer, the consequences of which could only be to their own injury?

There is an element of confidence between employer and all employees and an ascending scale up to those whose relation takes on the "confidential capacity". The point at which that is reached is a matter of judgment to be formed by weighing all the circumstances. For example, typewritten reports on advanced stages of atomic development where fundamental concepts may be expressed in communicable formulas might well today be classed as done by one in such a capacity; in engaging a person for such work, apart from the qualification as a competent operator and as a far more important consideration, integrity and the capacity for self-discipline and control would be decisive; but in twenty-five years from now all that information may be as common as the formulas of chemistry today. In this case, efficiency units are included in the secret category: but these business health tests are in general use and frequently ordinary items for arbitration between employer and employee. There is nothing special about them or their secrecy. The technician is chosen primarily for his professional or mechanical skill; in confidential employment, personal qualities take on greater importance and may be controlling. Here there is little beyond the relation sustained by the multitude in clerical work today; and the effects of a denial to this group of the privilege of being represented by a certified union must be taken into account in interpreting the statutory language. The task of evaluating all these considerations has been committed by the legislature to the Board; and so long as its judgment can

be said to be consonant with a rational appreciation of the situation presented, the Court is without power to modify or set it aside.

I would, therefore, allow the appeal with costs in this Court and in the Court of Appeal and restore the order of Farris C.J.

KELLOCK J. (dissenting):—Under the provisions of s. 2(1) of the statute "employee" does not include

> "a person employed in a confidential capacity."

By s-s. (4) of the same section, it is provided that

> If a question arises as to whether a person is an employee within the meaning of this Act, the question shall be determined by the Board, and the decision of the Board shall be final.

S. 58, s-s. (1) also provides that

> If a question arises under this Act as to whether:—
>
> (*a*) A person is an employer or employee . . . the Board shall decide the question, and its decision shall be final and conclusive for all the purposes of this Act except in respect of any matter that is before a Court.

As stated by Singleton L.J., in *Rex v. Northumberland Compensation Appeal Tribunal* (1):

> Error on the face of the proceedings has always been recognised as one of the grounds for the issue of an order of *certiorari*.

The provisions of ss. 2(4) and 58(1) do not exclude the supervisory jurisdiction of the court with respect to such questions, as is explained by Lord Sumner in the *Nat Bell* case, (2). The error alleged to be apparent on the face of the record in the case at bar is the view taken by the Board of the statutory definition of "employee". Although it is for the Board to determine whether or not a particular person is brought within the statutory definition, the Board may not misconstrue that definition.

The word "confidential" as it is used in the statute has, in my opinion, the sense of

> "intrusted with the confidence of another or with his secret affairs or purposes,"

see Black's Law Dictionary, 4th ed. 1952, p. 370.

The difference to my mind between a person employed in a confidential capacity and one not so employed is that, in the former case, for reasons, it may be, of convenience or

(1) [1952] 1 All E.R. 122 at 125. (2) [1922] 2 A.C. 128 at 159, 160.

1953

LABOUR RELATIONS BOARD (B.C.) *et al* *v.* CANADA SAFEWAY LTD.

Kellock J.

necessity on the part of the employer in the conduct of his business or affairs, the employee is put in possesison of matter which the employer regards, from his standpoint, as secret or private. In the case of a person engaged in business on a large scale, matters which are private or secret from his standpoint must of necessity be disclosed to varying numbers of employees, depending upon the volume and scope of the affairs in question. This necessity arises from the purely physical consideration of the employer being unable to keep these matters to himself, if his business or affairs are to be properly conducted.

The respondent, in the case at bar, operates a number of "chain" stores on a large scale and of necessity requires the assistance of a considerable number of employees in dealing with matters which it desires to keep private. It is quite true that the respondent is a public company and that its annual profits or losses are published, but, to take one example given by Mr. Guild on the argument, the profitableness or otherwise of an individual store is not ascertainable from such published statements, and it is obvious that the respondent would have the best of reasons for desiring to keep such information to itself and not available to its competitors. It is detailed information of this sort with which the disputed classes of employees dealt.

The view of the Board with respect to the meaning of the statutory definition is disclosed by its reasons as follows:

> A prime question for the decision here is the interpretation of "a person employed in a confidential capacity", (S. 2(1), I.C.A. Act). The employer argues that, with a few exceptions, all of the B.C. zone office staff are employed in a confidential capacity. This is to say that those employees are handling matters which are of a confidential nature in regard to the affairs of the employer.
>
> In the strict sense this view would appear to rule out such employees from any proposed bargaining unit within the scope of the *Industrial Conciliation and Arbitration Act*. Can the considerations really rest there? It seems obvious that many employees of most employers are "confidential" to some and to varying degree. Is not then a further consideration required as to the degree and capacity of the confidential employment met with in this application?
>
> Modern business practise and the emergence of large office organizations require a broad approach to this problem if the *Industrial Conciliation and Arbitration Act* is to be reasonably interpreted. Obviously one, or a few persons, could not be expected to deal with the mass of intimate information required in today's management office organization. Thus, nearly all employees in such an office handle, or have access to, confidential information. The Board's view is then, that the primary question for

study is:— does this type of employment make persons so employed persons employed in a confidential capacity according to the Act, and thus rule them out from appointing a bargaining authority to act on their behalf in respect of wages and working conditions?

In my view the Board has stated, only to discard, the proper meaning of the statute, because of that very necessity that the conduct of large affairs enlarges the number of persons whom an employer must take into his confidence. For my part, I find nothing in the statute which justifies such a departure from the plain meaning of the language used by the legislature. I do not obtain any assistance from the consideration that confidential employees any more than employees who participate in management, may be members of a trade union under the statute. That is so but such employees are in neither case under the statute to be considered for the purposes of certification for collective bargaining. I adopt the language of the Chief Justice of British Columbia as follows:

> The two disputed classifications of employees, when consideration is given to the nature of their assigned tasks, and the material with which they work, are in my opinion "employed in a confidential capacity" within the meaning of the Act. In consequence the Board erred in law and exceeded its jurisdiction in deciding otherwise.

I think the conclusion of the court below is correct and would dismiss the appeal with costs.

The Judgment of Estey and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—The relevant facts are stated in the reasons of other members of the Court. For the respondent it is argued that the decision of the appellant Board, that certain comptometer operators and power machine operators admittedly in the employ of the respondent, did not fall within the words "employed in a confidential capacity" so as to be excluded from the term "employee" as defined in s. 2(1) of the *Industrial Conciliation and Arbitration Act*, R.S.B.C. 1948 c. 155, was so opposed to the evidence that the inference is irresistible that the Board misconstrued the Statute, that there is therefore error in law apparent on the face of the proceedings and *certiorari* lies to quash the order.

I am in respectful agreement with the learned Chief Justice of the Supreme Court of British Columbia that, on the evidence before it, it was open to the Board to come to

1953

LABOUR RELATIONS BOARD (B.C.) *et al* *v.* CANADA SAFEWAY LTD.

Cartwright J.

the conclusion that the operators in question were not in fact employed in such a capacity as to be excluded from the term "employees" within the meaning of the Act. In such circumstances, in my opinion, effect must be given to s. 2(4) of the Act which provides that this question shall be determined by the Board and that its decision shall be final; and I do not find it necessary to inquire whether I would have reached the same conclusion as did the Board had the responsibility of making such decision been committed to the courts.

I would dispose of the appeal as proposed by my brother Kerwin.

Appeal allowed with costs against the respondent in this Court and the Court below. No costs for or against the Board or the A.G. of B.C.

L. H. Jackson, solicitor for the appellants the A.G. for B.C. and The Labour Relations Board.

R. J. McMaster, solicitor for the appellant union.

K. L. Yule, solicitor for the respondent.

1953

*Jan. 27
*Jun. 8

DAVID WANKLYN AND OTHERS .....APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Succession—Effect of will giving income from residue with power to draw from capital—Whether general power of appointment—Whether dutiable succession—Dominion Succession Duty Act, 4 and 5 Geo. VI, c. 4, ss. 4(1), 31.

By her will the testatrix left her estate to her trustees to pay to her husband during his lifetime the income from the residue and "in addition thereto to pay to my said husband from time to time and at any time such portion of the capital of my estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my executors and trustees shall be obliged to account further for any capital sums so paid to my said husband". Upon the death of the husband, the trustees were to dispose of what was left of the capital among designated legatees.

*PRESENT: Rinfret C.J. and Estey, Locke, Cartwright and Fauteux JJ.

The minister took the position that the will conferred a general power of appointment upon the husband over the residue of the estate and that consequently he became by virtue of s. 31 of the *Dominion Succession Duty Act* liable to duty on the same basis as if the residue had been abolutely bequeathed to him. The Minister's assessment was upheld by the Exchequer Court of Canada.

Held: (Rinfret C.J. and Locke J. dissenting), that the appeal should be allowed and the assessment set aside; the dutiable value of the succession to the husband in respect of the residuary estate of the testatrix was the value as of the date of her death of the estimated net revenues from such residuary estate and the residuary legatees were assessable as having on the death of the testatrix become beneficially entitled to the capital of the residue in remainder expectant upon the death of the husband, subject to the appropriate adjustment due to his having received a certain amount from the capital.

Per Estey J.: Assuming that the testatrix created a general power of appointment, it would still appear that no duty upon or in respect to a succession can be imposed to her husband except as to what he has already received from the capital. The giving of a general power of appointment at common law did not of itself constitute a disposition of property. The *Succession Duty Act* does not provide that it constitute a "disposition of property", that is to say, a succession as defined in s. 2(m). It is not included under s. 3(1) which defines those dispositions of property which should be deemed a succession. S. 31 does not contain language that would constitute such a power a disposition of the property. On the contrary, Parliament, in that section, would appear to have accepted the common law in relation to dispositions under a general power. Throughout s. 31, there are no words appropriate to the imposition of a levy that would justify a conclusion that this is a charging section.

Per Cartwright and Fauteux JJ.: The testatrix's husband was not given the power to appoint the capital by will; and even on the assumption that he was given a general power to appoint the capital *inter vivos,* there is no provision in the statute to support the claim that he was liable to pay succession duty in respect of that part of the residuary estate which he did not receive and which upon his death passed under the will of the testatrix to the residuary legatees. S. 31 of the *Act* does not purport to levy any duty or to create or define a succession. It provides only for the manner and time of payment of duty which is assumed to be levied by other provisions. Applying the words of s. 2(*m*) of the *Act,* the husband did not become beneficially entitled to the capital of the estate. A person who is given a power over property does not thereby become beneficially entitled to such property. In the present case, the residuary legatees immediately on the death of the testatrix took not a contingent but a vested remainder in the capital, expectant on the death of the husband, subject to be divested in whole or in part by his exercise of the power to take during his lifetime such portions of the capital as he might wish. So far as the capital of the residue was concerned no part of it became vested in him upon the death of the testatrix or under any disposition made by her.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Per Rinfret C.J. (dissenting): The right given to the husband to draw the capital was a general power to appoint equivalent to a bequest of the whole property of the testatrix to her husband and s. 31 of the *Act* covers a situation of that kind. It might even be said that within the definition of s. 2(*m*), the husband succeeded to the whole of the property of his wife.

Per Locke J. (dissenting): The right which accrued to the testatrix's husband upon her death to require the trustees of the estate at any time to pay to him the whole or any part of the capital of the estate, made him competent to dispose of the capital of his wife's estate (*Re Penrose* [1953] 1 Ch. 793: *Re Parsons* [1942] 2 A.E.R. 496); it therefore gave him a beneficial interest in the property and this disposition by the will was a succession within the meaning of s. 2(*m*) of the *Act*. Furthermore, the will gave to the husband a general power of appointment within the meaning of s. 4(1) and s. 31 (*Re Richards* [1902] 1 Ch. 76: *Re Ryder* [1914] 1 Ch. 865: 25 Halsbury 516); consequently, under s. 31, the liability for duty attached as if the capital of the estate over which the power had been given had been the subject of the bequest.

APPEAL from the judgment of the Exchequer Court of Canada, Saint-Pierre, Acting Judge (1), upholding the Minister's assessment.

J. E. Mitchell Q.C. for the appellants.

C. A. Geoffrion and R. G. Decary for the respondent.

The CHIEF JUSTICE (dissenting): I am of the opinion that this appeal should be dismissed.

The will of Mrs. Maud Angus Chipman, wife of Dr. Walter Chipman, contained the following clause:—

(*f*) To pay to my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residue of my Estate and in addition thereto to pay to my said husband from time to time and at any time such portions of the capital of my Estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my Executors and Trustees shall be obliged to account further for any capital sums so paid to my said husband.

By Notice of Assessment for Succession Duties purposes Dr. Chipman was treated as if the property itself had been given to him, in view of the general power to appoint given to him in Clause (*f*). The effect of that clause was to put Dr. Chipman in the position of succeeding to the whole of the estate at his option and upon his sole demand.

On appeal it was submitted that the right given to Dr. Chipman to draw capital was not a general power to

(1) [1952] C.T.C. 68.

appoint within the meaning of section 31 of the *Act*; and even if the right so given was a general power to appoint within the meaning of Section 31 the construction of that Section adopted by the Exchequer Court (1) was erroneous and not in accord with the context in which it is found; and, further, on the true construction of that Section the purpose of the Section is simply to regulate in a particular case the manner and time of payment of duties levied in respect of successions determined by other sections of the *Act*. The appellant submitted that Section 31 does not affect in any way the incidence of duties or purport to create any new succession.

The learned Judge of the Exchequer Court (Saint Pierre J.) (1) decided contrary to the submission of the appellant. He held that section 31 had to be read in conjunction with section 4(1), which reads as follows:—

> 4. (1) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit. whether exercisable by instrument *intervivos* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as mortgagee.

He held that in the present case Dr. Chipman received from his wife the general power by which the Executors of the Estate would pay him from time to time and at any time such portions of the capital of the Estate as he might wish or require and upon his simple demand, he being the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, without he or the Executors and Trustees being obliged to account for any capital sums so paid to him.

In my view this is the equivalent of a bequest of the whole property of the deceased to her husband and Section 31 of *The Dominion Succession Duty Act* duly covers a situation of that kind. In the words of O'Connor J. in *Cossit* v. *Minister of National Revenue* (2):

> There was a succession within section 31. And under section 31, the duty levied in respect of such succession is payable in the same manner and at the same time as if the property itself had been given to the appellant.

(In the present case, Dr. Chipman).

(1) [1952] C.T.C. 68. (2) [1949] Ex. C.R. 339 at 343.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Rinfret C.J.

It might even be said that within the definition of section 2(*m*) of the *Act*, Dr. Chipman succeeded to the whole of the property of his wife.

I would, therefore, dismiss the appeal with costs.

ESTEY, J.:—This is an appeal from a judgment in the Exchequer Court (1) affirming the assessment made in the estate of Maud Mary Angus Chipman by the respondent under the *Dominion Succession Duty Act* (S. of C. 1940-41, 4-5 Geo. VI, c. 14).

The textatrix, Maud Mary Angus Chipman, died January 14, 1946, leaving an estate of a net aggregate value of $1,001,627.96. In computation of the succession duty the parties disagree as to the construction of clause 3(*f*) in the will.

> 3 (*f*) To pay to my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residue of my Estate and in addition thereto to pay to my said husband from time to time and at any time such portions of the capital of my Estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my Executors and Trustees shall be obliged to account further for any capital sums so paid to my said husband.

It is also important to observe that in clause 3(*g*) the testatrix provided that

> Upon the death of my said husband or upon my death should he have predeceased me to dispose of my Estate as it may then exist . . .

Then followed a number of specific directions under which she disposed of the entire estate. Doctor Chipman died on April 4, 1950, and at that time had received capital under the exercise of his power in clause 3(*f*) in the sum of $33,164.41.

There is no dispute as to the amount of the duty relative to the interest and revenues given to the husband Doctor Chipman in the first part of clause 3(*f*). The controversy is with respect to the construction of the latter portion which the respondent has construed as a general power to appoint and, as a consequence, has levied the succession duty in the same manner as if the property had been bequeathed absolutely to Doctor Chipman.

(1) [1952] C.T.C. 68.

There is much to be said in principle for the contention that a power of appointment that permits one to appoint only to himself is not a general power of appointment. However, it seems unnecessary to decide that point as, even if we assume, for the purpose of this decision, that the testatrix, in clause 3(*f*), has created a general power of appointment, it would still appear that respondent, within the meaning of the statute, cannot impose a duty upon or in respect to a succession to Doctor Chipman except as to the sum of $33,164.41.

The statute imposes a duty upon and in respect of a succession (ss. 6, 10 and 11). A succession is defined in s. 2(*m*):

> 2 (*m*) 'succession' means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession;

The giving of a general power of appointment at common law did not of itself constitute a disposition of property.

> A Common Law Power enables the donee to pass the legal estate; but it is the execution, not the creation of the power, which effects the transmutation of estate. The legal estate before the execution remains in the creator of the power, or his grantee, or heir-at-law, as the case may be.

Farwell on Powers, 3rd Ed., p. 2.

When the donee exercised the power the beneficiaries took by virtue of the instrument creating the power, but not by virtue of the exercise thereof. *Attorney-General v. Parker* (1); *Re Lovelace* (2).

The testatrix, in the foregoing clause (3(*f*), under the common law made a disposition by which the legal estate passed to the executors subject to Doctor Chipman's power and then, upon his death, the executors would dispose of the estate, "as it may then exist," as directed in the will. He, as and when and to the extent that he exercised his power, became owner of the capital by virtue of the provisions of the will of the testatrix.

(1) (1898) 31 N.S.R. 202. (2) 4 De G. & J. 340.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Estey J.

The law in the Province of Quebec would appear to be to the same effect and, indeed, this appeal has been presented upon that basis.

The contention of the Crown could only be maintained if the *Succession Duty Act* had provided that the giving of a general power of appointment constituted a "disposition of property" and, therefore, a succession as defined in s. (2*m*). It may first of all be pointed out that the giving of a general power of appointment is not included under s. 3(1), which defines those dispositions of property which should be deemed a succession.

The provisions of s. 4 would be relevant if we were considering Doctor Chipman's estate, but do not appear to be of assistance in considering that of the testatrix.

The Crown relied particularly upon the provisions of s. 31:—

> 31. Where a general power to appoint any property either by instrument inter vivos, or by will, or both, is given to any person, the duty levied in respect of the succession thereto shall be payable in the same manner and at the same time as if the property itself had been given, devised or bequeathed, to the person to whom such power is given.

This section specifically refers to "the duty levied in respect of the succession thereto" (the word "thereto" referring back to the word "property"). It does not contain language that would constitute a general power a disposition of the property. On the contrary, Parliament, in this section, would appear to have accepted the common law in relation to dispositions under a general power. Indeed, throughout the section there are no words appropriate to the imposition of a levy that would justify a conclusion that this is a charging section. In any event, in the latter part the language assumes a levy has been made and provides how the same shall be payable.

Counsel for the respondent argued that the word "manner" in the foregoing section should be read as meaning "amount," or some other word that would support a conclusion that this section imposed a levy. The word "amount," or whatever other word might be inserted, would not change the effect of the word "payable," which is not an appropriate word of imposition or charge. It rather assumes the existence of a charge. In order that counsel's submission might be accepted, the section would have to be

reworded to include some such language as "The duty shall be levied in the same manner and payable at the same time as if the property itself had been given." This would, in effect, be to legislate rather than construe and, therefore, beyond the function of a court. As Lord Macmillan stated in *Altrincham Electric Supply Limited v. Sale Urban District Council* (1):

> A court may construe the language of an Act of Parliament but may not distort it to make it accord with what the court thinks to be reasonable.

The submission that, unless the phrase "in the same manner" is construed as counsel for respondent suggests, it would be equivalent to or synonymous with "at the same time" and, therefore, surplus cannot be maintained. It would rather appear that each of these phrases as used in s. 31 possesses a separate and independent meaning and purpose. The phrase "in the same manner" has reference to such items as interest (s. 25), security (s. 26), extensions of time for payment and other like matters dealt with in other sections of the statute. This view finds support from the use of the word "manner" in s. 28(3) where it appears: " . . . may be paid . . . in the manner provided by" s. 28(4) or 28(6). The former has regard to the consequences of non-payment under s. 24 and the latter provides: " . . . the duty levied . . . if not sooner paid, shall be paid in four equal instalments . . ." It would, therefore, appear that the section as drafted does not support respondent's view.

The appeal should be allowed, the judgment in the Exchequer Court set aside and the matter referred back to the Minister for a reassessment on the basis that upon the death of the testatrix the capital in the residue of her estate passed to the parties named in the will, subject to the amount received by Doctor Chipman in the sum of $33,164.41. The appellants are entitled to their costs both in the Exchequer Court and in this Court.

LOCKE, J. (dissenting):— The will of the late Maude Angus Chipman, after bequeathing the whole of her property to trustees, one of whom was her husband Dr. W. W.

(1) (1936) 154 L.T. 379 at 388.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Locke J.

Chipman, and directing the payment of her debts and making certain specific bequests, directed the said trustees, *inter alia*:—

> To pay to my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residue of my estate and in addition thereto to pay to my said husband from time to time and at any time such portions of the capital of my estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my executors and trustees shall be obliged to account further for any capital sums so paid to my said husband.

Upon the death of the husband, the will provided that the estate, as it might then exist, shall be disposed of among designated legatees.

Subsection (*m*) of section 2 of the *Dominion Succession Duty Act* defines a succession. So far as it affects the present matter, the definition reads:—

> 'Succession' means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval either certainly or contingently.

The language of the subsection is taken, almost without change, from s. 2 of the *Succession Duty Act 1853* (Imp. 16-17 Vict. c. 51). There was, however, added at the conclusion of ss. (*m*) the words:—

> and also includes any disposition of property deemed by this Act to be included in a succession.

"Successor", as in the English Act, is defined as meaning the person entitled under a succession.

Ss. 1 of s. 4 of the *Dominion Act* reproduces, with a change which does not affect the present question, ss. 2(*a*) of s. 22 of the *Finance Act 1894* (Imp. 57-58 Vict. cap. 30) and reads:—

> A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument, inter vivos or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as mortgagee.

Section 6 provides that, subject to the exemptions mentioned in s. 7, there shall be assesed, levied and paid at the rates provided for in the first schedule to the Act, duties

upon or in respect of the following successions, that is to say, where the deceased was at the time of his death domiciled in a province of Canada upon or in respect of the succession to all real or immovable property situated in Canada and all personal property wheresoever situated.

The charging provisions are in Part III of the *Act* and prescribe the rates of duty to be paid in respect of each succession mentioned in s. 6 and define the persons liable for payment. Section 12 included in this part imposes upon every successor liability for the duty levied upon or in respect of the succession to him.

Section 31 of the *Act* is included in Part V with other sections under the heading "Payment of Duties" and reads:—

> Where a general power to appoint any property either by instrument inter vivos, or by will, or both, is given to any person, the duty levied in respect of the succession thereto shall be payable in the same manner and at the same time as if the property itself had been given, devised or bequeathed, to the person to whom such power is given.

When the *Succession Duty Act 1853* was passed, s. 4, with a marginal note which read: "General Powers of Appointment to Confer Successions", provided that where a person was given a general power of appointment over property under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of the Act, he should:—

> in the event of his making any Appointment thereunder, be deemed to be entitled, at the Time of his exercising such Power, to the Property or Interest thereby appointed as a Succession derived from the Donor of the Power.

Section 18 of the *Finance Act 1894* provided that the value for the purpose of succession duty of a succession to real property arising upon the death of the deceased person should, where the successor is competent to dispose of the property, be the principal value of the property after deducting the estate duty payable in respect thereof on the said death.

Section 4 of the Act of 1853 was not adopted in the Canadian Act. The question as to whether the right which accrued to Dr. Chipman upon the death of his wife to require the trustees of the estate at any time to pay to him the whole or any part of the capital of the estate was a

1953

WANKLYN et al v. MINISTER OF NATIONAL REVENUE

Locke J.

general power to appoint such property, within the meaning of ss. (1) of s. 4 and s. 31, and whether this constituted a succession, within the meaning of ss. (*m*) of s. 2, must depend upon the interpretation to be given to the language of these sections.

By s. 3(1) (i) a succession includes the disposition of property of which the person dying was at the time of his death competent to dispose and the beneficiary of such a disposition is deemed to be a successor. Dr. Chipman was competent to dispose of the capital of his wife's estate, after providing for the debts and the specific legacies within the meaning of s. 3(*i*) (i) and s. 4(1) (*In Re Penrose* (1): *Re Parsons* (2)). As pointed out by Lord Greene, M.R. in *Parson's case,* the phrase "competent to dispose" is not a phrase of art and, taken by itself and quite apart from the definition clause in the Act, conveys the ability to dispose, including the ability to make a thing your own. In my opinion, this right vested in Dr. Chipman by his wife's will gave him a beneficial interest in the property and this disposition by the will was a succession, within the meaning of ss. (*m*) of s. 2.

I am further of the opinion that the disposition gave to Dr. Chipman a general power of appointment, within the meaning of ss. (1) of s. 4 and s. 31.

In *Re Richards* (3), where, by a will, the income of the estate was bequeathed to the wife of the testator for life with a direction that, in case such income should not be sufficient, she might use such portion of the capital as she might deem expedient, Farwell J. held that the wife had a general power of appointment over the capital during her life. This statement of the law was adopted by Warrington J. in *Re Ryder* (4), and in Halsbury's Article on Powers, vol. 25, p. 516.

Under s. 4 of the Act of 1853 the liability for succession duty would attach only when and as the donee exercised the power of appointment. Section 31 of the Canadian Act, however, provides that where a general power to appoint any property is given to any person by will, the duty levied in respect of the succession thereto shall be payable *in the same manner* and at the same time as if the property itself

(1) [1933] 1 Ch. 793 at 807.
(2) [1942] 2 A.E.R. 496.
(3) [1902] 1 Ch. 76.
(4) [1914] 1 Ch. 865 at 869.

had been bequeathed to the person to whom the power is given. The section is not restricted to fixing the *time* of payment of the duties. The words "in the same manner" must, in my opinion, be construed as meaning that the liability for duty attaches as it would if the capital of the estate over which the power is given were the subject of the bequest.

I would dismiss this appeal with costs.

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

CARTWRIGHT J.:—The questions raised on this appeal are as to the duties payable under *The Dominion Succession Duty Act* upon the death of the late Maud Mary Angus Chipman (hereinafter referred to as Mrs. Chipman) in respect of successions to her residuary estate.

Mrs. Chipman died, domiciled in the City of Montreal, on January 14, 1946, leaving a will and codicil made in notarial form dated respectively February 7, 1940 and May 26, 1943.

The will recites that Mrs. Chipman is the wife, separate as to property, of Dr. Walter William Chipman, (hereinafter referred to as Dr. Chipman) and by clause "Thirdly" gives the whole of her estate to her executors and trustees in trust:—

(*a*) To pay all my just debts, funeral and testamentary expenses as soon as possible after my death and to pay all succession duties, inheritance taxes, court fees and similar taxation on my Estate out of the capital of the residue of my Estate without charging same to my respective legatees and without the intervention of any of my legatees.

(*b*) is a bequest to a niece;

(*c*) and (*d*) give the use of her residence and its contents to Dr. Chipman for his lifetime;

(*e*) is a legacy to employees.

The will continues:—

(*f*) To pay to my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residue of my Estate and in addition thereto to pay to my said husband from time to time and at any time such portions of the capital of my Estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my Executors and Trustees shall be obliged to account further for any capital sums so paid to my said husband.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Cartwright J.

(*g*) Upon the death of my said husband or upon my death should he have predeceased me to dispose of my Estate as it may then exist as follows, namely:—

1. My jewellery, pictures, household furniture and household effects shall be disposed of in accordance with any memorandum I may leave with respect to the same and failing any such memorandum then the same shall be divided among my residuary legatees hereinafter named in the same manner as the residue of my Estate.

2. To pay to The Royal Institution for the Advancement of Learning (McGill University), of Montreal, the sum of fifty thousand dollars as a special legacy.

3. To pay to the Royal Victoria Hospital, Montreal, the sum of fifty thousand dollars as a special legacy.

4. To pay to The Art Gallery, presently situate at the corner of Ontario Avenue and Sherbrooke Street West, Montreal, the sum of fifty thousand dollars as a special legacy.

5. To pay to The Church of St. Andrew and St. Paul, presently on Sherbrooke Street West, Montreal, the sum of Twenty-five thousand dollars.

The receipt of the treasurer for the time being of each of the foregoing institutions shall be a good and valid discharge to my Executors and Trustees.

6. To divide the capital of the residue of my Estate between my brothers, sisters, niece and nephews as follows:— One-sixth thereto to my brother, D. Forbes Angus, of the City of Montreal; one-sixth thereof to my brother William Forrest Angus of the City of Montreal; one-sixth thereof to my brother, David James Angus, presently of Victoria, British Columbia; one-sixth thereof to my sister, Margaret Angus, wife of Dr. Charles Ferdinand Martin, of the City of Montreal; one-sixth thereof to my sister, Dame Bertha Angus, widow of Robert MacDougall Paterson of the City of Montreal; one-eighteenth thereof to my niece, Gyneth Wanklyn, widow of Durie McLennan, of the City of Montreal; one-eighteenth thereof to my nephew, David A. Wanklyn, of the City of Montreal; and one-eighteenth thereof to my nephew, Frederick A. Wanklyn, presently of Nassau, Bahamas; and I hereby constitute my said brothers, sisters, niece and nephews my universal residuary legatees in the aforesaid proportions.

The will then provides for the possibilities of brothers, sisters, nephews or the niece of the testatrix predeceasing her and defines the powers of the executors and trustees. The only provision of the will or codicil other than those quoted above which it is suggested may have relevance to the inquiry before us is the clause entitled "Fifthly", reading as follows:—

The bequests herein made whether of capital or revenue are intended as an alimentary provision for my legatees and shall be exempt from seizure for their debts except as a result of express hypothecation or pledge. I direct, moreover, that the bequests herein made while in the hands of my Executors and Trustees shall not be capable of being assigned by the beneficiaries.

Dr. Chipman died on April 4, 1950, domiciled in the City of Montreal. During his lifetime pursuant to the terms of Clause 3(*f*), quoted above, he demanded and received payment of $33,164.41 out of the capital of the residue of the estate.

In these circumstances the learned trial judge (1) has held affirming the assessment made by the Minister that under Mrs. Chipman's will a general power of appointment over the capital of the residue was given to Dr. Chipman and that duties should be assessed as if the capital of the residue had been given outright to him. The contention of the appellants, made when Dr. Chipman was still alive, was:—

> that the assessment should be revised on the basis of assessing Dr. Chipman as revenue beneficiary only and assessing the residuary legatees as capital beneficiaries, a suitable reserve being made in the assessment for reviewing the same in the event Dr. Chipman should withdraw capital.

Their submission on this appeal is the same, subject to the modification made necessary by the fact that the amount of capital withdrawn by Dr. Chipman has now been reduced to a certainty.

The first question is as to the proper construction of the relevant clauses of the will. Under the rules of the law of Quebec, which do not appear to differ in this regard from those of the common law, it seems clear that Dr. Chipman was entitled to the income from the residue for life and that on his death the capital was divisible among the residuary legatees, pursuant to clause 3(*g*) of the will, subject to the possibility of part or all of the capital having been paid to Dr. Chipman during his lifetime; and the shares received by the residuary legatees passed to them from Mrs. Chipman and not from Dr. Chipman. The provisions of the *Dominion Succession Duty Act* do not purport to alter this result, but in the submission of the respondent they have the effect of providing that duties shall be levied as if (i) the whole residue had been given outright to Dr. Chipman by the will of Mrs. Chipman, and (ii) the shares of Mrs. Chipman's estate received by the residuary legatees on Dr. Chipman's death had passed to them from him and not from her. It is with the first only of these two questions that we are directly concerned on this appeal. The power

(1) [1952] C.T.C. 68.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Cartwright J.

of Parliament to so provide is not challenged: the question is whether on a proper construction of the Statute it has done so.

For the appellants it is argued that clause 3(*f*) of the will does not give Dr. Chipman any general power of appointment over the capital of the residue. In my opinion no power to appoint any part of the capital of the residue by will was given to Dr. Chipman. The clause contemplates the exercise of judgment by him as to the amount or amounts that he wishes to take from capital and payment thereof to him in his lifetime. It is payment to him that relieves the executors from further liability to account. Under clause (*g*), upon his death, the capital "as it may then exist" falls to be divided under the terms of Mrs. Chipman's will. Be this as it may, counsel for the respondent contends that during Dr. Chipman's lifetime his power is unlimited as to the amounts that he may take, that the obligation of the executors is to pay to him from time to time and at any time, upon his simple demand, such portions of the capital as he may wish or require, and that consequently Dr. Chipman was given a general power to appoint *inter vivos*. If it were necessary to decide this question, careful consideration would first have to be given to the appellant's argument that the wide terms in which the power given to Dr. Chipman is expressed in clause 3(*f*) are modified and restricted by clause "Fifthly", quoted above. Even if the respondent's contention that Dr. Chipman was entitled to take the whole capital be accepted, the power given to him does not at first sight appear to fall within the text-book definitions of a general power. See, for example, Halsbury 2nd Edition, Vol. 25 at page 211:—

> A general power is such as the donee can exercise in favour of such person or persons as he pleases, including himself or his executors or administrators.

We were, however, referred to the following three cases, in which powers similar to that given to Dr. Chipman were held to be general powers to appoint *inter vivos*: *Re Richards, Uglow v. Richards* (1), a decision of Farwell J.; *In re Ryder, Burton v. Kearsley* (2), a decision of Warrington J.; and *In Re Shukers Estate, Bromley v. Reed* (3), a decision of Simonds J. (as he then was). The earliest of

(1) [1902] 1 Ch. 76. (2) [1914] 1 Ch. 865.
(3) [1937] 3 A.E.R. 25.

these decisions is now fifty years old and no authority questioning them has been cited to us. On the other hand it is to be observed that in the last mentioned case Simonds J. indicated that, while he decided he ought to follow *re Richards* and *re Ryder,* his own inclination was to hold that such a power was not a general power of appointment. In the case at bar I do not find it necessary to decide this question, which I regard as difficult and doubtful, because, even on the assumption that the will of Mrs. Chipman gave to Dr. Chipman a general power to appoint the capital of the residue *inter vivos* I have reached the conclusion that the appeal must succeed.

In order to support the claim that Dr. Chipman was liable to pay succession duty in respect of that part of the residuary estate which he did not receive and which upon his death passed under the will of Mrs. Chipman to the residuary legatees named therein, it is necessary to find a provision in the Statute which, on a proper construction, imposes such a liability. In Maxwell on Statutes, 9th Edition, at page 291, the learned author says:—

> It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language of the statute clearly imposes the obligation.

In *Coltness Iron Company v. Black* (1), Lord Blackburn said:—

> No tax can be imposed on the subject without words in an Act of Parliament clearly shewing an intention to lay a burden on him.

It has been suggested that these statements are subject to some modification by reason of the terms of the *Interpretation Act,* R.S.C. 1927 c. 1, section 15, but even if this be so, to use the words of Rand J. in *In re Fleet Estate, Minister of National Revenue v. The Royal Trust Co.* (2):

> A taxing Statute must make reasonably clear the intention to impose the tax.

The learned trial judge has held that the tax claimed by the respondent is imposed by section 31. The section reads as follows:—

> 31. Where a general power to appoint any property either by instrument *inter vivos,* or by will, or both, is given to any person, the duty levied in respect of the succession thereto shall be payable in the same manner and at the same time as if the property itself had been given, devised or bequeathed, to the person to whom such power is given.

(1) (1881) 6 App. Cas. 315 at 330. (2) [1949] S.C.R. 727 at 744.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Cartwright J.

As a matter of construction, I think it clear that the word "thereto" in the third line of the section refers to the word "property" in the first line. In my view, the section, whether read by itself, or, as it must be, as part of the Act considered as whole, does not purport to levy any duty or to create or define a succession. It provides only for the manner and time of payment of duty which is assumed to be levied by other provisions of the Statute. It is not without significance that section 31 is found in that part of the Statute which deals with the time and manner of the payment of duties but of greater importance is the sharp difference between its language and that employed in the levying sections, 6, 10 and 11:— "there shall be assessed, levied and paid . . ."

It is necessary therefore to examine the charging provisions of the Statute to discover what duty is levied in respect of the succession to the capital of the residue of Mrs. Chipman's estate as that is the property over which, *ex hypothesi*, Dr. Chipman was given a general power of appointment *inter vivos*.

By the applicable words of 6(*a*) (and of sections 10 and 11, which fix the rates) it is provided that there shall be assessed, levied and paid duties upon or in respect of successions to property. Nowhere in the Act is duty imposed except upon or in respect of successions to property. The capital of the residue is, of course, property, and the question is whether within the meaning of the words used in the Statute Dr. Chipman succeeded thereto. The learned trial judge held that while Dr. Chipman was a successor to the capital of the residue under section 31, he was not a successor thereto under section 2(*m*) but it is desirable to examine that provision. It reads as follows:—

> (*m*) 'succession' means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession;

Applying these words to the case at bar, the "disposition" with which we are concerned is the will of Mrs. Chipman, the "property" is the capital of the residue, the "death of

the deceased person" is the death of Mrs. Chipman, and the question is therefore whether under her will, upon her death, Dr. Chipman became beneficially entitled to that capital "either immediately or after any interval either certainly or contingently and either originally or by way of substitutive limitation." It appears to me that he did not. I am of opinion that upon the death of Mrs. Chipman, Dr. Chipman became beneficially entitled to the income from the residue and the residuary legatees became beneficially entitled to the capital thereof in remainder. I have already indicated my view that the legal effect of the relevant provisions of the will of Mrs. Chipman is the same under the law of Quebec as under the common law, and using the terminology of the latter, the residuary legatees immediately on the death of Mrs. Chipman took not a contingent but a vested remainder in the capital, expectant on the death of Dr. Chipman, subject to be divested in whole or in part by his exercise of the power to take during his lifetime such portion or portions of the capital as he might wish. So far as the capital of the residue was concerned no part of it became vested in Dr. Chipman upon Mrs. Chipman's death or under any disposition made by her. No doubt upon his exercising the power Dr. Chipman became entitled to the part of the capital of the residue in respect of which he exercised it, and became so entitled under Mrs. Chipman's will by the operation of the rule of law that "whatever is done in pursuance of a power is to be referred to the instrument by which the power is created, and not to that by which it is executed as the origin of the gift." (vide Farwell on Powers, 3rd Edition at page 318); but it was only to the extent that he exercised the power that he became beneficially entitled to any portion of such capital and it was conceded that he was liable to pay duty in respect of such portion. The respondent's argument depends upon the proposition that a person who is given a power over property thereby becomes beneficially entitled to such property but in my view this is not the law and no words in the Statute so provide. As is pointed out in Halsbury, 2nd Edition, Vol. 25, page 515:—

> The creation of a power over property does not in any way vest the property in the donee, though the exercise of the power may do so; and it is often difficult to say whether the intention was to give property or only a power over property.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Cartwright J.

I have already indicated my view that as a matter of construction it is clear that Mrs. Chipman's will gave Dr. Chipman no property in the capital of the residue but only a power over it.

During the argument the terms of sections 3(4) and 4(1) of the *Act* were fully discussed but they appear to deal with the question of what duties are payable upon the death of the donee of a power rather than with the question of the duties payable upon the death of the donor of a power, and their relevance to the question before us is limited to the bearing which they may have upon the proper construction of section 31.

It is suggested that if the view which I have indicated is adopted difficulties will arise by reason of the terms of section 5 of the *Act* owing to the fact that during Dr. Chipman's lifetime it would be impossible to predict how much of the capital he would take and how much would remain at his death; but it would appear that under other provisions of the *Act,* particularly sections 23 and 48, the revenue can be amply safe-guarded.

It is argued for the respondent that unless section 31 is construed as levying duty it is meaningless but I am unable to agree. In the case at bar, on the assumption that a general power to appoint was given to Dr. Chipman, section 31 would seem to have the effect of requiring that all duties be paid in the manner and at the time provided in section 24 and of taking away the right to pay in the manner and at the times provided in section 28 which would otherwise have existed. But for section 31, the duties of the interests in expectancy given by clause (*g*) of the will of Mrs. Chipman might have been paid either within six months of her death (section 24(2)) or within three months of such interests falling into possesion (section 28(4)); and it will be observed that section 28(3) which permits this choice uses the words:— "or *in the manner* provided by subsection four or subsection six of this section." As already indicated, after consideration of all the terms of the Statute, I find myself quite unable to construe the words of section 31 as levying any duty or defining any succession; and I can find no other provision which has the effect of levying the duty which the respondent contends is payable.

For the above reasons, I would allow the appeal, set aside the assessment and order that the matter be referred back to the Minister in order that an assessment may be made upon the basis that the dutiable value of the succession to Dr. Chipman in respect of the residuary estate of Mrs. Chipman was the value as of the date of her death of the estimated net revenues from such residuary estate during the remainder of his lifetime and that the residuary legatees were assessable as having on the death of Mrs. Chipman become beneficially entitled to the capital of the residue in remainder expectant upon the death of Dr. Chipman, subject to the appropriate adjustment made necessary by the fact of Dr. Chipman having received $33,164.41 from such capital. The appellants are entitled to their costs in the Exchequer Court and in this Court.

Appeal allowed with costs.

Solicitors for the appellants: *Dixon, Claxton, Senecal, Turnbull and Mitchell.*

Solicitor for the respondent: *R. G. Decary.*

SUTTON LUMBER AND TRADING COMPANY LIMITED ..... APPELLANT;

AND

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

1953
*May 15, 18, 19
*June 26

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Excess profits—Sale of timber land by lumber company—Whether profits assessable—Whether in the course of carrying on the business of dealing in timber limits—Was the sale part of the business carried on—Excess Profits Tax Act, 1940.

The appellant was incorporated in 1893 by memorandum of association under the British Columbia Companies Act 1890, and re-incorporated in 1902 under the Companies Act, 1897. The declared objects of the company included the acquisition of timber lands, leases of such lands and licences to cut timber and turning the same to account, and of saw mills and other mills and factories for the manufacturing of lumber and lumber products, and of water rights for such purposes. The portion of the memorandum in which the objects were defined included the power to sell or otherwise dispose of the properties of the company. The company acquired extensive areas of timber lands

*PRESENT: Taschereau, Estey, Locke, Cartwright and Fauteux JJ.

1953

SUTTON LUMBER AND TRADING CO. LTD. v. MINISTER OF NATIONAL REVENUE

in the Clayoquot and Nootka Districts on the West Coast of Vancouver Island, some of which were Crown granted and some held under timber leases from the Crown. In the year 1906 a lumber mill was built in the Clayoquot District and manufacturing commenced but, proving unprofitable, the operation was closed down at the end of 1907. Thereafter the lumber mill was kept in repair, surveys were made for the purpose of ascertaining the most profitable means of turning to account the timber upon the company's holdings, water rights were acquired and the preliminary work done for the construction of a dam for the purpose of utilizing such rights. In the year 1942 the mill had been dismantled on the order of the Machinery Controller of Canada and the machinery sold. According to the evidence, it had been the intention of those controlling the company since the year 1902 to utilize the timber limits for the manufacture of cedar lumber in a location in the Clayoquot District. In 1946 the company sold the greater part of its holdings in the Nootka area and was assessed under the *Excess Profits Tax Act 1940* for the profit made upon the sale.

Held: The evidence disclosed that the business carried on and intended to be carried on by the company had not at any time been that of purchasing and selling timber lands or interests in such lands but that of manufacturing cedar lumber from the properties in a mill to be operated in the Clayoquot District: that the sale was of a capital asset which was not required and did not fit in to the company's plans for the operation of its main properties and the profit resulting from the sale was not assessable to Excess Profits Tax under the *Act*.

Anderson Logging Co. v. The King [1925] S.C.R. 45 distinguished. *Commissioner of Taxes v. The Melbourne Trust Ltd.* [1914] A.C. 1001 and *California Copper Syndicate v. Harris* (1904) 5 T.C. 159 referred to.

APPEAL from the judgment of the Exchequer Court of Canada, Archibald J. (1), upholding the Minister's assessment.

C. K. Guild Q.C. and O. F. Lundell for the appellant.

D. W. Mundell Q.C., J. D. C. Boland and K. E. Eaton for the respondent.

The judgment of the Court was delivered by

LOCKE, J.:—This is an appeal from a judgment of Archibald J. (1) dismissing the appeal of the present appellant from an assessment made under the *Excess Profits Tax Act 1940* for the taxation year 1946.

The assessment in question was made in respect of a profit of $95,102.90 made by the appellant upon the sale in the year 1946 of a parcel of Crown granted land described as Section 1, Nootka District, British Columbia, and its interest in seven renewable timber leases made between the

(1) [1952] Ex. C.R. 498.

Crown in right of the Province and the appellant in respect of lands in the said district. The appellant gave notice of appeal to the Minister of National Revenue under the provisions of section 14 of the *Excess Profits Tax Act* on the ground that the profit was not income, within the meaning of the *Act*, and the latter affirmed the assessment. Archibald, J. (1) in dismissing the appeal, apparently considered that the question to be determined was governed by the judgment of this Court in *Anderson Logging Co. v. The King* (2).

The Sutton Lumber and Trading Company Limited was first incorporated by a memorandum of association under the provisions of the Companies Act 1890 of the Province of British Columbia in the year 1893. In the year 1897 that Act was repealed and the various statutes dealing with the incorporation of companies consolidated in the Companies Act 1897. By s. 5 of that statute it was provided that a company theretofore incorporated by memorandum of association, upon compliance with prescribed formalities, might deliver to the Registrar of Companies a copy of its charter and regulations and its certificate of incorporation and receive a certificate of what was called the "reincorporation" and registration of the company as a company under the new Act. The appellant company, taking advantage of this provision, was reincorporated under the Act of 1897 on November 17, 1902 The authorized capital was $100,000, divided into 1,000 shares of $100 each, at which figure it has remained to the present day.

The British Columbia legislation providing for the incorporation of companies by memorandum of association followed the plan provided in England by the Companies Act of 1862. Companies so incorporated, as was decided in the House of Lords in *Ashbury Carriage Company v. Riche* (3), and in *Attorney-General v. The Directors of the Great Eastern Railway Company* (4), have no inherent common law rights and are accordingly restricted in their activities to carrying out the objects and exercising such powers as are described in the memorandum, including those which are fairly incidental to those things which the Legislature has authorized. No doubt, it was for this reason

(1) [1952] Ex. C.R. 498.
(2) [1925] S.C.R. 45.
(3) (1875) L.R. 7 H.L. 653.
(4) (1880) 5 App. Cas. 473.

1953

SUTTON LUMBER AND TRADING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

that until the passing of the Companies Act of 1929, which by s. 22 gave to all companies, thereafter incorporated by memorandum, extensive powers for the purpose of carrying out their declared objects without the necessity of enumerating them in the memorandum, the memoranda of association of many companies incorporated in the province included far reaching powers to carry on activities, many of which were far removed from the real purpose of the incorporation of the company.

The memorandum of association, in so far as its terms affect the present matter, reads as follows:—

2. The objects for which the Company is established are:—

(1) To purchase, take on lease, or otherwise acquire and hold any lands, timber lands or leases, timber claims, licenses to cut timber, rights of way, water rights and privileges, foreshore rights, wharves, saw mills, factories, buildings, machinery, plant, stock-in-trade, or other real and personal property, and equip, operate and turn the same to account, and to sell, lease, sublet or otherwise dispose of the same, or any part thereof, or any interest therein.

(2) To purchase, lease, hire, build, and operate saw mills and other mills and factories for the manufacturing of lumber and sale of lumber, shingles, boxes, blinds, sash and furniture, and any other articles of which wood shall form a component part.

(3) To carry on the business of saw mill proprietors and merchants and manufacturers of and dealers in timber and lumber of all kinds.

(4) To construct dams and improve rivers, streams and lakes, and to divert the whole or part of the water of such streams and rivers as the purposes of the Company may require.

(5) To catch, purchase, preserve, sell and deal in seals, and seal skins, and all kinds of fish, and the products thereof, respectively; to acquire, erect and operate fish canneries; and to purchase, sell and trade in general merchandise.

(6) To carry on all or any of the businesses of dealers in furs, skins and fish, exporters and importers, carriers by land and water, warehousemen, wharfingers and general traders and merchants.

(7) To construct, carry out, acquire by purchase or otherwise maintain, improve, manage, work, control and superintend any trails, roads, railways, tramways, bridges, reservoirs, watercourse aqueducts, wharves, saw mills, electrical works, telephones, factories, warehouses, ships, vessels, fishing and other boats, and other works and conveniences which the Company may think directly or indirectly conducive to any of these objects, and to contribute or otherwise assist or take part in the construction, maintenance, development, working, control and management thereof.

(8) Generally to purchase, take on lease, hire, or otherwise acquire any real and personal property, and any rights and privileges which the Company may think necessary or convenient for the purposes of its business.

(9) To use water, steam, electricity, or any other power now, or hereafter to become known as a motive power or in any other ways for the uses and purposes of the Company.

(10) To acquire, operate, and carry on the business of a power company under Part IV of the Water Clauses Consolidation Act, 1897.

(11) To acquire and carry on all or any part of the business or property, and to undertake any liabilities of any person, firm or association, or Company, possessed of property suitable for the purposes of this Company, or carrying on any business which this Company is authorised to carry on, or which can be conveniently carried on in connection with the same, or may seem to the Company calculated directly or indirectly to benefit the Company, and as the consideration for the same to pay cash or to issue any shares, stocks or obligations of this Company.

(12) To enter into partnership or into any arrangement for sharing profits, union of interests, co-operation, joint adventure, reciprocal concessions, or otherwise, with any person or company carrying on, or engaged in, or about to carry on or engage in, any business or transaction which this Company is authorised to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this Company; and to lend money to, guarantee the contracts of, or otherwise assist any such person or Company, and to take or otherwise acquire shares and securities of any such Company, and to sell, hold, re-issue, with or without guarantee, or otherwise deal with the same.

(13) To sell or dispose of the undertaking of the Company, or any part thereof, for such consideration as the Company may think fit, and in particular, for shares, debentures, or securities of any other Company having objects altogether, or in part, similar to those of this Company.

(14) To promote any Company or Companies for the purpose of acquiring all or any of the property and liabilities of this Company, or for any other purpose which may seem directly or indirectly calculated to benefit this Company.

(15) To borrow or raise money for any purpose of the Company, and for the purpose of securing the same and interest, or for any other purpose, to mortgage or charge the undertaking, or all or any part of the property of the Company, present or after acquired or its uncalled capital, and to create, issue, make, draw, accept and negotiate perpetual or redeemable debentures or debenture stock, promissory notes, bills of exchange, bills of lading, warrants, obligations and other negotiable and transferable instruments.

(16) To take or otherwise acquire, and hold shares in any other Company having objects altogether or in part similar to those of this Company, or carrying on any business capable of being conducted so as directly or indirectly to benefit this Company.

(17) To distribute any of the property of the Company among the members in specie.

1953

SUTTON LUMBER AND TRADING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

(18) To sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with the undertaking, or all or any part of the property, and rights of the Company, with power to accept as the consideration any shares, stocks or obligations of any other Company.

(19) To do all such other things as are incidental or conducive to the attainment of the above objects, or any of them.

It will be noted that, while the foregoing subparagraphs 1 to 18 are referred to in the opening words of the paragraph as objects, objects and powers are mingled. It is, in my opinion, a matter of some difficulty to sever what were intended as objects from those which were merely powers, but it seems to me to be clear that to operate and turn to account saw mills, factories, water rights and timber lands or leases in subparagraph 1 and the activities referred to in subparagraphs 2, 3, 5, 6 and 10 were clearly intended as objects, while the remainder of the subparagraphs were intended to define the powers taken for the purpose of carrying out such objects. When, for the purpose of obviating the necessity of defining the powers taken in such detail, the Legislature enacted s. 22 of the Companies Act 1919, the powers which were given to all companies thereafter incorporated as ancillary and incidental to the objects set forth in the memorandum included practically all of those enumerated in subparagraphs 1, 7, 8, 9 and 11 to 19, both inclusive, in addition to others. The powers so vested in every company incorporated under the terms of the Act of 1919 and in any company which might under the provisions of s. 51 of the Act, by ordinary resolution, alter its memorandum of association so as to include any or all of the powers referred to in s. 22, include, it is to be noted, the right:—

(*a*) To purchase, take on lease or in exchange, hire, or otherwise acquire and hold any real and personal property and any rights or privileges which the Company may think necessary or convenient for the purposes of its business; . . .

(*l*) To sell or dispose of the undertaking of the company or any part thereof for such consideration as the company may think fit . . .

AND

(*q*) To sell, improve, manage, develop, exchange, lease, dispose of, turn to account, or otherwise deal with all or any part of the property and rights of the company.

The question to be decided is not as to what business or trade the company might have carried on under its memorandum, but rather what was in truth the business it did engage in. To determine this, it is necessary to examine the facts with care.

The company was incorporated under the Act of 1890 at the instance of W. J. Sutton, J. E. Sutton and their associates and acquired from one of the Suttons a lease granted by the Provincial Government of ten sections in the Clayoquot District on the West Coast of Vancouver Island. By the terms of the Lands Act of 1888, the Lieutenant-Governor in Council were authorized to grant renewable leases for terms not to exceed thirty years, containing provisions binding the lessee to erect in some part of the Province a lumber mill capable of cutting not less than 1,000 ft. of lumber per day for every 400 acres of land included in the lease. The company, while controlled by the Suttons, had built and operated what was referred to as a small lumber mill. The extent of the holdings of the company during this time was apparently some 2,500 acres.

In November 1902, W. H. and A. F. McEwan of Seattle, the principals in the Seattle Cedar Lumber Manufacturing Company, which was engaged in the production of cedar lumber in the State of Washington, acquired the share interest of the members of the Sutton family. As shown by the Minute Book of the company, the McEwans and one of their solicitors at Victoria were appointed the first directors of the company following its reincorporation and a resolution was passed that the registered office be at No. 2 Broughton Street in Victoria.

In November 1903, B. W. Arnold, a lumberman carrying on business in Ontario and the Eastern United States, became a shareholder and was elected a director and thereafter agreed to advance to the company the funds necessary for the construction of what was referred to as a mill and logging plant at Clayquot. Between the years 1902 and 1905, renewable leases of large areas of timber in the Clayoquot area were obtained by the company from the Provincial Government and some Crown granted lands were purchased. In addition, during this time certain leases and some Crown granted lands were obtained in the Nootka District lying to the north of the Clayoquot District.

1953

SUTTON LUMBER AND TRADING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

The English Lumber Company, a Washington corporation, acquired shares in the company at a date which is not disclosed in the evidence. Whether the shares were held in the name of the company or that of Edward English, the directing head of the company, is not shown. No further leases or Crown grants of timber were acquired between 1905 and the time of the sale made in 1946 which gave rise to the present litigation.

In 1946, Mr. A. F. McEwan alone survived of those who had been the principals in the direction of the affairs of the appellant company in 1915 and he died before the present dispute arose. W. H. McEwan, Arnold and Edward English had all died long prior to that time. There was, however, in the employ of the Seattle Lumber Company Wm. C. Schultheis who, since the year 1898, had been employed by that company as a log and timber buyer and looked after the outside interests of the McEwans and was intimately familiar with the activities of the appellant company between the year 1902, when the McEwans first acquired their interest, up, until the present time. In 1923, on the death of W. H. McEwan, Schultheis had succeeded him as a director and had been elected Vice-President of the appellant company.

Schultheis said that, at the time the McEwans acquired control of the appellant company, there was only a cursory examination made by cruisers of the limits in the Clayoquot area. There was only a limited time to take up the options his employers had taken upon the Suttons shares and the cruisers found enough timber to justify the purchase. Cedar predominated throughout the area. The Suttons apparently had not any cruise of the timber. It was apparently prior to 1905 that certain leases had been obtained in the Nootka District, which lay in a different water shed than Clayoquot. In either of the years 1904 or 1905 the company purchased three Crown granted claims from a Captain Townsend, which were suitable for a mill site and booming grounds. In the year 1905 the company started clearing the land for the erection of a mill in Mosquito Harbour in the Clayoquot District and obtained fore shore leases at that place and booming ground rights near the mouth of the Kennedy River. In the same year, it applied for and obtained a water licence enabling it to divert water from

Sutton Creek, a tributary of Mosquito Harbour, for the purpose of milling operations. In the year 1906 the mill was built, designed for the manufacture of cedar lumber and shingles. It was not designed to handle fir logs. The mill operated with logs cut from the adjoining limits of the company during the year 1907. The financial statement of the company as of January 1, 1908, showed an investment in buildings, machinery, machine shops, etc. in excess of $153,000. Other buildings including dwellings had accounted for an expenditure in excess of $14,000. Something more than $24,000 had been spent on dock construction in the harbour and for donkey engines and other equipment for use in logging, something more than $15,000 had been expended. The capital stock of the company remained at $100,000 and the company was indebted to its stockholders for loans of money, apparently for the acquisition of the timber limits, the payment of rentals and the construction and equipment of the mill in an amount approximating $460,000.

This was apparently the first time that a cedar mill had been operated on the West Coast of Vancouver Island and the results were not profitable. A cargo of lumber was shipped to the New York market which arrived there at the time of the financial panic of 1907 and a heavy loss resulted. The loss in the operations for the year 1907 approximated $150,000 and the mill was closed down. In so far as the market in the United States was concerned, Schultheis said it was decided to wait until the Panama Canal was completed. The location of the timber was such that during this period it was not possible to sell logs on the West Coast market at a profit. Owing to the necessity of rafts being towed for long distances in the open sea, such an operation was not possible and Davis rafts which might have made this feasible were not then known.

The financial statement of the company for the year 1909, during which neither the lumber nor shingle mills were operated, shows the investment of the company in the mill site before depreciation at $153,427.14, for outside buildings and dwellings $14,010.39, for the fresh water system $6,857.66, for dock construction $24,325.76, for woods plant comprising logging, donkeys, equipment, etc. $15,713.83, for the Tug Clayoquot $5,041.03, for the cook

1953

SUTTON LUMBER AND TRADING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

house and camp buildings $2,366.90, in addition to the amounts invested in boom chains and other miscellaneous equipment. The advances by shareholders to the company as at the end of the year totalled $462,000. A caretaker was employed at the mill and no logging operations were carried on.

According to Schultheis, it was either in the year 1910 or 1911 that a timber cruiser was sent to make an examination of the Nootka limits and he reportd that they were predominantly fir. These limits constituted only about one-seventh of the company's holdings and it was not practical to operate a fir mill in the Nootka District and a cedar mill in Clayoquot. On October 10, 1911, at the annual meeting of the shareholders held at Victoria, the directors were authorised to sell for such consideration as they thought fit the three Crown granted lots in the Nootka District and the company's leasehold holdings in that area. Other than the Crown granted lots, these were the properties which were sold thirty-five years later, the sale resulting in the profit sought to be taxed in these proceedings.

In the year 1922 the company had all of the limits completely cruised. In the Nootka District the area of the Crown granted and leased lands was 10,195 acres, upon which there was an estimated 335,701,000 ft. B.M. of timber, the greater part of which was fir, hemlock and balsam; in the Clayoquot District, where there was comparatively little fir and cedar greatly predominated, the area of the limits was 63,665 acres, containing an estimated 1,955,616,000 ft. B.M. The evidence of the witness Schultheis, together with that of Mr. Aird Flavelle, a manufacturer of cedar lumber of very long experience on the West Coast and who had an intimate knowledge of the cedar market during the past forty years, show conclusively that, from the time of the acquisition of the limits until after the conclusion of the Second World War, the manufacture of cedar lumber on the properties or the sale of cedar logs from the limits was not economically possible. The company, however, maintained the lumber and shingle mill and the appurtenant properties in a state of repair, looking forward to the day when operations might become possible. In 1924, concrete foundations were placed under

the mill replacing the timber posts originally installed. A caretaker was maintained continuously until it was dismantled in the year 1942.

In 1926, the company employed W. C. Morse, a hydraulic engineer, to advise as to the best means of bringing logs from Kennedy Lake, which lay in a southeasterly direction from the mill in Mosquito Harbour, down the Kennedy River to salt water, and after an extensive survey received his opinion as to the most feasible method and the probable cost. The engineer was further instructed to examine the area and report as to the possibilities of developing hydro-electric power in the Kennedy Lake area and as to suitable locations for a ground wood paper mill in the area, and two written reports made by him respectively in July and August 1926 were put in evidence. Mr. Morse advised that a suitable power site was available at the Kennedy River Rapids where there was an excellent dam site. He advised that a very large amount of timber would have to be cut and bucked before the lake level could be raised and advised as to its disposition. As to a site for such a mill, he said that there was a suitable location at the mouth of the Kennedy River with a wharf facing on deep navigable waters in Tofino Inlet and advised as to the cost of installations for the production of 9,550 and 18,500 horse power respectively. The engineer considered that the ideal combination to develop the timber in the Clayoquot District would be a cedar mill, a hemlock mill and a pulp and paper mill and, as between the existing location of the company's mill at Mosquito Harbour where the mill was, in his opinion, worth around $150,000, advised as to the suitability of a second site at the mouth of the Kennedy River and a third site at Mud Bay, giving figures as to the cost that would be involved in further construction at Mosquito Harbour if operations were to be continued there and if mills were constructed at the alternative sites. As an alternative to construction on the West Coast of Vancouver Island, the engineer considered and advised as to the cost of delivering logs to Alberni at the head of the Alberni Canal, assuming the company should decide to build a cedar mill at that point rather than in the vicinity of its Clayoquot holdings.

1953

SUTTON LUMBER AND TRADING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

In advance of incurring the expense of these surveys by Mr. Morse, a reservation of the water power in the area was made and the official findings of the engineer were filed with the Water Board at Victoria. A contract was made to drill the foundations for a dam at Kennedy Rapids and this work was done. The company also undertook negotiations with the Crown Zellerbach Corporation for the establishment of a pulp mill which continued over an extended period. The company had purchased a suitable property as a site for a pulp mill and town site at Mud Bay at a cost of $5,000, having accepted the recommendation of the engineer as to this. However, construction was not proceeded with and the depression commencing at the end of the year 1929 rendered impossible the profitable operation of the properties.

Other than the logging and lumbering activities which were carried on in the years 1906 and 1907, no such operations were carried on until the year 1937 when the company, by a contract dated August 3, sold to Gibson Brothers Limited the merchantable timber on section 2, which was Crown granted, in the Nootka District and upon the lands covered by the timber lease of Lot 656 in that area. Upon these areas there was, as shown by the cruise, 50,809,000 ft. of fir and 651,000 ft. of cedar. The contract price was a stumpage rate of $3 per thousand of timber cut from the Crown granted lands and $2 per thousand for timber cut from the lease, and in addition 50 per cent of the net proceeds received from the purchaser from the sale of the logs, after the deduction of logging and marketing costs specified by the agreement. By the agreement, the purchasers agreed to log and raft not less than 10,000,000 ft. B.M. during each twelve month period and, on the demand of the vendor, to sell to it all cedar logs cut from the property from time to time at the then market price. By a further agreement dated August 17, 1938, the company agreed to sell to Gibson Brothers Limited all the merchantable timber on its timber lease on Lot 34 in the Nootka District on the same terms. The purchaser found the logging operations unprofitable and did not complete the logging of the said limits and, by an agreement dated March 31, 1943, the two agreements were terminated and Gibson Brothers Limited was released from further liability.

On March 31, 1945, the company entered into an agreement to sell the merchantable timber upon part of its holdings in the Clayoquot District to the North Coast Timber Company Limited at an agreed stumpage rate and, in addition, in consideration of 60% of the net proceeds which the purchaser should receive from the sale of all logs cut off the said lands, the purchaser agreeing to log and raft not less than 20,000,000 ft. and not more than 35,000,000 ft. in each period of twelve months throughout the term of the contract. Much of the timber so sold was upon limits that, according to Morse's survey, would be flooded by the construction of a hydro-electric plant on Kennedy River. The North Coast Company sold its interest in the contract to Kennedy Lake Logging Co. Ltd. and active logging operations were commenced and were being carried on at the time of the trial of this action. The logs cut were taken to mills at Port Alberni and this was apparently the first time that, following the termination of the Second World War in 1945, the market was such as to permit logging the cedar timber at a profit. The financial statement of the company for the year 1946 showed receipts from stumpage and profit sharing under the North Coast agreement amounting to $49,754.68.

Other than such amounts as had been received from the logging operations of Gibson Brothers Limited, the company had had no income between the year 1907 and the year 1946. The moneys to provide for the payment of rentals, for the timber leases and for the other expenditures of the company were provided accordingly by loans made to the company by the shareholders which totalled as of December 31, 1946, $1,081,588.52.

During the year 1946 the company sold to British Columbia Forest Products Ltd. section 1 and all of its interest in its timber leases in the Nootka District, realizing, according to its financial statement, a profit of $95,261.10, which was carried to capital surplus in the balance sheet.

The company's mill at Mosquito Harbour had been dismantled in the year 1942 on the order of the Machinery Controller of Canada and the machinery sold. It was impossible to buy machinery during the war years but, after the sale in 1946, the company had been endeavouring to locate a suitable mill site in the vicinity of the Alberni

1953

SUTTON LUMBER AND TRADING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

Canal and, in the year 1948, purchased a property at Ucluelet in the Clayoquot District which had been used as an airport during the war and upon which there were hangars and numerous other buildings, of which use might be made when establishing a mill, the consideration for the purchase being approximately $60,000.

Keith Fisken, the Treasurer of the appellant company, had been a director since 1938 and President from that year until 1950, an officer of the Seattle Cedar Company since 1930 and was the executor of the estate of A. F. McEwan and intimately associated with the affairs of the appellant since being elected to its Board. Since 1938 he said that the directors had attempted on numerous occasions to find a way to operate the property but that every time it appeared that something could be done the cedar market fell. The English Lumber Company, to which the appellant company was indebted as of December 31, 1946, in the sum of $270,397.55 for advances and which held 25 per cent of the shares, got into difficulty with its creditors and its shares were taken over by them and further advances by that company were not available. In the existing state of the company's finances, the only source from which moneys for the construction of a mill and the developing of the property could be sought was from the shareholders. The company had not built a new mill up to the time of the inception of these proceedings.

In addition to the evidence of the actual activities carried on by the company since 1902, the appellant tendered at the hearing the evidence of Schultheis as to the business which those who controlled the company intended that it should carry on. Schultheis, as I have said, did not become a director of the company until 1923, when he was elected as such upon the death of A. F. McEwan. He was, however closely associated with the McEwans and their associates in the company and had been present at many conferences between them and Arnold prior to 1905 and was clearly in a position to say how the then directors intended to deal with the property. Counsel for the Crown, however, objected to Schultheis giving evidence as to the business which it was intended that the company should carry on and the learned trial Judge ruled that his evidence was inadmissible, apparently on the ground that he was not

then a director of the company. Thus, since all of those who were directors at the time were dead, the intention of those who controlled and directed its activities must be sought by inference from the record of the business actually carried on.

In my opinion, the evidence of Schultheis as to the business which the company proposed to carry on between the years 1902 and 1923 was improperly rejected. The record, however, of the activities of the company during this period is consistent only with the view that the intention was to carry on the business of operating a saw mill for the production of cedar lumber in the Clayoquot District. There had been no real cruise made of the timber in the Nootka area in 1910 or 1911 but the examination which had been made apparently led the directors to believe that the timber was predominantly fir and thus unsuitable for manufacturing into lumber in a cedar mill, whereupon they passed the resolution in October 1911 that these limits be disposed of. In fact, when an accurate cruise was made of all the properties by Gardiner and Baxter in 1922, it was disclosed that there was more cedar than fir upon the Nootka Limits. Taking, however, the hemlock, balsam and other species, the cruise showed the cedar to be only slightly more than one-third of the timber upon the property. The evidence of Schultheis, who was permitted to speak of the activities which the company proposed to carry on from the time in 1923 when he was elected a director, and of Fisken and the record of the heavy expenditures made by the company in Morse's survey, for the upkeep and maintenance of the mill, for the acquisition of a mill site, for a site for a pulp mill which could be operated in conjunction with a lumber mill, for the purchase of the mill and town site at Ucluelet and the acquisition of the water rights on Kennedy River, demonstrated, in my opinion, that those who controlled this company did not depart from their original intention to utilize these extensive limits for the manufacture of cedar lumber in a location in the Clayoquot District. The sales to Gibson Brothers and to the North Coast Timber Company were made in the hope of obtaining some money to assist in carrying the properties, which cost annually for rentals and taxes some $20,000, and the sale of the Nootka

1953

SUTTON LUMBER AND TRADING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

limits, which did not fit in to the proposed cedar operations, was to obtain funds to repay part of the long-standing indebtedness of the company to its shareholders.

In the reasons for judgment delivered at the trial, the learned trial Judge, commenting on the evidence of Schultheis, said that the evidence did not satisfy him that the witness had detailed knowledge respecting all the plans of the directors of the appellant company and that he could not accept his evidence as conclusive proof of the intent and purposes of the directors during the early years of its existence, adding that he found his evidence entirely unsatisfactory in that respect. With respect, this comment appears to overlook the fact that the evidence of Schultheis, which had been tendered as to the activities proposed to be carried on by the directors between the period 1902 to 1923, had been rejected. As to the business carried on and intended to be carried on from 1923 onward, the evidence is clear, direct and uncontradicted.

The case for the Minister is apparently based upon the fact that in subparagraph 1 of paragraph 2 of the memorandum the power "to sell, lease, sublet or otherwise dispose of" timber lands and leases was taken. It was apparently considered by the draftsmen of the memorandum that this power should be expressly taken. Had the Companies Act of 1897 included a section similar to s. 22 of the Act of 1929, the power to sell the limits would have been implied. The existence of this power does not afford evidence that the company was, in truth, carrying on the business of buying timber lands or acquiring leases and selling them with a view to profit. The evidence submitted by the appellant in the present case demonstrates the contrary. In *Anderson Logging Company v. The King,* above referred to, the appellant company was incorporated under the British Columbia Companies Act of 1907. The objects declared in the memorandum included the following:—

> To stake, lease, record, purchase, sell and *deal in* timber licenses, timber leases and timber lands and to cut and buy and sell timber of all sorts and to carry on a general business as logger and dealer in logs and timber of all sorts in British Columbia and elsewhere.

The company had purchased certain timber limits and these were sold at a substantial advance over their cost and the question was as to whether this profit was income, within

the meaning of the *Income and Personal Property Taxation Act (B.C.) 1921*. While the company had carried on business for several years, no evidence was given as to the nature of the business actually carried on from the time of its inception until the year 1916, a fact commented on by Duff, J. who delivered the judgment of the Court upholding the assessment. After pointing out that there was only evidence of one transaction, the purchase of the limits in question, the following further comment was made:—(p. 51).

> It is not unimportant to remark that neither of the principal partners of the company, who could have given a history of the company's affairs from its inception, was called as a witness, nor, as has already been mentioned, was any but the most meagre evidence adduced as to the character of the company's operations before 1916.

In the absence of the evidence of any one having any knowledge of what was referred to as the *design* of the directors of the company in purchasing the limits and as one of the substantive objects of the company, as declared by the memorandum, was to acquire timber lands and timber rights with a view to dealing in them and turning them to account for the profit of the company, it was held that the appellant had failed to show that the assessment was one which ought not to have been made.

The question as to whether or not the present appellant was engaged in the business of buying timber limits or acquiring timber leases with a view to dealing in them for the purpose of profit is a question of fact which must be determined upon the evidence. It may be noted that the memorandum of the appellant, while including the power to sell or dispose of timber properties, *to deal in* timber licenses is not one of the objects stated as it was in the *Anderson* case. Had it in fact included such an object, the evidence in this case demonstrated that the company at no time carried on or intended to carry on any such business. Unlike that case, in the present matter all the available evidence as to the activities carried on or intended to be carried on by the company in the fifty years prior to the time of the trial of this action was given or tendered by the appellant. The decision in that case does not, in my opinion, affect this matter.

1953

SUTTON LUMBER AND TRADING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

In *Commissioner of Taxes v. The Melbourne Trust Limited* (1), Lord Dunedin, in delivering the judgment of the Judicial Committee, quoted with approval the following passage from the judgment in *California Copper Syndicate v. Harris* (2):

> It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.

In the present case, the Nootka limits which were sold in 1946 were assets in which the company had invested with a view to cutting the merchantable timber into lumber in a mill to be erected by it in the Clayoquot District and the sale merely a realization upon one of its capital assets which was not required and did not fit in to the company's plans for the operation of its main property and one which was not made in the course of carrying on the business of buying, selling or dealing in timber limits or leases.

The appeal should be allowed with costs throughout and the judgment of the Exchequer Court and the assessments made set aside.

Appeal allowed with costs.

Solicitor for the appellant: *O. F. Lundell.*

Solicitor for the respondent: *J. D. C. Boland.*

(1) [1914] A.C. 1001 at 1010. (2) (1904) 5 T.C. 159.

SMITH & RHULAND LIMITED..... APPELLANT;

AND

THE QUEEN, ON THE RELATION OF BRICE ANDREWS et al ..... RESPONDENT.

1953

*Mar. 10, 11
*June 8

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Trade Unions—Certification—Labour Relations Board's discretion to refuse certification—Apprehension of Communistic influence—The Trade Union Act, 1947 (N.S.), c. 3, ss. 2, 7, 8, 9—The Interpretation Act, 1923, R.S.N.S., c. 1, ss. 22 (1), 23 (11).

The local of a trade union applied under the *Trade Union Act*, 1947 (N.S.) c. 3, to the Labour Relations Board for certification of the Union as its bargaining agent. The Board found a *prima facie* case for certification made out but found further that the secretary-treasurer of the Union, who had organized the local and as its acting secretary-treasurer signed the application, was a Communist and exercised a dominant influence in it. On this ground it refused certification. The respondent appealed to the Supreme Court of Nova Scotia *in banco* for a writ of mandamus which was granted. The company-employer appealed.

Held: (Taschereau, Cartwright and Fauteux JJ dissenting):—That the appeal should be dismissed.

Per: Kerwin, Taschereau, Rand, Estey, Cartwright and Fauteux JJ.—The word "may" in s. 9(2) of the Trade Union Act is to be interpreted as permissive and connoting an area of discretion. *McHugh v. Union Bank* [1913] A.C. 299, applied.

Per: Kerwin, Rand and Estey JJ.—The Board in rejecting the application exceeded the limits of its discretion since it was not empowered by the statute to act upon the view that official association with an individual holding political views considered dangerous by the Board proscribed a labour organization. Before such association would justify the exclusion of employees from the rights and privileges of a statute designed primarily for their benefit, there must be some evidence that with the acquiescence of the members, it had been directed to ends destructive of the legitimate purposes of the Union.

Per: Kellock J.—The plain implication of s. 9(2) is that if the Board is satisfied with the application from the standpoint of the considerations the Statute itself sets forth, the Union is entitled to be certified.

Per: Taschereau, Cartwright and Fauteux JJ. (dissenting)—The Board exercised its discretion on sufficient grounds. *Rex v. London County Council* [1915] 2 K.B. 466, referred to.

APPEAL by the appellant-employer from an order of the Supreme Court of Nova Scotia *in banco* (1) allowing the appeal of the respondents on *certiorari* and ordering a

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

(1) (1952) 29 M.P.R. 377.

1953

SMITH & RHULAND LTD. v. THE QUEEN EX REL. BRICE ANDREWS *et al.*

peremptory writ of mandamus issued directed to the Labour Relations Board commanding it to exercise the jurisdiction conferred upon it by the *Trade Union Act* in respect of the application for certification of Local No. 18, Industrial Union of Marine and Shipbuilding Workers of Canada and its members as the bargaining agent of a bargaining unit consisting of employees of the appellant.

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

I. M. MacKeigan and M. Wright for the respondents.

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

RAND J.:—This is an appeal from a judgment of the Supreme Court of Nova Scotia sitting *in banco* (1) by which an order made by the Labour Relations Board of that province rejecting an application by the Industrial Union of Marine and Shipbuilding Workers of Canada, Local 18, for certification as the bargaining agent of employees in a collective unit was, on *certiorari*, set aside and a mandamus to the Board directed. The latter had found the unit to be appropriate for bargaining purposes and that the other conditions to certification had been met; but, on the ground that one Bell, the secretary-treasurer of the Union, who had organized the local body and as its acting secretary-treasurer had signed the application, was a communist and the dominating influence in the Union, refused the certificate. The court in appeal held the Board to have had, in the circumstances, no discretion to refuse, but that even if it had, the discretion had been improperly exercised.

Before us, Mr. Robinette challenged both of these grounds. The first depends on the interpretation of the word "may" in s. 9(2)(*b*) of the *Trade Union Act* which reads:—

> If a vote of the employees in the unit has been taken under the direction of the Board and the Board is satisfied that not less than 60 per cent of such employees have voted and that a majority of such 60 per cent have selected the trade union to be bargaining agent on their behalf; the Board may certify the trade union as the bargaining agent of the employees in the unit.

(1) [1952] 29 M.P.R. 377; Can. Lab. Law Rep. (C.C.H.C.) No. 15035

The controlling consideration in this interpretation is the express declaration in s. 23(11) of the provincial Interpretation Act (1923 R.S.N.S. c. 1) that "may" shall be construed as being permissive, subject to s. 22(1) which provides that the definitions so given shall apply "except in so far as they are . . . inconsistent with the interest and object" of the acts to which they extend.

S. 9 of the *Trade Union Act,* as well as the statute as a whole, exemplifies strikingly the contrasted uses of both "shall" and "may". For instance, in 9(1) we have "the Board shall determine whether a unit is appropriate"; "the Board may . . . include additional employees in the unit"; "the Board shall take such steps to determine the wishes of the employees"; 9(4) "the Board . . . may, for the purpose . . . make such examination of records or other inquiries, etc."; "the Board may prescribe the nature of the evidence to be furnished"; 9(5) "the Board, in determining the appropriate unit, shall have regard to the community of interest"; 9(7) "if the Board is not satisfied . . . it shall reject the application and may designate the time before a new application will be considered"; s. 11, the Board "may revoke the certificate."

These examples could be multiplied and in the face of them it would, I think, be an act of temerity to hold that in the clause before us the word is to be taken in an imperative sense. The judgment of the Judicial Committee in *McHugh* v. *Union Bank,* (1) is, in this respect, conclusive. There the language of the ordnance was virtually identical with the interpretation act here, although in the reasons a simpler expression is indicated: but as Lord Moulton puts it, "only a clear case of impelling context would justify giving it an imperative construction." The earlier English cases are of little assistance because of the absence of such a clause, and, again to use Lord Moulton's words, "the object and effect of the insertion of the express provision as to the meaning of 'may' and 'shall' in the Interpretation Ordnance was to prevent such questions arising in the case of future statutes".

I agree, therefore, with Mr. Robinette's first contention that the word is to be interpreted as permissive and as connoting an area of discretion. The remaining question

(1) [1913] A.C. 299 at 315.

1953

SMITH & RHULAND LTD. v. THE QUEEN EX REL. BRICE ANDREWS *et al.*

Rand J.

is whether the Board, in its rejection, acted within the limits of that discretion, in examining which I assume the findings made as to Bell's adherence to the doctrines of communism and the strategy and techniques by which they are propagated.

The "domination" I take to mean not particularly or directly that of the local union. Bell was, by the constitution of the federated body, the provisional secretary-treasurer of every local union until it had elected its own officers, and in fact he had ceased to hold that office of the applicant before the hearing had taken place, although he did not know of it until afterwards. Nor is it to be related to the fact of his having been an or the leading actor in organizing the local: that was part of the duties of his office.

The domination found was evidenced by Bell's forcefulness in the key position of general secretary-treasurer and organizer, by his acceptance of communistic teachings and by the fact that the party espousing those teachings demands of its votaries unremitting pressure, by deceit, treachery and revolution, to subvert democratic institutions and to establish dictatorship subservient to Soviet Russia. That is to say, the circumstance that an officer of a federated labour union holds to these doctrines is, per se, and apart from illegal acts or conduct, a ground upon which its local unions, so long as he remains an officer, can be denied the benefits of the *Trade Union Act*.

No one can doubt the consequences of a successful propagation of such doctrines and the problem presented between toleration of those who hold them and restrictions that are repugnant to our political traditions is of a difficult nature. But there are certain facts which must be faced.

There is no law in this country against holding such views nor of being a member of a group or party supporting them. This man is eligible for election or appointment to the highest political offices in the province: on what ground can it be said that the legislature of which he might be a member has empowered the Board, in effect, to exclude him from a labour union? or to exclude a labour union from the benefits of the statute because it avails itself, in legitimate activities, of his abilities? If it should be shown that the union is not intended to be an instrument of

advantage and security to its members but one to destroy the very power from which it seeks privileges, a different situation is presented and one that was held to justify a revocation of the certificate by the Dominion Labour Board in *Branch Lines Limited* v. *Canadian Seamen's Union,* (1).

The statute deals with the rights and interests of citizens of the province generally, and, notwithstanding their private views on any subject, assumes them to be entitled to the freedoms of citizenship until it is shown that under the law they have forfeited them. It deals particularly with employees in and of that citizenry and gives to them certain benefits in joint action for their own interests. Admittedly nothing can be urged against the bona fides of the local union; it seeks the legitimate end of the welfare of those for whom it speaks. During 1951, at least two local units of this union were certified by the Board notwithstanding that Bell at the time held the same office and adhered to the same views as found against him. One local includes employees working in the Halifax shipyards. Hubley, the associate of Bell in the application to the Board, who is president of the federated body, has been found by the Department of Defence to be unobjectionable on security grounds and is the holder of a pass to the Dartmouth shipyards; and the federation is affiliated with the Canadian Congress of Labour.

To treat that personal subjective taint as a ground for refusing certification is to evince a want of faith in the intelligence and loyalty of the membership of both the local and the federation. The dangers from the propagation of the communist dogmas lie essentially in the receptivity of the environment. The Canadian social order rests on the enlightened opinion and the reasonable satisfaction of the wants and desires of the people as a whole: but how can that state of things be advanced by the action of a local tribunal otherwise than on the footing of trust and confidence in those with whose interests the tribunal deals? Employees of every rank and description throughout the Dominion furnish the substance of the national life and the security of the state itself resides in their solidarity as loyal subjects. To them, as to all citizens, we must look for the protection and defence of that security within the governmental structure, and in these days on them rests an

(1) Can. Lab. Service (DeBoo) p. 6-1057.

1953

SMITH & RHULAND LTD. v. THE QUEEN EX REL. BRICE ANDREWS et al.

Rand J.

immediate responsibility for keeping under scrutiny the motives and actions of their leaders. Those are the considerations that have shaped the legislative policy of this country to the present time and they underlie the statute before us.

I am unable to agree, then, that the Board has been empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization. Regardless of the strength and character of the influence of such a person, there must be some evidence that, with the acquiescence of the members, it has been directed to ends destructive of the legitimate purposes of the union, before that association can justify the exclusion of employees from the rights and privileges of a statute designed primarily for their benefit.

The appeal must, therefore, be dismissed with costs.

TASCHEREAU J. (dissenting): I agree that by virtue of s. 9(2) of the *Trade Union Act* of Nova Scotia, a discretion is given to the Board to certify or not a Trade Union as the bargaining agent of a group of employees, and that this discretion may be exercised even if all the prescriptions of the Statute have been complied with.

In the case at bar, the Board declined to certify the applicant, because it was satisfied that it would be inconsistent with the principles and purposes of the Act, and contrary to the public interest, to have as bargaining agent a Trade Union whose organizer is a member of the Communist Party.

I believe that in coming to that conclusion, the Board properly exercised its discretion conferred on it by the law, and that it is not the function of this Court to interfere in the matter.

I would allow the appeal with costs here and in the Supreme Court of Nova Scotia.

KELLOCK J.: The statute here in question provides by s. 7(1) that a trade union claiming to have as members in good standing a majority of employees of one or more employers in a "unit" that is "appropriate for collective bargaining", may, subject to the rules and in accordance

with the section, apply to be "certified as bargaining agent" of the employees in the unit.

S. 2(3) defines, for the purposes of the Act, "unit" as a "group of employees" and "appropriate for collective bargaining" as "appropriate for such purposes" whether the unit "be an employer unit, craft unit, technical unit, plant unit, or any other unit and whether or not the employees therein are employed by one or more employer."

"Collective bargaining" is, in turn, defined by s. 2(1)(*e*) as "negotiating with a view to the conclusion of a collective agreement or the renewal or revision thereof", and "collective agreement" as

> an agreement in writing between an employer or an employers' organization acting on behalf of an employer, on the one hand, and a bargaining agent of his employees, on behalf of the employees, on the other hand, containing terms or conditions of employment of employees that include provisions with reference to rates of pay and hours of work.

Where such an application is made under s. 7, the statute, by s. 9(1), requires the board to determine whether the unit in respect of which the application is made is appropriate for collective bargaining, i.e., whether the group is such that a collective agreement between it and the employer or employers should come about. In making that determination the board is required by s.-s. (5) of s. 9 to have regard to

> the community of interest among the employees in the proposed unit in such matters as work location, hours of work, working conditions and methods of remuneration.

Although, as already mentioned, a unit is expressly defined by s. 2(3) to be appropriate whether or not the employees therein are employed by one or more employers, in the case of an application for certification with respect to a unit whose members are employed by two or more employers, s. 9(3) prohibits the board from certifying the union as bargaining agent unless (*a*) all the employers consent, and (*b*) the board is satisfied that the union could be certified under the section as bargaining agent in the unit of each employer if separate applications for such purposes were made. Moreover, s.-s. (6) of s. 9 prohibits the board from certifying any union "the administration, management or policy of which is, in the opinion of the board, dominated or influenced by an employer, so that its fitness to represent employees for the purpose of collective bargaining is impaired."

1953

SMITH & RHULAND LTD. v. THE QUEEN EX REL. BRICE ANDREWS *et al.*

Kellock J.

When, therefore, the statute provides by s.-s. (2) of s. 9 that when the board has determined that a unit of employees is appropriate for collective bargaining and is satisfied that the majority of the employees in the unit are members in good standing of the applicant trade union, it "may" certify the union as the bargaining agent of the employees in the unit, the statute contemplates, in my view, that the question of appropriateness of the unit is to be decided with regard to the considerations the statute itself sets forth to which I have referred. Provided that the board, acting upon these considerations, is satisfied that a majority of the members of the unit are members of the applicant union, and that the union itself comes within the definition of "trade union" contained in s. 2(1)(*r*), other considerations are irrelevant.

While s. 9(2) uses the word "may", that provision does not stand alone. S.-s. (7) provides that

> If the Board is not satisfied that a trade union is *entitled to be certified* under this Section, it shall reject the application.

In this language the subsection recognizes that a union can become "entitled" to certification under the section, and this, obviously, before actual certification. This, to my mind, would create a direct contradiction, if the statute were, at the same time, to be construed as giving a discretion to the Board enabling it to reject such a rightful claim. In my view the plain implication of the subsection is that, if the board is satisfied with the application from the standpoint of the considerations to which I have referred, the union is "entitled" to be certified.

I think this view is confirmed by reference to s. 8, which provides that where a group of employees belong to a craft or a group exercising technical skills by reason of which they are distinguishable from the employees as a whole, and the majority of the group are members of one trade union pertaining to such craft or other skills, the trade union may apply to the board, subject to the provisions of s. 7, and if the group is otherwise appropriate as a unit for collective bargaining, the union "*shall* be entitled" to be certified as the bargaining agent of the employees in the group. In my opinion this section, bringing in, as it does, the provisions of s. 7 and those provisions of s. 9 which relate to the appropriateness of a unit for collective

bargaining purposes, provides expressly for the same result which, in the view above expressed, is provided for by s. 9. I do not think that the legislature intended any different result in cases coming within s. 8 from those not within that section. The statute is harmonized by the construction above set forth, and in my opinion should be so construed.

The decision of the Labour Board, accordingly, was reached upon a consideration of extraneous matters. I would therefore dismiss the appeal with costs.

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

CARTWRIGHT J. (dissenting): For the reasons given by my brother Rand I agree with his conclusion that on a proper construction of s. 9(2) of *The Trade Union Act* (1947 N.S. 11 Geo. VI c. 3) the Board is given a discretion as to whether or not it will certify a trade union as the bargaining agent of the employees in a unit although, as in the case at bar, all statutory conditions precedent to certification have been fulfilled by the applicant.

The Act does not expressly indicate the principles by which the Board is to be guided in exercising this discretion and these must be deduced from a consideration of the statute as a whole. The view which the Board has taken on this point and its reasons for exercising its discretion against certification are expressed in the following words in its reasons for judgment:—

> The main purpose of the Nova Scotia Trade Union Act is to facilitate and encourage collective bargaining in good faith between employers and trade unions representing their employees as a means of attaining peaceful settlement of differences or disputes concerning wages, hours and conditions of work and other matters affecting their employment. The legal effect of certification of a trade union as a "Bargaining Agent" is to confer on the union (*a*) the power to require the employer of the employees in the "bargaining unit" to bargain exclusively and in good faith with the certified union concerning wages, hours and conditions of work and other employer-employee relations, and (*b*) the power to represent and hence determine the rights not only of members of the certified union but also of all other employees in the designated "bargaining unit" whether or not they belong to the union. The public interest in good faith exercise of these powers solely for the benefit of the employees as such, and also in the conduct of collective bargaining in good faith by both union and employer is very great.

1953

SMITH & RHULAND LTD. v. THE QUEEN EX REL. BRICE ANDREWS *et al.*

Cartwright J.

The Board finds in this case that:

The Applicant was organized by and is a constituent part of the Maritime Marine Workers' Federation. The Secretary-Treasurer of the Federation, who is its administrative Executive Officer and the principal organizer is J. K. Bell who exercises dominant leadership and direction of the Federation. The application for certification in this case was made and signed by J. K. Bell and M. S. Hubley and J. K. Bell appears as the provisional Secretary-Treasurer of the Applicant Union. J. K. Bell is a member of the Communist party (self-styled in Canada the Labour Progressive Party).

The Communist party is a highly disciplined organization, the actions of whose members are rigidly controlled by its leaders who require the policies and aims laid down by them to be slavishly followed by party members.

The Communist party differs essentially from genuine Canadian political parties in that it uses positions of trade union leadership and influence as a means of furthering policies and aims dictated by a foreign government. Statements and actions of Communists show that their policy is designed to weaken the economic and political structure of Canada as a means of ultimately destroying the established form of government.

Consequently to certify as bargaining agent a union while its dominant leadership and direction is provided by a member of the Communist party would be incompatible with promotion of good faith collective bargaining and would confer legal powers to affect vital interests of employees and employer upon persons who would inevitably use those powers primarily to advance Communist aims and policies rather than for the benefit of the employees.

Therefore, exercising the discretion conferred by the *Trade Union Act* on the Board to refrain from certifying an Applicant as Bargaining Agent when the Board is satisfied on reasonable grounds that certification would be inconsistent with the principle and purpose of the Act and contrary to the public interest, the Board denies certification to the Applicant herein.

The legislature has not given any right of appeal from a decision of the Board and the question to be decided is whether, in the case at bar, sufficient grounds have been shewn to warrant the Court interfering by way of mandamus with the exercise of the Board's discretion. The following passage in Halsbury (2nd Ed.) Vol. 9, p. 764 appears to me to state accurately the general rule governing such cases as this:—

In cases where application is made for the issue of a writ of mandamus to tribunals of a judicial character, the writ will only be allowed to go commanding such tribunals to hear and decide a particular matter. No writ will be issued dictating to them in what manner they are to decide. Where, accordingly . . . any . . . tribunal of a judicial character have in fact heard and determined any matter within their jurisdiction, no mandamus will issue for the purpose of reviewing their decision. The rule

holds good even though such decision is erroneous, not only as to facts, but also in point of law; . . . The Court will only interfere when the tribunal has not properly exercised its jurisdiction and has not heard and determined according to law, because it has taken into account extraneous matters and allowed itself to be influenced by them.

For the purposes of this branch of the matter the Supreme Court of Nova Scotia *in banco* has accepted the findings of fact made by the Board. These findings were challenged before us by counsel for the respondent. Assuming that the Court is entitled to examine the evidence which was before the Board, and having in mind the wide power given to the Board by s. 55(7) to receive evidence whether admissible in a Court of law or not, I am unable to say that there was no evidence before the Board to support the conclusions of fact upon which its decision is founded and it is not for the Court to weigh the evidence.

The judgments delivered in *Rex v. London County Council* (1), by the Divisional Court (Lord Reading C.J. and Bray and Shearman JJ.) and by the Court of Appeal (Buckley, Pickford and Bankes LL.JJ.) are most helpful. In that case rules *nisi* were obtained directed to the Council to show cause why a writ of mandamus should not issue commanding them to hear and determine certain applications for the renewal of music and cinematograph licences, which they had refused, upon the ground that they were actuated by extraneous considerations namely the shareholding and nationality of shareholders in the applicant, which was an English company. It appeared that the majority of such shareholders were alien enemies. The rules were discharged. I quote the following passages, with all of which I respectfully agree:—

From the judgment of Lord Reading C.J. at page 475:—

. . . It must be borne in mind that this Court, in determining whether or not the mandamus should issue, is not exercising appellate jurisdication. We are not entitled to decide according to the view we should have taken in the first instance had the matter come before us. We should only order the mandamus to issue if we came to the conclusion that the Council, by taking into consideration the enemy character of the constitution of the company, had allowed their minds to be influenced by extraneous considerations. The Council in these matters are the guardians of the public interest and welfare.

(1) [1915] 2 K.B. 466.

1953

SMITH & RHULAND LTD. v. THE QUEEN EX REL. BRICE ANDREWS et al.

Cartwright J.

From the judgment of Bray J. at page 479:—

. . . In considering the fitness of the persons the Council must not be guided by extraneous considerations. It is clear that in this case the Council were guided by the consideration that the large majority of the shareholders were alien enemies, and the question for us is whether this was an extraneous consideration. It seems to me to be clearly permissible for the Council to consider when a company is the applicant who are the persons who control the company. If it clearly appeared that such persons were not fit persons to have the licences the licences ought not to be granted. Next, is it permissible to consider whether such persons are alien enemies? These exhibitions have a strong influence on the minds of the spectators—in some cases a bad influence. Alien enemies have a strong motive to injure this country, and there would be a risk of their exercising this influence contrary to the interests of this country. It is said that there must be evidence that such an injury ought to be anticipated. It is impossible that there should be such evidence. There has been no experience which could afford such evidence. Is it not sufficient that in the opinion of the members, or the majority of the members, of the London County Council there is such a risk? They cannot wait and see. The licence is for a year. If there is such a risk, why is the risk to be run? It seems to me to be entirely a matter for the Council in their discretion to say whether or not it is desirable in the interest of the public that licences should be granted to a company controlled by alien enemies. It is not, in my opinion, an extraneous consideration. The Legislature has thought fit to leave it to the Council to say whether the applicants are fit persons, and we cannot direct them to hear and determine the matter because we might think—and I am far from saying I do so think—that these were fit persons.

From the judgment of Buckley L.J. at page 488:—

. . . The Lord Chief Justice was well founded in saying:— "If the Council are of opinion that the exhibition of cinematograph films accompanied by music should not be entrusted to a company so largely composed of persons whose interest or whose desire at the present time is or may be to inflict injury upon this country, can it be held as a matter of law that the Council have travelled beyond the limits allowed to them? I think not." The Council had to consider whether they would give a license to a company, in the name of an agent, which might be controlled or influenced by persons actuated by hostility to this country. If acting bona fide they thought that was a circumstance which ought to guide them in the exercise of their discretion, it was for them and not for us to determine. The only question we have to determine is whether the body with whom exclusively the determination of that matter lies has acted fairly and according to law.

In the case at bar, the Board was guided by the fact, as found by it, that the dominant leadership and direction of the applicant union was provided by a member of the Communist party, to the conclusion that certification would be inconsistent with the principle and purpose of the Act and contrary to the public interest. I am quite unable to

1953

SMITH & RHULAND LTD. v. THE QUEEN EX REL. BRICE ANDREWS *et al.*

Cartwright J.

say as a matter of law that this was an extraneous consideration. It must not be forgotten that under s. 11 certification once granted may be revoked but only after it has been in effect for not less than ten months. It is not necessary that I should express an opinion as to whether the decision of the Board was right or wise. It appears to me to be a decision made in the bona fide exercise of a discretion which the legislature has seen fit to commit to it and not to the courts.

Counsel for the respondent submitted that we should not entertain this appeal because no appeal was taken from the order of the Supreme Court *in banco* quashing the order of the Board, but this does not seem to me to relieve us of the duty of dealing with the order for the issue of a mandamus which is properly before us.

I would allow the appeal and set aside the order of the Supreme Court of Nova Scotia *in banco* directing the issue of a writ of mandamus. The appellant is entitled to its costs of this appeal and in the Supreme Court of Nova Scotia.

Appeal dismissed with costs.

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

Solicitor for the respondents: *I. M. MacKeigan.*

JOSEPH FINESTONE ..... APPELLANT

AND

HER MAJESTY THE QUEEN ..... RESPONDENT

1953

*Apr. 28, 29
*Jun. 26

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

Criminal law—Evidence—Exporting to destination not authorized by permit—Entry on bill of lading made by customs officer pursuant to duty under foreign law—Whether admissible—Error and defect in notice of appeal—Export and Import Permits Act, 1947, c. 17, ss. 5, 13—Criminal Code, s. 1018(2).

The appellant was charged with having exported tin plate from Canada to an ultimate destination not authorized by his permit for the export, issued under the *Export and Import Permits Act*, 1947, c. 17. The goods were to be shipped from Montreal to New York for furtherance to a South American country. The evidence consisted of a customs bill of lading, produced from the records of the Collector of Customs at New York, on which a signed entry was endorsed to the effect that the goods had been shipped from the United States destined to a

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

1953

FINESTONE v. THE QUEEN

European country. The bill had been prepared for admittance of the goods to the United States and was required by the law of that country.

Held: As to counts other than 6 and 7, the document was admissible.

Held further: As to counts 6 and 7, the copies of documents before the Court were improperly admitted and the appeal as to these counts was allowed.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing the trial judge's decision and convicting the appellant.

A. Tourigny Q.C. and J. Drapeau for the appellant.

G. W. Hill Q.C. and J. G. Ahearn Q.C. for the respondent.

The judgment of the Court was delivered by:—

RAND J.: The charge against the accused was for exporting tin plate from Canada to an ultimate destination not authorized by the permit for the export, and the substantial question in the appeal concerns a rule of evidence.

The goods were shipped from Montreal to New York for furtherance by water to a country in South America on bills of lading showing the accused to be the shipper. For admittance to the United States at the border point, what is called a customs bill of lading is made out by the railway on behalf of the shipper from the information furnished on the bill of lading; and since, on such a transit through the United States, the goods must be in bond, the customs bill of lading, supplemented, undoubtedly, by an official seal placed on the car, evidenced the receipt of the goods from the Customs authorities and committed them to the Collector of Customs at New York. The document was produced in court from the records of the Collector by his assistant solicitor. Endorsed on it was a signed entry that the goods had been shipped from the United States destined to a European country.

That control of the goods by the customs department of the government, effected by the customs bill of lading, was required by the law of the United States. In order that the transit be cleared, it was necessary that the goods should be exported and the entry to that effect on the records of the Customs Collector made in the course of public duty authenticates that fact. The document accepted in evidence contained such a record, and the question is whether it was admissible.

(1) 16 C.R. 41.

The argument made to us somewhat confused the admissibility of an entry made strictly in the course of business and one made pursuant to a public duty. The rule in relation to the latter does not seem ever to have been doubted. As early as 1785 in *R.* v. *Aickles* (1), it is said:

> The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require.

In *Doe* v. *France* (2), Erle J. says:

> It depends upon the public duty of the person who keeps the register to make such entries in it, after satisfying himself of their truth.

In *Irish Society* v. *Bishop of Derry* (3), *Parke B.* says:

> The bishop in making the return discharged a public duty, and faith is given that they would perform their duty correctly; the return is therefore admissible on the same principle on which other public documents are received.

In *Richardson* v. *Mellish* (4), in admitting a list showing the names, capacities and descriptions of all persons embarked on a ship, Best C.J., overruling an objection, said:

> For the purpose of proving the damage, the plaintiff put in a list returned by a captain under the authority of 53 Geo. III, cap. 155. It is contended that that paper was not evidence against third parties. I am decidedly of opinion that there is no foundation for that objection. This is a public paper made out by a public officer under a sanction and responsibility which impel him to make that paper out accurately; and that being the case, it is admissible in evidence, on the principle on which sailing instructions, the list of convoy, and the list of the crew of a ship are admissible.

The grounds for this exception to the hearsay rule are the inconvenience of the ordinary modes of proof and the trustworthiness of the entry arising from the duty, and that they apply much more forcefully in the complex governmental functions of today is beyond controversy. They have equal force in the case of an entry made pursuant to a duty under a foreign as well as a domestic law; *People* v. *Reese* (5) (Cardozo C.J.). In the infinite variety of commercial relations we have with the United States, it would be virtually impossible in such a case as that before us to establish proof if this long accepted rule could not

(1) (1785) 1 Leach Cr. L. 390 at 392.
(2) 15 Q.B. 758.
(3) 12 Cl. & F. 468.
(4) 2 Bing. 229, 240.
(5) 258 N.Y. 89.

1953

FINESTONE v. THE QUEEN

Rand J.

be invoked; and since the Court retains a discretion in admitting the document, any special circumstances tending to qualify the dependability of the entry would be subjected to judicial scrutiny.

It was urged by Mr. Tourigny, however, that for two of the shipments there was no evidence that the ultimate destination had been other than that authorized by the permit. The original documents in the office of the Customs Collector in New York had been mislaid and were not available and photostat copies tendered were rejected; there is, therefore, no evidence of the destination of export from New York before the Court. It is necessary, then, to consider, first, the precise requirement of the permit that is alleged to have been violated and the extent to which that violation can be said to be shown by the documents before us.

Sec. 5 of the *Export and Import Permits Act* reads:

> No person shall export or attempt to export from Canada any goods included in a list established pursuant to section three of this Act except under the authority of and in accordance with a permit issued under this Act.

The permit given the accused is headed "Application for permit to export war materials and other goods"; the name of the consignee is Charles Brauner, New York; the country of ultimate destination is stated to be Peru; and the application is granted "subject to the conditions entered on the reverse side of this permit." No such conditions are shown.

All that can be deduced from this, as the charge laid shows, is that to be exported in accordance with the permit, the goods must have as their ultimate destination a point in Peru.

The first of these two counts, No. 6, is supported by bill of lading for Car No. 29107 stated to have been shipped in bond to New York City for export "under T. & E. entry to Callao, Peru."; the second, No. 7, by bill of lading for Car No. 144541, shipped likewise in bond to New York for export "under T. & E. entry to Callao, Peru." The former is endorsed "intended for S.S. *Copgapo,* Chilean Line"; the latter "intended for S.S. *Santa Louisa,* Grace Line." I am unable to see how it can be contended that these acts of the accused in Canada contained in the directions and entries on the bill of lading can be taken to evidence a shipment in violation of the permit.

1953

FINESTONE v. THE QUEEN

Rand J.

A further point was taken that the notice of appeal by the Crown was insufficient. There was admittedly an error in the description of the charges from the acquittal on which the appeal was being taken; but the references to the Court and to the dates of the adjudications made clear to the accused both the error in the description and the judgments against which the appeal was being taken. Mr. Tourigny frankly conceded that the accused was in no way misled.

Under sec. 1018 (2) of the *Criminal Code* the time within which notice of appeal may be given may be extended at any time by the Court of Appeal. The point was considered by that Court in this case, but was rejected, which can only mean that the notice was dealt with in such a manner as brought the appeal properly before the Court. There is no question of the jurisdiction to do that and we would not interfere with a discretion so exercised.

I would, therefore, allow the appeal as to counts 6 and 7 and dismiss it as to the others.

Appeal dismissed except as to counts 6 and 7.

Solicitors for the appellant: *A. Tourigny and J. Drapeau.*

Solicitors for the respondent: *G. W. Hill and J. G. Ahearn.*

1953

*May 8, 11
*June 26

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED (*Plaintiff*) .. APPELLANT;

AND

KIWANIS CLUB OF WEST TORONTO (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Infringement—Performance by fraternal organization of copyrighted musical work in public dance hall—Whether performance "in furtherance of" a charitable object within meaning of exemption clause, s. 17 of the Copyright Act—The Copyright Act, R.S.C. 1927, c. 32, s. 17 as amended by 1938 (Can) c. 27, s. 5.

*PRESENT: Kerwin, Rand, Kellock, Locke and Cartwright JJ.

1953

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LTD. v. KIWANIS CLUB OF WEST TORONTO

The second proviso to s. 17 of the *Copyright Act*, 1927, R.S.C., c. 32, as amended by 1938 (Can.), c. 27, s. 5, provides that no charitable or fraternal organization shall be held liable to pay any compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational or charitable object.

The respondent, a fraternal organization, carried on various social, charitable and benevolent activities and as a means of raising funds for them, operated a dance hall. The appellant, the holder of the performing rights in certain musical compositions, sued the respondent for infringement, alleging that the respondent without its consent had performed or permitted to be performed the compositions in public in its dance hall. The respondent pleaded that it was a charitable or fraternal organization and that any public performance as alleged by the appellant was in furtherance of a charitable object and it specifically pleaded s. 17 of the Act as amended.

The action was dismissed by the Exchequer Court of Canada.

Held: The performance of a musical work to be "in furtherance of" a charitable object within the meaning of the exemption contained in the second proviso of s. 17 of the *Copyright Act*, must be a participating factor in the charitable object itself or in an activity incidental to it, for the purpose of which the object may consist of component parts of a cognate character; but it could not be said to be so associated with the object here by its role in the ordinary business entertainment of a dance: there being neither a participation in the object nor in anything incidental to it.

Decision of the Exchequer Court of Canada [1952] Ex. C.R. 162, reversed.

APPEAL by special leave from the judgment of the Exchequer Court of Canada (1) Cameron J., dismissing the appellant's action in damages for breach of copyright by the respondent, and for an injunction.

H. E. Manning, Q.C. for the appellant.

H. G. Fox, Q.C. and *G. M. Ferguson* for the respondent.

The judgment of the Court was delivered by:—

RAND J.:—This is an appeal by a company entitled to performing rights in certain copyright musical compositions. The claim is brought against Kiwanis Club of West Toronto, the respondent, a fraternal organization carrying on various social, charitable and benevolent activities, centering around the city of Toronto. Among other things, it has leased Casa Loma which had been built as a palatial residence but which through the vicissitudes of several decades had been abandoned to taxes and allowed by the city to become almost derelict. The Club sensed the possibilities of a profitable use of the building and premises to

(1) [1952] Ex. C.R. 162.

enable it to extend its own good works and for the past few years its foresight has been vindicated by the successful results of its venture. Substantial payments in the nature of rent are made to the city, and all net profits are restricted in their application to charitable purposes.

Among the means of raising money adopted is that of holding frequent dances from which the great part of its net income is derived. The Club has availed itself of other uses such as tours of the estate, conducting tea rooms, holding musicales, concerts, sales of souvenirs and refreshments, and other forms of service or entertainment, both with and without charge.

The meetings of the Club are held in the building, including the regular weekly luncheon, which serve not only the social purposes of the Club as between its members but enable the details of its administration generally to be discussed and courses of action to be decided upon. A full-time secretary devotes himself primarily to the activities of the centre and there is a staff for carrying them out.

Against the net income of approximately $44,000 for the year 1950 and some $4,000 interest on accumulated profit investments, certain charges or appropriations were called to our attention by Mr. Manning as not being attributable to charitable purposes. Among them was a sum of $1,500 applied to general administration costs of the Club. This, it was argued, could not represent any real service by the organization to Casa Loma nor a contribution to charity. There were sums paid for carrying on a summer camp at which paying as well as non-paying guests were received; in assisting agricultural clubs to spread the knowledge of animal husbandry and in demonstration of tree culture on a particular farm; junior Kiwanis clubs were promoted, a campaign in courtesy and safety in automobile driving likewise; and a large item of over $11,000 paid to the Y.M.C.A. These appropriations of funds were claimed to show the income of Casa Loma not to be wholly devoted to charitable objects and not, therefore, within the statutory exemption claimed by the respondent. But I do not find it necessary to deal further with this feature.

1953

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LTD. v. KIWANIS CLUB OF WEST TORONTO

Rand J.

That exemption is contained in the second proviso of s. 17 of the *Copyright Act*, and is as follows:—

> Further provided that no church, college, or school and no religious, charitable or fraternal organization shall be held liable to pay any compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational or charitable object.

The question posed is this: is the performance of such music by an orchestra paid for its services at the dances held by the Club an act "in furtherance of . . . a charitable object" by reason of the ultimate destination of the net profits to charity? This admirable ultilization of what would probably otherwise be a wasted property is, except for its general direction by the unpaid officers of the Club, carried on as an ordinary business enterprise, in which service is rendered on a commercial footing: does that ultimate disposal of the net return bring these operations within the proviso so that it can be said that the Club may, carte blanche, use any music it sees fit regardless of copyright?

On this question we have had the benefit of thorough argument from counsel for both sides. Mr. Fox, for the respondent, says that every act done in the course of this or any like chain or group of activities is, regardless of its nature, "in furtherance" of the concluding charitable act or object. But from this it is at once seen that there can be objects immediate, proximate or remote in relation to the performance. What, then, are we to take as that or those intended by the proviso?

It is the "public performance" that is to further the object. Now undoubtedly there can be an immediate charitable object in connection with and as part of which a performance can be given. Singing or performing music in and as part of a church service is directly furthering that service, itself a charitable object; an educational meeting with musical interpolations is carried on in a charitable sense and is itself such an object; and in the relief or amelioration of poverty, the accompaniment of the music of an orchestra at a Christmas dinner given to the poor through the means of voluntary contributions is equally so. Since, then, the proviso can be satisfied by a performance in the furtherance of a charitable activity of which it furnishes one of the functions, are we justified in attributing to the proviso the

intention to embrace also an ultimate, possible and remote result following a series of disjoined business transactions?

The ends to which Mr. Fox's argument leads are plain and undisputed. The Club could organize an opera company for the same purposes as Casa Loma. Opera ventures are notoriously unprofitable, but the "object" of the proviso, as Mr. Fox conceded, cannot be made to depend on the actual accrual of profit as the end result: what is looked to is the intention with which the step involving the performance is taken. And so Mr. Britten's "Peter Grimes" could be presented to the Toronto public without payment of the fee to which the composer has the right to look for his own subsistence. And there would be no limit to the mode of business to which resort could be so made, provided it involved the performance of music.

Some light is thrown on the question by para. 7 of the first proviso to s. 17. It exempts "the performance without motive of gain of any musical work at any agricultural, agricultural-industrial exhibition or fair which received a grant from or is held under Dominion, provincial or municipal authority, by the directors thereof." In *Composers, Authors & Publishers Association of Canada v. Western Fair Association* (1), this was held not to apply to the case of a paid performance by a band as part of an entertainment at a fair to which a special admission fee was charged, the object being both to entertain and to attract attendance. And in *The King v. Assessors of Sunny Brae ex p. Les Dames Réligieuses de Notre Dame de Charité du Bon Pasteur* (2), an exemption from taxation of property used for charitable purposes was held not to apply to a laundry operated by the Sisters, the net income from which went wholly to charity.

The performance, to be "in furtherance of", must, I should say, be a participating factor in the charitable object itself or in an activity incidental to it, for the purpose of which the object may consist of component parts of cognate character; but it could not be said to be so associated with the object here by its role in the ordinary business entertainment of a dance: there is neither a participation in the object nor in anything incidental to it.

(1) [1951] S.C.R. 596. (2) [1952] 2 S.C.R 76

1953

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LTD. v. KIWANIS CLUB OF WEST TORONTO

Rand J.

We cannot, then, treat the ultimate object here as exempting the performance from the prescribed fees: so to extend the language of the proviso would unnecessarily run counter to those principles of justice which accord to owners, particularly of property which in the truest sense they have created, the accepted privileges of ownership.

An injunction is claimed not only in respect of the unauthorized performance of the musical works mentioned in paragraphs 4 and 5 of the claim but also of all musical works included in lists which the appellant may file in the Copyright Office, the exclusive rights to the public performance of which belong to it. Whether or not an injunction can be given such a comprehensive scope, there is not, in this case, sufficient occasion to consider; the question between the parties arises out of the interpretation of the statute, and that now having been settled, the controversy should be ended.

I would, therefore, allow the appeal and direct judgment

(*a*) declaring the appellant to be the owner of that part of the copyright in the musical works mentioned in paragraphs 4 and 5 of the statement of claim, consisting of the sole right to perform them in public;

(*b*) declaring that the respondent has infringed the appellant's right by authorizing the performance of the musical works in public without the consent of the appellant;

(*c*) enjoining the respondent, its agents, servants and employees from infringing the appellant's copyright in the said musical works while comprised in the lists of such works which have been or will be filed by the appellant with the Honourable the Secretary of State at the Copyright Office in Ottawa and while the sole and exclusive right to perform the same in public remains the property of the appellant;

(*d*) damages in the sum of five dollars.

The appellant will have its costs of the action and of this appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Manning, Mortimer & Kennedy.*

Solicitors for the respondent: *Ferguson & Martin.*

SALMON RIVER LOGGING COMPANY LIMITED (*Defendant*) ..... } APPELLANT;

1953

*May 20, 21
*Jun 26

AND

CHARLES HARVEY BURT AND JOHN JOSEPH BURT carrying on business under the firm name and style of Burt Bros. and BURT BROS. (*Plaintiffs*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Hauling of logs—Negligence—Liability—Scope of exemption clause respecting damages to trucks—Whether party exempted from liability for negligence—Whether damage within scope of contract.

The respondent contracted to haul all logs produced by the appellant logging company from the logging area. One of its trucks was damaged while standing in the logging area near to a spar tree of the appellant where it had been placed for loading. This spar tree was used both for yarding logs and for loading them on to the trucks. A log which the appellant was yarding hit and broke a snag with the result that the spar tree fell on the truck.

The respondent's action, claiming negligence, was met by the contention that the appellant's liability was excluded by the exempting clause of the contract which provided that: "The trucks and the personnel operating such trucks shall . . . be at the risk of and the responsibility of the truckers and the truckers will provide their own insurance, pay their own workmen's compensation charges and will indemnify . . . the company from any claims or damages or for any damage that may occur arising out of the use or operation of the said trucks . . .". The action was maintained by the trial judge and by the Court of Appeal for British Columbia. The negligence of the appellant was not contested in this Court.

Held: (Kellock and Locke JJ. dissenting), that the appeal should be dismissed.

Per: Rand J.: On the principle followed in *Canada Steamships Company v. The King* [1952] 1 All E.R. 305, as the exempting clause can be satisfied reasonably by reference to an area not touching the negligence of the company, its language is not to be read as extending to that negligence. Furthermore, the accident arose out of work carried on exclusively by the company and therefore outside the scope of the contract.

Per: Estey and Cartwright JJ.: The reciprocal obligations contracted by the parties had to do with the loading, hauling and dumping of the logs. The operation in the course of which the truck was negligently damaged had nothing to do with the operation of loading the truck; it was therefore not within the four corners of the contract and the exempting clause did not apply. On the assumption that the words

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ.

1953

SALMON RIVER LOGGING CO. LTD. v. BURT BROS.

of the clause should apply to the negligence of the appellant in matters within the contract, clear words would be necessary to cover damage caused by negligence in an operation carried on outside the contract.

Per: Kellock and Locke JJ. (dissenting): Effect can be given to all of the language of the exempting clause only by construing it as covering damage or injury to trucks or drivers caused by the negligence of the appellant as well as to damage to the person or property of third persons caused by reason of the operation of the trucks. As the damage arose within the scope of the contract, the appellant should be exempted from liability.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), upholding the decision of the trial judge (2) and maintaining the action for damages.

C. K. Guild Q.C. for the appellant.

Alfred Bull Q.C. for the respondent.

RAND J.:—Clause 3 of the agreement, on which the contention of Mr. Guild is based, reads:—

3. IT IS UNDERSTOOD AND AGREED that the trucks and the personnel operating such trucks, shall, at all times during the life of the within contract, be at the risk of and the responsibility of the Truckers and that the Truckers will provide their own insurance, pay their own Workmen's Compensation charges and will indemnify and save harmless the Company from any claims or damage or for any damage that may occur arising out of the use or operation of the said trucks for the term of the within contract.

Construing that language as a whole and with the remaining provisions, I have come to the conclusion that it is designed to evidence conclusively the fact that the trucking was to be taken as separate and distinct from the loading and other work carried on by the Logging Company; that the trucking firm was to act as an independent contractor and not in any relation of agency, partnership, sub-contractor, or anything of like nature toward the Company: that, in short, no risk relating to the property or personnel of the Truckers was to be placed upon the Company attributable to any relationship arising from the contract. This may have been quite unnecessary but the language indicates it to have been in the minds of the parties.

Mr. Guild contends that the clause is aimed at the hazards of the work undertaken so far as it involved co-operative or concurrent action by the Company, and that since outside the obligations of the contract the Company

(1) [1952] 6 W.W.R. (N.S.) 92. (2) [1951-52] 4 W.W.R. (N.S.) 370.

would be liable only for negligence, this latter must be imported to give subject matter to the language. The first significant word is "risk." That may denote risks of damage or injury caused to the trucks or personnel by accident, by the negligence of the Truckers themselves or by third parties, or by that of the Company, and it is so far ambiguous: but on the principle followed by the Judicial Committee in *Canada Steamships Company v. the Crown* (1), as the clause can be satisfied reasonably by reference to an area not touching the negligence of the party claiming the benefit of it, its language is not to be read as extending to that negligence; and that interpretation is confirmed by the considerations which follow. The word "responsibility" is to be related, obviously, to the consequences of conduct of the Truckers. Why should tortious action by the Truckers be declared to be on their own responsibility? Only because of possible effects resulting from the special relations created by the contract. The Truckers are to insure generally. Insurance would cover loss from accident and the negligence of themselves as well as that of third persons; but what of damage caused by the Company? Being of the nature of indemnity, insurance gives rise to subrogation against the wrongdoer: is this subrogation to be negatived in relation to the Company by insuring for its benefit where the damage is the result of its negligence but not so in the case of other wrongdoers? How can we imply such a significant provision? The Truckers will pay their own compensation charges. What could raise a doubt about this? Only that the terms of the contract might seem to create a relationship affecting that obligation by associating in some way the Truckers with the Company in what is, objectively, an entirety of operation. Mr. Guild referred to the provisions of the Act by which where an employee of one class is injured by the negligence of an employee in another class, the latter is charged with the resulting compensation. How the Truckers could, short of bearing the entire award themselves, prevent that transfer from being made under the statute I am unable to see; and what the Truckers are to do is to pay their charges, not compensation to their own employees.

(1) [1952] 1 All E.R. 305.

1953

SALMON RIVER LOGGING CO. LTD. v. BURT BROS.

Rand J.

This view is strikingly confirmed by the last member of the clause. The Truckers are to "indemnify and save harmless the Company" from the consequences specified. To what consequences are these words appropriate? We do not "indemnify and save harmless" from or against our own claims or for damage done to us by others. To give them that effect would be to interpret them as an anticipatory release or a declaration that no claims would arise or could be made by the Truckers against the Company. But this familiar phrase must be given its well established meaning. To indemnify and save harmless is to protect one person against action in the nature of claims made or proceedings taken against him by a third person, and it would distort that plain meaning to attribute any other signification to it.

Finally, the indemnity is to be for damage "arising out of the use or operations of the said trucks", that is, those operations or use as being the cause of damage or to which it is attributable. This concluding sentence gathers up the effects of the previous language and furnishes protection in law to the substantive matter of the preceding specifications. It completes a consistent and logically developed expression of a specific area of security to the Company and one which, in the circumstances, the parties can readily be understood to have had in mind.

The accident here was not of the nature so envisaged; it arose out of work carried on exclusively by the Company; the fact that the truck was in its vicinity awaiting loading cannot in any sense stamp the resulting damage as arising out of that fact.

There remains to be added what is to me a most pertinent question: in this situation of doubtful meaning of their language, for what conceivable reason can we take the parties to have intended that in relation to these associated operations in which there might easily be joint negligence, and as between themselves, the Truckers were to be liable for their negligence while the Company was to be excused? I can imagine none.

I would, therefore, dismiss the appeal with costs.

The dissenting judgment of Kellock and Locke JJ. was delivered by

KELLOCK J.:—I cannot accept the contention of the respondent that paragraph 3 of the agreement here in question extends to breaches on the part of the appellant of its contractual obligations. So to construe the paragraph would nullify such obligations and I do not think any such intention is to be gathered from the terms in which the agreement is expressed.

Leaving this contention aside, therefore, damage or injury might arise in the course of the carrying out of the contract not only to the person or property of others but also to the trucks and the drivers themselves. The appellant would, however, be liable only for injury or damage arising from negligence.

It is said for the respondent that by reason of the agreement between the parties, it might be held that the doctrine of *respondeat superior* would apply so as to make the appellant liable for claims of third persons and that the terms of paragraph 3 are limited to protection against such claims. I cannot, however, accept this contention. I do not think it can be doubted that the parties to the agreement contemplated that the logging operations, to which the trucking was incidental, were operations involving risk of injury not only to persons or property which might be caused by the trucks but also danger to the trucks and the truck drivers themselves from the mere presence of the latter on the appellant's premises during the carrying on of logging and loading operations.

Paragraph 3 provides not only that the trucks and their drivers shall be "the responsibility" of the truckers but also that they shall be at their "risk." "Risk" certainly includes injury or damage occurring *to* the trucks or the drivers, while "responsibility" envisages accountability for damage caused *by* the trucks or drivers. In my view these words are used in contradistinction with the result that damage to trucks and personnel as well as damage by them is expressly provided for.

With respect to protection against claims for third party damage, such a result is attained by the following language, namely, that "the trucks and the personnel operating such trucks shall at all times be . . . the responsibility of

1953

SALMON RIVER LOGGING CO. LTD. v. BURT BROS.

Kellock J.

the truckers" who agree to "indemnify and save harmless the Company . . . for any damages that may occur arising out of the use or operation of the said trucks."

This, however, as already noted, does not exhaust the actual terms of paragraph 3 as it also provides that the trucks and the drivers shall at all times "be at the risk" of the truckers who shall also "provide their own insurance", (no doubt insurance as to the trucks themselves) and "pay their own Workmen's Compensation charges" (insurance as to the drivers) and "indemnify and save harmless the Company from any claims or damage."

With respect to the obligation to insure, it is, I think, obvious, as was pointed out by Banks L.J., in *Rutter v. Palmer* (1), that

> it is well known to be the common practice for the owners of motor-cars to insure themselves against all risks in connection with the car, that is to say against damage done not only to the car but by the car, and damage caused not only by negligent acts but by innocent acts as well.

In *Canada Steamship Lines v. The King* (2), with respect to a provision there in question that the respondents would "provide their own insurance," Lord Morton, speaking for the Judicial Committee, said at p. 211 that the other party to the contract had indicated by that language that it did not intend to be liable for any damage to the property there in question "howsoever such damage might arise."

In my view the contention of the respondent gives effect to part only of the terms of paragraph 3. I think, with respect, it cannot be so limited, and that effect can be given to all of its language only by construing it as covering damage or injury to trucks or drivers caused by the negligence of the appellant as well as damage to the person or property of third persons caused by reason of the operation of the trucks. The appellant would not be liable for any damage or injury to trucks or drivers caused otherwise than by negligence on the part of its servants.

With respect also, I cannot accept the contention that the damage here in question arose outside the scope of the contract and, therefore, outside the protection of paragraph 3. The words "at all times" sufficiently indicate that

(1) [1922] 2 K.B. 87 at 90. (2) [1952] A.C. 192.

an occasion, such as that here in question when the truck was waiting to be loaded, was, in the contemplation of the parties, an occasion within the express terms of the contract.

I would allow the appeal. The appellant should have its costs throughout.

The judgment of Estey and Cartwright JJ. was delivered by

CARTWRIGHT J.:—The facts out of which this appeal arises are undisputed. On March 5, 1948, the appellant and the respondents entered into a contract in which they are referred to respectively as "the Company" and "the Truckers". The relevant parts of this contract are as follows:—

WHEREAS the Company owns and has the right to log Timber Licences 3233p, 3234p, and 6420p, together with certain adjoining Crown Timber Sales situate in the vicinity of Elk Creek, in the District of Sayward, Vancouver Island, Province of British Columbia, with a log pond adjacent thereto, with dumping facilities (hereinafter referred to as the "Log Dump");

AND WHEREAS the Truckers are desirous of transporting the log production from the said timber lands to the Company's said Log Dump and have agreed with the Company to haul all logs produced by the Company from the area within three and one-half miles of the said Log Dump as shown on the sketch attached hereto, which area is hereinafter referred to as the "Logging Area", and to perform the additional services hereinafter set out for the remuneration and on the terms and conditions hereinafter contained;

NOW THIS AGREEMENT WITNESSETH:

1. During the life of the within contract IT IS AGREED that the Truckers shall have the exclusive right at the remuneration and on the terms and conditions hereinafter set out, to haul all logs produced by the Company from its said logging area.

2. The Truckers HEREBY COVENANT with the Company as follows:

(a) The Truckers shall furnish sufficient logging trucks, which in the opinion of the Company are necessary to haul all of the logs produced from the said logging area, and will at all times during the life of the within contract at the Trucker's expense, maintain and keep the said logging trucks in first-class operating condition;

(b) The truck or trucks to be provided by the Truckers shall, at all times during the life of the within contract, be kept in readiness and available for the purpose of hauling logs produced by the Company pursuant to the terms of this contract and that the time of loading and the despatch of the trucks for the purpose of efficiently transporting the said logs shall be at the sole discretion and control of the Company;

(c) The driver of each truck shall be a competent and qualified logging truck driver approved by and acceptable to the Company.

1953

SALMON RIVER LOGGING CO. LTD. v. BURT BROS.

Cartwright J.

3. IT IS UNDERSTOOD AND AGREED that the trucks and the personnel operating such trucks shall, at all times during the life of the within contract, be at the risk of and the responsibility of the Truckers and that the Truckers will provide their own insurance, pay their own Workmen's Compensation charges and will indemnify and save harmless the Company from any claims or damage or for any damage that may occur arising out of the use or operation of the said trucks for the term of the within contract.

Paragraph 4 deals with the terms of payment. The contract continues:

5. IT IS UNDERSTOOD AND AGREED that the Truckers shall haul all logs produced under the within contract to the said log dump and will, with the equipment to be provided by the Company and with the assistance of the Company's log dump employees, cause the said logs to be dumped at the Company's said log dump.

6. IT IS UNDERSTOOD AND AGREED that to facilitate the maintenance and repair of the Trucker's trucking equipment that the Truckers may use the Company's temporary garage for the purpose of making repairs and carrying out maintenance and service work on the said trucks and trailers free of charge, but that any gasoline, oils, grease, major parts or other major materials provided by the Company for such maintenance and service work shall be paid for by the Truckers at cost, and IT IS FURTHER UNDERSTOOD that the intention is that the Company shall provide the facilities in this clause referred to to assist the Truckers in maintaining the truck and trailers to be provided by the Truckers in operating conditions and that it is not intended that the Company shall in any wise be expected to provide parts or materials for overhaul.

7. IT IS UNDERSTOOD AND AGREED that the Company shall, with the use of its road grader, so far as possible keep its logging truck roads in the said logging area, and particularly the main line logging truck road, in as good shape as reasonably possible for the hauling of the said logs, subject to circumstances or conditions arising beyond the control of the Company.

8. IT IS UNDERSTOOD that the Company will furnish suitable water facilities for the purpose of cooling brakes when required and will for the purpose of enabling the Truckers to furnish light for the said temporary garage, furnish the Truckers with one of its existing gasoline light plants which it is understood the Truckers will maintain and operate for the purpose of furnishing light for the said temporary garage.

9. In order to facilitate the carrying on of continuous logging and to, so far as possible, prevent shutdowns the Truckers AGREE with the Company that they will provide without charge their equipment for the purpose of moving necessary miscellaneous equipment from one setting or logging area to another setting or logging area.

Paragraph 10 deals with terms of payment.

11. IT IS UNDERSTOOD AND AGREED that it is the intention of the Company to carry on continuous operations except for necessary seasonable shutdowns and that the Company will use its best endeavours to provide a continuous supply of logs for hauling by the Truckers but that the quantity of timber and the time of the removal thereof and the right to shutdown operations at any time and for any cause shall be solely a matter of decision by the Company and the Company shall not under any circumstances by reason of a shutdown or its inability to make logs available for transport to its said log dump be in anywise responsible to the Truckers for any claim for damages or otherwise.

It was not suggested that any other provision of the contract was material to the question before us.

On June 22, 1949, a logging truck belonging to the respondents was standing near to a spar-tree of the appellant which was used for the two purposes of yarding (i.e. drawing in by the use of tackle rigged to the spar-tree) logs and of loading them on to the trucks. Both the yarding and the loading were done by employees of the appellant. These operations were separate and were performed with different tackle and by different crews. While the truck was being loaded the appellant's yarding crew were engaged in yarding a log. This log hit and broke a "snag" which fell against and broke one of the guy-wires supporting the spar-tree, with the result that the spar-tree broke and fell on the truck damaging it to the extent of $5,549.29, for which amount the respondents brought action against the appellant. The action was tried before the Chief Justice of the Supreme Court of British Columbia (1), who found that the damage was caused by the negligence of the servants of the appellant. This finding was not questioned in the Court of Appeal (2) or before us. The learned Chief Justice held that the appellant was not relieved from liability by the terms of paragraph 3 of the contract quoted above because, in his view, the operation in the course of which the truck was negligently damaged was not within the contract and consequently the following words of Lord Greene M.R. in *Alderslade v. Hendon Laundry Ld.* (3) were applicable:—

It must be remembered that a limitation clause of this kind only applies where the damage, in respect of which the limitation clause is operative, takes place within the four corners of the contract.

(1) [1951-52] 4 W.W. R. (N.S.) 370. (2) [1952] 6 W.W.R. (N.S.) 92.
(3) [1945] K.B. 189 at 192.

1953

SALMON RIVER LOGGING CO. LTD. v. BURT BROS.

Cartwright J.

On this point Sidney Smith J.A., with whom O'Halloran J.A. agreed, held a contrary opinion which he expressed in the following words:—

> I think this too strict a view. I think it was based on his finding that the spar tree had nothing to do with the operation of loading the truck. But the evidence shows (and both counsel agree) that it had; that the same spar tree was used for yarding the logs (and it was in the yarding that negligence was found) and for loading them on to the truck. That being so, and the truck at the time being in the course of being loaded, it would seem that the damage was done while the truck was being used entirely in accordance with the contract terms, and in the very heart of the logging operations.

It is true that the words used by the learned Chief Justice who presided at the trial are open to the construction that he had overlooked the fact that the spar-tree was used in the operation of loading the trucks as well as in the operation of yarding the logs but, if this be so, in my opinion it in no way affects the validity of his conclusion. The negligent operation which caused the spar-tree to break had nothing to do with the operation of loading the truck. The reciprocal obligations with which the contract deals have to do with the loading of the logs on the respondent's trucks, the hauling of them to the appellant's log dump, and the dumping of them there. The contract is silent as to how the logs are to be brought to the places at which they are loaded. The appellant is left free to do this in any manner it sees fit or to arrange with an indepedent contractor to do it. Even if the words of the exempting clause should on a proper construction be held to apply to negligence of the appellant or its servants in regard to all matters falling within the four corners of the contract, I think that clear words would be necessary to extend it to cover damage caused by the negligence of its servants in a separate operation carried on by a different crew, and which, as has already been pointed out, the appellant was free to entrust to an independent contractor. Such operation does not in my opinion fall within the four corners of the contract merely by reason of the fact that it was being carried on in the immediate vicinity of the truck at the time it was being loaded. I am in respectful agreement with the conclusion of the learned Chief Justice of the Supreme Court of British Columbia on this branch of the matter, without finding it

necessary to resort to the rule stated in Beal's Cardinal Rules of Legal Interpretation, 3rd Edition at page 144 that:—

> Where there is any doubt as to the interpretation of any stipulation in a contract, it ought to be interpreted strictly against the party in whose favour it has been made.

I am, therefore, of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. S. Lane.*

Solicitor for the respondents: *G. E. Housser.*

RONALD ALEXANDER GORDON (*Plaintiff*) ..... APPELLANT;

AND

ADDA WEIS CONNORS (*Defendant*) .... RESPONDENT.

1953

*May 27, 28
*Jun 26

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Option to lease—Minerals—Variation between lease and terms of option—Whether option binding.

The respondent signed a 30 days option to lease certain mineral rights to the appellant for a term of ten years, with a bonus payable on completion of the option. The appellant tendered the bonus payment and at the same time submitted for the signature of the respondent a form of lease containing provisions contrary to the terms of the option. The tender was refused. The trial judge found the option to be binding but the Court of Appeal for Alberta held that the tender was conditional and that the option had ceased to exist.

Held: The appeal should be dismissed. The evidence showed that the tender was not within the terms of the option.

Per: Kerwin and Fauteux JJ. The principles of *Pierce v. Empey* [1939] S.C.R. 247 apply to an option for a lease.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment at trial and dismissing an action for a declaration that the option for lease of minerals was binding.

H. W. Riley Q.C. and J. R. McColough for the appellant.

M. E. Shannon for the respondent.

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

(1) [1953] 2 D.L.R. 137; 8 W.W.R. (N.S.) 145.

1953

GORDON v. CONNORS

The judgment of Kerwin and Fauteux JJ. was delivered by

KERWIN J.:—This action is concerned with what is called an "option to lease", signed by Mrs. Connors, and is in these terms:—

OPTION TO LEASE

THIS INDENTURE made this 22nd day of October, A.D. 1951

BETWEEN

Adda Weis Connors of Rimbey, Province of Alberta, Canada, hereinafter called the Lessor,

and

R. A. Gordon of Lacombe, Province of Alberta, hereinafter called the Lessee.

The Lessor being the registered owner of the S.W. 23-42-3 W 5M and also being in possession of the mines and mineral rights does on this day grant an option to R. A. Gordon, the Lessee, for a period of thirty (30) days from the date of this Option, the right to lease the mines and minerals on the above mentioned land, for a period of ten (10) years at the rate of One (1) Dollars per acre per year. It is also agreed that the Lessee will pay Sixteen Hundred ($1,600.00) bonus which includes the lease fee for one year.

Now it is understood by both parties that for the sum of One Hundred ($100.00) Dollars paid by the Lessee to the Lessor, the Lessor agrees to give the Lessee Thirty (30) days to complete the payment of Sixteen Hundred ($1,600.00) Dollars agreed upon and in case the Lessee completes and takes up the option it is understood that the One Hundred ($100.00) Dollars now paid will be credited on the Sixteen Hundred ($1,600.00) payment. In case the payment of Fifteen Hundred ($1,500.00) is completed.

The Lessor and Lessee covenant and agree as follows: The Lessee shall pay to the Lessor as royalty (*a*) 12½ per cent of the current market value at the well of all petroleum oil produced, saved and marketed from the said lands. (*b*) 12½ per cent of the current market value of gas produced from the said lands and marketed or used off the said lands or in the manufacture of casinghead gasoline.

In witness whereof the Lessor and Lessee have signed their names this 22 day of October, A.D. 1951.

In *Pierce v. Empey* (1), with reference to an option for a sale of land, Sir Lyman Duff on behalf of the Court stated the law in the following terms at page 252:—

It is well settled that a plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the conditions precedent are fulfilled or, as the result of his conduct, the holder of the option is on some

(1) [1939] S.C.R. 247.

equitable ground relieved from the strict fulfilment of them (Cushing v. Knight (1912) 46 Can. S.C.R. 555; Hughes v. Metropolitan Rly. Co. (1877) 2 App. Cas. 439; Bruner v. Moore (1904) 1 Ch. 305.

The same principles apply to an option for a lease.

In the reasons for judgment of the Appellate Division (1), delivered on behalf of that Court by Mr. Justice Clinton J. Ford, appears the following :

> The position taken by the plaintiff at the trial was that Mrs. Connors agreed to sign a lease in the form and content of what is spoken of in the case as a Landmen's lease, that was being used in the Rimbey area in the leasing of petroleum and natural gas rights.

This is made plain by the statement of counsel for the appellant at the opening of the trial:— "As I see it the main issue in the case is whether the lease should be for ten years or for ten years and longer thereafter as oil is produced." That this position was justified is shown by the evidence given on cross-examination by Mr. MacGillivray, the agent of the appellant, who in response to the following question:— "You wanted her to take the money first before you would discuss the lease with her, is that it?",—referring to the interview on November 9 or 10 between Mrs. Connors and Mr. MacGillivray,—answered by a decisive "No." It is true that the witness proceeded to state:— "I wanted her to accept the money, say she would accept it and then we would go into the lease" but that does not qualify the emphatic negative and in fact it shows that the witness was merely following the instructions he had received from the appellant who testified that he had told Mr. MacGillivray:— "Pay Mrs. Connors the $1,500.00 and have her sign the lease." The lease followed in substance the Landmen's form that was being used in the Rimbey area and instead of being a lease for ten years, it was for "ten years or so long thereafter as the leased substances were produced." It also contained other provisions contrary to the terms of the option.

It is of importance that on November 20 (before the expiration of the thirty days mentioned in the option) Mr. Braithwaite, Mrs. Connors' son-in-law, offered Mr. MacGillivray a ten year lease and repeated the offer the follow-

(1) [1953] 2 D.L.R. 137; 8 W.W.R. (N.S.) 145.

1953

GORDON v. CONNORS

Kerwin J.

ing day to the appellant. Part of the appellant's cross-examination upon this point and as to that conversation is as follows:—

Q. And do you recall Mr. Braithwaite telling you at that time that any lease they submitted to you would be for ten years certain, nothing more, nothing less, in accordance with the option?—A. I do not. But I do recall him saying that he understood that they were bound to give a lease for ten years. Yes?—A. And that they were prepared to execute a lease of that type.

Giving full effect to the trial judge's finding:— "I accept the evidence of B. M. MacGillivray throughout respecting the transactions between the parties.", it is clear that in accordance with his instructions, Mr. MacGillivray would not have paid the $1,500 to Mrs. Connors without having the latter sign the form of lease sent to him by the appellant. The Appellate Division came to the right conclusion and the appeal should be dismissed with costs.

RAND J.:—Throughout these proceedings both parties have agreed and acted on the view that, by its terms, the option was to be accepted by the unconditional tender to the respondent of the sum of $1,500. The evidence indicates clearly that no such tender was made. That of the agent representing the appellant shows beyond a doubt his intention, after demonstrating, as he did, that the money was there and available to be paid over, to proceed first to settle the terms of a lease which both parties assumed would be drawn up. The document presented at that time contained clauses that contradicted the provisions of the option, and the respondent was justified in rejecting it. But quite apart from that, at no time within the period of the option was the appellant or his agent willing to pay the money over as the act of acceptance and therefore antecedent to the formulation of terms. There was, then, no acceptance of the offer of sale, and consequently no contract, and the appeal must be dismissed with costs.

ESTEY, J.:—The appellant and Adda Weis Connors in her lifetime entered into an option agreement dated October 22, 1951, which reads as follows:

The Lessor being the registered owner of the S.W. 23-42-3 W. 5M and also being in possession of the mines and mineral rights does on this day grant an option to R. A. Gordon, the Lessee, for a period of thirty (30) days from the date of this Option, the right to lease the mines and minerals on the above mentioned land, for a period of ten (10) years at

the rate of One (1) Dollar per acre per year. It is also agreed that the Lessee will pay Sixteen Hundred ($1,600.00) bonus which includes the lease fee for one year.

Now it is understood by both parties that for the sum of One Hundred ($100.00) Dollars paid by the Lessee to the Lessor, the Lessor agrees to give the Lesse Thirty (30) days to complete the payment of Sixteen Hundred ($1,600.00) Dollars agreed upon and in case the Lessee completes and takes up the option it is undertsood that the One Hundred ($100.00) Dollars now paid will be credited on the Sixteen Hundred ($1,600.00) payment. In case the payment of Fifteen Hundred ($1,500.00) is completed the Lessor and Lessee covenant and agree as follows:

The Lessee shall pay to the Lessor as royalty (*a*) 12½ per cent of the current market value at the well of all petroleum oil produced, saved and marketed from the said lands.

(*b*) 12½ per cent of the current market value of gas produced from the said lands and marketed or used off the said lands or in the manufacture of casinghead gasoline.

The appellant contends that through his agent, MacGillivray, on the 9th or 10th day of November, 1951, he accepted the option by tendering the sum of $1,500, which Mrs. Connors refused. The respondent contends that it was but a conditional offer. The learned trial judge found in favour of the appellant and declared that the appellant was entitled to a lease in the terms of the above-quoted option, read in conjunction with the terms of the Alberta Landmen's Association form of lease, on payment by the plaintiff of $1,500.00.

The learned judges in the Court of Appeal (1) held that the Landmen's lease was not a part of the option and that the tender on the 9th or 10th of November by MacGillivray of $1,500 was conditional.

I am in agreement with the learned judges in the Court of Appeal that the Landmen's lease was not a part of the option.

The evidence justifies a conclusion that early in November the appellant had made up his mind to accept the option, provided he could obtain a lease upon the terms that he desired, which were not those of the lease contemplated by the option. He sent the $1,500 and a draft lease to his agent, MacGillivray, with instructions: "Pay Mrs. Connors the $1,500 and have her sign the lease." MacGillivray advised Mrs. Connors that he had the $1,500 and the lease. As a consequence she went to his office and, after

(1) [1953] 2 D.L.R. 137; 8 W.W.R. (N.S.) 145.

1953

GORDON v. CONNORS

Estey J.

some conversation to the effect that she preferred to be released from the option and Mr. MacGillivray's statement that he could do nothing about it, he continued: "I am instructed to tender you $1,500, and here is the money in cash." The evidence shows clearly that he did no more than show her the money. When asked: "You wanted her to take the money first before you would discuss the lease with her, is that it?" he replied: "No. I wanted her to accept the money, say she would accept it, and then we would go into the lease."

The lease prepared by the appellant and sent to MacGillivray included clauses contrary to the terms of the option. The two to which particular objections were taken provided for a right in the lessee to surrender at any time and that it should "remain in force for ten years from this date and so long thereafter as the leased substances, or any of them are produced from the said land or any operations are conducted thereon for the discovery and/or recovery of leased substances."

The learned trial judge accepted the evidence of MacGillivray "throughout respecting the transactions between the parties." MacGillivray arranged for a meeting at his office on November 21, when the appellant, MacGillivray, Mrs. Connors and Mr. and Mrs. Braithwaite were present. Notwithstanding that the appellant then had in his possession a letter written by Mrs. Connors' solicitor taking exception to certain clauses, including the two above mentioned, he brought a second draft lease to the meeting which contained both of these objectionable clauses. Braithwaite, who was acting as agent for Mrs. Connors, deposed that he, upon that occasion, offered appellant a lease for a ten-year period, which he refused in the words "It is no good to me." The appellants, while not expressly admitting Braithwaite's statement, did admit that Braithwaite had offered him a lease in the terms of the option, to which he replied: "I did tell him at the time that I did not think such a lease would be worth very much, but I should certainly like it prepared and submitted to me for my inspection." He was then asked and replied:

Q. . . . But your option is for 10 years, is it not?—A. Yes.

Q. All right. And what did you want the term to be in the lease?—A. Ten years or so long thereafter as the leased substances were produced.

Moreover, at the trial one of the main issues was whether or not the form of lease known as the Alberta Landmen's Association lease was not a part of the option agreement and, in fact, the learned trial judge directed that it be declared

> that the plaintiff is entitled to a Petroleum and Natural Gas lease of S.W. 23-42-3, W. 5th, in the terms of the agreement between the parties dated 22nd October, 1951, read in conjunction with the terms of the Alberta Landmen's Association form of lease on payment by the plaintiff of $1,500.00.

This Landmen's lease contained clauses providing for continuation and surrender to the same effect as those objected to by the respondent.

The foregoing indicates that the appellant was at all times insisting upon a lease for ten years and so long thereafter as the leased substances were produced, and, therefore, quite contrary to the terms of the option, which provided for a period of ten years certain. It was this he desired and insisted upon throughout. It was in the first lease that he sent to his agent, MacGillivray, with the instructions: "Pay Mrs. Connors the $1,500 and have her sign the lease." That MacGillivray understood and was but carrying out his principal's instructions is clear from the language "I wanted her to . . . say she would accept it, and then we would go into the lease." This leads to the conclusion that had she failed to sign the lease he would have retained the $1,500. It cannot, therefore, be construed as more than a conditional tender.

Counsel for the appellant emphasized a portion of his client's evidence as to what took place in MacGillivray's office on November 21 when all were present. This evidence reads as follows:

> I advised Mr. Braithwaite that my information was that $1,500.00 had been tendered to Mrs. Connors, and that I was prepared to go over to the bank and obtain another $1,500.00 if she desired tender to be made, and he advised that there was no necessity of making tender, because they admitted tender had been made to Mrs. Connors.

The appellant does not purport to give Braithwaite's words, but rather his own conclusion as to the effect thereof. Braithwaite was not asked as to this part of the conversation, nor was it referred to by MacGillivray. Even upon the assumption that the appellant's recollection and conclusion as to the admission is correct, it could not

1953

GORDON v. CONNORS

Estey J.

amount to more than that a tender had, in fact, been made to MacGillivray. It still remained for the Court to determine, as a matter of law, whether the tender was absolute or conditional.

The appeal should be dismissed with costs.

LOCKE, J.:—The document signed by Mrs. Connors called an "option to lease" described the land, the term of the lease, the annual rental and the royalty to be paid to the lessor in the event of oil or gas being discovered, the payment by Gordon of the sum of $100 was acknowledged and the offer to lease the mineral rights was stated to be open for acceptance for a period of thirty days from October 22, 1951. Upon acceptance and the payment of a further $1,500 before the expiration of that period without more, the transaction would have been completed. The offer thus made said nothing about any more formal lease and did not, by its terms, obligate Mrs. Connors to sign any other document.

The appellant in framing his action, after referring to the written document, said that "the lease to be granted on the exercising of the option" was for a term certain which was stated in the language of the option and, after alleging a tender, pleaded that:—

> The Defendant further refused to grant the plaintiff a lease of the said mines and minerals in direct violation of the terms and covenants in the said agreement.

By the defence it was alleged that the plaintiff had failed to tender the sum of $1,500 within the time limited by the option and, alternatively, that if any such tender was made the plaintiff had required the defendant, at the time of the tender, to sign a lease which did not comply with the terms of the option and which contained terms and covenants not provided for or contemplated in the said option.

It was upon this record that the action went to trial. The opening statement of counsel for the plaintiff, however, made it clear that the issue which the plaintiff contended was to be tried was not one which was raised by the pleadings, as he then said that the main issue in the case was whether the lease should be for ten years or for ten years and so long thereafter as oil was produced. No such question could arise under the terms of the written instrument.

The appellant, however, apparently without objection, proceeded to set up another case which was that there had been negotiations between the parties prior to the signing of the option, which obligated Mrs. Connors, if the option was accepted, to sign a written lease in a form referred to in the evidence as the Landman's lease, which, it was said, is extensively used in leasing mineral rights in the Province of Alberta. Despite the state of the record and without any amendment, evidence was directed to this issue by both parties and the learned trial Judge found that the plaintiff was:—

> entitled to a petroleum and natural gas lease of S.W. 23-42-3, W. 5th, in the terms of the agreement between the parties dated 22nd October, 1951 (Ex. 1), read in conjunction with the terms of the Alberta Landmen's Association form of lease (Ex. 3) on payment by the plaintiff of $1,500.

A blank form of the Landmen's lease had been introduced by the plaintiff into the evidence. In addition to a large number of important terms which had never been discussed between the parties, the form fixed the duration of the lease as being for a term of years to be specified,

> and so long thereafter as the substances or any of them are being produced from the said lands subject to the sooner termination of the said term as hereinafter provided.

A further provision gave to the lessee the right to surrender the lease at any time as to all or any portion of the lands, whereupon the obligations of the lessee should cease.

It was, no doubt, because the appellant had not in his statement of claim alleged that Mrs. Connors had orally agreed to lease the mineral rights for ten years upon the terms and conditions stipulated for in the Landmen's lease form that the Statute of Frauds was not raised as a defence. Clinton J. Ford, J.A. (1), in delivering the judgment of the Court of Appeal, has said that, if it were necessary, permission to amend to plead the statute should be granted but considered that the defence was open to the present respondent without this being done. On the view I take of this matter, it is unnecessary to consider the question.

The action is one for specific performance. If the issue to be disposed of is that raised by the pleadings, it is perfectly clear that Mrs. Connors did not by the terms of the option agree to sign any further written instrument and the

(1) [1953] 2 D.L.R. 137; 8 W.W.R. (N.S.) 145.

1953

GORDON v. CONNORS

Locke J.

action fails since the evidence shows that there was no unconditional tender of the sum of $1,500 during the period within which the offer was open for acceptance but that, on the contrary, the amount was offered to her on condition that she sign a lease, the terms of which differed radically from the terms of the offer. If, on the other hand, the matter be considered upon the evidence as to the negotiations between the parties, both prior to and after October 22, 1951, while it is apparent that Mrs. Connors, who had apparently very little business experience in matters of this nature, was prepared to sign a formal lease in the terms of the offer, there is no evidence that she agreed to sign such an instrument, either in the terms of the Landmen's lease or in either of the other forms which the appellant endeavoured to induce her to execute.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Macleod, Riley, McDermid, Bessemer & Dixon.*

Solicitors for the respondent: *McLaws & McLaws.*

1953

*May 25
*June 26

EDITH NOAK ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Excess profits—Dealings in real estate—Whether carrying on a business—Income War Tax Act, 1927, c. 97—Excess Profits Tax Act, 1940, c. 32.

The appellant was assessed for income and excess profits tax in respect of the years 1943, 1944 and 1945, on profits made from a number of purchases and sales of real estate. She was a partner in a meat business but testified that since 1930 she had, out of her savings, purchased from time to time a number of properties which she sold soon thereafter; that since 1940 she had capital gain in view in making these purchases. The terms of sale in most cases called for a small down-payment and for the balance in monthly instalments. She contended that these were capital profits but the assessment was upheld by the Exchequer Court of Canada.

*PRESENT: Kerwin, Rand, Kellock, Estey and Locke JJ.

Held: The appeal should be dismissed.

Held: The number of transactions entered into by the appellant and, in some cases, the proximity of the purchase to the sale amounted to a carrying on of a "business" within the meaning of the *Excess Profits Tax Act*.

Held further: Nothing has been shown to indicate any error in the method of assessment adopted by the respondent.

APPEAL from the judgment of the Exchequer Court of Canada, Hyndman J. (1), upholding the Minister's assessment.

G. H. Steer Q.C. for the appellant.

H. W. Riley Q.C. and F. J. Cross for the respondent.

The judgment of Kerwin, Estey and Locke JJ. was delivered by

KERWIN J.:—In this appeal nothing turns upon the credibility of the appellant but having read the record since the argument, I am of opinion that the trial judge (1) came to the right conclusion. The principle to be applied is well settled and its application is exemplified in two decisions of this Court: *Argue v. Minister of National Revenue* (2), where the taxpayer succeeded, and *Campbell v. Minister of National Revenue* (3), where the taxpayer failed. It is a question of fact in each case.

The number of transactions entered into by the appellant and, in some cases, the proximity of the purchase to the sale of the property indicates that she was carrying on a business and not merely realizing or changing investments. The method of assessment adopted by the respondent is indicated in a letter to the appellant's auditors from the Director of Income Tax at Edmonton, and nothing has been shown in evidence or in argument to indicate any error in that method. The appeal should be dismissed with costs.

RAND J.:—The question raised in this appeal is simply whether, during the years in question, the series of transactions carried out by the appellant amounted to a carrying on of a "business" as that word is used in the *Excess Profits Tax Act*. Hyndman, Deputy Judge, proceeding on a sound appreciation of the considerations applicable to

(1) [1952] Ex. C.R. 20. (2) [1948] S.C.R. 467.
(3) [1953] 1 S.C.R. 3.

1953

NOAK
v.
MINISTER OF NATIONAL REVENUE

Rand J.

that determination, found that it did, and I am quite unable to say that, in reaching that conclusion, he was not amply supported by the facts disclosed.

The appeal must be dismissed with costs.

KELLOCK J.:—The sole question involved in this appeal is as to whether or not the profits here in question were derived from the carrying on by the appellant of a "business" within the meaning of the *Excess Profits Tax Act*. The learned trial judge (1), after a careful review of the evidence, concluded that they were so derived.

During the years 1938 to 1945, the appellant carried out some fifty-three transactions of purchase and sale of real estate, to the carrying out of which she devoted all her time outside of that devoted to the meat business which she was carrying on in partnership. She testified that before buying any property she would probably inspect as many as thirty; that since 1940 she had capital gain in view in the making of her purchase; and that she improved some of these properties "for purposes of sale." In a number of instances she had evidently arranged the sale before she consummated the purchase as sale followed immediately on the purchase.

The learned judge approached the question in issue from the standpoint of the principle laid down by Lord Justice Clerk in *California Copper Syndicate v. Harris* (2), approved by Lord Dunedin in delivering the judgment of the Judicial Committee in *Commissioner of Taxes v. Melbourne Trust* (3), and applied by Locke J., delivering the unanimous judgment of this court in *Campbell v. Minister of National Revenue* (4), as follows:

> It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.

(1) [1952] Ex. C.R. 20.
(2) (1904) 5 T.C. 159 at 165.
(3) [1914] A.C. 1001 at 1010.
(4) [1953] 1 S.C.R. 3.

In *Cooper v. Stubbs* (1), Atkin L.J., as he then was, in considering the question as to whether on the evidence in that case the appellant was carrying on a "trade" within the meaning of Schedule D of the *Income Tax Act 1918*, said at page 772:

> There are no doubt laymen who do indulge in speculative purchases in these commodities, and they repeat those speculative purchases more than once, being probably buoyed up by their initial successes. Nevertheless, it seems to me still to be a question of fact whether the professional man, to quote an extreme case, who makes purchases of that kind, and makes more than one of them in the year, can be said to be engaged in a trade or vocation in the course of these purchases. I should think it would probably be a question of degree. Now if it is a question of degree, it must be a question of fact . . . Of course, in all these matters there may be a state of facts which can only lead to one conclusion of law, but when it is, as I have said, a question of degree, it seems to me it must necessarily be a question of fact.

In the case at bar the learned judge below concluded that the only reasonable inference from the evidence was that the appellant had followed a course or system which had in view not just investment but the intention to make profits by sale, and that in so doing she was engaged in the carrying on of a business. I think the learned judge has properly appreciated the facts and has properly directed himself with regard to the law and that his finding should not be disturbed.

The appellant relies upon the judgment of this court delivered by Locke J., in *Argue v. The Minister of National Revenue* (2), as assisting her position. In that case, however, Locke J., said at p. 477:

> I find nothing in the evidence in this case which, in my opinion, justifies the conclusion that the appellant . . . was trading in securities or buying and selling them with a view to profit.

I think, therefore, this decision does not help the appellant.

I concur also with the learned judge in the view that the appellant has not satisfied the onus of establishing any error in the method of assessment, and would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Milner, Steer, Dyde, Poirier, Martland & Layton.*

Solicitor for the respondent: *F. J. Cross.*

(1) [1925] 2 K.B. 753. (2) [1948] S.C.R. 467.

1953
*Jan. 28, 29
*Jun 8

L'ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL.. (PETITIONER); APPELLANT;

AND

THE LABOUR RELATIONS BOARD OF QUEBEC ..... RESPONDENT.

AND

THE MONTREAL CATHOLIC SCHOOL COMMISSION ..... MIS-EN-CAUSE.

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

Labour—School teachers on strike—Revocation of certificate of representation—Union not notified of hearing of Labour Board—Whether writ of prohibition proper remedy—Judicial function of Board—Whether revocation null—Public Services Employees Disputes Act, R.S.Q. 1941, c. 169—Labour Relations Act, R.S.Q. 1941, c. 162A—Public Inquiry Commission Act, R.S.Q. 1941, c. 9—Articles 50, 82, 1003 C.P.

The appellant called a strike of its members in violation of the *Public Services Employees Disputes Act* (R.S.Q. 1941, c. 169), which forbids such action from the employees of a school corporation. Thereupon, the respondent, acting *ex parte* and without notice to the appellant, invoked s. 41 of the *Labour Relations Act* (R.S.Q. 1941, c. 162A) and cancelled the appellant's certificate of representation. A writ of prohibition taken by the appellant and in which it asked for a declaration of nullity, was maintained by the Superior Court and rejected by the Court of Appeal for Quebec.

Held: The appeal should be allowed; the respondent acted without jurisdiction and the revocation of the appellant's certificate of representation was null and of no effect.

Per Rinfret C.J.: Having acted as a judicial tribunal, the Board must be assimilated to a court of inferior jurisdiction within the meaning of s. 1003 of the *Code of Civil Procedure,* and was therefore subjected to the writ of prohibition. The Board acted without jurisdiction and the writ of prohibition was the proper remedy to prevent the execution of its decision.

An express declaration from the legislator is required to prevent the application of the principle that no person can be condemned or deprived of his rights without being heard.

S. 17 of the *Public Inquiry Commission Act* (R.S.Q. 1941, c. 9) does not apply to the Board and cannot be invoked to prevent the prohibition against a decision rendered without jurisdiction.

Per Kerwin and Estey JJ.: Notwithstanding that s. 41 of the *Labour Act* does not in terms require it and notwithstanding s. 50 of that *Act,* the respondent was bound to give notice to the appellant before cancelling its certificate, even though an illegal strike had been called. The appellant was entitled to a declaration of nullity and was authorized to join a claim for such relief to a demand for prohibition.

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

Per Rand J.: The provisions of the *Labour Relations Act* are incompatible with authority to revoke the certificate solely on the ground that there had been a violation of a penal provision of the statute.

Although an administrative body, the Board in making decisions of a judicial nature, as it did here, was bound by the maxim Audi Alteram Partem.

Prohibition would be futile in the present case since the Board's action was exhausted by the revocation, but the proceeding can still be maintained for there is nothing in the articles of the *Code of Civil Procedure* against the maintenance of the finding, necessarily involved in such a proceeding, that the act challenged was beyond the jurisdiction of the Board.

Per Fauteux J.: In revoking the certificate of the appellant, the Board acted as a judicial tribunal and therefore should have heard the appellant or at least given him the opportunity to be heard. The application of the principle Audi Alteram Partem is implied in the statutes giving judicial powers to administrative bodies and to suspend its application an explicit text or equivalent inference must be found in the statute. There is here no such text nor does a comparison of s. 41 of the *Labour Act* with s. 50 justify the inference that the legislator clearly intended to make an exception.

Since there is nothing incompatible in the joining of a claim of nullity for lack of jurisdiction to a request for prohibition, the appellant is entitled to an adjudication on the question of nullity, even on the assumption that prohibition was not the proper remedy.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing the trial judge and quashing a writ of prohibition.

L. P. Pigeon Q.C. for the appellant.

L. E. Beaulieu Q.C. and J. Gingras Q.C. for the respondent.

The CHIEF JUSTICE:—L'Alliance des Professeurs catholiques de Montréal porte un appel d'un jugement de la Cour du Banc de la Reine (1) en date du 5 octobre 1951, à raison duquel un jugement de la Cour Supérieure, rendu le 23 septembre 1950, fut infirmé et le bref de prohibition émis à la demande de l'appelante contre les intimées fut annulé et l'action rejetée avec dépens.

L'objet de l'appel est un ordre de la Commission des Relations ouvrières de la province de Québec, émis *ex parte,* le 21 janvier 1949, ayant pour résultat de révoquer, à toute fin que de droit, le certificat de reconnaissance syndicale, émis le 12 mai 1944, en faveur de l'Alliance des Professeurs catholiques de Montréal, comme agent négociateur de tous

(1) Q.R. [1951] K.B. 752.

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Rinfret C.J.

les instituteurs et institutrices qui enseignent en françcais dans les écoles françaises de la Commission des Ecoles catholiques de Montreal.

L'appelante est une association incorporée en mars 1944, en vertu de la *Loi des syndicats professionnels* (S.R.Q. 1941, c. 162).

Le 12 mai 1944, la Commission des Relations ouvrières de la province de Québec émit, en faveur de cette association, un certificat de reconnaissance pour représenter tous les instituteurs et institutrices qui enseignent en français dans les écoles françaises de la Commisison scolaire catholique de Montréal, comme agent négociateur avec cette Commission, le tout conformément à la *Loi des différends entre les services publics et leurs salariés* (S.R.Q. 1941, c. 169) et la *Loi des relations ouvrières* (S.R.Q. 1941, c. 162A).

En janvier 1949, l'Alliance et la Commisison des Ecoles catholiques de Montréal n'avaient pas encore réussi à conclure une convention collective concernant les salaires des instituteurs pour l'année courante. A une réunion générale tenue le 12 janvier, la majorité des membres présents de l'Alliance se prononça en faveur d'une grève qui devait commencer le lundi 17 Janvier. Effectivement cette grève se déclencha à la date fixée, bien que, à la fin de la semaine, les instituteurs décidèrent de retourner à leur travail; ce qu'ils firent dès le lundi 24 janvier. Dans l'intervalle, à savoir, le 21 janvier, la Commission des Ecoles catholiques de Montréal avait adressé une lettre à l'intimée demandant l'annulation du certificat de l'Alliance comme agent négociateur. Le même jour (21 janvier), sans audition ni avis à l'Alliance, l'intimée rendit une décision annulant le certificat de l'Alliance. Cette décision fut transmise à l'Alliance par télégramme expédié le même jour par le secrétaire de l'intimée et confirmé par une lettre en date du jour suivant.

Le 27 avril 1949, l'Alliance obtint d'un juge de la Cour Supérieure un ordre autorisant l'émission d'un bref de prohibition. La requête de l'Alliance, qui accompagnait ce bref, alléguait que l'annulation du certificat de reconnaissance était illégale, parce qu'une grève n'était pas une raison justifiant cette annulation et parce que, en plus,

(1) Q.R. [1951] K.B. 752.

l'Alliance n'avait reçu aucun avis de la demande d'annulation . La requête concluait à ce qu'il fut déclaré que l'intimée avait excédé sa juridiction en rendant la décision du 21 janvier et à ce qu'en conséquence cette décision fut adjugée nulle et sans effet.

L'action de l'Alliance fut d'abord rencontrée par une exception à la forme, qui fut rejetée par jugement du 28 juin 1949. L'intimée en appela de cette décision à la Cour du Banc de la Reine et l'appel fut de nouveau rejeté par jugement de cette Cour, en date du 8 février 1950.

La cause revint alors devant la Cour Supérieure et, au mérite, l'intimée plaida que la décision dont l'Alliance se plaignait était justifiée par le fait que toute grève était prohibée par la *Loi des différends entre les services publics et leurs salariés* (S.R.Q. 1941, c. 169) et, en plus, que la Commission des Relations ouvrières de la province de Québec jouissait de l'immunité à l'encontre d'un bref de prohibition.

Le bref de prohibition fut néanmoins maintenu par jugement de la Cour Supérieure du 23 septembre 1950 et la décision d'annulation de la part de l'intimée fut déclarée nulle.

Sur appel, la Cour du Banc de la Reine (1) infirma ce jugement. Une majorité des juges (St-Germain, St-Jacques et Gagné, JJ.) fut d'avis que la grève des instituteurs était illégale et qu'elle justifiait l'annulation du certificat émis en faveur de l'Alliance; en plus, qu'un avis à l'Alliance avant l'annulation du certificat n'était pas requis par la loi. Les deux autres juges (Barclay et Casey, JJ.) émirent l'opinion que le bref de prohibition n'était pas le remède approprié en l'espèce parce qu'après que la décision de l'intimée eût été rendue, il ne subsistait rien à faire de plus de la part de l'intimée avant que la décision de cette dernière fut exécutée.

L'Alliance a porté ce jugement en appel devant la Cour Suprême du Canada et soumet que l'intimée, en agissant sans avis à l'Alliance, a excédé sa juridiction; que, au surplus, une grève, même illégale, n'est pas une cause suffisante pour annuler un certificat de reconnaissance; et que, dans les circonstances, le bref de prohibition est le remède approprié.

(1) Q.R. [1951] K.B. 752.

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Rinfret C.J.

Le jugement de la Cour Supérieure commence par prendre état des faits suivants:

Les intimées admettent qu'aucune requête en révocation de reconnaissance syndicale n'a été signifiée à l'Alliance.

L'Alliance n'a reçu aucun avis de la requête en révocation et elle n'était pas présente ni représentée à la prétendue séance à laquelle l'intimée a pris sur elle de rendre la décision révoquant la reconnaissance;

Le 21 janvier 1949, l'intimée a rendu une décision révoquant le certificat de reconnaissance syndicale;

Cette décision fut portée à la connaissance de l'Alliance par une dépêche télégraphique du 21 janvier 1949, datée et signée à Québec par le secrétaire de la Commission des Relations ouvrières de la province de Québec, M. Bernier;

Le 22 janvier 1949, le secrétaire de la Commission a adressé une copie de la décision au président de l'Alliance des Professeurs catholiques de Montréal, M. Léo Guindon. Cette lettre est datée de Québec et sur la décision il est mentionné qu'elle fut émise à Quebec, le 21 janvier 1949.

L'honorable juge de première instance déclare qu'il ne fait aucun doute qu'à la date de la révocation l'Alliance était dans les conditions requises pour conserver le certificat de reconnaissance syndicale. A cette date, il y avait 1,620 instituteurs et institutrices qui enseignaient en français dans les écoles françaises de la Commission des Ecoles catholiques de Montréal et de ce nombre 1,509 étaient membres en règle de l'Alliance.

L'honorable juge invoque l'article 1003 du *Code de procédure civile* qui décrète qu'il y a lieu au bref de prohibition lorsqu'un tribunal inférieur excède sa juridicition. En plus, l'article 50 du même *Code* décrète qu'à l'exception de la Cour du Banc de la Reine, tous les tribunaux, juges de Circuit, magistrats et autres personnes, corps politiques et corporations, dans la province de Québec, sont soumis au droit de surveillance et de réforme, aux ordres et au contrôle de la Cour Supérieure et de ses juges, en la manière et la forme que prescrit la loi.

Deux lois, d'après la Cour Supérieure, peuvent régir le présent cas: La première est la *Loi des différends entre les services publics et leurs salariés* (S.R.Q. 1941, c. 169) et l'autre est la *Loi des relations ouvrières* (S.R.Q. 1941, c. 162A).

Les dispositions de la *Loi des relations ouvrières* s'appliquent aux services publics et aux salariés, à leurs employés mais, suivant la *Loi des différends entre les services publics et leurs salariés,* "avec les modifications qui s'y trouvent et

qui sont réputées en faire partie intégrante". Les instituteurs sont des salariés au sens de la loi (*L'Association catholique des Instituteurs du District n⁰ 16 v. Les Commissaires d'écoles pour la Municipalité de la Paroisse de St-Athanase* (1)).

L'article 5 de la *Loi des différends entre les services publics et leurs salariés* défend la grève en toute circonstance. Les articles 7 et 8 édictent les peines pour les infractions, et l'article 11 ordonne qu'elles soient imposées suivant la *Loi des convictions sommaires.*

D'autre part, l'article 3 de la *Loi des relations ouvrières* reconnaît à tout salarié le droit d'être membre d'une association et de prendre part à ses activités légitimes. L'article 4 stipule que tout employeur est tenu de reconnaître, comme représentant collectif des salariés à son emploi, une association groupant la majorité absolue des dits salariés, et de négocier de bonne foi, avec eux, une convention collective de travail. Les articles 11 à 19 prévoient la procédure à suivre pour la négociation des conventions collectives, et les articles 20 à 28 définissent les pratiques interdites. Les articles 29 et suivants traitent de la formation de la Commission des Relations ouvrières de la province de Québec et règlent son fonctionnement. Cette Commission a été instituée en corporation par cette loi spéciale et c'est uniquement dans cette loi qu'on doit trouver les pouvoirs qui lui sont attribués. L'article 41 permet à la Commission, pour cause, de reviser ou révoquer toute décision et tout ordre rendus par elle et tout certificat qu'elle a émis. Les articles 42 à 47 définissent les peines imposées à ceux qui contreviennent à cette loi; et l'article 48 ordonne qu'elles soient imposées sur poursuite sommaire, suivant la Loi des convictions.

En rapport avec les infractions, les seuls pouvoirs attribués à la Commisison des Relations ouvrières sont définis aux articles 49 à 50.

L'article 49 prévoit qu'aucune poursuite pénale ne peut être intentée en vertu de la loi sans l'autorisation écrite de la Commission ou le consentement du Procureur général. L'article 50 donne certains pouvoirs à la Commission des Relations ouvrières: Dans le cas d'infractions à la section des pratiques interdites, elle peut, sans préjudice de toute

(1) Q.R. [1947] K.B. 703.

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Rinfret C.J.

autre peine, prononcer la dissolution de l'association, mais "après lui avoir donné l'occasion d'être entendue et de faire toute la preuve tendant à se disculper".

Aux termes de l'article 41, la Commission ne peut révoquer une décision que "pour cause". D'après le juge de première instance, cette cause de révocation doit nécessairement être une cause suffisante en droit. Il est d'avis que le pouvoir conféré par l'article 41 doit être exercé strictement en conformité avec les termes de la loi et que toute décision qui n'est pas ainsi prise doit être considérée en Cour de justice comme illégale (*Wrights' Canadian Ropes Ltd. v. Minister of National Revenue* (1), décision du Conseil Privé (2)). 1946, S.C.R., à la page 146:

> Of course, the discretion must be exercised on proper legal principles.

A la page 156:

> The Court is warranted in interfering with the exercise of the Minister's discretion if such discretion has not been exercised in accordance with sound and fundamental principles (Pioneer Laundry and Dry Cleaners Ltd. v. Minister of National Revenue, 1939 S.C.R. p. 1; 1940 A.C. p. 127; The King v. Noxzema Chemical Co. of Canada Ltd., 1942 S.C.R. p. 178).

L'honorable juge émet ensuite l'avis que, quand un organisme gouvernemental exerce une discrétion basée sur des motifs erronés en droit et que sa décision n'est pas susceptible d'appel, il y a ouverture au bref de prohibition. (*The Queen v. The Vestry of St. Pancras* (3)).

L'honorable juge continue:

> Les articles 50 et 1003 du Code de Procédure civile nous viennent du droit anglais, et les autorités anglaises font autorité en la matière.
>
> Ces articles ont pour but de contraindre les tribunaux inférieurs et les corps publics à exercer leurs pouvoirs d'après les principes fondamentaux du droit (Minister of National Revenue v. Wrights' Canadian Ropes Ltd., 1947 A.C. p. 109 à 122).

Il en conclut donc que la Commission intimée n'avait pas le droit de prononcer la dissolution de l'Alliance sans lui avoir, au préalable, donner l'occasion d'être entendue et de faire toute preuve tendant à se disculper.

Mais, toujours en suivant le jugement du tribunal de première instance, il y a en cette espèce beaucoup plus que le défaut d'entendre l'Alliance, au préalable, et de lui

(1) [1946] S.C.R. 139. (2) [1947] A.C. 109.
(3) (1890) 24 Q.B.D. 371.

donner l'occasion de faire toute preuve tendant à se disculper; il ressort de la preuve que la décision de la Commission intimée a été rendue avant qu'elle ait été régulièrement saisie de la question. En effet, comme le fait remarquer le juge, la requête de la Commission des Écoles catholiques de Montréal est en date du 21 janvier 1949. Elle fut préparée à Montréal, à la suite d'une réunion des commissaires des écoles catholiques de Montréal; or, c'est le même jour que la Commisison intimée, siégeant à Québec, accordait cette requête, alors qu'il est en preuve que ce n'est que le 24 janvier 1949 que cette dernière est parvenue au bureau de la Commission des Relations ouvrières de la province de Québec, à Québec.

Il en résulte que cette requête aurait été accordée par la Commission intimée avant même de l'avoir reçue. Puis, cette décision annulant le certificat de reconnaissance fut communiquée à l'Alliance par télégraphe.

Voilà une justice expéditive, s'il en est une: Le jugement rendu avant que la requête fut devant la Commission intimée et la partie intéressée informée par télégramme; aucune signification à cette dernière de la requête de la Commission des Écoles catholiques de Montréal, aucun avis et aucune audition des moyens que l'Alliance pouvait opposer à la demande de la Commission des Écoles catholiques de Montréal.

Il est difficile de qualifier cette façon de procéder et c'est avec raison que le juge de la Cour Supérieure déclare qu'elle est "contraire aux principes fondamentaux de la justice".

En vertu de l'article 82 du *Code de procédure civile*, "il ne peut être adjugé sur une demande judiciaire sans que la partie contre laquelle elle est formée ait été entendue ou dûment appelée". Et cette prescription a été appliquée par la jurisprudence aux décisions quasi-judiciaires: *Lapointe v. Association de Bienfaisance et de Retraite de la Police de Montréal* (1), *Board of Education v. Rice* (2), *Richelieu & Ontario Navigation v. Commercial Union Ass.* (3); Ville *de Bauharnois v. Liverpool, London & Globe Ins. Co.* (4), *Home Insurance Co. of New York v. Capuano* (5).

(1) [1906] A.C. 535 at 540.
(2) [1911] A.C. 179 at 182.
(3) Q.R. 3 K.B. 410.
(4) Q.R. 15 K.B. 235.
(5) Q.R. 41 K.B. 85.

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Rinfret C.J.

Il répugne à la raison de croire qu'un tribunal quelconque puisse accorder une requête avant d'en être saisi. C'est là indiscutablement un empêchement radical à l'exercice de la juridiction. C'est plus que le défaut d'avis à la partie intéressée; c'est une adjudication sur une procédure qui n'est pas devant le tribunal.

Le juge de première instance réfère à plusieurs jugements à l'effet que le défaut d'avis à la partie intéressée détruit la juridiction et entraîne la nullité de la sentence. Mais, pour d'excellentes raisons sur lesquelles il n'est pas besoin d'insister, il n'y a probablement pas jusqu'ici un seul jugement d'une cour supérieure se prononçant sur l'acte d'un tribunal inférieur qui aurait agi sur une requête avant qu'il en soit saisi.

Quel que soit le pouvoir d'exercer sa discrétion que l'on veuille attribuer à une commission du genre de la Commission des Relations ouvrières de la province de Québec, il ne s'agit plus ici de discrétion mais de l'arbitraire le plus absolu; et que l'on décore du nom de tribunal administratif une commission du genre de la Commission intimée, dès qu'elle exerce un pouvoir quasi-judiciaire, comme elle l'a fait dans les circonstances, à l'égard de l'exercice de ce pouvoir elle doit être assimilée à un tribunal inférieur dans le sens de l'article 1003 du *Code de procédure civile.* Elle fait plus qu'excéder sa juridiction; elle agit sans juridiction aucune et son acte donne lieu à l'emploi du bref de prohibition. De nombreuses décisions dans la province de Québec justifient la procédure qui a été adoptée dans la présente cause: *Demers v. Choquette* (1); *Montreal Street Railway v. Board of Conciliation* (2); *Maillet v. le Bureau des Gouverneurs du Collège des Chirurgiens-dentistes* (3); *De Lamirande v. La Cour du Recorder* (4).

Dans la cause de *Toronto v. York* (5), le Comité judiciaire du Conseil Privé eut à considérer la constitution de "The Ontario Municipal Board." Il décida:

> The Ontario Municipal Board is primarily, in pith and substance, an administrative body. The members of the Municipal Board not having been appointed in accordance with the provisions of ss. 96, 99 and 100 of the British North America Act, 1887, which regulate the appointment of judges of Superior, District and County Courts, the Board is not validly

(1) Q.R. 12 R. de Pr. 411.
(2) Q.R. 44 S.C. 350.
(3) Q.R. 27 K.B. 364.
(4) Q.R. 66 K.B. 235, 236, 237.
(5) [1938] A.C. 415.

constituted to receive judicial authority. Assuming that the Ontario Municipal Board Act, 1932, which set up the Board, does by some of its sections purport to constitute the Board a Court of Justice analogous to a Superior, District, or County Court, it is to that extent invalid. There is, however, nothing to suggest that the Board would not have been granted its administrative powers without the addition of the alleged judicial powers, and although, therefore, such parts of the Act of 1932 as purport to vest in the Board the functions of a Court have no effect, they are severable; and the Board is validly constituted for the performance of its administrative functions.

Le jugement du Comité judiciaire fut prononcé par Lord Atkin qui, après avoir fait remarquer que "The Ontario Municipal Board is not validly constituted to receive judicial authority", ajoute:

> So far, therefore, as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District, or County Court, it is pro tanto invalid; . . . The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect.

Sur toute cette question, il est très instructif de lire le jugement de la Cour du Banc du Roi de la province de Québec dans la cause du *Procureur Général v. Slanec et Grimstead* (1). Ce jugement a infirmé celui de la Cour Supérieure rendu le 25 mai 1932 (70 C.S. p. 274), avec cependant la dissidence très élaborée de l'honorable juge Rivard (54 B.R. p. 263), et a déclaré que la *Loi des accidents du travail* (S.Q. 18 Geo V, cc. 79 et 80) était *intra vires* de la province, qui était compétente à faire le choix et la nomination des membres de la Commission appelée à administrer la loi en question.

Mais, il est de jurisprudence constante que même les commissions administratives sont sujettes à la prohibition, tel qu'édicté à l'article 1003 du *Code de procédure civile*, lorsqu'elles exercent des fonctions judiciaires ou quasi-judiciaires, et il y a lieu alors au bref de prohibition, même après jugement rendu pour en empêcher l'exécution ou qu'il y soit donné effet.

Sur ce dernier point, je ne saurais admettre l'avis de MM. les juges Barclay et Casey en Cour du Banc de la Reine. Tous deux ont mis de côté le jugement de la Cour Supérieure pour le simple motif que le bref de prohibition était sans objet lors de son émission et ne pouvait produire aucun effet, parce que, après la décision de la Commission des Relations ouvrières, il ne restait plus rien à prohiber ou

(1) Q.R. 54 K.B. 230.

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Rinfret C.J.

empêcher. Il me semble en tout respect qu'il restait encore à exécuter la décision et que, si la procédure de l'Alliance réussissait à faire déclarer que cette décision avait été rendue sans juridiction, non seulement elle était nulle et ne pouvait produire aucun effet, mais il s'ensuit que le certificat de reconnaissance subsiste dans toute sa vigueur et que la Commission intimée est tenue de le considérer comme tel.

Je crois donc que ce motif doit être écarté. Ce n'est pas d'ailleurs celui de la majorité en Cour d'Appel.

Mais, pour revenir au jugement de première instance, il ne fait pas de doute que le bref de prohibition peut être adressé même à l'encontre d'un tribunal administratif (si l'on arrive à la conclusion que le tribunal particulier n'est pas une Cour de justice; et, sur ce point, je le répète, le jugement dans la cause de *Slanec supra* est très instructif), lorsque ce tribunal exerce des fonctions judiciaires ou quasi-judiciaires. A tout événement, en Cour Suprême du Canada, cette question n'est plus discutable depuis l'arrêt de cette Cour dans la cause de *Segal v. la Cité de Montréal* (1). Ce jugement fut unanime. Il s'agit d'un règlement de la cité qui exige l'obtention préalable d'un permis pour toute personne, corporation ou société avant de s'engager dans "the business as canvasser." La discussion portait sur le sens de ces mots "business as canvasser." La Cour du Recorder avait décidé que l'appelant tombait sous cette description et naturellement la décision sur ce point était nécessaire pour donner à la Cour du Recorder juridiction sur le cas. La conclusion de la Cour Suprême était que:

> The appellant was not doing business as canvasser within the meaning of the by-law and was under no obligation to take out a licence.

La question se posait alors de savoir si, en l'espèce, la Cour du Recorder était susceptible de l'application du bref de prohibition, en vertu de l'article 1003 du *Code de procédure civile.*

L'honorable juge Lamont, rendant le jugement de la Cour, commence par faire précéder sa discussion de cette question par la remarque suivante:

> In dealing with the question of prohibition it is important to bear in mind that the functions of a superior court on an application for a writ are in no sense those of a court of appeal. It has nothing to do with the merits of the dispute between the parties; it is concerned only to see that the Recorder's Court did not transgress the limits of its jurisdiction.

(1) [1931] S.C.R. 460.

Il ajoute:

The first question which a judge has to ask himself, when he is invited to exercise a limited statutory jurisdiction, is whether the case falls within the defined ambit of the statute; if it does not, his duty is to refuse to make an order as judge; and, if he makes an order, he may be restrained by prohibition. Davey, L.J., in Farquharson v. Morgan (1894, 1 Q.B. p. 552).

Aprés avoir cité un passage du jugement de Lord Denham, C.J., dans *The Queen v. Bolton* (1), l'honorable juge Lamont déclare:

It is now well settled law that where the jurisdiction of the judge of an inferior court depends upon the construction of a statute, he cannot give himself jurisdiction by misinterpreting the statute. Elston v. Rose (1868 L.R. 4 Q.B. p. 4); in re Long Point Co. v. Anderson (1891, 18 Ont. A.R. p. 401).

Puis, il cite en l'approuvant la règle exposée par M. le juge Riddell dans *Township of Ameliasburg v. Pitcher* (2), qui est au même effet, et il poursuit:

It has also been said that a judge of an inferior court cannot give himself jurisdiction by a wrong decision on the facts . . .

car, dit-il,

where the legislature has said that, if certain facts exist, the judge shall have jurisdiction, in such a case the existence of the facts is a condition precedent to the exercise of jurisdiction . . . The rule, I think, may be stated in another way, as follows:—

If the existence or non-existence of the jurisdiction of a judge of an inferior court depends upon a question of fact, then, if upon the facts proved or admitted he has no jurisdiction, his finding that he has jurisdiction will not prevent prohibition, but if the jurisdiction depends upon contested facts and there has been a real conflict of testimony upon some fact which goes to the question of jurisdiction, and the judge decides in such a way as to give himself jurisdiction, a superior court, on an application for prohibition, will hesitate before reversing his finding of fact and will only do so where the grounds are exceedingly strong. Mayor of London v. Cox (1867 L.R. 2 H.L. p. 239); Brown v. Cocking (1868 L.R. 3 Q.B. p. 672); Liverpool Gas Company v. Everton (1871 L.R. 6 C.P. p. 414); Rex v. Bradford (1908, 1 K.B. p. 365 at 371).

Et plus loin:

I quite agree that if the statute had given the Recorder jurisdiction only where the person charged had been actually doing business as canvasser, then, upon this court coming to the conclusion that he had not been doing business, it would be our duty to direct a writ of prohibition to issue.

Dans cette affaire de *Segal*, cependant, après avoir exposé la doctrine comme nous venons de le voir, la Cour en vint à la conclusion que le statut ne limitait pas la juri-

(1) (1841) 1 Q.B. 66.

(2) (1906) 13 O.L.R. 417 at 420.

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Rinfret C.J.

diction de la Cour du Recorder dans le sens des constatations qui viennent d'être faites et le bref de prohibition fut refusé.

Dans la présente instance, la Commission intimée agissait indiscutablement en une fonction quasi-judiciaire. L'Alliance possédait le certificat de reconnaissance émis par la Commission intimée elle-même. En vertu de l'article 7 de la Loi des relations ouvrières, la Commission, avant d'émettre le certificat, devait s'assurer du caractère représentatif de l'Alliance et de son droit d'être reconnue, après avoir procédé à cette fin à la vérification de ses livres et archives. Cet article 7 emploie bien les mots: "droit d'être reconnu."

D'autre part, en vertu de l'article 41, la Commission peut, pour cause, reviser ou révoquer toute décision et tout ordre rendus par elle et tout certificat qu'elle a émis. Ce pouvoir lui est donc donné seulement "pour cause."

Nous avons donc ici la situation que le droit de l'Alliance avait été reconnu par la Commission intimée et que cette reconnaissance ne pouvait plus être révoquée arbitrairement, ni même dans l'exercice d'une discrétion, mais seulement "pour cause." En conséquence, en révoquant le certificat de l'Alliance, la Commission intimée la privait de son droit et la décision qu'elle rendait ainsi était strictement une décision judiciaire où la Commission intimée était appelée à juger qu'il existait une cause pour enlever ce droit à l'Alliance.

En pareil cas, la règle est que la partie dont le droit est en jeu doit être entendue et que l'opportunité lui soit fournie de se défendre. Sur ce point, il existe une jurisprudence abondante: *Maillet v. le Bureau des Gouverneurs du Collège des Chirurgiens-dentistes* (1), *In re Ashby* (2), décision de la Cour d'Appel d'Ontario; et surtout l'arrêt du Comité judiciaire du Conseil Privé dans une cause de Québec: *Lapointe v. Association de Bienfaisance et de retraite de la Police de Montréal* (3), où l'on trouve ce qui suit:

> They are bound in the exercise of their functions by the rule expressed in the maxim *'Audi alteram partem'* that no man should be condemned to consequence resulting from alleged misconduct unheard, and without having the opportunity of making his defence. This rule is not confined

(1) Q.R. 27 K.B. 364. (2) [1934] 3 D.L.R. 565.
(3) [1906] A.C. 535 at 540.

to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

La maxime *"audi alteram partem"* est, si l'on peut dire, un principe vénérable. Elle est reconnue dans la loi elle-même. L'article 50 donne certains pouvoirs à la Commission des Relations ouvrières et stipule que, dans le cas d'infractions à la Section des pratiques interdites, la Commission peut, sans préjudice de toute autre peine, prononcer la dissolution de l'association, mais "après lui avoir donné l'occasion d'être entendue et de faire toute preuve tendant à se disculper." En Cour d'Appel, on a fait observer que cette prescription n'était expressément introduite dans la loi que pour le cas des infractions à la Section des pratiques interdites et l'on a voulu appliquer ici le principe que la mention pour un cas particulier exclut l'application pour les autres cas qui n'y sont pas mentionnés. L'on ajoute qu'en ce qui concerne l'application de l'article 41, qui permet à la Commission de révoquer "pour cause" toute décision et tout ordre rendus par elle et tout certificat qu'elle a émis, la loi est silencieuse quant à l'obligation d'entendre le détenteur du certificat de reconnaissance et de lui fournir toute opportunité de se défendre.

Mais, sous ce rapport, la règle posée par Maxwell: "On the Interpretation of Statutes", 4 éd., p. 546, me paraît s'appliquer:

> Again, in giving judicial powers to affect prejudicially the rights of person or property, a statute is understood as silently implying, when it does not expressly provide, the condition or qualification that the power is to be exercised in accordance with the fundamental rules of judicial procedure, such for instance as that which requires that before its exercise, the person sought to be prejudicially affected shall have an opportunity of defending himself.

Et Maxwell (p. 467) prévoit l'objection que la stipulation expresse pour un cas particulier n'implique pas nécessairement que ce précepte d'ordre général doit être considéré comme exclus d'un autre cas où la loi est restée silencieuse. En résumant les précédents sur ce point, il exprime l'opinion suivante (p. 467):

> Provisions sometimes found in statutes enacting imperfectly or for particular cases only that which was already and more widely the law have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment; resting on the maxim *'Expressio unius est exclusio alterius.'* But that maxim is inapplicable in such cases.

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Rinfret C.J.

Voir sur ce point le jugement de Farwell L.J. *Re Lowe v. Darling & Son* (1):

> The generality of the maxim *'Expressum facit cessare tacitum'* which was relied on, renders caution necessary in its application. It is not enough that the express and the tacit are merely incongruous; it must be clear that they cannot reasonably be intended to co-exist. In Colquhoun v. Brooks (19 Q.B.D. 400 at p. 406) Wills J. says: 'May observe that the method of construction summarised in the maxim "Expressio unius exclusio ulterius" is one that certainly requires to be watched . . . The failure to make the "expressio" complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind. Lopes L.J. in the Court of Appeal (21 Q.B.D. 52 at p. 65) says : 'The maxim "Expressio in unius exclusio alterius" has been pressed upon us. I agree with what is said in the Court below by Wills J. about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.'

Le principe que nul ne doit être condamné ou privé de ses droits sans être entendu, et surtout sans avoir même reçu avis que ses droits seraient mis en jeu est d'une équité universelle et ce n'est pas le silence de la loi qui devraît être invoqué pour en priver quelqu'un. A mon avis, il ne faudrait rien moins qu'une déclaration expresse du législateur pour mettre de côté cette exigence qui s'applique à tous les tribunaux et à tous les corps appelés à rendre une décision qui aurait pour effet d'annuler un droit possédé par un individu.

Il est bon de faire remarquer ici qu'en vertu de l'article 51 de la *Loi des relations ouvrières* "nulle décision de la Commission ne fait preuve pour des fins autres que celles expressément prévues par la présente loi ou par la Loi des différends entre les services publics et leurs salariés."

Il ne reste plus qu'à considérer un argument qui a eu la faveur de l'opinion exprimée par la majorité de la Cour du Banc de la Reine (en appel).

Dans leur contestation les intimées ont soutenu que la Commission des Relations ouvrières de Québec possède tous les pouvoirs, immunités et privilèges de commissaires nommés en vertu de la *Loi des commissions d'enquête* et que, par conséquent, nul bref de prohibition ou d'injonction ne peut entraver ou arrêter leurs procédures. C'est l'article

(1) [1906] 2 K.B. 772 at 785.

36 de la *Loi des relations ouvrières*. Et, si l'on réfère à l'article 17 de la *Loi des commissions d'enquête* (S.R.Q. c. 9), cet article est à l'effet que "nul bref d'injonction ou de prohibition et nulle autre procédure. légale ne peuvent entraver ou arrêter les procédures des commissaires à l'enquête."

De même que le juge de première instance, je serais d'avis que "rien ne permet de conclure que la législature ait voulu rendre ce texte applicable à la Commission des Relations ouvrières." Comme il le fait remarquer, l'article 17, vu qu'il limite un recours, doit être interprété strictement; et il ne défend pas complètement le recours au bref de prohibition, il défend seulement que l'on s'en serve pour entraver les procédures des commissaires à l'enquête.

Il ne saurait être invoqué pour empêcher la prohibition à l'encontre d'une décision rendue en absence de toute juridiction.

Déjà, nous avons vu que la Cour Suprême du Canada a décidé de cette question dans la cause de *Segal v. la Cité de Montréal supra*. Nous le répétons, un tribunal ne peut s'attribuer à lui-même une juridiction qu'il n'a pas. Il semble que cette proposition est tellement évidente qu'elle n'a pas besoin de démonstration. En plus, toute restriction aux pouvoirs de contrôle et de surveillance d'un tribunal supérieur est nécessairement inopérante lorsqu'il s'agit pour lui d'empêcher l'exécution d'une décision, d'un ordre ou d'une sentence rendue en l'absence de juridiction.

Pareille décision, ordre ou sentence est, de toute façon, *Ultra vires* et par conséquent absolument nulle. Le législateur, même s'il le voulait, ne pourrait déclarer l'absurdité qu'un tribunal qui agit sans juridiction peut être immunisé contre l'application du bref de prohibition. Sa décision est nulle et aucun texte d'un statut ne peut lui donner de la validité ou décider que, malgré sa nullité, cette décision devrait quand même être reconnue comme valide et être exécutoire.

Il y aurait beaucoup à dire sur la constitutionnalité de ces articles des statuts qui se généralisent et qui ont pour objet d'empêcher les tribunaux supérieurs d'examiner la validité de décisions rendues par telle ou telle commission et de fermer la porte à l'accès aux tribunaux réguliers du pays. Ici, la constitutionnalité de l'article qu'on veut

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Rinfret C.J.

opposer à l'Alliance n'a pas été soulevée. Il est probable que la Cour Suprême du Canada pourrait la soulever *proprio motu*. Il faudrait, sans doute, que le Procureur général du Canada et celui de la province de Québec en fussent avisés. Je n'hésiterais pas, pour ma part, à ordonner que cet avis leur fut adressé; mais il vaut mieux attendre que cette question devienne essentielle pour la décision d'une cause.

Dans l'affaire qui nous est soumise cela n'est pas essentiel, car il est évident qu'un tribunal quel qu'il soit ne peut procéder à adjuger sur une requête qui n'est pas encore devant lui. Cela est suffisant. En plus, je ne saurais en venir à la conclusion qu'un tribunal, même saisi d'une requête, peut procéder à dépouiller d'un droit un citoyen canadien ou une association quelconque qui n'a pas été avisé que demande en serait faite à ce tribunal, qui n'a pas été entendu et à qui toute opportunité de se défendre a été déniée.

Je suis tout à fait de l'avis du juge de première instance que, dans la cause qui nous est soumise, la manière de procéder de la Commission intimée équivaut à un déni de justice.

Pour ces raisons, sur lesquelles j'ai eu à m'expliquer aussi longuement que possible, je suis d'avis que l'appel doit être maintenu, le jugement de la Cour du Banc de la Reine infirmé et le jugement de la Cour Supérieure rétabli, avec dépens de toutes les Cours contre la Commission des Relations ouvrières de la province de Québec.

The judgment of Kerwin and Estey JJ. was delivered by

KERWIN J.:—Even though an admittedly illegal strike had been called by the appellant and had commenced, the respondent, the Labour Relations Board, was bound to give notice to the appellant before acting under section 41 of the *Labour Relations Act* to cancel the appellant's certificate which had been granted May 12, 1944. The Board would then have heard any representations the appellant desired to make in order to explain the circumstances under which the strike was called, and it could then have proceeded to decide whether the certificate should be cancelled. Many cases, of which *Board of Education v. Rice* (1) and *L'Association de Bienfaisance et de Retraite de la police de Montreal* (2), may be taken as typical, show that such a

(1) [1911] A.C. 179. (2) [1906] A.C. 535.

body as the Board is bound in the exercise of its functions by the rule expressed in the maxim "audi alteram partem."

The appellant was entitled to notice notwithstanding that section 41 does not in terms require it. Reliance was placed by some members of the Court below upon section 50 of the *Act*:—

> 50. If it be proved to the Board that an association has participated in an offence against section 20 the Board may, without prejudice to any other penalty, decree the dissolution of such association after giving it an opportunity to be heard and to produce any evidence tending to exculpate it.
>
> In the case of a professional syndicate, an authentic copy of the decision shall be transmitted to the Provincial Secretary who shall give notice thereof in the Quebec Official Gazette.

It was considered that since this section specified that the Board, before acting, should give an association an opportunity of being heard and producing evidence, the Legislature must have intended that no notice was necessary under section 41. With respect I think the true view is that since the Legislature must be presumed to know that notice is required by the general rule, it would be necessary for it to use explicit terms in order to absolve the Board from the necessity of giving notice.

In this view of the matter, the appellant was entitled to ask for a declaration of nullity and, as my brother Fauteux shows in his reasons, there is nothing incompatible in such a claim being joined to a request for prohibition. Holding as I do that the appellant is entitled to succeed in its claim for a declaration of nullity, it is unnecessary to consider the various arguments advanced as to the applicability of the writ of prohibition and as to whether, as was held by Barclay J. and Casey J., the application therefor was too late.

The appeal should be allowed and the judgment of the Court of Queen's Bench (Appeal Side) set aside. The judgment at the trial should also be set aside and in lieu thereof there should be a declaration that in revoking on January 21, 1949, its certificate of May 12, 1944, which had recognized the appellant "comme agent négociateur de tous les instituteurs et institutrices qui enseignent en français dans les écoles françaises de la mise-en-cause," the respondent Board acted without jurisdiction and that such revocation is null and of no effect. The appellant is entitled to its costs throughout against the respondent.

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

RAND J.:—Three questions are raised in this appeal: whether a strike called in violation of the provisions of the *Labour Relations Act* and of the *Public Services Employees Disputes Act* is a cause for revoking a certificate of representation issued under sec. 9 of the *Labor Act* to a syndicate incorporated under the *Professional Syndicates Act:* whether the Labor Board can, without a hearing, revoke such a certificate; and whether an action claiming a writ of prohibition brought after a purported revocation can, for any purpose, be maintained.

The members of the syndicate Association in these proceedings are French teachers in French Catholic schools of Montreal. The certificate was issued on May 12, 1944. In June 1947, negotiations were commenced for a revision of the working arrangement then in effect with the Montreal Catholic School Commission, but the parties were unable to reach agreement. The dispute was accordingly submitted to arbitration under the *Public Services Employees Disputes Act.* On August 27, 1948, the Board of Arbitration rendered its decision which applied to the year ending June 30, 1948 only. Against this the Association appealed to the Quebec Municipal Commission which affirmed the award. On September 7, while that appeal was pending, the Association again presented to the School Commission the proposals which had previously been rejected. After further negotiations and at least one meeting with representatives of the provincial Government, a strike was called on January 16, 1949 which continued from the 17th until the 21st of that month. As the result of a communication from the School Commission, the Labor Board on the 21st issued an order revoking the certificate. The strike was thereupon called off.

On the 27th of January the Association presented a petition to Edge J. for leave to issue a writ of summons in which the relief sought was a declaration of the invalidity of the order of revocation and the issue of a writ of prohibition to the Labor Board and the School Commission. Leave was given and at the same time an order made restraining the defendants until the final adjudication from acting in any manner on the revocation.

The action was maintained at the trial before Savard J. for the reasons, among others:—

(*a*) La révocation de la franchise syndicale de la requérante a été décrétée comme peine pour infractions à la Loi des Différends entre les services publics et leurs salariés, alors que cette loi a prévu d'autres peines pour de telles infractions, et c'est aux tribunaux seulement qu'il appartient de les appliquer.

(*b*) Le retrait de la reconnaissance syndicale n'était ni plus ni moins qu'une confiscation.

(*c*) Il est contraire aux principes fondamentaux de la justice qu'une décision judiciaire ou quasi-judiciaire soit rendue, sans audition des parties.

(*d*) Le défaut d'avis à la requérante qui était la partie intéressée, détruit la juridiction de la Commission et entraîne la nullité de la sentence qu'elle a rendue.

On appeal to the Court of King's Bench (1), this judgment was reversed on the grounds of the majority that the Labor Board, not being an inferior court, was not subject to prohibition, and that in any event, the Board had acted within its jurisdiction; but by Barclay J. because, as nothing further remained to be done by the Labor Board, prohibition would be ineffectual and did not lie.

The object of the *Labor Act,* the provisions of which, it must be said, are of a most skeletal nature, is to promote the reconciliation, with the least waste, and by rational means, of the conflicting interests of employers and employees. Indirectly it seeks the broader object of maintaining confidence and faith of the community in itself and in its solidarity in freedom by furnishing means for reaching adjustments between those who employ and those employed in the execution of the various functions of our complex life.

Those objects furnish us with trustworthy indications of the scope within which the legislation was conceived and enacted and was intended to be administered. Can we then, in such a perspective, attribute to the language of the legislature the intention that any breach of the provisions of either statute, such as a strike, ipso facto and regardless of any circumstances attending it, should be cause for which, under sec. 41 of the *Labor Act,* the Board may revoke the certificate?

(1) Q.R. [1951] K.B. 752.

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Rand J.

The effect of revocation would be to deprive the syndicate of its right to require negotiation by the employer until, on the basis of Mr. Beaulieu's argument, the Board in its wisdom thought the punishment had been sufficient or until the Association, to the satisfaction of the Board, in some form or other, had purged itself of its sin. Until then, the Association would, in effect, be outlawed. Can that, on any reasonable view of the language and objects of the statute as a whole, be reconciled with promoting harmony in any service or work, public or private? Mr. Beaulieu says that the strike shows the Association not to be a group that seeks its objects "with respect for law and authority" as the concluding language of the definition of "Association" puts it, but this cannot be taken seriously. On his argument, these teachers have been put in leading strings to the Labor Board and their interests balanced on the peril of absolute obedience to this administrative agency acting, as the argument goes, with a discretionary power beyond juridical interference.

Neither statute provides either for that total subordination or that unlimited discretion. Express provision is made for the punishment of every person participating in a violation of any of their terms. It is a basic rule that where an Act creates an offence and provides a penalty for it, the latter, in the absence of language indicating a contrary intent, is to be presumed to be the only punishment intended: Beal's Cardinal Rules of Interpretation, 3rd Ed. p. 483. There is nothing from which the slightest implication can be drawn that other punishment was intended to be permitted: but the Board has imposed other punishment compared with which the pecuniary penalties authorized, though substantial, are insignificant.

The provisions of sec. 4 of the *Labor Act* bear directly upon this question:—

> Tout employeur est tenu de reconnaître comme représentant collectif des salariés à son emploi les représentants d'une association groupant la majorité absolue desdits salariés et de négocier, de bonne foi, avec eux, une convention collective de travail.
>
> Plusieurs associations de salariés peuvent s'unir pour former cette majorité et nommer des représentants pour fins de négociation collective à telles conditions non incompatibles avec la présente loi qu'elles peuvent juger opportunes.

The task of the Board, upon an application, is seen to be to ascertain whether the state of facts specified is present; secs. 5, 6, 7 and 8 elaborate this conception in the clearest terms; and once those facts are found, the Board is bound to recognize the Association as the bargaining agent and by sec. 9, to issue the certificate. It follows, then, that immediately upon the cancellation of the certificate, the Association would, under the conditions of sec. 4, be entitled to apply for its certificate anew, and assuming them to exist as before, the recognition and the certification must at once have followed. These considerations are incompatible with authority to revoke solely on the ground that there has been a violation of a penal provision of the statute.

The second objection is that before revoking the certificate for cause, the Board must hear the party to be affected by that action. *Audi alteram partem* is a pervading principle of our law, and is peculiarly applicable to the interpretation of statutes which delegate judicial action in any form to inferior tribunals: in making decisions of a judicial nature they must hear both sides, and there is nothing in the statute here qualifying the application of that principle.

The only answer suggested to this is that the Board, being an "administrative body", can, in effect, act as it pleases. But in this we are too much the prisoners of words. In one sense of administration, in the enactment of subordinate legislation or quasi-legislation, the principle has a limited application; but in the complexity of governmental activities today, a so-called administrative board may be charged not only with administrative and executive but also with judicial functions, and it is these functions to which we must direct our attention. When of a judicial character, they affect the extinguishment or modification of private rights or interests. The rights here, some recognized and other conferred by the statute, depend for their full exercise upon findings by the Board; but they are not created by the Board nor are they enjoyed at the mere will of the Board; and the Association can be deprived of their benefits only by means of a procedure inherent in judicial process.

Mr. Beaulieu cites *Burgess v. Brockton* (1), where the question concerned the revocation of licenses granted to taxi owners to carry on their business within the city. The

(1) (1920) Mass. 235.

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Rand J.

city charter conferred power to deal generally with transportation carried on in the streets, and the situation arose that if the competition of the taxi cabs with the street railway continued, the latter would be compelled, because of financial reasons, to cease operations. It became therefore a subject of purely public interest whether only the one or the other mode of transportation should be permitted. What the Council of Brockton did was, in effect, to enact subordinate legislation, but there is nothing of that nature here.

The final question is whether, seeing that the revocation, though a nullity, exhausted the Board's action, the proceeding for any purpose can be maintained. In dealing with this question I do not find it necessary to examine the scope of art. 1003 *C.P.* but I agree with Barclay J. that in the situation presented, prohibition would be futile. Necessarily involved in such a proceeding, however, is the finding that the act challenged is beyond the jurisdiction of the tribunal purporting to make it. Unlike the direct procedure at English common law, the application under the *Code of Procedure* is, as stated, by way of a writ of summons. By that writ the ordinary action is commenced; and the petition presented here, setting forth the facts, furnishes all of the allegations necessary to a declaration or statement of claim. To the petition a defence was entered, and the issues were tried out as in the ordinary case.

Can that necessary finding and declaration, then, be maintained even though the writ itself should be denied? I see nothing in the articles of the Code of Procedure against it. In *Samson v. Drolet* (1), this Court held that, on a dilatory exception, demands in the nature of penalties for misconduct in office provided by a statute could be joined with the relief of quo warranto. Quo warranto is provided for by sec. 2 of c. 40 of the *Code of Procedure,* which contains nothing permitting such a joinder. The claims were allowed because, although having different sources, they had the same origin in fact and were of similar character. Here we have not only that similarity in character and identity of origin, but also the essential condition of the main relief. The claim for prohibition was made in good faith; but the substantial contest was over the

(1) [1928] S.C.R. 96.

authority of the Board to revoke the certificate as it was done. We are asked to hold that because, in strict formality, prohibition would be ineffectual, the proceedings in which every feature of the controversy has been examined should be rejected as futile and wasted. Since we have, in substance, the procedure, the matter and the decision on the real issue, it would be a miscarriage of justice to dispose of them in such a manner.

The appeal should be allowed and the judgment of the Court of Queen's Bench (Appeal Side) set aside. The judgment at the trial should also be set aside and in lieu thereof there should be a declaration that in revoking on January 21, 1949, its certificate of May 12, 1944, which had recognized the appellant "comme agent négociateur de tous les instituteurs et institutrices qui enseignent en français dans les écoles françaises de la mise-en-cause," the respondent Board acted without jurisdiction and that such revocation is null and of no effect. The appellant is entitled to its costs throughout against the respondent.

FAUTEUX J.:—Je concours au maintien de cet appel et sans qu'il soit nécessaire de relater à nouveau et en détail les faits, procédures et jugements y conduisant, je désire simplement souligner certains des motifs m'amenant à cette conclusion.

En émettant, le 12 mai 1944, et en maintenant depuis lors et jusqu'au 21 janvier 1949, un certificat attestant que l'appelante était l'agent négociateur de tous les instituteurs et institutrices qui enseignent le français dans les écoles françaises de la mise-en-cause, l'intimée reconnaissait que l'Alliance des Professeurs Catholiques de Montréal, association constituée sous l'empire de la *Loi des Syndicats Professionnels du Québec* (S.R.Q., 1941 c. 162), était, aux termes de la *Loi des Relations Ouvrières* (S.R.Q., 1941 c. 162A), une association groupant la majorité absolue de ces salariés à l'emploi de la mise-en-cause et, comme telle, l'association exclusivement qualifiée, suivant la loi, pour négocier avec l'employeur une convention collective. Advenant le 21 janvier 1949, et nonobstant—suivant la prétention de l'appelante—la continuelle existence des conditions de la loi lui donnant le droit à ce certificat, la mise-en-cause en demanda et obtint de l'intimée, de la façon la plus expéditive et sans aucune notification à l'appelante ou

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Fauteux J.

opportunité donnée à icelle d'être entendue, la révocation. D'où l'action de cette dernière recherchant l'annulation de cette révocation et l'obtention d'un sursis à sa mise à effet, fondant ce double recours sur le défaut de juridiction de l'intimée résultant:— (i) du fait que la Commission n'avait aucun pouvoir de ce faire pour le motif invoqué et (ii) des irrégularités de substance dans la procédure suivie en l'occurrence.

Sur le premier moyen:— l'intimée entend justifier sa décision, en droit, sur l'interprétation qu'elle donne à la *Loi des Relations Ouvrières* et, en particulier, aux dispositions de l'article 41 de cette loi édictant que

> La Commission peut, *pour cause,* reviser ou révoquer toute décision et tout ordre rendus par elle et tout certificat qu'elle a émis.

et, en fait, invoque comme "cause" de révocation l'illégalité d'une grève déclarée par l'appelante.

Etant donné la conclusion à laquelle j'en suis arrivé sur le second moyen de l'appelante, il n'est pas nécessaire et il ne m'apparaît pas opportun, non plus, d'exprimer mes vues sur le mérite du premier moyen.

Sur le deuxième moyen:— Il est concédé par l'intimée qu'elle a adjugé sur la demande de la mise-en-cause sans que l'appelante, contre laquelle elle était formée, ait été entendue ou dûment appelée. C'est là, a soumis l'appelante, une violation du principe d'ordre public formulé à l'article 82 du *Code de procédure civile* et reconnu par de nombreuses autorités comme s'appliquant également dans l'exercice des fonctions d'ordre judiciaire attribuées aux corps administratifs. *Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montréal* (1):

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

En adjugeant, comme susdit, sur la demande de la mise-en-cause s'appuyant, en droit, sur son interprétation de la *Loi des Relations Ouvrières* et, particulièrement, des dispositions de l'article 41 de cette loi, et, en fait, sur l'illégalité de la grève, l'intimée remplissait, au sens même des

(1) [1906] A.C. 535 at 540.

précisions apportées, en particulier, par M. le Juge Pratte dans la cause de *Giroux v. Maheux* (1), une fonction d'ordre judiciaire et non d'ordre purement administratif ou législatif. Ainsi qu'on décida en cette cause où il s'agissait, entre autres, d'apprécier le rôle de la régie sous la *Loi des Transports,* le rôle de cet organisme administratif sous cette loi était de *réglementer,* en fonction de l'intérêt public, les services publics sous son contrôle. Au contraire, et sous la *Loi des Relations Ouvrières,* le droit d'être reconnu comme agent négociateur est *déjà réglementé* par le Législateur lui-même lequel n'a, sur le point, délégué aucun pouvoir à la Commission bien que lui imposant l'obligation de vérifier, sur requête écrite, l'existence des conditions donnant lieu à ce droit sans pour cela, cependant, lui conférer le droit de les modifier ou d'en ajouter de nouvelles. Et quelle que soit l'extension susceptible d'être donnée à l'interprétation du mot "cause" de l'article 41, en relation avec la révocation du certificat, il est certain que dans les limites d'une interprétation légale, on ne saurait inclure une cause dont la reconnaissance et le jeu seraient, dans le résultat, incompatibles avec les dispositions de la loi où il se trouve. Et si, comme le prétend l'intimée en réponse au premier moyen soulevé par l'appelante la loi lui permettait de s'enquérir si l'illégalité de la grève pouvait autoriser la révocation du certicat, en procédant de fait à ce faire et en en déterminant le point, elle accomplissait une fonction d'ordre judiciaire. Effectivement, l'intimée, en l'espèce, a examiné les faits à la lumière de l'interprétation qu'elle a donnée à la loi et a, de ce chef, déclaré l'appelante déchue du droit d'être reconnue comme agent négociateur. Cette détermination, l'intimée ne pouvait la faire sans entendre, ou au moins sans donner l'opportunité à l'appelante d'être entendue, non seulement sur le fait mais sur le droit lui-même. Voir la décision de la Chambre des Lords dans *Board of Education v. Rice* (2), et particulièrement au deuxième paragraphe de la page 182. Cette décision fut appliquée par cette Cour dans *Mantha v. The City of Montreal* (3). Voir à la page 466, aux raisons de Sir Lyman Duff, Juge en chef, qui rendit le jugement de la majorité.

(1) Q.R. [1947] R. de J. 163. (2) [1911] A.C. 179.
(3) [1939] S.C.R. 458.

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Fauteux J.

On ne peut, comme le prétend l'intimée, corriger la position en alléguant que le fait et l'illégalité de la grève étaient de notoriété publique et que cela était même concédé par l'appelante. Érigée en doctrine et poussée à ses justes limites, cette prétention pourrait justifier la supression totale de toute procédure et la mise à néant des principes fondamentaux régissant l'exercice de la fonction judiciaire. Il reste, d'ailleurs, que l'appelante avait aussi le droit d'être entendue, ou d'être appelée à l'être, sur la question de droit que l'intimée prétendait pouvoir soulever et déterminer, savoir si cette illégalité constituait une cause de révocation du certificat.

Il est de règle que l'application du principe *audi alteram partem* est implicitement sous-entendue dans les lois attribuant aux corps administratifs des fonctions d'ordre judiciaire. Maxwell: On Interpretation of Statutes, 9th ed., 368. Le Législateur est présumé tenir compte de cette règle en édictant ces lois. Pour en suspendre l'opération, il faut donc, dans la loi, un texte explicite à cet effet ou une inférence en ayant l'équivalence. (Maxwell, op. cit. 318). Il n'y a, en l'espèce, aucun texte à cet effet et la comparison des dispositions de l'article 41 avec celles de l'article 50 de la *Loi des Relations Ouvrières* ne justifie pas une inférence ayant la valeur requise en la matière pour établir que le Législateur a clairement voulu faire exception au principe. Voir aussi, sur la portée de la maxime d'interprétation *Expressio unius exclusio alterius,* la décision rendue dans *Lowe v. Dorling & Son* (1).

Il faut donc considérer ce second moyen comme fondé et déclarer que la révocation prononcée par l'intimée est nulle et sans effet.

Mais, poursuit l'intimée, l'appelante ne peut réussir sur la prohibition puisque, en fait, la décision étant rendue, la fonction judiciaire de l'intimée était épuisée et qu'en droit, comme il n'y avait plus rien à prohiber, au moment où l'action fut initiée en Cour Supérieure, une prohibition sans objet ne pouvait être accordée. Il n'apparaît pas nécessaire de s'arrêter à la considération du bien ou mal fondé de ces prétentions de fait et de droit au sujet desquelles il y aurait, à raison des dispositions de la *Loi des Relations Ouvrières,* plusieurs questions à considérer.

(1) [1906] 2 K.B. 772 at 785.

Par ailleurs, et dans les conclusions de son action, l'appelante a non seulement demandé d' "Ordonner aux intimés de surseoir à toutes procédures dans la cause ci-haut mentionnée et plus particulièrement de surseoir à l'exécution de la décision ci-dessus récitée", mais également de "Déclarer qu'il y a défaut de juridiction de la part des intimés dans l'affaire ci-dessus alléguée et déclarer nulle et de nul effet ladite décision." Sans doute, l'appelante avait intérêt à rechercher, en addition d'une déclaration de nullité, une ordonnance de prohibition comme recours le plus approprié, avantageux et efficace et, ce, à raison, particulièrement, des sursis provisoires auxquels donne lieu ce remède particulier, ainsi qu'affirmé par M. le Juge Dorion dans *Rossi v. Lacroix* (1), et reconnu au jugement du 8 février 1950 rendu par la Cour d'Appel en la présente affaire. Mais il n'en reste pas moins que dans les conclusions de l'appelante, il y a deux recours, soit un de nullité de la décision et l'autre de prohibition. Du bien fondé du premier dépend, en principe, le bien fondé du second. Ces deux recours sont donc, non seulement compatibles et non contradictoires, mais le premier était nécessaire au second. L'appelante pouvait, par ailleurs, n'exercer que le premier en prenant une action directe pour faire mettre de côté comme nulle la décision de la Commission. Et le fait que le bien fondé de ce recours en nullité soit, dans la procédure actuelle, une prémisse nécessaire au bien fondé du recours en prohibition ne saurait,—en supposant que, pour la raison alléguée par l'intimée, la prohibition ne puisse être décrétée en l'espèce, —priver l'appelante d'une adjudication particulière et au mérite sur son recours en nullité. Dans *Turcotte v. Dansereau* (2), l'honorable Juge Taschereau, subséquemment Juge en chef, rendant jugement pour cette Cour, disait, particulièrement à la page 587:—

> The insufficiency of a litigant's allegations may be fatal to his claim, but if he alleges more than is necessary, or adds to a legitimate demand conclusions which he is not entitled to, that is no reason to reject the whole of his demand.

Les tribunaux reconnaissent l'action directe en pareille matière, (*Mantha v. City of Montreal,* citée plus haut), comme, d'ailleurs, en certaines circonstances, ils admettent l'action directe pour mettre de côté même le jugement des

(1) Q.R. 46 R. de J. 405. (2) (1897) 27 Can. S.C.R. 583.

1953

ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD

Fauteux J.

Cours. Particulièrement la décision de la Cour d'Appel dans *Legault v. Surprenant et Paquin v. Surprenant* (1), où l'on confirma à l'unanimité le jugement de feu l'honorable Juge Archer et décréta que l'action directe peut être exercée par le défendeur condamné par défaut, qui n'a pas été légalement assignée devant le tribunal, pour faire déclarer nul le jugement rendu contre lui et que ce recours existe indépendamment des autres recours. Rendant le jugement pour la Cour d'Appel, M. le Juge Dorion dit à la page 230:—

> Notre jurisprudence a toujours admis ce recours à l'action directe, parce que c'est un principe absolu dans notre droit que personne ne peut être condamné sans avoir été assigné, (C.P., 82). Il en résulte qu'un jugement rendu contre un défendeur qui n'a pas été assigné est nul et que cette nullité peut toujours être invoquée par les moyens ordinaires de la procédure. Turcotte & Dansereau, 27 S.C.R. 583.
>
> Mais alors pourquoi le Code indique-t-il un mode spécial de révision des jugements rendus par défaut? C'est qu'il peut être urgent d'y avoir recours pour obtenir la suspension de l'exécution du jugement (1172 C.P.). C'est pourquoi la requête doit être accompagnée d'affidavit et des moyens de défense. Mais le défaut d'assignation est un excellent moyen de défense par lui-même.

La loi, d'une part, reconnaît le droit de cumuler des recours compatibles et non contradictoires dans une même demande, (Art. 87 *C.P.C.*), mais ne favorise pas l'inutile multiplicité des actions et des frais en résultant. Si, comme je le crois, la décision de la Commission pouvait être attaquée par action directe, prétendre que ce recours devait, en l'espèce, être exercé séparément du recours en prohibition,—soit par une action distincte,—pour éviter qu'un jugement adverse sur ce dernier empêche une adjudication sur le premier, n'est-il pas vouloir justifier une inutile litispendance sur le recours en nullité? Aussi bien, je ne vois pas que le défaut d'objet du recours en prohibition puisse, en l'instance, affecter le mérite du recours en nullité.

Ajoutons que cette cause est, sur le point, bien différente de celle de *Segal v. Cité de Montréal* (2). Il faut noter qu'en cette cause, le défendeur avait été appelé et entendu. Et voilà bien ce qui la distingue fondamentalement de la présente. Cette Cour, en étant venue à la conclusion que la Cour du Recorder avait erré sur son interprétation de la loi, la revision de la décision par elle rendue dépendait de la question de savoir si elle avait juridiction pour interpréter

(1) Q.R. (1926) 40 K.B. 228. (2) [1931] S.C.R. 460.

la loi comme elle l'avait fait, ou si sa juridiction dépendait de la mauvaise interprétation qu'elle en fit. Et, ayant conclu dans le sens de la première alternative, la Cour s'est déclarée incompétente à maintenir le bref de prohibition et à annuler une décision qui, pour la raison ci-dessus, aurait pu l'être dans le cas d'un appel. En somme, ce précédent de *Segal v. Cité de Montréal* est pertinent à la considération du premier, mais non du second moyen soulevé par l'appelante en cette cause.

Enfin, le fait que les formalités de la procédure pour obtenir le bref de prohibition ajoutent aux formalités de la procédure pour l'obtention d'un bref ordinaire, n'est pas en soi une objection ainsi qu'il a été décidé par cette Cour dans *Samson v. Drolet* (1).

Je maintiendrais l'appel, infirmerais le jugement de la Cour du Banc de la Reine, déclarerais qu'en décidant, le 21 janvier 1949, de révoquer le certificat reconnaissant l'appelante comme agent négociateur de tous les instituteurs et institutrices qui enseignent le français dans le écoles françaises de la mise-en-cause, l'intimée a agi sans juridiction et que telle décision, i.e., la révocation de ce certificat, est nulle et de nul effet; le tout avec dépens de toutes les Cours contre l'intimée.

Appeal allowed with costs.

Solicitors for the appellant: *Germain, Pigeon & Thibodeau.*

Solicitors for the respondent: *J. Gingras and G. Trudel.*

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(1) [1928] S.C.R. 96.

1953

*May 11,12
*June 26

JOHN GEORGE MACDONALD and DONALD ARTHUR MACDONALD, infants suing by their next friend John Louis Macdonald, and JOHN LOUIS MACDONALD (Plaintiffs) ..... RESPONDENTS.

AND

CITY OF VANCOUVER and JACK PINCH (Defendants) ..... APPELLANTS;

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Automobiles—Negligence—Mother fatally injured while riding in police car following ambulance conveying injured child to hospital—Liability of city where no gross negligence—Whether deceased transported as a passenger in the ordinary course of the business of the city—Motor-vehicle Act R.S.B.C. 1948, c. 227, s. 82(b).

Section 82 of the *Motor-vehicle Act,* R.S.B.C. 1948, c. 227 exempts the owner or driver of a motor-vehicle from liability to a passenger by reason of the operation of the motor-vehicle, in the absence of gross negligence, but does not relieve "any person to whose business the transportation of passengers is normally incidental, transporting a passenger in the ordinary course of the transporter's business" from liability arising from the death of such passenger.

The plaintiff as next friend of his two infant sons, and on his own behalf, sued the City of Vancouver and the driver of a police car under the *Families Compensation Act,* R.S.B.C. 1948, c. 116, for damages arising out of the death of his wife, the boys' mother. The latter was fatally injured when a member of Vancouver's Police Force, acting on the orders of his superior officer, was transporting the parents in a police car owned by the City, to a hospital to which a third child, injured in a traffic accident, was being conveyed in an ambulance. The action was tried before a jury, which in answer to questions, found that the defendant city was a person to whose business the transportation of passengers was normally incidental and that it was transporting the parents in the ordinary course of its business. It also found negligence but not gross negligence on the part of the driver of the police car, and awarded damages. The Court of Appeal for British Columbia set aside the judgment and dismissed the action.

Held: That there was no evidence to support the jury's finding that the parents in the circumstances of the case were being transported in the ordinary course of the city's business.

Judgment of the Court of Appeal for British Columbia (1952-53) 7 W.W.R., affirmed.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Locke JJ.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), O'Halloran J.A. dissenting, allowing the appeal of the respondents and setting aside the judgment of Macfarlane J. following a verdict of a jury awarding damages.

C. K. Guild, Q.C. and *M. G. Caple* for the appellants.

J. W. de B. Farris, Q.C. for the respondents.

KERWIN J.:—The jury found that there was negligence on the part of the respondent Pinch which caused the accident and that such negligence consisted of excessive speed under the circumstances. That finding is not now in dispute. However, the jury also found that there was no gross negligence on his part and, therefore, under s. 82 of the British Columbia *Motor-vehicle* Act, R.S.B.C. 1948, c. 227, no action lies for the death of Mrs. MacDonald unless the respondents fall within these words at the end of the section:—

> but the provisions of this section shall not relieve:—
>
> * * *
>
> (*b*) Any person, to whose business the transportation of passengers is normally incidental, transporting a passenger in the ordinary course of the transporter's business,—
>
> from liability for injury, loss, or damage to such passenger, or arising from the death of such passenger.

It was argued on behalf of the respondent City that the pleadings and the course of the trial showed plainly that the only business of the City suggested by the appellants was that of policing the municipality. Assuming, however, that the appellants are entitled to claim that anything that might be described as a business mentioned in the Vancouver charter constitutes the Municipality's business within (*b*), and without expressing an opinion on any other question, I find it impossible to say that transporting Mr. and Mrs. MacDonald was in the ordinary course of any such business. Not only was there no evidence upon which the jury could answer "Yes" to Question 2:— "If your answer to Question 1 is 'Yes' was the City transporting Mr. and Mrs. MacDonald in the ordinary course of its business?" but the evidence was all in the opposite sense. The appeal must be dismissed with costs if demanded.

(1) (1952-53) 7 W.W.R. (N.S.) 454; [1953] 1 D.L.R. 516.

1953

MACDONALD v. CITY OF VANCOUVER

TASCHEREAU J.:—This case arises out of an automobile accident which occurred in the City of Vancouver on July 18, 1950. On that date a four year old son of Mr. and Mrs. John G. MacDonald was run over by a truck in front of the MacDonald home, at 2295 Parker Street, in the City of Vancouver. An ambulance as well as two police cars were called to the scene of this accident, one of which was a "beat" car driven by Constable Jack Pinch who was accompanied by Constable Robert Gibson.

Permission was refused to Mr. and Mrs. MacDonald to ride in the ambulance with the injured boy, on account of his critical condition, but authorization was given by the Police Traffic Sergeant to Pinch and Gibson to take the MacDonald's in their car. It is while following the ambulance to the hospital that the "beat" car went out of control, skidded and struck a tree, whereupon Mrs. MacDonald received severe injuries which caused her death.

The jury awarded $6,000 to the husband John G. MacDonald and $5,000 each to the two infants John G. and Donald A. MacDonald, and Mr. Justice MacFarlane accepted this verdict, and directed judgment to be entered accordingly. The Court of Appeal, Mr. Justice O'Halloran dissenting, allowed the appeal and dismissed the action with costs.

The law that has to be considered for the determination of this case, is s. 82 of the *Motor-vehicle Act* R.S.B.C. 1948, c. 227. The section reads:—

> 82. No action shall lie against either the owner or the driver of a motor-vehicle or of a motor-vehicle with a trailer attached by a person who is carried as a passenger in that motor-vehicle or trailer, or by his executor or administrator or by any person who is entitled to sue under the "Families Compensation Act", for any injury, loss, or damage sustained by such person or for the death of such person by reason of the operation of that motor-vehicle or of that motor-vehicle with trailer attached by the driver thereof while such person is a passenger on or is entering or alighting from that motor-vehicle or trailer, unless there has been *gross negligence* on the part of the driver of the vehicle and unless such gross negligence contributed to the injury, loss, or damage in respect of which the action is brought; but the provisions of this section shall not relieve:—
>
> (*a*) Any person transporting a passenger for hire or gain; or
>
> (*b*) Any person, to whose business the transportation of passengers *is normally incidental,* transporting a passenger in the ordinary course of the transporters' business,—
>
> from liability for injury, loss, or damage to such passenger, or arising from the death of such passenger.

By its answer to question 5, the jury negatived *gross negligence,* so that the plaintiffs in order to succeed, must necessarily rely on the argument that the City of Vancouver came within subsection (*b*), and that it was a person, to whose business the transportation of passengers was normally incidental, and it was transporting Mrs. MacDonald in the ordinary course of its business.

With this proposition, I respectfully disagree. The business of municipal constables is to police the city, and protect the lives and property of its citizens. It is not a part of the city's business, and it is not "normally incidental" thereto, that the "beat" cars of the police force be used to transport passengers, as Mr. and Mrs. MacDonald have been, in the circumstances of this case. I find nothing in the City Charter and in the evidence to support the proposition of the appellants.

I would dismiss the appeal with costs.

RAND J.:—Assuming that the City is a person "to whose business the transportation of passengers is normally incidental", and that as owner it would be responsible for the negligence of its police officers in operating the automobile in the circumstances here, on neither of which I express an opinion, that it was a carriage of a passenger "in the ordinary course of the transporter's business", is unsupported by anything in the case. It was an exceptional accommodation to the anxious parents of a child who had been injured and is not within the exception to s. 82 of the *Motor-vehicle Act,* R.S.B.C. 1948, c. 227.

The appeal must, therefore, be dismissed with costs if required.

KELLOCK J.:—The automobiles here concerned were both police cars and the evidence as to their use was limited to their use by the police. The first car, No. 4, a prowler or "beat" car, took the adult appellant and his wife from the scene of the first accident to the scene of the second, where Mrs. MacDonald was injured. No. 6, a traffic car, took them from there to the hospital. According to evidence which the jury could accept, the entry of the MacDonalds into each of the cars was on the orders of the police without any request on their part. It is argued by Mr. Farris that

1953

MACDONALD v. CITY OF VANCOUVER

Kellock J.

the mission of No. 6 was quite a different mission from that of No. 4 in that No. 6 was taking an injured person to the hospital accompanied by her husband, while No. 4 was taking two perfectly healthy people to the hospital in the wake of the ambulance carrying the child.

However that may be, there is no magic in the words "traffic" and "beat" and it would seem that the appearance of No. 6 and the use to which it was put sufficiently indicates that the police considered it their business to use their cars for such purposes, while paragraph 16 of the statement of defence indicates that car No. 4 was equally employed in the performance of a proper police duty. In my opinion, on the evidence car No. 4 was engaged upon police "business" at the time of the accident here in question.

The question which arises in the first place, therefore, is whether this business can be said to be the business of the city within the meaning of s. 82(*b*) of the *Motor-vehicle Act*. By virtue of the provisions of s. 253 of the city charter, however, jurisdictional limits are expressly marked off between the business of the city and the business of the police commission. In my opinion it cannot be said that what was done by either police car on the day in question fell within the scope of the business of the respondent, which, in relation to the police, is confined "exclusively to the business and financial matters incident to the establishment, maintenance and upkeep of the police force". On the other hand, the "appointment, control, direction, supervision, discipline, and government" of the force are exclusively matters within the jurisdiction of the commission. In that view the appeal should be dismissed, with costs, if demanded.

LOCKE J.:—In the appellant's statement of claim it is alleged that the late Ethel Elizabeth MacDonald, having been directed or ordered by the respondent Constable Pinch, or by Constable Gibson or Sergeant Abercrombie, to ride in a motor car owned by the respondent city to be conveyed to the Vancouver General Hospital, suffered injuries which resulted in her death by reason of the gross negligence in the driving and operation of the car by respondent Pinch.

It was further alleged that the conveyance of Mrs. MacDonald was performed by one or other of the three constables above named:—

> In their business of the transportation of passengers normally incidental thereto, viz.: transportation of passengers in the ordinary course of their duty as police officers in the said motor vehicle as referred to under s. 82 of the Motor Vehicle Act and the said Act and regulations aforesaid.

and that the automobile was at the time in question driven by Pinch, while in the employment of and in answering a police call of the City of Vancouver Police Department.

The allegation that the respondent city was the owner of the motor vehicle was not denied in the statement of defence and, as it appears to have been common ground between the parties throughout the course of this litigation that the city was to be regarded as the owner of the motor vehicle within the meaning of that word, as used in s. 81 of the *Motor-vehicle Act* (c. 227, R.S.B.C. 1948), we should not, in my opinion, consider the question as to the accuracy of this conclusion raised by the judgment of Mathers, C.J. in *Bowles v. City of Winnipeg* (1) at p. 496 *et seq.*

As the jury found, in answer to one of the questions submitted to them, that the manner in which Pinch drove the motor car was negligent but that it had not been grossly negligent, the appellants were forced to rely upon their contention that the city was a person to whose business the transportation of passengers is normally incidental and that the accident occurred while it was engaged in transporting the passenger in the ordinary course of the transport business, within the meaning of s. 82 of the *Motor-vehicle Act.*

The statement of claim and the evidence given at the trial make it clear that the business of the city, to which it was contended that the transportation of passengers was normally incidental, was that of policing the streets. It was the "transportation of passengers in the ordinary course of their duty as police officers" as to which the negligence was alleged. The answer to the appellant's claim is that the Chief Constable and all the constables and members of the Police Force of the City are appointed by the Board of Police Commissioners, constituted under the provisions of s. 253 of the *Vancouver Incorporation Act, 1921,* as

(1) (1919) 29 Man. R. 480.

1953

MACDONALD v. CITY OF VANCOUVER

Locke J.

amended, to which Board of control, direction, supervision, discipline and government are given by the statute. Members of the Police Force are directed by s-s. 10 of s. 253 to obey the lawful directions and be subject to the discipline and government of the Board and are charged with special duties of preventing infractions of by-laws of the city, preserving the peace, preventing crime and apprehending offenders, and are stated to have generally all the powers and privileges and be liable to all the duties and responsibilities which belong by law to the constables. Constable Pinch was directed by his superior, Sergeant Abercrombie, to drive the appellant John L. MacDonald and his wife to the hospital and it was in the course of what he undoubtedly considered to be his duty as a police officer that he was driving the car at the time of the accident. He was neither acting nor assuming to act on behalf of the City of Vancouver, or engaged in any of its business. If the City of Vancouver engages in any business to which the transportation of passengers is normally incidental, it is not in connection with the performance of the duties imposed upon the Board of Police Commissioners and the members of the Police Force by the statute.

While the question is not raised by the pleadings in the present action, the liability asserted being *qua* owner, it may be noted that in *Bowles v. Winnipeg,* above referred to, was held that neither the City of Winnipeg nor the Board of Police Commissioners was liable for the negligence of a police constable appointed by the Board and acting under its orders. Further authority on this aspect of the matter may be found in *Wishart v. City of Brandon* (1); *Winterbottom v. Board of Commisisoners of Police of the City of London* (2); and *McCleave v. City of Moncton* (3).

The appeal should be dismissed with costs if demanded.

Appeal dismissed with costs, if demanded.

Solicitor for the appellants: *M. G. Caple.*

Solicitors for the respondents: *W. H. K. Edmonds.*

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(1) (1887) 4 M.R. 453. (2) (1901) 1 O.L.R. 549.
(3) (1902) 32 Can. S.C.R. 106.

1953

DONALD BECHTHOLD, JOHN GIBSON AND OTTO HAROLD MEHEW (*Defendants*) ..... APPELLANTS; *May 26, 27 *Jun 26

AND

ALBERT OSBALDESTON as Administrator of the estate of MARVIN HAROLD OSBALDESTON, Deceased, and AGNES MARGARET HARVIE (*Plaintiffs*) ..... RESPONDENTS.

AND

JOHN GIBSON AND OTTO HAROLD MEHEW (*Defendants by Counterclaim*) ..... APPELLANTS.

AND

DONALD BECHTHOLD (*Plaintiff by Counterclaim*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA APPELLATE DIVISION

Damages—Fatal injuries—Motor vehicle—Car stationary on highway—Approaching driver—Liability—Negligence—Last clear chance—Trustee Act, R.S.A. 1942, c. 215, c. 32.

The respondent sued under the *Trustee Act* (R.S.A. 1942, c. 215) as administrator of the estate of his son who was a passenger in a car and who was fatally injured when that car was hit by a truck. The road was straight and the visibility clear. The victim was in a coma from the date of the accident to the date of his death which occurred one year later. There was evidence that during that period he reacted only to pain from stimuli. The trial judge found the driver of the truck solely to blame and awarded $10,000 general damages. The Court of Appeal for Alberta upheld the finding of negligence but reduced the general damages to $7,500.

Held: Following the principle set down in *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation* Co. ([1924] A.C. 406), the sole cause of the accident was the negligence of the driver of the truck.

Held: The principles to be followed in fixing damages under this head being as set down in *Benham v. Gambling* ([1941] A.C. 157), which was presumably followed in this case by the Appellate Division, the latter's adjudication should stand. If there was anything included therein for pain and suffering, the maxim *de minimus non curat lex* applied.

*PRESENT: Kerwin, Taschereau, Estey, Cartwright and Fauteux JJ.

1953

BECHTHOLD AND OTHERS v. OSBALDESTON AND OTHERS

APPEAL and CROSS-APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), dismissing an appeal from the judgment at trial in an action for damages.

H. W. Riley Q.C. and *J. R. McColough* for the appellant.

S. H. McCuaig Q.C. for the respondents Harvie and Osbaldeston.

C. W. Clement Q.C. and W. R. Sinclair for the respondent Bechthold.

The judgment of the Court was delivered by

KERWIN J.:—The position in this appeal on the question of liability is that put by Lord Shaw in *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* (2):

> And I take the principle to be that, although there might be—which for the purpose of this point I am reckoning there was—fault in being in a position which makes an accident possible yet, if the position is recognized by the other prior to operations which result in an accident occurring, the author of that accident is the party who, recognizing the position of the other, fails negligently to avoid an accident which with reasonable conduct on his part, could have been avoided. Unless that principle be applied it would be always open to a person negligently and recklessly approaching, and failing to avoid a known danger, to plead that the reckless encountering of danger was contributed to by the fact that there was a danger to be encountered.

The trial judge found that Bechthold's car was stationary and, in effect, that Gibson saw that to be so, and his judgment was approved unanimously by the Appellate Division (1). Mr. Riley has said all that was possible on the point but he has not convinced me that the concurrent judgments in the Courts below should be set aside. Without reference to the signals either by Bechthold or Gibson and assuming that Bechthold was negligent in proceeding to the south side of the road, it was Gibson's negligence that was the sole cause of the accident.

There still remains the question of damages. We are concerned only with the amount awarded the plaintiff Albert Osbaldeston as administrator of his son Marvin Harold Osbaldeston. The trial judge, Mr. Justice Egbert allowed $13,000 and it is admitted that of that amount $3,000 represents special damages. The remaining $10,000 was awarded in accordance with the principles the trial

(1) [1952-53] 7 W.W.R. (N.S.) 253. (2) [1924] A.C. 406 at 419.

judge had previously enunciated in *Maltais v. C.P.R.* (1). There he had adopted as correct the reasons for judgment of Mr. Justice Adamson in the Manitoba Court of Appeal in *Anderson v. Chasney* (2), in whose conclusion on this particular topic Mr. Justice Coyn had agreed. There was an appeal to this Court in that case (3), which was dismissed but the question of damages was not in issue. Mr. Justice Adamson departed from the principles set forth by the House of Lords in *Benham v. Gambling* (4). In Manitoba, as in Alberta, there is a statutory provision which in the latter province is found in the *Trustee Act,* R.S.A. 1942, c. 215, s. 32:—

> 32. The executors or administrators of any deceased person may maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased except in cases of libel and slander in the same manner and with the same rights and remedies as the deceased would if living have been entitled to do; and the damages when recovered shall form part of the personal estate of the deceased; but such action shall be brought within one year after his decease.

I am unable to perceive any difference in substance between this provision and that in England whereby all causes of action vested in a person shall survive for the benefit of his estate.

Contrary to what had been considered to be the law in practically every jurisdiction where similar provisions existed, a claim for what may be described as damages for shortened expectation of life, was upheld by the House of Lords in *Rose v. Ford* (5). As a result, particularly in England, excessive damages were from time to time awarded under such a head and it was in an effort to offset that tendency that the House of Lords decided *Benham v. Gambling.* With the consent of counsel on both sides, the tables of expectation of life periodically prepared by the Registrar General had been placed before the trial judge but Viscount Simon, delivering the judgment of the House of Lords, stated that the trial judge had observed that these tables "are not really evidence in a matter of this kind." Viscount Simon considered that this statistical material was not of assistance in such a case as the one before the House but I take it that this was because the child in respect of

(1) [1950] 2 W.W.R. 145.
(2) [1949] 2 W.W.R. 337.
(3) [1950] 4 D.L.R. 223.
(4) [1941] A.C. 157.
(5) [1937] A.C. 926.

1953

BECHTHOLD AND OTHERS v. OSBALDESTON AND OTHERS

Kerwin J.

whose death its father and administrator had brought the action was but two and one-half years of age. Later in his speech Viscount Simon acknowledged that the age of the individual might in some cases be a relevant factor but that "arithmetical calculations are to be avoided, if only for the reason that it is of no assistance to know how many years have been lost, unless one knows how to put a value on the years." It was pointed out that all lives are not uniformly happy and that the thing to be valued was not the prospect of length of days but the prospect of a predominantly happy life. It is generally recognized that infants are subject to children's diseases, which in many cases prove fatal, and the House of Lords therefore felt justified in reducing the amount of damages allowed by the trial judge.

In *Anderson v. Chasney,* Mr. Justice Adamson seemed to consider that the *Benham* judgment should not be followed in Canada because of the difference in conditions here and in England. While differences do exist, they may be taken into account without departing from the ratio of the House of Lords decision. He also appeared to think that Viscount Simon's statement that "compensation is not being given to the person who was injured at all" was opposed to the provision in the *Manitoba Trustee Act* that such an action may be brought "as if the representative were the deceased in life." I am satisfied that the members of the House of Lords who took part in the judgment in *Benham v. Gambling* meant only that while the matter was to be treated as if the representative were the deceased in life, any compensation would in fact go to those entitled on an intestacy or under a testamentary disposition. Furthermore, an allowance is not made to compensate the parents, or either of them, for money spent to rear a son or daughter as Mr. Justice Adamson's statement on page 369 of the report in *Anderson v. Chaseney* might indicate.

If the matter were left in this position, the award of Mr. Justice Egbert could not stand. However, the Appelate Division reduced the amount awarded by $2,500. There was no difference on this point among the members of that Court, the main judgment of whom was delivered by Mr. Justice Parlee. Previously he had delivered the reasons for

judgment on behalf of the Appellate Division in *Kirschman v. Nichols* (1). There, in fixing damages under this head, he referred to a number of cases, among which was *Benham v. Gambling,* thus indicating that the Appellate Division was following the House of Lords decision.

Under these circumstances and bearing in mind the depreciation in the value of money, this Court should not interfere with the amount fixed by the highest provincial court unless Mr. Riley is correct in his contention that that adjudication cannot stand in view of the following statement in the reasons of Mr. Justice Parlee:— "It is, I think, fair to say that there is evidence that the deceased did suffer pain; in any event, such should not be excluded in determining the amount to be awarded the administrator under the Trustee Act." The accident occurred on June 10, 1950, and Osbaldeston died June 16, 1951. The medical evidence was by consent given in the form of written reports. Dr. Stevens reported on February 15, 1951, that Osbaldeston "has not regained consciousness though he does react somewhat to external stimuli such as pain and spoken word. He has moved his arms and legs slightly but only as an involuntary response to stimulus." Dr. Gordon first saw the patient on June 13, 1950, and had him under observation until he was transferred from Macleod Hospital to the University Hospital in Edmonton on July 11, 1950. Dr. Gordon reported:— "He responded only to most painful stimuli." There is also the evidence of the deceased's father who saw his son frequently and who testified as follows:—

Q. Did he ever show signs of recognition?—A. At times he did.

Q. Were you satisfied that he recognized you?—A. Well, we liked to make ourselves believe that he knew us, although he never said anything, he never spoke.

It is clear that the deceased was always in a coma and, therefore, if he suffered any pain it would not be to the same extent as one who was in full possession of all his faculties. In his claim for damages, the father, and administrator of Marvin Harold Osbaldeston, did not include anything for pain and suffering of his son and in fact counsel disclaimed any such pretension. Particularly in view of the

(1) (1950) 2 W.W.R. 420.

1953

BECHTHOLD AND OTHERS v. OSBALDESTON AND OTHERS

Kerwin J.

extract from the reasons of Mr. Justice Parlee quoted above, I am satisfied that the Appellate Division realized that the only possible evidence under this head was as I have indicated and anything included in the award finally made should be treated by this Court as within the maxim *de minimus non curat lex.*

The appeal should be dismissed with costs and the cross-appeal without costs.

Appeal dismissed with costs.

Cross-Appeal dismissed without costs.

Solicitors for the appellant: *Macleod, Riley, McDermid, Bessemer & Dixon.*

Solicitors for Respondents: *Osbaldeston and Harvie: McGuaig, Parsons & McGuaig.*

Solicitors for Respondent Bechthold: *Smith, Clement, Parlee & Whittaker.*

1953

*Mar. 25, 26
*June 26

MUZAK CORPORATION ..... APPELLANT;

AND

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED ..... } RESPONDENT;

AND

ASSOCIATED BROADCASTING COMPANY LIMITED and MARTIN MAXWELL ..... } DEFENDANTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Practice—Exchequer Court—Copyright—Infringement—Writ of Summons—Service of Notice out of jurisdiction—Whether an Exchequer Court interlocutory judgment includes an order—Whether English O.11 applies—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 75, 82(1)(b) as amended—Rr. 42, 76.

The respondent in an action for infringement of copyright applied under Exchequer Court r. 76 for leave to issue notice of a statement of claim for service outside the jurisdiction upon the appellant, a corporation incorporated under the laws of the State of New York and having its chief place of business therein. The application was supported by an affidavit stating that in the belief of the deponent the plaintiff (respondent) had a good cause of action. The application was allowed and the appellant then, by leave granted it under s. 82(1)(*b*) of the *Exchequer Court Act* R.S.C. 1927, c. 34, as amended by 1949,

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*PRESENT: Kerwin, Taschereau, Rand, Kellock and Cartwright JJ.

c. 5, s. 2, appealed on the grounds that the court below had erred in applying *Falcon v. Famous Players Film Co.*, had proceeded upon a wrong principle, and that the material relied upon was not sufficient to entitle an order to be made.

Held: 1. That an "interlocutory judgment", within the meaning of s. 82(1)(*b*) of the *Exchequer Court Act*, includes an order and therefore there was jurisdiction to hear the appeal.

2. (Taschereau and Rand JJ. expressing no opinion), that the combined effect of s. 75 of the Act and of rr. 76 and 42 is to make applicable O. 11 of the Supreme Court of Judicature in England.

3. (Kerwin and Taschereau JJ. dissenting), that the evidence adduced in support of the application was not sufficient to establish that the case was a proper one for service outside the jurisdiction. *Vitkovice Horni A Hutni Tezirsto v. Korner* [1951] A.C. 869 referred to.

Falcon v. Famous Players Film Co. [1926] 1 K.B. 393; [1926] 2 K.B. 474, distinguished.

Decision of the Exchequer Court (not reported), reversed.

APPEAL from the judgment of Thorson P. of the Exchequer Court of Canada wherein leave was granted to the respondent to issue notice of the Statement of Claim for service out of the jurisdiction against the appellant.

G. F. Henderson for the appellant.

H. E. Manning Q.C. for the respondent.

KERWIN J. (dissenting):—By leave granted by Mr. Justice Estey under s-s. 1 of s. 82 of the *Exchequer Court Act* as enacted in 1949, Muzak Corporation appeals from an order of the President of the Exchequer Court granting Composers, Authors and Publishers Association, the plaintiff in an action in that Court, leave to issue a notice of the statement of claim for service out of the jurisdiction against the appellant. S-s. 1 of s. 82 reads as follows:—

> 82. (1) An appeal to the Supreme Court of Canada lies
>
> (*a*) from a final judgment or a judgment upon a demurrer or point of law raised by the pleadings, and
>
> (*b*) with leave of a judge of the Supreme Court of Canada, from an interlocutory judgment,
>
> pronounced by the Exchequer Court in an action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars.

Unless "interlocutory judgment" in this subsection includes "order", there is nothing to which it applies, and the paragraph would be nugatory. Notwithstanding the use of the word "judgment" and "order" in other sections of the Act and in the Rules, I am not prepared to hold that Parliament in enacting a provision, which so far as (*b*) is concerned was new, meant and accomplished nothing thereby.

1953

MUZAK CORPORATION v. COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LTD.

Kerwin J.

There being jurisdiction to grant leave, should the President's order be set aside? The action was commenced by a statement of claim filed April 16, 1952, the plaintiff being the present respondent and the defendants Associated Broadcasting Company Limited (hereinafter referred to as Associated), Martin Maxwell, and Muzak Corp. Presumably after the statement of claim had been served in Canada upon the first two defendants, an affidavit was made by Harry Houghton, described as President of Muzak Corporation, a company incorporated and organized under the laws of the State of New York, and also as President of Muzak Corporation, a company incorporated and organized under the laws of Delaware, and stating that the New York company succeeded to the business carried on by the Delaware company. This affidavit, to which further reference will be made, was sworn to on June 16, 1952. As a result, the statement of claim was amended by striking out Muzak Corp. as a party defendant and any reference to it and by making Muzak Corporation, the present appellant, the third defendant. Notice of the motion for leave to issue notice of the statement of claim for service out of the jurisdiction was served upon the appellant and the other defendants. The order in appeal was made after considering the statement of claim, two affidavits upon which the motion was based, and the affidavit of Harry Houghton.

The statement of claim is to the following effect. The plaintiff was the owner of the sole right to perform in public throughout Canada numerous musical works and at all relevant times it was entitled to require the defendants, and each of them, to take out a licence to perform such works in Canada and to pay the fees prescribed, and none of the defendants obtained such a licence. The appellant caused recordings known as electrical transcriptions to be made of musical works specially arranged for the purpose of enabling such transcriptions to be performed by means of transcription turntables. Transcriptions were furnished by the appellant to Associated of several musical works, the sole right to perform which in public throughout Canada was owned by the plaintiff. Associated performed (and the defendant Maxwell as principal shareholder, director and executive officer, counselled, authorized and procured it so to do) a number of musical works in which the respondent had the appropriate copyright. The appellant furnished

the transcriptions only to those entering into contracts with it. By paragraph 8 it was alleged that such a contract was entered into between the appellant and Associated whereby the latter became a franchise holder on terms that it should receive from the appellant programs suitable for performance and reproduction and pay the appellant a percentage of ten percentum of the gross receipts from all contracts made by Associated with its subscribers for the musical programs. Paragraph 13 reads:—

13. The Defendant Muzak, by virtue of the agreement set forth in paragraph 8 hereof and the acts performed by it thereunder, and the Defendant Maxwell, by virtue of the acts hereinbefore set forth, have infringed the Plaintiff's copyright in the said musical works by authorizing the performances of the said musical works, the sole right to perform which in public in Canada is the property of the Plaintiff.

One affidavit filed on behalf of the plaintiff was made by its counsel, who stated that he had advised the plaintiff that in his opinion he believed that the plaintiff had a good cause of action against the appellant in respect of the matters disclosed in the statement of claim. The second affidavit filed on behalf of the plaintiff was made by C. R. Matheson, paragraphs 4 and 5 whereof state:—

4. The statement of claim should be served upon the Defendant Muzak Corporation because it authorizes and did authorize all the performances in question in this action and it is a necessary and proper person to be joined in the present action.

5. The Defendant Muzak Corporation is engaged in the business of providing electrical transcriptions and programme schedules to enable musical works to be performed in the manner in which they are alleged to be performed in the statement of claim in this action and collects very substantial fees from the so-called franchise holders to whom pursuant to contracts entered into by Muzak Corporation the electrical transcriptions and programme schedules for performance are made available to franchise holders including the Defendant Association Broadcasting Corporation Limited.

Paragraphs 6 to 11 of the affidavit of Harry Houghton, referred to earlier, are as follows:—

6. The New York Company lets and supplies to the Defendant, Associated Broadcasting Company Limited, (hereinafter called Associated) in the United States of America under contract a library of electrical transcriptions containing musical selections.

7. The New York Company delivers to Associated the library in the United States of America, Associated being responsible for all customs duties and other taxes that may be levied in respect of the importation of the said library into Canada.

8. By contract with the New York Company Associated is granted a territorial franchise in respect of the use of the said library of transcriptions.

1953

MUZAK CORPORATION v. COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LTD.

Kerwin J.

9. The contracts between the New York Company and Associated were entered into in the State of New York and are governed in their interpretation and construction by the laws of the State of New York and all payments are made in the said State of New York.

10. The New York Company does not do any act in Canada.

11. The New York Company denies that it has authorized Associated to use any musical selection in infringement of the rights of any person.

I take it that "lets" signifies that the appellant leased the electrical transcriptions to Associated and did not sell them.

Rules 76 and 42 of the *Exchequer Court Act* read:—

Rule 76. When a defendant is out of the jurisdiction of the Court, then upon application, supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, the Court or a Judge may order that a notice of the information, petition of right, statement of claim or other judicial proceeding be served on the defendant in such place or country or within such limits as the Court or a Judge thinks fit to direct, and the order is, in such case, to limit a time (depending on the place of service) within which the defendant is to file his statement in defence, plea, answer or exception, or otherwise make his defence according to the practice applicable to the particular case, or obtain from the Court or a Judge further time to do so.

Rule 42. In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trade mark or industrial design, the practice and procedure shall, in any matter not provided for by any Act of the Parliament of Canada or by the Rules of this Court (but subject always thereto) conform to, and be regulated by, as near as may be, the practice and procedure for the time being in force in similar proceedings in His Majesty's Supreme Court of Judicature in England.

In my opinion this has the effect of making applicable Order XI, Rules 1 and 4 of the English Rules:—

Rule 1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever . . .

(*ee*) The action is founded on a tort committed within the jurisdiction.

(*f*) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

Rule 4. Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or Judge that the case is a proper one for service out of the jurisdiction under this Order.

A reference to the following authorities is sufficient to indicate the tests that have been laid down in applying these rules. In *Badische Anilin und Soda Fabrik v. Chemische Fabrik vormals Sandoz* (1), Joyce J. said at page 491:—

> I am invited on this application to try the question whether there has been infringement or not. I am not going to do anything of the kind; but it is perfectly clear that questions of fact are raised and also a very serious question of law.

In the Court of Appeal, Collins M.R. said at page 494:—

> Now, it does not appear to me that in conferring this jurisdiction—which I agree is an important one and one to be carefully exercised—the Legislature has imposed on the courts the duty of trying the case before they allow the plaintiff to put it in suit. That would be going much too far in favour of persons outside the jurisdiction.
>
> * * *
>
> If the court has got before it a *primâ facie* case which is not completely displaced by the evidence on the other side, then it seems to me that the plaintiff has not lost his right to have that case tried.

On appeal to the House of Lords (2) the order was again affirmed. Lord Davey said at page 735:—

> This does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that be believes that there is a good cause of action is sufficient. On the other hand, the court is not, on an application for leave to serve out of the jurisdiction, or on a motion made to discharge an order for such service, called upon to try the action or express a premature opinion on its merits,
>
> * * *
>
> If the Court is judicially satisfied that the alleged facts, if proved, will not support the action, I think the court ought to say so, and dismiss the application or discharge the order. But where there is a substantial legal question arising on the facts disclosed by the affidavits which the plaintiff *bonâ fide* desires to try, I think that the court should, as a rule, allow the service of the writ.

In *Vitkovice Horni A Hutni Tezirstvo v. Korner* (3), Lord Simonds stated at page 878:—

> . . . the obligation of the plaintiff is, not to "satisfy" the court that he is right, but to make it sufficiently appear . . . that the case is a "proper one for service out of the jurisdiction under this order."

referring to the remarks of Lord Davey in 90 L.T.R., p. 735, (*supra*) Lord Simonds, at page 879, stated:—

> It is, no doubt, difficult to say precisely what test must be passed for an applicant to make it sufficiently appear that the case is a proper one.

and at page 880:—

> The description "a good arguable case" has been suggested and I do not quarrel with it.

(1) (1903) 88 L.T.R. 490. (2) (1904) 90 L.T.R. 733.
(3) [1951] A.C. 869; 2 All E.R. 334.

1953

MUZAK CORPORATION v. COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LTD.

In my opinion a good arguable case has been suggested by the combined effect of the statement of claim and the three affidavits. Upon the trial of the action, difficult questions of law will no doubt emerge but as to these I express no opinion. The reasons of the President in granting the motion are short:—

> I grant the motion based upon *Falcon v. Famous Players Film Co.* (1), and on appeal (2).

Kerwin J.

I agree that the case cited is distinguishable from the present but that fact does not, in my opinion, indicate that the President proceeded upon a wrong principle. I would dismiss the appeal with costs.

TASCHEREAU, J. (dissenting):—I have reached the conclusion that the "order" given by the learned President of the Exchequer Court, authorizing the respondent to issue a notice of the statement of claim for service out of the jurisdiction against the appellant, is an "interlocutory judgment", within the meaning of s. 82(1)(*b*) of the *Exchequer Court Act*, and that therefore this Court has jurisdiction to hear the present appeal, leave having been granted.

As to the second point, I do not think that this Court should interfere with the conclusion of the trial judge. When by affidavit or otherwise, it is shown, that the plaintiff has a "good arguable case" against the party intended to be served, the court or the judge may properly issue the order. It is not the function of a court or a judge who considers an application, as the one made in the present case, to go into all the merits of the litigation, and to dispose of the ultimate rights of the parties.

I would dismiss the appeal with costs.

RAND J.:—On the argument, Mr. Manning gave us a very full statement of the scope of copyright in musical composition. It is distributed into a number of interests both "vertical" and "horizontal". By s. 3 of the statute the copyright holder has the sole right "to produce, reproduce", say, a song in sheet form for ordinary sale; to perform it in public; to make a record of it by means enabling it to be performed mechanically; to adapt and present it publicly by cinematograph or radio communication. These rights,

(1) [1926] 1 K.B. 393. (2) [1926] 2 K.B. 474.

again, may be limited to sale or production or performance in specified areas of specified countries and they may be exclusive to one person or open to the market.

The material on which the order for service out of the jurisdiction was made shows that Muzak Corporation carries on in New York the business of furnishing electric transcriptions and programme schedules by way of hire as the means by which Associated Broadcasting Company can perform the compositions in Ontario. The units are shipped from New York at the entire cost of Associated, including customs duties and other taxes and fees payable in this country. Furnishing the transcript in New York violates no law or copyright there and it is done in the ordinary course of business. All payments to Muzak by Associated are made there. The privilege enjoyed by Associated within Ontario is exclusive and is of the same nature as another "franchise" granted to a different company for Quebec.

It is, then, the simple situation of a hiring in New York by a Canadian company of a means or instrument for performing a copyright musical composition in Canada. Muzak is in no other sense related to the business in Canada of Associated; and there is no more connection between that company and the payment of performance fees than the payment of customs duties at the border.

But it is said that the sole rights enjoyed under s. 3 include that "to authorize any such acts as aforesaid", which Muzak has violated. Obviously, in one sense, Muzak authorizes Associated to make use of instruments which it owns but that use is to be in accordance with regulations dealing with it. There is not a syllable in the material to suggest that Muzak has made itself a party in interest to the performance either by warranting the right to perform without fee or by anything in the nature of a partnership or similar business relation. If by letting a device the owner is to be taken as engaging himself to its use in defiance of regulations, the very distinction between the right to make a record and the right to give a public performance by means of it which Mr. Manning made and the Act provides for, is wiped out. It would be as if a person who lets a gun to another is to be charged with "authorizing" hunting without a game license.

1953

MUZAK CORPORATION v. COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LTD.

Rand J.

It is urged that in some manner or other the exclusive "franchise", as it is called, to make use of the transcription in Ontario supports the contention that Muzak has "authorized its use" within the meaning of s. 3, but how that has anything to do with the conditions under law which relate to public performances I am at a loss to see. The word "franchise" is here simply a commercial use of the term meaning an exclusive right within a given territory; it has nothing whatever to do with the conditions in law under which that right is to be exercised.

The rules of the Exchequer Court dealing with service of this nature are of a most skeletal form. By r. No. 2 the practice and procedure not otherwise provided shall conform to and be regulated as near as may be by that at the time in force in the Supreme Court of Judicature in England; but it is not necessary, for the purposes of this appeal, to treat the rules of Order No. 11 as being applicable by reason of that provision. An order for such service is the exercise of an unusual power by the domestic forum, and it has at all times been limited to such situations as are consistent with a proper appreciation of the limitations to be placed on exercising jurisdiction beyond a country's territorial boundaries. If the person beyond those limits has been a party to an act within them, that is a basic fact to which the power may be related; but in all cases the minimal requirement is that a prima facie case be shown. This attempt to attach Muzak to the activities of Associated would be futile were it not for the retained ownership of the instruments which it hires to Associated; and it is by the coercion made available by that fact that the effectiveness of a service out of the jurisdiction could be realized. On the facts laid before the Court as I find them, there is not the slightest warrant for exercising this power.

Agreeing as I do that for the reasons given by my brother Cartwright, a right to bring the case here lies, I would allow the appeal and set aside the order below with costs both here and in the Exchequer Court.

KELLOCK J.:—In *Vigneux v. Canadian Performing Right Society Ltd.* (1), Lord Russell of Killowen, in delivering the judgment of the Judicial Committee, said, at p. 123,

(1) [1945] A.C. 108.

with reference to the owners of the mechanical device and suppliers of the records there in question:

> . . . their Lordships think, they neither gave the public performance . . . nor did they authorize it. They had no control over the use of the machine; they had no voice as to whether at any particular time it was to be available to the restaurant customers or not. The only part which they played in the matter was, in the ordinary course of their business, to hire out to Raes one of their machines and supply it with records, at a weekly rental of ten dollars.

In the case at bar the respondent claims to be the owner of the sole right to perform the works here in question in Canada, and alleges infringement on the part of the appellant because, as it is said, the appellant has "authorized" the performance of the said musical works under its contract with the defendant broadcasting company. The business of the appellant is to supply in the State of New York, in consideration of fees payable in New York, electrical recordings of musical works adapted for performance on certain mechanical contrivances, to persons entering into contracts with the appellant in New York, under which a territorial "franchise" is granted with respect to the use of such recordings. It is by reason of the entry by the appellant into such a contract with the defendant broadcasting company with respect to some part of Canada that the respondent rests its claim.

For any performance on its own part of any musical work which is the subject of copyright, the evidence is that the appellant obtains a licence from the copyright owner and also, with respect to franchise holders from the appellant in the United States, the former obtain their own licences, as is also the case with respect to the only other franchise holder in Canada.

The learned President who made the order permitting service upon the appellant outside the jurisdiction did so "upon *Falcon v. Famous Players Film Co.* (1), and on appeal (2)." In my opinion, with respect, when this decision is examined, it has no application in the circumstances here present. It is not in fact a decision upon any question as to the propriety of permitting service outside the jurisdiction. It is a decision upon the merits in an action.

(1) [1926] 1 K.B. 393. (2) [1926] 2 K.B. 474.

1953

MUZAK CORPORATION v. COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LTD.

Kellock J.

In that case a United States company had made a film of a literary work, the copyright in which was the property of the plaintiff. It then sent the negative and two positives to an English company, who made further copies and handed them to a second English company which let out a copy to the proprietor of a picture theatre for exhibition. All three companies participated in the moneys paid by the theatre proprietor and it was conceded by their counsel that no distinction was to be drawn between any of them but that they were all to be treated as on the same footing. The contract with the actual exhibitor contained the following clause: "the company shall grant to the hirer the *right* to exhibit the film" for the sum of £20, "which sum the hirer agrees to pay on the first day of exhibition of the said film, and in any event not later than the final day of such exhibition."

On the terms of that contract Scrutton L.J., considered that the defendants had imposed an obligation upon the exhibitor to exhibit the film in order that they should receive the moneys provided for by the contract, and that in so doing the defendants were themselves involved in performance.

In the view of Atkin L.J., as he then was, the hiring out of the film

> on the terms of the contract of hiring, which is before us

amounted to an "authorization" to the exhibitor to perform the play. He said at p. 499:

> For the purposes of this case it appears to me that to "authorize" means to grant or to purport to grant to a third person the *right to do the act complained of*, whether the intention is that the grantee shall do the act on his own account or only on account of the grantor;

It is plain, therefore, that in *Falcon's* case the defendants did not merely supply the film but purported to confer upon the exhibitor the *right to perform* in opposition to the right of the true owner.

The theory of the respondent in the case at bar assumes that the grant of a "franchise" extending to this country necessarily involves the grant of the "right" to perform in this country. Evidence of any such element in the contract in question in the case at bar is entirely lacking.

The word "franchise" connotes nothing more than "privilege" and nothing more on the evidence as to the contents of the contract can reasonably be inferred than that it confers the privilege of using the recordings. It is not, therefore, to be assumed that the appellant purported to grant to the defendants any *right to perform* in Canada and certainly not the right to perform in opposition to the title of the true owner of that right.

In *Falcon's* case, Bankes, L.J., with whom Atkin L.J., agreed, approved of earlier expressions of opinion as to the meaning of "authorize", namely, that it is to be understood in its ordinary dictionary sense of "sanction, approve, and countenance". Unless what is done by a defendant is to sanction, approve or countenance actual performance, it cannot be said, in my opinion, that it has "authorized" performance. While it is true that to perform by means of such a mechanical contrivance as is here in question involves the use of recordings, and while the appellant, on the evidence, has authorized the use of the recordings in performing, it has not authorized the performance itself and has, therefore, not invaded any right of the respondent. Performance was clearly contemplated and authorized in *Falcon's* case, while in the case at bar the appellant is in the position of the appellant in *Vigneux's* case, as described by Lord Russell in the passage from the judgment above cited.

Mr. Manning contends that the language of Lord Russell is quite inconsistent with the decision of the Judicial Committee in the earlier case of *Mellor v. Australian Broadcasting Commission* (1), but I find no such inconsistency. It would have been strange had it been otherwise in view of the fact that both Viscount Maugham and Lord Porter were members of the Board in each instance. In *Mellor's* case, the appellants, who carried on business as publishers of music and were the owners of the performing right in Australia in certain musical works which they had supplied to a band with a licence to perform the same, alleged infringement against the defendant broadcasting commission in respect of its broadcasting of the performance by a band of these musical works. In that case, however, it was shown, and indeed admitted, that the actual performance was one for which the defendant Commission was itself responsible.

(1) [1940] 2 All E.R. 20.

1953

MUZAK CORPORATION v. COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LTD.

Kellock J.

With respect to Mr. Manning's contention as to the construction of r. 76 of the Exchequer Court Rules and s. 75 of the Statute itself that these provisions constitute a complete code of procedure and that r. 42 does not apply so as to invoke the practice in the Supreme Court of Judicature in England, I cannot agree. Such a contention is, moreover, opposed to the long-standing view implicit in the reference of the second edition of Audette, at page 436, to the seventh edition of Wilson's Judicature Act, page 151, which deals with O. XI of the rules relating to the Supreme Court of Judicature. In my opinion, this Order is invoked by r. 42 of the Exchequer Court Rules and it is not sufficient for the applicant for an order for leave to serve outside the jurisdiction, simply to file an affidavit or other evidence stating his belief that the plaintiff has a good cause of action.

The cause of action here alleged by the respondent is a tort committed within Canada. In such a case the question for the appellate court is, in the words of Lord Simonds in *Vitkovice Horni A Hutni Tezirstvo v. Korner* (1):

> . . . whether the learned judge did exercise his discretion, and did so on the right principles.

In *Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks* (2), Lord James at 735 said:

> . . . the court ought, I think, to be convinced by the proof brought before it that the applicant is in a position to present to the tribunals of the country a substantial case for their determination.

Lord Davey uses much the same language at 735:

> But where there is a substantial legal question arising on the facts disclosed by the affidavits which the plaintiff *bonâ fide* desires to try, I think that the court should, as a rule, allow the service of the writ.

In *Vitkovice's* case Lord Simonds uses the words "a good arguable case."

In my view the respondent has failed to show, on the evidence presented, the existence of any such case.

As I agree that notwithstanding the employment of the words "judgment" and "order" throughout the *Exchequer Court Act* and Rules, it is difficult to give any meaning to the word "interlocutory judgment" without applying it to "order", the appeal should be allowed and the order below set aside with costs throughout.

(1) [1951] 2 All E.R. 334 at 336. (2) 90 L.T. 733.

CARTWRIGHT J.:—This is an appeal, brought pursuant to leave granted by Estey J., from a decision of the learned President giving the respondent leave to issue a notice of the statement of claim for service out of the jurisdiction upon the appellant, a corporation incorporated under the laws of the State of New York and having its principal place of business in that State.

The respondent questions our jurisdiction to entertain the appeal on the ground that the decision from which it is taken is an interlocutory order and that the *Exchequer Court Act* does not authorize an appeal from an order but only from a judgment. The relevant section is 82, s-s. (1) and (4) of which read as follows:—

82. (1) An appeal to the Supreme Court of Canada lies

(*a*) from a final judgment or a judgment upon a demurrer or point of law raised by the pleading, and

(*b*) with leave of a judge of the Supreme Court of Canada, from an interlocutory judgment, pronounced by the Exchequer Court in an action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars.

(4) A judgment shall be considered final for the purpose of this section if it determines the rights of the parties, except as to the amount of the damages or the amount of liability.

The order appealed from is in the form of a judgment, that is to say, the operative part thereof commences with the words:— "This Court doth order and adjudge that the Plaintiff be at liberty to issue a notice . . .". Counsel for the appellant, however, concedes that the form in which the decision of the learned President was entered is not decisive, and in my opinion, it is more properly described as an "order" than as a "judgment" if those terms are used in contradistinction from each other. S. 75 of the *Exchequer Court Act* confers the power to permit service of notice of proceedings on defendants out of the jurisdiction of the Court. The words used are, in s-s. (1), ". . . a judge . . . may *order* . . . that notice . . . be served", and in s-s (2), "The *order* shall in such case . . .". The question is whether such an order falls within the words "an interlocutory judgment" in s. 82(1)(*b*) quoted above. In common parlance the word "judgment" is, I think, often used as a generic term including all judicial decisions. In the Shorter Oxford English Dictionary, Vol. 1, page 1071, one of the meanings given to it is:— "a judicial decision or order in court". Blackstone appears to have used the word

1953

MUZAK CORPORATION v. COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LTD.

Cartwright J.

"judgments" to include decisions which would now more usually be referred to as "orders"—see Blackstone's Commentaries, (1768), Vol. 3, page 396:—

> All these species of judgments are either *interlocutory* or *final*. *Interlocutory* judgments are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action: in which it is considered by the court, that the defendant do answer over, *respondeat ouster;* that is, put in a more substantial plea. It is easy to observe, that the judgment here given is not final, but merely interlocutory; for there are afterwards farther proceedings to be had, when the defendant hath put in a better answer.

In *Ex Parte Chinery* (1), Cotton L.J. said:—

> . . . Now, in legal language, and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a "judgment" and an "order". No doubt the orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment; but still judgments and orders are kept entirely distinct. It is not said that the word "judgment" shall in other Acts of Parliament include an "order". I think we ought to give to the words "final judgment" in this subsection their strict and proper meaning, i.e., a judgment obtained in an action by which a previous existing liability of the defendant to the plaintiff is ascertained or established—unless there is something to shew an intention to use the words in a more extended sense.

This language was adopted by Lord Esher, M.R. in *Onslow v. Commissioners of Inland Revenue* (2), but in both of these cases the order held not to be a judgment had been obtained in a proceeding other than an action and in the last mentioned case Lord Esther said at page 466:—

> A "judgment", therefore, is a decision obtained in an action, and every other decision is an order.

It will be observed that the judgments in both of the last mentioned cases envisage the possibility of there being something in the statutory provisions under consideration to show an intention on the part of Parliament to use the word "judgment" in a more extended sense. In the case at bar I think such an intention is shown by the circumstance, pointed out by my brother Kerwin, that if s. 82 is construed as dealing only with judgments falling strictly within the definition given by Cotton L.J. there would be nothing upon which clause (*b*) of subsection (1) of s. 82 could operate. A construction which would leave the clause without any effect must be avoided if possible, and, in this case, it can be avoided by giving to the word "judgment", a sense in which it is often used and interpreting it as including orders.

(1) (1884) 12 Q.B.D. 342. (2) (1890) 25 Q.B.D. 465.

While, in view of the decision of this Court in *British American Brewing Co. Ltd. v. The King* (1), I do not suggest that the interpretation section of the *Supreme Court Act* applies to s. 82 of the *Exchequer Court Act*, the words of clause (*d*) of s. 2 of the first mentioned Act furnish an example of the wide sense in which the word "judgment" is frequently employed. It reads as follows:—

> 2. (*d*) "judgment", when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof; and when used with reference to the Supreme Court, includes any judgment or order of that Court;

I conclude that we have jurisdiction to entertain this appeal and it becomes necessary to consider its merits.

In my opinion, the combined effect of s. 75 of the *Exchequer Court Act* and of rr. 76 and 42 of that Court is to make applicable to motions for leave to serve out of the jurisdiction the provisions of Order XI of the Supreme Court of Judicature in England. The principles by which the Court should be governed in dealing with applications under that order have been recently re-stated by the House of Lords in *Vitkovice Horni a Hutni Tezirstvo v. Korner* (2).

The learned President was of the view that the motion before him was governed by the decision in *Falcon v. Famous Players Film Co.* (3), (4). For the reasons given by my brother Kellock I am of opinion that the material before us does not indicate facts sufficient to bring the case at bar within that decision. After a perusal of all the material I am of opinion that it was not sufficient to justify the making of an order for service out under any of clauses (*ee*), (*f*) or (*g*) of rule 1 of O. XI.

I would allow the appeal and set aside the order below with costs throughout.

Appeal allowed and order of the Exchequer Court set aside. Appellant allowed costs of its motion before the Exchequer Court and of this appeal.

Solicitors for the appellant: *Gowling, MacTavish, Osborn & Henderson.*

Solicitors for the respondent: *Manning, Mortimer & Kennedy.*

(1) [1935] S.C.R. 568.
(2) [1951] A.C. 869.
(3) [1926] 1 K.B. 393;
(4) [1926] 2 K.B. 474.

1953

*May 6, 7
*June 26

JEAN KIEFFER (*Claimant*) .....APPELLANT;

AND

THE SECRETARY OF STATE OF CANADA (*Respondent*) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Enemy, Consolidated Orders re Trading with, P.C. 1023, 1916—Purchase during 1914-18 War of shares of Canadian company from German national by German national; latter acquiring French nationality by Treaty of Versailles—Right to shares as between The Custodian and the purchaser—Treaty of Peace (Germany) Order 1920, P.C. 755 as modified by P.C. 267.

Consolidated Orders respecting Trading with the Enemy, (P.C. 1023 of May 2, 1916) provide by para. 6(1) that after publication of the Orders and regulations thereunder, save as to specified exceptions, no transfer by or on behalf of any enemy of any securities shall confer on the transferee any rights or remedies and, by para. 28(1), that by order of any judge of any superior court of record within Canada such securities may be vested in the Custodian.

The claimant, a German national who acquired French nationality by the Treaty of Versailles as of Nov. 11, 1918, purchased in May and Sept. 1918 Canadian Pacific Ry. Co. shares from a German broker in Germany. By an action brought in the Exchequer Court of Canada he sought a declaration that he was their owner and for their delivery by the respondent to him or payment in lieu thereof. The latter contended that if the claimant had purchased the shares as alleged, he had done so illegally, contrary to the above-cited Orders and, that the shares had become the respondent's property pursuant to a general vesting order made by Duclos J. on April 23, 1919 under the provisions of the said Orders, confirmed by the Treaty of Peace (Germany) Order 1920 and amendments. The claimant admitted that under the decision in *Braun v. The Custodian* [1944] S.C.R. 339, para. 6(1) applied to purchases from an enemy outside of Canada of shares in a Canadian company made subsequent to the publication of P.C. 1023 but argued that para. 6(1) did not apply here because (*a*) It did not prohibit dealings between two parties both of whom were German nationals and, (*b*) By the Treaty of Versailles the claimant had acquired French nationality as from Nov. 11, 1918.

Held: 1.—That the nationality of the transferee was immaterial; *Spitz v. Secretary of State for Canada* [1939] Ex. C.R. 162; *Braun v. The Custodian,* supra, applied. The onus was on the appellant to show that the shares purchased by him in 1918 were not owned by the enemy but, even if that were not so, there was evidence in the record that they were.

2.—That so far as s. 34(1) of the Treaty of Peace (Germany) Order 1920 was concerned, the appellant purchased the shares when he was a German national. Furthermore, he did not acquire any title in good faith and for value in accordance with Canadian law.

*PRESENT: Kerwin, Taschereau, Rand, Locke and Cartwright JJ.

Judgment of the Exchequer Court of Canada, Thorson P., dismissing the action (not reported), affirmed.

APPEAL from a judgment of the Exchequer Court of Canada, Thorson P., dated June 15, 1950, dismissing the claimant's action with costs.

Redmond Quain, Q.C., Henri St. Jacques, Q.C. and *Auguste Lemieux, Q.C.* for the appellant.

G. F. Maclaren, Q.C. and *L. A. Sherwood* for the respondent.

The judgment of the Court was delivered by:—

KERWIN J.:—The appellant claimed a declaration that he had a good title to certain shares of stock and that the respondent, the Secretary of State for Canada as Custodian of Alien Enemy Property, had no interest in, or right or title to them. He also asked for delivery over of the certificates representing the shares, or payment in lieu thereof. The Exchequer Court declared "that the shares never belonged to the claimant but belong to Canada and are vested in the respondent" and dismissed the action.

The appellant was born in 1885 in Alsace-Lorraine and was a German national. In May and October, 1918, he was on leave from military service in the German army and in those months purchased 100 shares and 90 shares respectively of the capital stock of the Canadian Pacific Railway Company. The certificates for these shares were in the names of Nationalbank fur Deutschland or G. Schlessinger-Trier & Co., both German banking houses with headquarters in Berlin, Germany. On the recommendation of a German, he purchased both lots in Strasburg from another German, Albert Bintz, acting as a broker. The certificates had been endorsed in blank by the registered owners and were treated as bearer certificates in the European Exchange.

The position of the Custodian has been explained in *Spitz v. Secretary of State of Canada* (1) and *Braun v. The Custodian* (2). By paragraph 1 of Order 6 of Canadian Order in Council P.C. 1023, of May 2, 1916:—

6. (1) No transfer made after the publication of these orders and regulations in the *Canada Gazette,* (unless upon licence duly granted exempting the particular transaction from the provisions of this subsection)

(1) [1939] Ex. C.R. 162. (2) [1944] S.C.R. 339.

1953

KIEFFER v. SECRETARY OF STATE OF CANADA

Kerwin J.

by or on behalf of an enemy of any securities shall confer on the transferred any rights or remedies in respect thereof and no company or municipal authority or other body by whom the securities were issued or are managed shall, except as hereinafter appears, take any cognizance of or otherwise act upon any notice of such a transfer.

The appellant admits that under the decision in the *Braun* case this paragraph applies to purchases from an enemy outside Canada of shares in a Canadian company made subsequent to May 6, 1916, the date of publication of P.C. 1023 in the Canada Gazette. However, it was argued that the paragraph did not apply to the purchases here in question (1) because it did not prohibit dealings between two parties, both of whom were at the time German nationals and (2) because of the appellant's nationality. As to the first, while the appellant points out that P.C. 1023 is intituled "Consolidated Orders respecting Trading with the Enemy", paragraph 6(1) is clear and unambiguous, and the argument fails.

The Treaty of Versailles signed June 28, 1919, became effective at midnight on January 10, 1920. Under Section V thereof the appellant as an Alsace-Lorrainer acquired French nationality as from November 11, 1918, but this circumstance does not assist him. In the *Spitz* case the claimant was born in Slovakia, Hungary. While a subject of Czechoslovakia, which was recognized by the Allied Powers as an independent republic in October, 1918, he bought shares of stock from an enemy but he was held not entitled to succeed against the Custodian. That decision was approved in the *Braun* case where the claimant was a United States citizen who, under a general licence granted to citizens of that country, had purchased shares in Germany from an enemy. Braun also failed in his action against the Custodian. In both cases the nationality of the transferee was immaterial. The vesting order of Mr. Justice Duclos of April 23, 1919, referred to in the cases cited and made under paragraph 1 of Order 28 of P.C. 1023 also vested the shares here in question in the Custodian. If, because of Order 6(1) the appellant acquired no title to the shares, the fact that the order of Mr. Justice Duclos was made after the purchase by the appellant is of no significance.

None of the provisions of the Treaty of Peace referred to on behalf of the appellant affects the matter. By c. 30 of 10 Geo. V., Parliament enacted "An Act for carrying into effect the Treaties of Peace between His Majesty and certain other Powers",—including Germany. By subsection 1 of section 1:—

1. (1) The Governor in Council may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to Him to be necessary for carrying out the said Treaties, and for giving effect to any of the provisions of the said Treaties.

In pursuance of this enactment, "The Treaty of Peace (Germany) Order, 1920" was passed by the Governor General in Council (P.C. 755). In Part II thereof, "Property, Rights and Interests", paragraph 32 provides that a German national who had acquired *ipso facto* in accordance with the provisions of the Treaty the nationality of a Power allied or associated during the war with His Majesty shall not be considered as a German national within the meaning of Part V. However, by paragraph 33 it was provided:—

33. All property, rights and interests in Canada belonging on the tenth day of January, 1920, to enemies, or theretofore belonging to enemies and in the possession or control of the Custodian at the date of this Order shall belong to Canada and are hereby vested in the Custodian.

(2) Notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy, such property, right or interest shall belong to Canada and the Custodian shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order.

In 1924, upon a recital that the Secretary of State had reported that P.C. 755 contained certain clauses which were ambiguous and that others were found to require modification, the Governor General in Council, by P.C. 267, repealed paragraph 33 and substituted the following therefor:—

33. All property, rights and interests in Canada belonging on the 10th day of January, 1920, to enemies, or heretofore belonging to enemies, and in the possession or control of the Custodian at the date of this Order are hereby vested in and subject to the control of the Custodian.

(2) Notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy, such property, right or interest shall be vested in and subject to the control of the Custodian, who shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interest vested in him by this Order.

1953

KIEFFER
v.
SECRETARY OF STATE OF CANADA

Kerwin J.

The words "theretofore" in P.C. 755 and "heretofore" in P.C. 267 have the same effect. If the shares in question in this action belonged to an enemy on January 10, 1920, (the date of coming into force of the Treaty of Versailles) or theretofore and were in the possession or control of the Custodian, they thereby became vested in and subject to his control. Not only was there the earlier prohibition in Order 6(1) of P.C. 1023 of 1916 but there was the later vesting order of Mr. Justice Duclos of April 23, 1919.

This action was brought by the consent of the Custodian granted under paragraph 41 of The Treaty of Peace (Germany) Order 1920 as amended, permitting the appellant to proceed in the Exchequer Court for a declaration as to the ownership of the shares. The onus is on the appellant to show that the shares purchased by him in 1918 were not owned by an enemy but, even if that were not so, there is evidence in the record that the shares were owned by an enemy. In such a case not only must paragraph 1 of Order 6 of P.C. 1023 of May 2, 1916, and the vesting order of Mr. Justice Duclos be kept in mind but also sections 34 and 39 of The Treaty of Peace (Germany) Order, 1920. These are as follows:—

34. All vesting orders and all orders for the winding up of businesses or companies, and all other orders, directions, decisions and instructions of any Court in Canada or any Department of the Government of Canada made or given or purporting to be made or given in pursuance of the Consolidated Orders respecting Trading with the Enemy, 1916, or in pursuance of any other Canadian war legislation with regard to the property, rights and interests of enemies, and all actions taken with regard to any property, business or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges or expenses, or any other matter whatsoever in pursuance of any such order, direction, decision or instruction, and in general all exceptional war measures or measures of transfer or acts done or to be done in the execution of any such measures are hereby validated and confirmed and shall be considered as final and binding upon all persons, subject to the provisions of sections 33 and 41.

(2) The interests of all persons shall be regarded as having been effectively dealt with by any such order, direction, decision or instruction dealing with property, rights or interests in which they may be interested, whether or not their interests are specifically mentioned therein.

(3) No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction.

(4) The provisions of this section shall not be held to prejudice any title to property heretofore acquired in good faith and for value and in accordance with the Canadian law by a British subject or by a national of any of the Powers allied or associated during the war with His Majesty.

39. No transfer, whether for valuable consideration or not, made after the sixth day of May, 1916, without the leave of some competent authority in Canada, by or on behalf of an enemy as defined in paragraphs (*a*) and (*b*) of Section 32 of any securities shall confer on the transfer any rights or remedies in respect thereof and no company or municipality or other body by whom the securities were issued or are managed shall take any cognizance of or otherwise act upon any notice of such transfer.

So far as s-s. 4 of s. 34 is concerned, when the appellant purchased the shares in May and October, 1918, he was a German national and, in any event, his acquired French nationality dated only from November 11, 1918. Furthermore, he did not acquire any title in good faith and for value *in accordance with Canadian law.*

For the reasons given, the shares may not be taken out of the custody and control of the Custodian and the action fails. However, in view of the alteration in the wording of paragraph 33 of The Treaty of Peace (Germany) Order, 1920, as effected by P.C. 267 of 1924, whereby the words "shall belong to Canada" were omitted so as to comply with the Treaty of Versailles, the judgment appealed from should be amended by striking out the words "belong to Canada and". With this variation, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the claimant: *Auguste Lemieux.*

Solicitors for the respondent: *McLaren, Laidlaw, Corlett & Sherwood.*

1953

*May 12, 13,14
*Oct. 6

W. G. RATHIE (*Plaintiff*) ..... APPELLANT;

AND

MONTREAL TRUST COMPANY and BRITISH COLUMBIA PULP and PAPER CO. LTD. (*Defendants*) .... } RESPONDENTS.

AND

THE ATTORNEY GENERAL OF CANADA, CHARTERED TRUST COMPANY, and W. H. POWELL ... } INTERVENANTS.

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Companies—Offer by company to buy shares of another—Period offer to be open for acceptance under The Companies Act (Can.)—Compliance with terms of s. 124 (1) prerequisite to obtaining court order compelling acceptance—The Companies Act, 1934 (Can.) c. 33, s. 124 (1).

S. 124 (1) of *The Companies Act, 1934* (Can.) c. 33, provides that where when any contract involving the transfer of shares in one company has within four months after the making of the offer been approved by the holders of not less than nine-tenths of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months give notice in such manner as may be prescribed by the court, to any dissenting shareholder that it desires to acquire his shares, and where such notice is given the transferee shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the contract, the shares of the approving shareholders are to be transferred to the company.

The respondent Trust company, acting on behalf of an undisclosed principal, on Dec. 1, 1950, made an offer to the shareholder of the common stock of the respondent pulp and paper company to purchase their shares at $200 per share, subject to the offer being accepted by Dec. 15, 1950 by the holders of not less than 90 per cent of the shares. It further provided that it should not be bound to accept or pay for any shares not deposited with it by that date. The holders of more than the required percentage accepted and complied with the terms of the offer, but the appellant did not, nor did the intervenants. On April 15, 1951 upon application of the respondents, Coady J. made an order under s. 124 (1) of the Act authorizing the Trust company to notify the shareholders who had not accepted the offer that it desired to acquire their shares under its terms and that, unless upon an application made by any of them within one month from the date upon which notice was given them the court should otherwise order, the Trust company would be entitled to acquire their shares on such terms. The appellant then brought action naming the respondents

*PRESENT: Kerwin, Taschereau, Rand, Kellock, Locke, Cartwright and Fauteux JJ.

as defendants, claiming a declaration that the Trust company was neither entitled nor bound to purchase his shares, nor the plaintiff bound to sell or transfer them to it, and that s. 124 was *ultra vires*, and alternatively that its provisions did not apply to the plaintiffs' shares. He also moved for an order setting aside the *ex parte* order made by Coady J. The latter dismissed the action and the motion. An appeal to the Court of Appeal for British Columbia was also dismissed.

Held: That the language of s. 124 (1) of *The Companies Act* contemplates that the offer shall be open for acceptance for a period of four months after its making by those to whom it is made. Where the offer, as in this case, does not comply with the terms of the subsection, the offeror is not entitled to invoke the assistance of the court to compel the dissentients to transfer their shares.

Judgment of the Court of Appeal for British Columbia (1952) 6 W.W.R. (N.S.) 652, reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Coady J. (2), who dismissed the appellant's (plaintiff's) action. By orders of various judges in chamber, the Attorney General for Canada, Chartered Trust Co., and W. W. Powell were permitted to intervene.

M. M. Grosman, Q.C. and *C. F. Scott* for appellant.

A. S. Gregory for the respondents.

F. P. Varcoe, Q.C. and *K. E. Eaton* for the Attorney General of Canada, intervenant.

Terence Sheard, Q.C. for the Chartered Trust Co., intervenant.

W. H. Powell, intervenant, in person.

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

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia, by which the appeal of the present appellant from a judgment of Coady, J. in the action brought by the appellant under the provisions of s. 124 of the Dominion Companies Act was dismissed. As it was contended both in the action and upon the motion that the section was *ultra vires* the Parliament of Canada, the Attorney-General of Canada intervened in the proceedings in this Court. Mr. W. H. Powell, a holder of common

(1) 1952) 5 W.W.R. (N.S.) 675; [1952] 3 D.L.R. 61.
(2) (1952) 6 W.W.R. (N.S.) 652.

1953

RATHIE v. MONTREAL TRUST COMPANY AND B.C. PULP & PAPER CO. LTD. et al

Locke J.

shares in the British Columbia Pulp and Paper Company Limited, and the Chartered Trust Company as trustee of the property of W. F. Bald, deceased, were by orders of this Court permitted to intervene.

The British Columbia Pulp and Paper Company Limited was incorporated by letters patent under the Companies Act of Canada on December 24, 1925, and has since that time carried on extensive operations in the production of pulp and and allied products in the Province of British Columbia. Its head office is at the City of Vancouver.

On December 1, 1950, the authorised capital of the company was 150,000 shares of common stock without nominal par value and 10,000 shares of redeemable preference stock of the par value of $100 each. Prior to December 1, 1950, 100,000 of the common shares had been issued and were in the hands of 243 shareholders. On that date, Montreal Trust Company addressed to each of these shareholders an offer to purchase their shares which read as follows:—

MONTREAL TRUST COMPANY
Executors and Trustees
15 King Street West,
Toronto 1, Ont.

December 1, 1950.

TO THE HOLDERS OF COMMON SHARES OF
BRITISH COLUMBIA PULP & PAPER COMPANY,
LIMITED:

Montreal Trust Company (hereinafter called the "Trust Company") hereby offers to purchase at $200 cash per share flat, Canadian funds, less transfer taxes, all the outstanding common shares (hereinafter called the "shares") in the capital stock of British Columbia Pulp & Paper Company, Limited, a company incorporated under the laws of Canada (hereinafter called the "company").

This offer is subject to the following conditions:

1. That it shall have been accepted on or before December 15, 1950 in the manner hereinafter provided by the holders of not less than ninety per cent (90%) of the shares.

2. That acceptance of this offer can be made by you only by depositing with any office of the Trust Company in Canada your certificate or certificates for shares duly endorsed in blank for transfer with signature guaranteed by a bank or trust company or a member of a recognized stock exchange together with a letter of transmittal in the form enclosed duly completed and signed. The conditions of this paragraph 2 may be waived in whole or in part by the Trust Company.

Upon acceptance of this offer within the time aforesaid by the holders of not less than ninety per cent (90%) of the shares, the Trust Company will forthwith make payment for such shares. Failing acceptance of this

offer within the time aforesaid by the holders of not less than ninety per cent (90%) of the shares, the share certificates deposited will thereupon be returned by the Trust Company to the persons depositing the same. The Trust Company may, but shall not be bound to accept deposit of or to pay for any shares not deposited on or before December 15, 1950. All payments for the shares shall be made by cheque negotiable without charge at all Canadian Branches of The Royal Bank of Canada.

Shareholders who wish to forward their certificates by mail are advised to use registered post for their protection.

The Canadian Foreign Exchange Control Board has approved of the making of this offer. It is understood, however, that shareholders who are resident in the United States dollar area countries and who wish to accept this offer by depositing their shares in accordance with its terms will be required to re-invest the purchase price payable hereunder in appropriate Canadian domestic securities.

Yours very truly,
MONTREAL TRUST COMPANY.

It was found as a fact by the learned trial Judge that on or before December 15, 1950, the holders of more than 90 per cent of these shares accepted the offer.

S. 124 of *The Companies Act, 1934*, reads as follows:—

124. (1) Where any contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to any other company (in this section referred to as "the transferee company") has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths of the shares affected, or not less than nine-tenths of each class of shares affected if more than one class of shares is affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice, in such manner as may be prescribed by the court in the province in which the head office of the transferor company is situate, to any dissenting shareholder that it desires to acquire his shares, and where such notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the contract, the shares of the approving shareholders are to be transferred to the transferee company.

Provided that, where any contract has been so approved at any time before the coming into force of this Act, the court may by order, on an application made to it by the transferee company within two months after the coming into force of this Act, authorize notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall be on such terms as the court may by order direct, instead of the terms provided by the contract. The terms substituted by order of the court as aforesaid shall not be such as to deprive the dissenting shareholder, without his consent, of the right to receive any dividends declared and unpaid on his shares or any unpaid cumulative preferential dividend on those shares whether declared or not accrued or accruing up to the date of the

1953

RATHIE
v.
MONTREAL TRUST COMPANY AND B.C. PULP & PAPER CO. LTD. et al

Locke J.

acquisition of those shares by the transferee company, but any provision made for the preservation of such right shall be taken into account in determining such substituted terms.

(2) Where a notice has been so given and the court has not ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice was given, or, if an application to the court by the dissenting shareholder is then pending, after the application has been disposed of transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section it is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums so received by the transferor company shall be paid into a separate bank account in a chartered bank in Canada and such sums and any other consideration so received shall be held by the transferor company in trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(4) In this section the expression "contract" includes an offer of exchange and any plan or arrangement, whether contained in or evidenced by one or more documents, whereby or pursuant to which the transferee company has become or may become entitled or bound absolutely or conditionally to acquire all the shares in the transferor company of any one or more classes of shareholders who accept or have accepted the offer or who assent to or have assented to the plan or arrangement; and the expression "dissenting shareholder" includes a shareholder who has not accepted the offer or assented to the plan or arrangement and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the contract.

The appellant had become the registered owner of 25 of the common shares on November 30, 1950, and did not accept the offer and it was not accepted by the intervenants Powell and the Chartered Trust Company. On April 5, 1951, upon the application of Montreal Trust Company and British Columbia Pulp and Paper Company Limited, Coady, J., acting under the provisions of s-s. 1 of s. 124, made an order authorising the Trust Company to give notice to such of the holders of the common shares who had not accepted the offer, advising them that it desired to acquire the shares on the terms of the offer and settling the form of the written notice to be given. It was a term of the order that unless, upon an application made to the Court by any of these shareholders within one month from the date upon which notice was given to him as directed, the Court should otherwise order, the Montreal Trust Company should be entitled and bound to acquire the said shares on the terms of the offer and should pay to the

British Columbia Pulp and Paper Company Limited, or the several persons entitled thereto, the money representing the price payable for the shares in accordance with those terms.

On May 2, 1951, the appellant issued a writ in which the Trust Company and the Paper Company were named as defendants, the endorsement claiming, *inter alia,* a declaration that the Trust Company was neither entitled nor bound to purchase the shares of the appellant and that the plaintiff was not bound to sell or transfer them to the Trust Company, for a declaration that s. 124 of the Companies Act was *ultra vires* the Parliament of Canada, and alternatively, a declaration that the provisions of the section did not apply to the shares owned by the plaintiff. The appellant obtained special leave to serve with the writ a notice of a motion to be made on June 5, 1951, for judgment in the terms of the endorsement. Notice of this motion was given to the Attorneys-General of Canada and of the Province of British Columbia. In addition, the appellant gave notice of a further motion in the original proceedings for an order setting aside the *ex parte* order made by Coady, J. on April 5 on the grounds, *inter alia,* that s. 124 was ultra vires and that there had been no jurisdiction to make the order and notice of this application was also given to the Attorneys-General. These applications came on for hearing together. Neither of the Attorneys-General were represented. Coady, J. dismissed the action and the motion.

The first matter to be considered is as to whether the proceedings taken by the Montreal Trust Company were in accordance with the provisions of s. 124. In a matter involving what amounts to a forced sale of the shares of the dissentients, there must clearly be strict compliance with the terms of the section. S. 124 first appeared in the Dominion Companies Act 1934. Other than that part of s-s. 4 which defines certain of the meanings to be attributed to the word "contract" in s-s. 1, the section was taken almost verbatim from s. 50 of the Companies Act 1928 (Imp.) which amended in this respect the Companies (Consolidation) Act 1908. That section was carried into the Companies Act of 1929 as s. 155 and, with certain amendments and additions, is now s. 209 of the Companies Act, 1948.

1953

RATHIE v. MONTREAL TRUST COMPANY AND B.C. PULP & PAPER CO. LTD. et al

Locke J.

The offer of the Montreal Trust Company, it is to be noted, was made subject to the condition that it should be accepted in the manner specified on or before a date fourteen days after the date of the offer by the holders of not less than 90 per cent of the shares. As to those who did not accept within that time, the offer read:—

> The Trust Company may, but shall not be bound, to accept deposit of or to pay for any shares not deposited on or before December 15, 1950.

The appellant contends that such an offer is not within the terms of the section. For the respondents it is said that, since it was shown that within two weeks it was accepted by the holders of more than 90 per cent of the shares, they are entitled to invoke the provisions of the first paragraph of s-s. 1 for the compulsory acquisition of the shares of those who did not accept the offer. The point was carefully considered by Mr. Justice Coady, who was of the opinion that an offer open only for this limited period complied with the requirements of the section. With great respect, I am unable to agree. The Trust Company's offer was open for acceptance for a period of two weeks only: for the remainder of the four month period after the making of the offer the company might, at its option, decline to purchase the shares of any of those who had not accepted on or before December 15, 1950. In my opinion, the language of s-s. 1:—

> Where any contract involving the transfer of shares or any class of shares in a company . . . to any other company . . . has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths of the shares affected . . .

contemplates that the offer shall be open for acceptance for the period of four months by those to whom it has been made. The procedure authorised by the first paragraph of s-s. 1 enables the transferee company, if the offer is not accepted, to apply to the Court for an order that the dissenting shareholders transfer the shares on the terms of the offer. The intention of Parliament in providing that such an application could not be made until four months after the making of the offer was, in my opinion, to enable the shareholders to make such investigation as they might think advisable to enable them to determine whether the offer was fair and one that they wished to accept. I cannot think

that it was contemplated that the offeror might limit the period within which the offeree might make these inquiries in such manner as might suit his own convenience. If the time for acceptance might be limited to two weeks, it might, of course, be limited to a much shorter period and afford the shareholders a wholly inadequate opportunity to make such inquiries as they saw fit to make before deciding upon the acceptance or rejection of the offer.

As, in my opinion, the offer made did not comply with the terms of the subsection, the respondents were not entitled to invoke the assistance of the Court to compel the dissentients to transfer their shares.

I express no opinion as to any of the other questions which were so fully argued before us.

I would allow this appeal with costs throughout and set aside the judgments of the Court of Appeal and of the learned trial Judge and direct that judgment be entered in the action granting the relief claimed in Paragraph (*e*) of the endorsement on the writ. No order upon the substantive motion should be made.

I would make no order as to the costs of the intervenants.

The judgment of Taschereau and Rand, JJ. was delivered by:—

RAND J.:—In this appeal both the interpretation and the constitutional validity of s. 124 of the Dominion Companies Act have been raised: but the view at which I have arrived on the former dispenses with a consideration of the latter.

The section reads:—

> Where any contract involving the transfer of shares or any class of shares in a company . . . to any other company . . . has within four months after the making of the offer in that behalf . . . been approved by the holders of not less than nine-tenths of the shares affected . . . the transferee company may, at any time within two months after the expiration of the four months, give notice . . . to any dissenting shareholder that it desires to acquire his shares, and where such notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the contract, the shares of the approving shareholders are to be transferred to the transferee company.

1953

RATHIE v. MONTREAL TRUST COMPANY AND B.C. PULP & PAPER CO. LTD. et al

Rand J.

If no application is made by the dissenting shareholder, the transferee company, on transmitting to the transferor company a copy of the notice and paying or transferring the amount of money or other consideration to be given for the shares, is entitled to have them registered in its name. Provision is made for placing sums so received into a separate bank account to be held in trust for the persons entitled. The word "contract" is defined to include an

> offer of exchange and any plan or arrangement . . . pursuant to which the transferee company has become or may become entitled or bound absolutely or conditionally to acquire all the shares in the transferor company of any one or more classes of shareholders who accept or have accepted the offer or who assent or have assented to the plan or arrangement; and "dissenting shareholder" includes one who has not accepted the offer or assented to the plan or arrangement as well as one who has failed or refused to transfer his shares to the transferee company in accordance with the contract.

The language of this section, which appears within a fasciculus headed, "Arrangements and Compromises", may have been clear to the draftsman, but I confess that it presents to me many difficulties of construction. What, for instance, does the word "contract", even including an "offer of exchange and any plan or arrangement", mean? With whom is the contract made? Certainly not with the shareholders; both the singular number and the fact that their individual acceptances would be necessary exclude that; and I doubt that the word "exchange", although in one sense including purchase, is an exemplary use of language. Then the contract, within four months after the "making of the offer", is to be "approved". If the offer is to be made direct to the shareholders, it is quite impossible to say that in the ordinary case it could be made on a particular day from which the four months would be computed; and the word "approved" is quite out of place if used in relation to such an offer. By s-s. (2), the transferor company is to change the register upon receipt of a copy of a notice sent out to the dissenting shareholder, which would be an extraordinary mode of dealing with registered titles were that copy the only matter of record before the transferor company.

In view of these difficulties, I am bound to interpret the section as contemplating, in the practical working out of a business scheme, an offer or plan or arrangement submitted by the proposed transferee to the transferor company and

by the latter to its shareholders for approval. That was the course pursued in *In re Evertite Locknuts Ld.* (1); and *In re Press Caps Ld.* (2), the proposal was accompanied by a letter from the directors to the shareholders recommending acceptance. In that way the date of the "making of the offer" is fixed by its delivery to the transferor company; meaning is given to the word "approved"; and the notice to the dissenting shareholder as received by the transferor takes its place in the records of that company as arising out of the proposal already received.

The proposal must also remain open for approval by any shareholder for the four months mentioned, otherwise the postponement of the right to proceed by notice against the dissenting shareholder until after the expiration of that period would scarcely make sense. I should say, too, that every shareholder who approved the proposal would be entitled to compel the transferee to purchase his shares, but there seems to be no obligation to acquire shares of dissenting shareholders.

This comparatively new power by which a majority may coerce a minority is one to be exercised in good faith and with the controlling facts available to shareholders to enable them to come to a decision one way or the other. In most, at least, of the cases which have reached the courts in England, the circumstances showed a straightforward transaction with its business considerations made evident to the shareholders. The analogy which obviously suggests itself is that of the sale of a company's undertaking. Such a power has long been accorded companies, and the equivalent transfer by way of share acquisition presents no greater objection in principle except in relation to individual shareholders. One can easily imagine resort to s. 124 for a purely arbitrary acquisition of shares of a small interest by a larger one, but I cannot think the provision was introduced for any such a purpose; and it is significant that it is to a company and not an individual that the power is given.

The proposal here was made without reference either to s. 124 or to the Act or to the transferor company: it was made direct by the transferee to the shareholders; there

(1) [1945] 1 Ch. 220. (2) [1949] 1 Ch. 434.

1953

RATHIE v. MONTREAL TRUST COMPANY AND B.C. PULP & PAPER CO. LTD. et al

Rand J.

was therefore nothing to indicate that those who disregarded the offer might be exposed to a compulsory divesting of their property. Its offer to buy was one that could have been made at any time regardless of the statute. Dated December 1, 1950, instead of being open to the shareholders for approval for the period of four months, it was to be accepted on or before December 15, 1950 by the holders of not less than 90 per cent of the shares or it would lapse; and to put that beyond doubt, the proposal added that in relation to any acceptances received after December 15 the company reserved the right to reject them. The date of the offer is assumed to be December 1, but obviously that cannot be the time of its receipt by those to whom it was addressed: the list of shareholders shows that three were residents of the sterling area, nine of the United States, and the remainder of Canada, and certainly the mailing date cannot be taken to be the date of an offer to all. The applicant has, rather, proceeded on the view that all that was necessary for the giving of notice was the ownership of the required percentage of the shares.

There is also the point raised by Mr. Sheard that the proposal was made by a trust company and we are asked, in view of the nature of the company, to draw the inference that it was acting for an undisclosed principal. It was pointed out that of the 100,000 shares issued, 79,161 were owned by five of a total of 244 shareholders. Nothing is indicated of the interest of these persons in the trust or other purchasing company, and it is difficult to say that that fact could not, in the situation here, be a material consideration. That the shareholders are entitled to know the company which in reality is proposing to buy or exchange appears to me to be undoubted. In the present circumstances, however, I do not treat this feature as material to the determination of the appeal and it is unnecessary to examine it further.

The question, then, is whether the failure to conform with the procedure envisaged by the section, notwithstanding that the trust company has acquired over 90 per cent of the shares, is fatal to its claim to the benefit of the coercive effect of the section. Is the mere fact of possessing the required percentage sufficient to justify, in this case, such a departure from the procedural requirements?

In my opinion, that procedure cannot be disregarded or modified because of the special circumstances of a proposal. The language contemplates various forms of schemes or arrangements, and we have before us the simplest of them; but I can see no reason why a departure in this case would not justify a like departure in any case. Here is the exercise of a power by which an individual's property may be taken from him, possibly by a fellow shareholder and a more complete negation of the terms upon which originally, at least, individuals entered into the association of company membership can hardly be imagined. Since the applicant specifically intimated that the acquisition of all the shares was not vital to its proposal, it cannot be taken that shares now outstanding can, in the slightest manner, affect the exercise of the substantial control that was sought. If the property of the minority shareholder is to be taken from him without his consent, then on a principle as old as the common law, the steps prescribed must be strictly followed. As that has not been done here, the applicant has not brought itself within the conditions necessary to the exercise of the compulsory power of acquisition.

I would, therefore, allow the appeal and direct an order that the applicant is not entitled to acquire the shares of the appellant. The latter will have his costs throughout. There will be no costs to the intervenants.

Appeal allowed with costs to appellant throughout. No costs to or against the intervenants.

Solicitors for the appellant: *Grossman & Sharp.*

Solicitor for the respondents: *A. S. Gregory.*

Solicitor for the intervenant, Chartered Trust Co: *Johnston, Sheard & Johnston.*

Solicitor for the intervenant, W. H. Powell: *W. H. Powell* in person.

1952
Oct. 30, 31
Nov. 3
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*Jun 26.

YVONNE GUAY (*Plaintiff*) ..... APPELLANT;

AND

SUN PUBLISHING COMPANY LIMITED (*Defendant*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Tort—Negligence—Newspaper—Negligent misstatement—False report of death of husband and children—Whether actionable by wife—Absence of malice—Whether duty owed—Nervous shock—Whether damages recoverable.

The respondent published in one issue of its daily newspaper printed in Vancouver, a news item stating that the appellant's husband and their three children had been killed in an automobile accident in Ontario where they were living. No such accident had taken place but the appellant read the item and claimed that the resulting shock affected her health. The respondent could not explain its publication. The appellant claimed damages for negligence and did not allege fraud or malice or the existence of any contractual relationship. The action was maintained by the trial judge but dismissed by a majority in the Court of Appeal for British Columbia.

Held: (Rinfret C.J. and Cartwright J. dissenting), that the appeal and the action should be dismissed.

Per Kerwin J.: Since there was no duty in law owed by the respondent to the appellant, the former could not be held liable in negligence for the shock and impairment in health suffered by the appellant as a result of reading the report. The appellant was not a "neighbour" of the respondent within the meaning of Lord Atkin's statement in *Donoghue v. Stevenson* ([1932] A.C. 562), since she was not a person so closely and directly affected by the publishing of the report that the respondent ought reasonably to have had the appellant in contemplation as being affected injuriously when it was directing its mind to the act of publishing.

Per Estey J.: Assuming that the respondent owed a duty to the appellant to exercise reasonable care to verify the truth of the report, because injury would be foreseeable to a reasonable person, the appellant cannot succeed since the evidence does not establish that she suffered physical illness or other injury consequent upon shock or emotional disturbance caused by a reading of the report.

Per Locke J.: Since it was conceded on behalf of the appellant that the respondent had acted without malice in publishing the article believing the statements made to be true, there was no cause of action, even though the respondent had acted carelessly in failing, before publication, to make adequate inquiries as to their truth, and damage has resulted. *Dickson v. Reuter's Telegram Co.* (1877) L.R. 3 C.P. 1; *Derry v. Peek* (1889) 14 App. Cas. 366; *Nocton v. Ashburton* [1914] A.C. 932; *Angus v. Clifford* [1891] 2 Ch. D. 449; *Le Lievre v. Gould* [1893] 1 Q.B. 491; *Balden v. Shorter* [1933] 1 Ch. 427 and *Chandler v. Crane* [1951] 2 K.B. 164. Nothing decided in *Donoghue v. Stevenson* [1932] A.C. 562 affected the question to be determined.

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

Per Rinfret C.J. and Cartwright J. (dissenting): There is no analogy between the present case and an action for damages for misrepresentation or for injurious falsehood; the present case is analogous to a case in which the respondent has unintentionally but negligently struck the appellant or caused some object to strike her. The respondent, as a reasonable man, should have foreseen the probability of the appellant reading the report and suffering injury as a result. (*Donoghue v. Stevenson* [1932] A.C. 562 and *Hambrook v. Stokes Bros.* [1925] 1 K.B. applied). Therefore a duty rested upon the respondent to check the accuracy of the report before publishing it.

2. The respondent failed in that duty.

3. The appellant can recover damages for nervous shock even though there was no physical impact (*Hay or Bourhill* v. *Young* [1943] A.C. 92).

4. The evidence as to damages does not warrant an interference with the assessment made by the trial judge.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing, O'Halloran J.A. dissenting, the decision of the trial judge and dismissing the action for injurious falsehood.

D. L. Silvers for the appellant.

D. McK. Brown for the respondent.

The dissenting judgment of the Chief Justice and of Cartwright J. was delivered by:—

CARTWRIGHT J.:—This is an appeal, brought by special leave granted by the Court of Appeal for British Columbia, from a judgment of that court (1) reversing, by a majority, the judgment of Wood J. in favour of the appellant for $1,025 and costs and directing that the action be dismissed. O'Halloran J.A., dissenting, would have dismissed the appeal and on the cross-appeal would have increased the damages to $3,275.

The material facts may be summarized as follows. The appellant is a married woman. In February 1948 she was living, separate from her husband, in the City of Vancouver. Her husband was living with their three children in Northern Ontario. The respondent publishes a daily

(1) [1952] 2 D.L.R. 479; 5 W.W.R. (N.S.) 97.

1953

GUAY
v.
SUN PUBLISHING CO. LTD.

Cartwright J.

newspaper in the City of Vancouver. On the 3rd February 1948, the defendant published the following item in its newspaper:—

Ex-Vancouver Man, Children Killed in Crash.

A former Vancouver man and his three children were killed in an antomobile-train collision in Northern Ontario over the weekend, according to word received by relatives here.

Mrs. R. C. Guay, 1972 West Sixth, said today she and her husband had been notified that her husband's brother, Dick Guay, his daughter and two sons, are all dead.

The wife of the dead man is believed to be in Vancouver, Mrs. Guay said.

Mr. Guay left Vancouver last June and has been living in North Bay.

The accident occurred when he was motoring with the three children from Timmins to North Bay. The news of the tragedy was sent here by another brother who lives in Ontario.

The statement that Mr. Guay and the children had been killed was untrue. They had not been concerned in any accident. It was true, however, that the appellant's husband was known as Dick Guay, that he had a brother whose name was R. C. Guay, that he had another brother living in Ontario and that the children were a daughter and two sons. The evidence does not disclose where R. C. Guay was living at the time of the publication but there is nothing to suggest he was living in Vancouver. It is clear that neither Mr. nor Mrs. R. C. Guay lived at the address mentioned, 1972 West Sixth. There is no evidence as to how or by whom the item was furnished to the respondent. It seems to be a reasonable inference that it was concocted by someone, acquainted with the affairs of the appellant and her husband, who wished to hurt the appellant.

On the day on which the item was published the appellant, in accordance with her usual custom, purchased a copy of the respondent's newspaper, read the item, believed it, and suffered from severe shock which somewhat seriously affected her health. She required treatment by two doctors, extending over some months, was prevented from carrying on her customary work and suffered a partial disability of indefinite duration.

It is conceded that there was neither malice nor fraud on the part of the defendant. The appellant claims damages for negligence. She does not allege the existence of any contractual relationship between herself and the respondent.

The learned trial judge was of opinion that under the principles stated in *Donoghue v. Stevenson* (1), and *Hay or Bourhill v. Young* (2), the respondent owed a duty to the appellant which it failed to perform, that such failure caused the injuries suffered by her and that she was accordingly entitled to judgment. The majority in the Court of Appeal were of opinion that the respondent would be under no liability unless it had acted wilfully or maliciously and consequently did not find it necessary to decide whether or not it had been negligent.

The following questions were argued before us. (i) Under the circumstances, did the respondent owe a duty to the appellant to be careful? The appellant submits that it did. The respondent submits that it owed no duty to the appellant other than a duty not to publish false news, which might injure her, wilfully, fraudulently or maliciously. (ii) If the respondent was under a duty to the appellant to take care, was there a breach of such duty? (iii) Even if the foregoing questions are answered in favour of the appellant could she recover damages for nervous shock unaccompanied by any physical impact? and (iv) The quantum of damages.

It is first necessary to observe that the cause of action alleged by the appellant is based on negligence regarded as a specific tort in itself. In *Grant v. Australian Knitting Mills Ltd.* (3), Lord Wright, who delivered the judgment of the Judicial Committee, discusses the judgments in *Donoghue's* case (*supra*) and says at page 103:—

> It is clear that the decision treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialized breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however, essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists.

(1) [1932] A.C. 562. (2) [1943] A.C. 92.
(3) [1936] A.C. 85.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Cartwright J.

The learned trial judge refers to the often quoted passage in the judgment of Lord Atkin in *Donoghue's* case (*supra*) at page 580:—

> At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in the other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably forsee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be —persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The learned trial judge proceeds:—

> As I stated above, the article in the newspaper indicated that the wife and mother whose husband and children were supposed to have been killed lived in Vancouver and she naturally would read or at least hear of the article. Surely, therefore, she was the defendant's neighbour.

In *Hay or Bourhill v. Young* (*supra*) at page 111, Lord Wright points out "that the issue of duty or no duty is, indeed, a question for the court, but it depends on the view taken of the facts." The judgments of all the Law Lords who took part in the last mentioned case appear to me to establish that in determining this issue of duty or no duty it is material to consider what the defendant ought to have contemplated as a reasonable man, and that, *prima facie* at least, a duty to take care arises towards those individuals as to whom a reasonable man in the position of the defendant would have anticipated that they would be injured by the omission to take such care.

For the reasons given by the learned trial judge and by O'Halloran J.A. I am of opinion that a reasonable man in the position of the respondent would have foreseen the probability of the appellant reading the news item and suffering serious injury as a result and that consequently a duty rested upon the respondent to take care to check its authenticity before publishing it; unless, as is argued for the respondent, the authorities negative such a duty where the act complained of is the speaking or writing of words.

Counsel for the respondent contends that *Donoghue's* case has never so far been applied to negligence in words and that it has uniformly been held that fraud or malice is an essential ingredient of a cause of action for damages based on words spoken or written. He does not suggest any analogy between the case at bar and an action for defamation but argues that it is similar to actions for damages for misrepresentation or for injurious falsehood. In my view it is analogous to neither. The gist of the former is the making of false statements to the plaintiff whereby he is induced to act to his own loss; and that of the latter, is the making of false statements to others concerning the plaintiff whereby he suffers loss through the action of those others.

In my view the case at bar is an action on the case for negligently inflicting injury to the person of the appellant and thereby causing injury to her health, and is closely analogous to, if not identical with, a case in which the defendant has unintentionally but negligently struck the appellant or caused some object to strike him. In principle I find it difficult to assert that a defendant who unintentionally but carelessly injures an appellant by a blow or an electric shock should be under liability but a defendant who causes a similar, and perhaps much more serious, injury to an appellant by carelessly inflicting a mental shock by the use of words should escape liability.

I find it unnecessary to attempt to choose between the view of the majority and that of Denning L.J. in *Candler v. Crane Christmas and Co.* (1), which was, in essence, an action for damages for misrepresentation, as I have already expressed my view that the cause of action in the case at bar differs in kind from that in a case where the appellant's loss is due to his having been induced to act to his loss by representations made by the defendant. For similar reasons I can derive little assistance from the judgment in *Shapiro v. La Morta* (2), and *Balden v. Shorter* (3), both of which were actions for injurious falsehood.

Two cases, *Wilkinson v. Downton* (4), and *Janvier v. Sweeney* (5), resemble the case at bar in several respects. In the former Wright J., and in the latter the Court of Appeal, held that damages were recoverable for illness

(1) [1951] 2 K.B. 164.
(2) (1923) 40 T.L.R. 201.
(3) [1933] 1 Ch. 427.
(4) [1897] 2 Q.B. 57.
(5) [1919] 2 K.B. 316.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Cartwright J.

resulting from shock caused by words spoken directly by the defendant to the plaintiff; but in both cases the defendant knew when speaking the words that they were false so that the element of wilfulness, which is lacking in the case at bar, was present. In *Janvier v. Sweeney* the Court of Appeal approved the decision in *Wilkinson v. Downton*, and speaking of that decision Bankes L.J., said at pages 321 and 322:—

> In my view that judgment was right. It has been approved in subsequent cases. It did not create any new rule of law, though it may be said to have extended existing principles over an area wider than that which they had been recognized as covering, because the Court there accepted the view that the damage there relied on was not in the circumstances too remote in the eye of the law. The substance of that decision may be found in the following passage from the judgment of Wright J. After referring to the doctrine of Pasley v. Freeman and Langridge v. Levy the learned judge said: "I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no injuria of that kind. I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant."

In *Dulieu v. White and Sons* (1), the plaintiff suffered illness as a result of nervous shock caused by the defendant's servant negligently driving a van into the public-house of the plaintiff's husband while the plaintiff was behind the bar. There was no actual impact upon the person of the plaintiff. It was held she was entitled to recover damages. Phillimore J. said at page 682:

> I think there may be cases in which A owes a duty to B not to inflict a mental shock on him or her, and that in such a case, if A does inflict such a shock upon B—as by terrifying B—and physical damage thereby ensues, B may have an action for the physical damage, though the medium through which it has been inflicted is the mind.

and at page 683:—

> I cordially accept the decision of my brother Wright in Wilkinson v. Downton that every one has a legal right to his personal safety, and that it is a tort to destroy this safety by wilfully false statements and thereby to cause a physical injury to the sufferer. In that case it will be observed that the only physical action of the wrong-doer was that of speech.

(1) [1901] 2 K.B. 669.

Dulieu v. White and Sons was approved by the Court of Appeal in *Hambrook v. Stokes Bros.* (1), in which damages were recovered for injuries caused to the plaintiff's wife by shock caused by the defendants negligently permitting their unattended lorry to rush down a steep hill, the shock being caused by the wife's fear, not for her own safety, but for that of her children. It will be observed that in both of these cases there was no element of wilfulness or malice, but the shock was administered by the instrumentality of a vehicle, not of words.

I share the view of O'Halloran J.A. and the learned trial judge that the American decisions to which counsel referred are not of great assistance as they do not discuss the problem in the light of the principles laid down in *Donoghue's* case, and for this reason I refrain from a detailed examination of them.

While it is true, as is pointed out by Lord Haldane in *Nocton v. Ashburton* (2), that "liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act" I can find no reason for refusing to apply the principles stated in the passage from Lord Atkin's speech in *Donoghue's* case, quoted above, to the case of a false statement communicated directly by a defendant to a plaintiff in such circumstances that a reasonable man in the position of the defendant would have foreseen the probability of the mere communication causing a serious shock with resulting injury to the health of the plaintiff. Wrottesley J. in *Old Gate Estates v. Toplis* (3), expresses the view that the application of *Donoghue's* case is confined to negligence which results in danger to life, danger to limb or danger to health. It is not necessary to decide whether this is always so but in my view *Donoghue's* case should apply to the particular facts of the case at bar where what the respondent should have foreseen was the probability of danger to the health of the appellant. The circumstance that in *Dulieu v. White and Sons* and in *Hambrook v. Stokes Bros.* the shock was caused by negligently presenting a vehicle to the view of the person shocked in such circumstances as to terrify her while in the case at bar the shock was caused by negligently presenting the false news item to the appellant

(1) [1925] 1 K.B. 141. (2) [1914] A.C. 932 at 948.
(3) [1939] 3 All E.R. 209 at 217.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Cartwright J.

does not seem to me to be a satisfactory ground for affirming liability in the one case and denying it in the other. I cannot distinguish in principle between liability for nervous shock caused to a mother by carelessly allowing a truck to run away and so to cause her to think that it will injure her children and liability for nervous shock caused to her by carelessly communicating a false statement to her which will cause her to believe that all her children have met a violent death. Indeed, in my opinion, the probability of injurious shock to the claimant would be more readily foreseen in the latter instance than in the former.

In my opinion *Hambrook v. Stokes Bros.* rightly decides that the right to recover damages which result from nervous shock negligently caused to the plaintiff is not limited to cases in which the shock arises from a reasonable fear of immediate personal injury to the plaintiff. It is true that that decision has not been finally passed upon by the House of Lords. It was dealt with in all the judgments delivered in *Hay or Bourhill v. Young* (*supra*). Lord Thankerton and Lord Macmillan reserved their opinion in regard to it. Lord Russell of Killowen said that he preferred the dissenting judgment of Sargant L.J. to the decision of the majority but that the judgment of the House did not amount to a disapproval of that decision. Lord Wright stated that as at present advised he agreed with it. Lord Porter refers to it as showing the high water mark reached in claims of the character under discussion, and explains the dissent of Sargant L.J. as being based on the view that the injury complained of could not reasonably have been anticipated and therefore the defendant had broken no duty which he owed to the plaintiff. In the result, it appears to me that we are free to follow *Hambrook v. Stokes Bros.* and I have already indicated my view that we should do so. I think that the existence of liability for shock negligently caused should be determined not by inquiring whether the shock resulted from fear for the personal safety of the claimant but rather by inquiring whether a reasonable person in the position of the defendant would have foreseen that his negligent act would probably result in shock injurious to the health of the claimant.

I conclude, as did the learned trial judge, that the respondent did owe a duty to the appellant to take reasonable care not to inflict a mental shock on her by communicating the false item to her and that the first question listed above should accordingly be answered in favour of the appellant.

The second question presents little difficulty. I agree with O'Halloran J.A. and the learned trial judge that the respondent failed in its duty to take care. Inquiries occupying only a few minutes would have shewn that no such person as Mrs. R. C. Guay lived at the address stated in the item. The evidence of the respondent's witness quoted by O'Halloran J.A. seems to me to conclude this question against the respondent.

The third question would present no difficulty if it were not for the decision of the Judicial Committee in *Victorian Railway Commissioners v. Coultas* (1). For the reasons given by O'Halloran J.A., in the case at bar, those given by Middleton J.A., speaking for the Court of Appeal for Ontario in *Negro v. Pietros Bread* (2), and those given by Hogg J., as he then was, in *Austin v. Mascarin* (3), I think that we are not bound to follow and ought not to follow the decision in the *Coultas case*. I would respectfully adopt as a correct statement of the law the following passage from the judgment of Lord Macmillan in *Hay or Bourhill v. Young* (*supra*) at page 103:—

> It is no longer necessary to consider whether the infliction of what is called mental shock may constitute an actionable wrong. The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognized that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact.

It follows from the above reasons that I think that the appeal should be allowed and it remains to consider the fourth question, whether the judgment of the learned trial judge should be restored *simpliciter* or whether the damages should be increased in accordance with the view of O'Halloran J.A. After an anxious consideration of all the evidence dealing with the question of damages, I have reached the conclusion that we ought not to interfere with the assessment made by the learned trial judge, who had

(1) (1883) 13 App. Cas. 222. (2) [1933] O.R. 112.
(3) [1942] O.R. 165.

1953
GUAY
v.
SUN PUBLISHING CO. LTD.
Cartwright J.

the advantage, always great and in this case peculiarly so, of actually seeing and hearing the witnesses, and particularly the appellant herself.

Before parting with the matter I wish to mention the argument addressed to us that if the judgment of the learned trial judge is restored it will, in effect, amount to a decision that a newspaper must warrant the truth of everything it prints. In my view there is nothing in the judgment of the learned trial judge or in what I have said above which has any such effect. This decision does not touch the case of a reader of a newspaper who suffers financial loss through acting to his detriment on inaccurate information which he reads in the paper. The questions involved in such a case are not before us, as they would have been if, for example, the appellant had been induced by reading the item to fly to Timmins thereby incurring expense. In this regard I think it well to follow the example set by Lord Wright in *Grant v. Australian Knitting Mills, Ld.* (*supra*) where, faced with a somewhat similar argument, he said at page 107:—

> In their Lordships' opinion it is enough for them to decide this case on its actual facts. No doubt many difficult problems will arise before the precise limits of the principle are defined: many qualifying conditions and many complications of fact may in the future come before the Courts for decision. It is enough now to say that their Lordships hold the present case to come within the principle of Donoghue's case, . . .

I would allow the appeal and restore the judgment of the learned trial judge. The appellant should have her costs in the Court of Appeal and in this Court, the respondent should have its costs of the cross-appeal in the Court of Appeal.

KERWIN J.:—In one issue of its daily newspaper printed in Vancouver, the respondent published a news item stating that the husband and three children of the appellant had been killed in an accident in Northern Ontario. This report was untrue. The information leading to the publication did not come from one of the recognized press services or from any of the respondent's reporters or correspondents but apparently from someone who must have known of the appellant and the whereabouts of her husband and children. The respondent was unable to say who that was or the manner in which the information was conveyed to it. The respondent was not actuated by malice

and there was no contractual relationship between it and the appellant. Upon consideration of the evidence, I am satisfied that the trial judge rightly found that the respondent was negligent in publishing the item and therefore the question is whether it is liable in negligence for the shock and impairment in health suffered by the appellant as a result of her reading the report. There is no authority in this Court that compels us to decide either way but there is a considerable body of opinion leading to an answer in the negative.

Negligence is a separate tort: *Donoghue v. Stevenson* (1): *Grant v. Australian Knitting Mills Ltd.* (2). *Hay or Bourhill v. Young* (3). Several cases bearing upon the point to be determined in this appeal have been decided both before and after this proposition was firmly established, some of which will now be referred to. *Derry v. Peek* (4), was an action for damages for deceit, and the speeches of all the members of the House of Lords and the reasons for judgment in subsequent cases referring to that decision must be read with that fact in mind. In *Shapiro v. La Morta* (5), as stated by Lord Justice Banks at 626, the Court of Appeal proceeded upon the basis that:— "It was not disputed that in order to succeed the plaintiff must prove that the publication by the defendants was malicious." From this I take it that counsel had admitted that malice was necessary, and it is in the light of that circumstance that one must read the statement of Lord Atkin at page 628:— "I think the plaintiff fails in consequence of being unable to prove that the damage was caused by a representation that was malicious."

However, it had been laid down by the Common Pleas in *Rawlins v. Bell* (6) and by the Exchequer Chamber in *Ormrod v. Huth* (7), that an injury caused by a statement false in fact but not so to the knowledge of the party making it, or made without intent to deceive, will not support an action. In *Playford v. United Kingdom Electric Telegraph Company Limited* (8), the Queen's Bench decided that the defendant was not liable in damages for a mistake made by it in transmitting a telegram sent to the plaintiff

(1) [1932] A.C. 562.
(2) [1936] A.C. 85.
(3) [1943] A.C. 92.
(4) (1889) 14 App. Cas. 337.
(5) (1924) 130 L.T.R. 622.
(6) [1895] 1 C.B. 951.
(7) (1895) 14 M.&W. 651.
(8) (1869) L.R. 4 Q.B. 706.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Kerwin J.

by a third party, upon which the plaintiff acted to his detriment. This decision apparently proceeded upon the ground that there was no contract between the plaintiff and the defendant but in *Dickson v. Reuter's Telegram Company, Limited* (1), the Common Pleas Division held that the decision disposed of the case before it where the defendant had negligently delivered to the plaintiffs a message intended for a third person and the plaintiffs had suffered damages as a consequence of acting upon the telegram. *Rawlins v. Bell* and *Ormrod v. Huth* were referred to by Denman J., speaking on behalf of the Court. The judgment of the Common Pleas Division was affirmed by the Court of Appeal (2). Lord Justice Bramwell stated that plaintiffs' counsel had admitted that the case prima facie fell within the general rule "That no action is maintainable for a mere statement although untrue and although acted on to the damage of the person to whom it is made unless that statement is false to the knowledge of the person making it." After posing the question whether any duty arose by law he proceeded:— "If it did arise by law, the consequence would be that the general rule which has been admitted to exist is inaccurate, and that it ought to be laid down in these terms, that no action will lie against a man for misrepresentation of facts whereby damage has been occasioned to another person, unless that misrepresentation is fraudulent or careless. But it is never laid down that the exemption from liability for an innocent misrepresentation is taken away by carelessness." Lord Justice Brett said that the general rule was that no erroneous statement is actionable unless it be intentionally false and that this seemed to be admitted by the plaintiffs' counsel. Lord Justice Cotton pointed out that it was admitted that misrepresentation alone would not have supported an action but that it was contended that owing to the nature of the business carried on by the defendants they were bound to warrant the accuracy of the message, or at least to guarantee that every precaution had been taken by their agents to avoid mistake. In *Balden v. Shorter* (3), Maugham J. decided that an action would not lay if a person by a false statement made negligently but in the belief that it was true led a third person to act to his damage.

(1) (1876) L.R. 2 C.P.D. 62. (2) (1877) L.R. 3 C.P.D. 1.
(3) [1933] 1 Ch. 427.

In *Nocton v. Ashburton* (1), the House of Lords decided that *Derry v. Peek* did not prevent an action succeeding where there was a fiduciary relationship between a mortgagee and a solicitor but, at page 948, Lord Haldane pointed out that "liability for negligence in word has in material respect been developed in our law differently from liability for negligence in act." In truth there appear to be weighty reasons for differentiating between the liability in these two classes of cases. Defamatory statements, oral or written, were in very early times placed in a category by themselves and with the protection afforded by the law to those so affected there was a reluctance to hold liable in damages the publishers of incorrect non-defamatory statements made negligently but not maliciously. It is important to note that the same reluctance existed in the State of New York because the judgment of Cardoza J., speaking for the majority of the Court of Appeals, in the well-known case of *MacPherson v. Buick* (2), was approved by two of their Lordships in *Donoghue v. Stevenson.*

The Court of Appeals, speaking through the same judge who by then had become Chief Judge, also decided *Glanzer v. Shepherd* (3). There a public weigher employed by a seller of beans by his negligence in weighing, or in reporting the weight, gave to the purchaser a certificate which erroneously overstated the amount delivered. A third party relying upon the certificate sustained damages for which the weigher was held liable upon the ground that the controlling circumstance was not the character of the consequences but its proximity or remoteness in the thought and purpose of the action, and that the copy of the weigh slip was sent to the plaintiff for the very purpose of inducing action. Subsequently, in *Jaillet v. Cashman* (4), the Court of Appeals, affirming the judgments below, held that a stock-ticker company was not liable where it had given wrong information as to the decision of a Court, as a result of which a speculator reading the tape in a broker's office was misled into dealing in shares the value of which was affected by the decision. No reasons were given but the trial Court had compared the ticker services to a newspaper, stating that practical expediency was more important than logic. Still later, in *Ultra Mares v. Houche* (5),

(1) [1914] A.C. 932.
(2) (1916) 217 N.Y. 382.
(3) (1922) 223 N.Y. 236.
(4) (1923) 235 N.Y. 511.
(5) (1931) 255 N.Y. 170.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Kerwin J.

Chief Judge Cardoza delivered the unanimous judgment of the Court of Appeals and, referring to *Jaillet v. Cashman*, stated that "if liability had been upheld, the step would have been a short one to the declaration of a like liability on the part of proprietors of newspapers." In the case then before him, public accountants were held not liable for an inaccurate certificate as to a company's finances if made merely negligently and not fraudulently. The Chief Judge pointed out at page 185 that if, as was argued, the principle should be extended so as to cover such a case "the extension, if made, will so expand the field of liability for negligent speech as to make it nearly, if not quite, co-terminus with that of liability for fraud." Such an expansion had already been negatived by Lord Justice Bramwell in the *Dickson* case.

We may now revert to the decision in *Donoghue v. Stevenson*, upon which the trial judge and the dissenting judge in the Court of Appeal relied. While there are traces in some quarters of a distinction being drawn between damages for injuries to a person in body or mind or damages to a person's property on the one hand, and economic loss on the other, there would appear to be difficulty in ascertaining a sound basis for such a distinction. On the other hand there may be differences of substance between cases where a person of his own volition proceeds to act upon a negligent but non-fraudulent mis-statement, and where he does not so act but suffers damage as a direct result of the mis-statement. No opinion, therefore, is expressed as to the decision of the Court of Appeal in *Candler v. Crane* (1). In any event it is unnecessary to explore these matters further because I am of opinion that in this case the appellant was not a "neighbour" of the respondent within the meaning of Lord Atkin's oft-quoted statement in *Donoghue v. Stevenson* since she was not a person so closely and directly affected by the publishing of the report that the respondent ought reasonably to have the appellant in contemplation as being affected injuriously when it was directing its mind to the act of publishing. This being so, there was no duty in law owed by the respondent to the appellant.

The appeal should be dismissed with costs.

(1) [1951] 2 K.B. 164.

ESTEY, J.:—The respondent published, under date of February 3, 1948, in its newspaper the Vancouver Sun, the following:

EX-VANCOUVER MAN, CHILDREN KILLED IN CRASH

A former Vancouver man and his three children were killed in an automobile-train collision in Northern Ontario over the weekend, according to word received by relatives here.

Mrs. R. C. Guay, 1972 West Sixth, said today she and her husband had been notified that her husband's brother, Dick Guay, his daughter and two sons, are all dead.

The wife of the dead man is believed to be in Vancouver, Mrs. Guay said.

Mr. Guay left Vancouver last June and has been living in North Bay.

The accident occurred when he was motoring with the three children from Timmins to North Bay. The news of the tragedy was sent here by another brother who lives in Ontario.

This news item was, upon the evidence, probably delivered at the office of the respondent by some person whose identity has not been determined. It was a false statement, published as received, without in any way checking its contents.

The appellant read this item on the evening of its publication and was naturally deeply grieved and affected. She inquired at the address given and found that no Mrs. Guay resided there, nor could she obtain any information with respect to the contents of the news item. She later inquired by telephone of the respondent and received a very indifferent answer. A friend later telephoned with the same result, but no effort was made to inquire of the officers or employees in the more responsible positions. In the result, respondent officers did not learn of the misstatement until the appellant consulted a lawyer in the fall who, under date of November 5, 1948, wrote a letter advising that based upon "negligent editing" a claim for damages would be made. The investigation then made by the respondent could not ascertain precisely just how the statement had been received, more than that it was not from one of the recognized news services.

The appellant alleges that as a consequence of reading this news item she "suffered shock resulting in an acute anxiety state." On her behalf it is submitted that such shock was a foreseeable consequence within the meaning of

1953

GUAY v. SUN PUBLISHING CO. LTD.

Estey J.

our law of negligence and, therefore, before publication the respondent owed a duty to her to exercise reasonable care to verify the truth thereof.

Counsel for the appellant did not cite, nor have we found in our law, a decision directly in point. He submits, however, that if not before then since the decision of *Donoghue v. Stevenson* (1), respondent owed the duty already expressed to the appellant and, because she suffered shock resulting from a breach thereof, she should recover therefor.

Counsel for the respondent submits that throughout the decided cases and recognized texts, both before and since the *Donoghue* decision, statements are found to the effect that recovery is not permitted for damage resulting from statements negligently made.

In Salmond on the Law of Torts, 10th Ed., 1945, at p. 580, the learned author, in discussing the law of deceit, states:

> Mere negligence in the making of false statements is not actionable either as deceit or as any other kind of tort. This is the anomalous rule established by the House of Lords in the leading case of Derry v. Peek, (1889) 14 App. Cas. 337. Although in almost all other forms of human action a man is bound to take reasonable care not to do harm to others, this duty does not extend to the making of statements on which other persons are intended to act.

In Pollock on Torts, 11th Ed., 1951, at p. 430, the learned author, after discussing liability in tort arising out of a contract in favour of a contracting party against one not a party to the contract, goes on to discuss that under English law a telegraph company is not liable to the recipient of a telegram for damages caused by the negligent transmission of that message, while in the United States a telegraph company would be liable to such a recipient. After pointing out that the United States decisions "are on principle correct," the learned author goes on to state at p. 430:

> Generally speaking, there is no such thing as liability for negligence in word as distinguished from act and this difference is founded in the nature of the thing.

In *Dickson v. Reuter's Telegram Company* (2), cited by the learned author, Brett L.J., at p. 7, states:

> If the case for the plaintiffs be simply that there was a misrepresentation upon which they have reasonably acted to their detriment, it must fail, owing to the general rule that no erroneous statement is actionable unless it be intentionally false.

(1) [1932] A.C. 562.

(2) [1877] L.R. 3 C.P.D. 1.

In a note at p. 429 of Pollock on Torts, 11th Ed., referring to the *Dickson* case, it is stated:

> Its authority would be impaired if Lord Atkin's wide principle in Donoghue v. Stevenson, 1932, A.C. 562, could be accepted, but it is submitted that it is still good law.

Bowen L.J. in *Le Lievre v. Gould* (1), referring to "the suggestion that a man is responsible for what he states in a certificate to any person to whom he may have reason to suppose that the certificate may be shewn", adds that

> The law of England does not go to that extent: it does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly.

The foregoing quotations and others to similar effect are found in discussions of false statements intentionally made or statements which, when negligently made, have induced a person to pursue a course of action from which he suffered financial loss. They are, therefore, not made in relation to a discussion of an issue such as here raised.

Respondent submitted that *Candler v. Crane Christmas & Co.* (2), supported his contention. In the *Candler* case a firm of accountants was employed to prepare a statement of accounts and a balance sheet. Their clerk, in the course of his duty, negligently prepared the statement of accounts and a balance sheet which he knew would be used to induce the plaintiff to invest. The latter, relying thereon, did invest and suffered a loss. The accountants, however, were held not liable. The majority of the Lord Justices felt bound by *Le Lievre v. Gould, supra,* while Lord Denning, in a dissenting opinion, though since *Donoghue v. Stevenson, supra,* such precedents ought to be reviewed. Whatever the decision may be when such a case is reviewed by the House of Lords, it and similar cases have to do with negligent misstatements which induced a decision on the part of the plaintiff to pursue a course of conduct from which he suffered financial loss. There the essential factor is the inducement founded upon the misstatement, which is quite different from the present case where the contention is that the respondent suffered shock from a reading of the misstatement.

(1) [1893] 1 Q.B. 491 at 502. (2) [1951] 1 All E.R. 426.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Estey J.

While there does not appear to be any difference in principle between pecuniary and personal injury, historically greater emphasis has been placed upon the latter. What is important is the difference in the nature and character of negligent misstatements which cause someone to act to his detriment and those that normally and usually cause shock and consequent physical illness or other injury.

In the absence of binding authority the issue must be determined upon principle. At common law defamatory statements and malicious statements relative to title or goods and deceit are treated in a manner separate and distinct from acts or other conduct. On the other hand, a person who intentionally makes false statements is liable in damages for personal injuries which directly result therefrom. *Wilkinson v. Downton* (1); *Janvier v. Sweeney* (2); *Bielitzki v. Obadisk* (3).

That facts similar to those here present have not been the subject of litigation in our own courts may be due to several factors. Newspapers gather and publish news in a manner that, having regard to the nature of their business, even if due care be used, errors and mistakes will occur. These errors and mistakes are so common that the natural impulse is, upon reading such an item, that it may not be true and to commence appropriate inquiry. Moreover, the question of liability for physical injuries consequent upon shock has been of comparatively recent origin and the law in relation thereto does not appear to be settled. *Victorian Railways Commissioners v. Coultas* (4); *Dulieu v. White & Sons* (5); *Hambrook v. Stokes Bros.* (6); *Owens v. Liverpool Corporation* (7); *Bourhill (Hay) v. Young* (8). Whatever the reason may be, no similar case has been found in the reports in our own country or in Great Britain and counsel cited only two in the United States.

In the United States the plaintiff in both cases was denied recovery. *Herrick v. Evening Express Pub. Co.,* (9) is a decision of the Supreme Judicial Court of the State of Maine. The Portland Evening Express Advertiser negligently published, under the heading "Boy Dies Across," a

(1) [1897] 2 Q.B. 57.
(2) [1919] 2 K.B. 316.
(3) (1921) 15 S.L.R. 153.
(4) (1888) 13 App. Cas. 222.
(5) [1901] 2 K.B. 669.
(6) [1925] 1 K.B. 141.
(7) [1939] 1 K.B. 394.
(8) [1943] A.C. 92.
(9) (1921) 113 A. 16.

picture of the plaintiff's son and a report of his death. In fact the plaintiff's son was not dead. Recovery was denied on the basis that damages for mental suffering, apart from physical impact, could not be recovered.

Curry et ux. v. Journal Pub. Co. et al (1), is a case almost identical in its facts. The proprietors of the Albuquerque Journal, a daily newspaper in New Mexico, negligently published that "George Curry, 70, former territorial governor of New Mexico, . . . died here Sunday afternoon." In fact he had not died. This news item was read by his son Clifford Curry and the latter's wife and as a consequence both suffered mental and physical injury. The court stated two questions, first "Are damages that result from words negligently spoken or written, as distinguished from acts, actionable?" and second "Can damages be recovered from the publishers of a newspaper for the consequences of grief resulting in physical injury, occasioned by reading in such paper a negligently published false report of the death of the reader's parent?" Both British and United States authorities were considered and the decision was undoubtedly influenced by cases similar in character to the *Candler* case, *supra,* and particularly the decision of *Jaillet v. Cashman* (2) (affirmed in the Appellate Division (3), and in the Court of Appeals (4)). There the defendant supplied to its subscribers items of current news by what is known as a ticker service. The plaintiff read from this ticker service an incorrect report of a decision of the United States Supreme Court dealing with the matter of taxation. As a consequence the plaintiff sold his stock and suffered a loss which he could not recover from the operator of the ticker service. In the course of the reasons for judgment it was stated at p. 173:

> No attempt has been made by any American court . . ., nor will be by us, to state rules which will apply generally to all conditions or circumstances, which will authorize a recovery for damages resulting from false words negligently written or spoken, and in the absence of contract, malice, intentional injury, or other like circumstance. We hold that in some such cases recovery may be had, but we will confine our decision to the facts of this particular case.

(1) (1937) 68 P. (2d) 168.
(2) 189 N.Y.S. 743.
(3) 194 N.Y.S. 947.
(4) 235 N.Y. 511.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Estey J.

The Court found more than one basis upon which to deny liability, one of which was expressed at p. 174 as follows:

> In this world of disease and death the families of aged persons, while never entirely prepared, yet may not be greatly surprised to hear of their death at any time; and such serious consequences to the plaintiffs, and particularly to Mrs. Curry (a daughter-in-law of Governor Curry), are so unusual and unlikely to happen under any circumstances, and certainly not to persons in good health (and nothing appears to the contrary), that it cannot be said there was an appreciable chance of such results; and defendants, as reasonable men, could not have realized that there was an appreciable risk to the health of plaintiffs from reading the article, though they had known of plaintiffs' existence, which does not appear.

The Court, it would appear, in the foregoing is directing its mind to the issue of the existence of a duty rather than to that of remoteness of damage.

Lord Wright, in *Bourhill (Hay) v. Young* (1), after pointing out that damage by mental shock may give a cause of action, went on to state at p. 106:

> Where there is no immediate physical action by the defendant on the plaintiff, but the action operates at a distance, or is not direct, or is what is called nervous shock, difficulties arise in ascertaining if there has been a breach of duty.

The difficulty here envisaged is emphasized by a consideration of *Dulieu v. White & Sons* (2), where Kennedy J. was of the opinion that the shock, in order to provide a basis for liability, must arise from "a reasonable fear of immediate personal injury to oneself," which the Court of Appeal refused to follow in *Hambrook v. Stokes Bros.* (3). This conflict of opinion, though considered, was not resolved in *Bourhill (Hay) v. Young, supra.*

In view of the more recent development of the law of torts and the present state of authorities, I am not prepared to say that there can never be recovery for physical illness or other injury caused by shock consequent upon negligent misstatements. Whether in a particular case such as the present a duty to exercise due care exists because injury, as a normal and ordinary consequence, would be foreseeable to a reasonable person, always presents an important and difficult question. While rather disposed to the conclusion upon the authorities already mentioned and, in particular, the remarks in *Bourhill (Hay) v. Young, supra,* and those of Professor Goodhart in Modern Law

(1) [1943] A.C. 92. (2) [1901] 2 K.B. 669.
(3) [1925] 1 K.B. 141.

Review, Vol. 16 at p. 25, that in the particular facts of this case a duty does not rest upon the respondent, it is unnecessary to decide that issue. Even if it be assumed that such a duty rested upon the respondent, which I do not decide, it is an essential part of the appellant's case that damages be established. *J. R. Munday Limited v. London County Council* (1); Pollock on Torts, 15th Ed., p. 139; Winfield Law of Torts 5th Ed., p. 19.

No question as to the sufficiency of the proof of damage appears to have been raised before the learned trial judge. The evidence discloses that at the time of reading the article the appellant was emotionally upset, but it does not disclose illness or absence from work at that time. While this is not conclusive, it is, in the circumstances of this case, significant. The appellant had purchased a restaurant in 1946 and had sold it in December, 1947, when she took a trip east and visited her children. She returned to Vancouver in January, 1948, and went to work at Pratts Secret Service with whom she was employed as an investigator "checking on the employees" of another employer. At the time of reading the item here in question she was so employed and states that a few weeks later she was asked to resign, as her work was not satisfactory. In the following May, 1948, she took back the restaurant and again sold it in May, 1949. Thereafter she accepted a position at Eaton's which she retained until January, 1950, when she was laid off because "they were over-staffed." She went back to work for Eaton's in the spring of 1950 and at the time of the action was employed with the B.C. Electric. No person was called who had been associated with her either in business or socially who deposed to any illness or change of conduct on her part. She herself stated:

> I would not say that I am sick or anything, but any time any little things upset me so badly. When I balance the cash, if there is a few cents short, I will be nights without sleep. Everything upsets me. Otherwise, physically, I am O.K.

The medical evidence is far from conclusive. Although the article appeared on February 3, a doctor was not consulted until October. He deposed that there was no physical disability other than the fact that she was suffering from an anxiety as exemplified by symptoms of pulse and moist or cold palms and soles. He did express his opinion,

(1) [1916] 2 K.B. 331.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Estey J.

based upon her history as she gave it to him and his own examination, that her condition was directly related to the reading of the news item here in question. He, however, went on to depose that the fact that she had been living apart from her husband and children, with the attendant uncertainty and insecurity, would cause her condition of anxiety such as he found it. Another doctor agreed that her condition might be the result of her separation from husband and family and, in referring particularly to emotional disturbances, stated:

> I think, in medical experience and psychological experience as it usually occurs it is an examination of various factors, and it is difficult to single out one factor and say, "That is the factor".

In *Wilkinson v. Downton, supra,* where, because of the intentionally made false statement, the plaintiff suffered shock causing physical illness and other injury, the remarks of Wright J. at p. 58 are relevant to this issue:

> These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.

Moreover, it is important to keep in mind what must be proved in order that damages may be recovered, as stated in Pollock on Torts, 15th Ed. at p. 37, as follows:

> A state of mind such as fear or acute grief is not in itself capable of assessment as measurable temporal damage. But visible and provable illness may be the natural consequence of violent emotion, and may furnish a ground of action against a person whose wrongful act or want of due care produced that emotion. . . . In every case the question is whether the shock and the illness were in fact natural or direct consequences of the wrongful act or default; if they were, the illness, not the shock, furnishes the measurable damage, and there is no more difficulty in assessing it than in assessing damages for bodily injuries of any kind.

In my opinion the evidence does not establish that the appellant suffered physical illness or other injury consequent upon shock or emotional disturbance caused by a reading of the item in question.

The appeal should be dismissed with costs.

LOCKE, J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) which allowed the appeal of the present respondent from a judgment for damages awarded against it at the trial by Wood, J. O'Halloran, J.A. dissented and would have dismissed the appeal and increased the amount of damages awarded.

(1) [1952] 2 D.L.R. 479; 5 W.W.R. (N.S.) 97.

The question to be determined is one of general importance. The respondent company publishes a daily newspaper called the Vancouver Sun having a large circulation in Vancouver and throughout the Province of British Columbia. On February 3, 1948, there appeared in the newspaper the following article:—

Ex-Vancouver man, Children
Killed in Crash

A former Vancouver man and his three children were killed in an automobile-train collision in Northern Ontario over the weekend, according to word received by relatives here.

Mrs. R. C. Guay, 1972 West Sixth, said today she and her husband had been notified that her husband's brother, Dick Guay, his daughter and two sons, are all dead.

The wife of the dead man is believed to be in Vancouver, Mrs. Guay said.

Mr. Guay left Vancouver last June and has been living in North Bay.

The accident occurred when he was motoring with the three children from Timmins to North Bay. The news of the tragedy was sent here by another brother who lives in Ontario.

No such accident had taken place. There was no such person as Mrs. R. C. Guay living at the address given and there is no evidence that anyone of that name had made any such statement as was attributed to her by the article.

The appellant, the wife of the man referred to as "Dick" Guay and the mother of the three children, by her statement of claim alleged that the publication of the article was negligent on the part of the respondent and that, as a result of such publication she was caused to believe that her husband and children had been killed and, in consequence, suffered shock which resulted in an acute state of anxiety, as a consequence of which she had been unable to carry on her customary occupation and would, for an indefinite time, be partially disabled. She further claimed that she had for a period of approximately three weeks been unable to discover the truth and, believing during such period that her children and husband were dead, had suffered intense mental anguish which affected her mental and physical well-being. Malice on the part of the respondent was not pleaded.

While the question to be determined is a matter of law, it is, I think, of some importance to consider the facts in this particular case, in order to appreciate the extent of the liability of newspapers contended for by the appellant.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Locke J.

The appellant lives in Vancouver and, at the time of the publication of the article in question, was living apart from her husband, in accordance with the terms of an agreement of separation made between them on February 4, 1947. Three children had been born of her marriage to Ulderic Guay and by the terms of the agreement the husband undertook the custody of the children and their maintenance and support and it was agreed that he should be at liberty to remove them to the Town of Val Gagni, Ont., where his brother and sister resided and where suitable schooling and maintenance might be afforded to the children. The parties agreed thereafter to live separate and apart, the wife to be free of any control or authority of the husband and surrendering all claims upon him for support or maintenance. The agreement contained further provisions that the wife should have the right of access to the children at all reasonable times. In accordance with this agreement, Guay had removed the children to Timmins, Ont. during the summer of 1947 and the appellant had spent Christmas and New Year's with them at that place, returning to Vancouver on January 7, 1948. It was on February 2 of that year that she saw the article in question.

While it might have been expected that the appellant reading of the death of all the members of her family would have either telephoned immediately to the persons in Timmins with whom her children resided to obtain further information and to learn where and when they were to be buried, or obtained this information by telegraph, she did none of these things. According to her, she had some friends telephone to the Sun newspaper but they could not get any "satisfactory explanation" and accordingly she wrote to her husband's relatives in Ontario but got no answer. She also wrote to her mother who, in turn, wrote to her eldest brother in Quebec to investigate whether the article had appeared in the Eastern papers. The brother apparently wired the Chief of Police in Timmins who informed him that there never had been such an accident. He then wired this information to his mother who lived in Saskatchewan, who, in turn, forwarded the telegram to Mrs. Guay at Vancouver. According to the appellant, she received this wire which had been sent to her brother from Timmins on February 19 around the beginning of March.

She had, however, some three or four weeks after February 2 received a letter from one of the children, which was the first intimation she had had that the article had been untrue.

At the time of the publication the appellant was employed as a store detective by a commercial firm in Vancouver and while she continued in that employment for a few weeks she was so upset by the news that she was unable to carry on her duties and was asked by her employer to resign. She first consulted a doctor on October 27, 1948. According to her, she had been nervous and upset since reading the article but, as she thought there was nothing wrong with her physically, she had not thought that there was any point in seeing a physician. Doctor Kaplan, whom she first consulted, had examined her and found that her pulse rate was high, that she had an increased blood pressure and suffering from sweating of the palms with cold extremities, these symptoms indicating to him that she was suffering anxiety. Doctor Kaplan had experience in psychiatric work and after hearing Mrs. Guay's story prescribed concentrated therapy. In his opinion, her condition was directly related to the incident in question.

While Mrs. Guay had telephoned to the newspaper office a few days after the publication, the person to whom she spoke and whose identity does not appear told her that the reporter who had turned in the article was out and was unable to give her any information. The employer of her sister, at the latter's instance, also telephoned to the respondent's office and spoke to someone who, he thought, was a person at the news desk who could not tell him the source of the information upon which the article was based. It was not until November 5, 1948, more than nine months after the time of publication, that the solicitors wrote the publishing company to say that the appellant claimed damages for negligence, by reason of the publication. In the letter it was said that, as a result of what was described as "a series of fortuitous circumstances" Mrs. Guay had been unable to discover the erroneous nature of the report for some weeks.

According to Mr. Charles F. Bailey, the business manager of the respondent company, the first intimation that had been received by the respondent that the article published

1953

GUAY v. SUN PUBLISHING CO. LTD.

Locke J.

had been incorrect was this letter from the solicitors. After receiving the letter, endeavours had been made to locate the R. C. Guay referred to in the article but no one of that name lived at 1972 West 6th Avenue in Vancouver and they were unable to find any such person. Inquiries were also made among the employees of the publishing company but none of those in its employ at that time knew anything about the matter and the respondent had been unable to ascertain by whom the report had been turned in to the office. According to Mr. Bailey, an average of from 800 to 1,000 despatches or news reports of various kinds are received daily and, of these, less than half are published. News despatches are received from the Canadian Press and the British United Press but the article in question had not been transmitted by either of these organizations. Asked as to the manner in which other news received by the paper was handled, he said that stories brought in by their own trained reporters were not checked, except for further background material and that:—

> Similarly where news reports that come from our country correspondents, unless there should be something in the nature of the story that would indicate that further enquiries should be made before it was published. It would not normally be checked; other than for elaboration. Unsolicited stories, particularly those that would come in by telephone, we or any other newspaper would normally be wary of and more careful. Those presented in person would have to be checked, largely on their merits, by the decision of the editor handling the story.

He said further that it was in the discretion of the editor handling the matter as to what check there should be made. Whether the story in question had been received by the newspaper in writing or by telephone and reduced to writing in the office, does not appear. Owing to the volume of material that came in to the office of such a newspaper every day, it is found impossible, according to this witness, to keep it on file for any protracted length of time. The delay in disputing the accuracy of the report had thus prevented the respondent from making any effective efforts to find out the source of its information for the article in question.

The respondent had been unable to find anyone in its employ in November 1948 who had been in its employ in February 1948 who knew the appellant or her husband or any of her family. It is, I think, apparent, however, from the terms of the article that the information had been given

to the respondent by some one who knew something about the family of the appellant (which consisted of a daughter and two sons as stated) and it being the fact that Guay had left Vancouver the previous June and had been living in North Bay or in that vicinity. Whether the informant had heard a false report of such an accident or acted maliciously in giving the information to the newspaper cannot be determined. The good faith of the respondent, however, is not questioned.

Wood, J. by whom the action was tried, considered that the judgment of Lord Atkin in *Donoghue v. Stevenson* (1), stated the principle which should be applied. The passage in the judgment relied upon reads:—

> The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The learned trial Judge found on the evidence that the respondent had been negligent in publishing the article. He then said:—

> I take the view that the defendant owed a duty to the plaintiff and that as a result of its failure to observe that duty the plaintiff suffered.

The exact nature of the duty is not stated but I think it to be clear that it was to refrain from publishing a news item of this nature, without first making reasonable efforts to ascertain that the facts were as stated.

In the Court of Appeal (2), Sidney Smith, J.A., with whom Robertson, J.A. agreed, was of the opinion that nothing decided in *Donoghue v. Stevenson* touched the question in the present matter. I respectfully concur in that opinion. The learned Justice of Appeal considered that the matter was to be determined upon the principle

(1) [1932] A.C. 562 at 580. (2) [1952] 2 D.L.R. 479; 5 W.W.R. (N.S.) 97.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Locke J.

which had been applied in *Shapiro v. La Morta* (1) and *Balden v. Shorter* (2). O'Halloran, J.A. agreed with Wood, J. and in concluding his judgment said in part:—

> Once the Donoghue concept of the tort of negligence is accepted, then whether appellant owed a duty vis-a-vis the respondent not to harm her by negligent publication of a false news item of the kind in this case, is a question of fact.

and said that this fact had been found in favour of the present appellant by the trial Judge who had neither misapprehended the evidence or misconceived its weight. He further expressed the opinion that the general damages allowed had been inadequate and would have allowed the appeal and increased the amount to $3,000.

In my opinion, there was evidence from which the learned trial Judge might draw the inference that the defendant had acted negligently in publishing the article without first making an effort to ascertain its accuracy. There may have been some explanation regarding this aspect of the matter which might have been made, had the appellant made her claim promptly instead of waiting for a period of over nine months. Since, however, the respondent was unable to give any evidence at all as to the source of its information and as an enquiry by telephone or otherwise would have immediately disclosed the fact that there was no such person as Mrs. R. C. Guay living at 1972 West 6th Avenue and no one of that name known there, the finding at the trial that this was negligent conduct should not, in my opinion, be disturbed. The question to be determined in this appeal is as to whether, assuming that the appellant suffered injury in consequence of the publication, she has a right of action against the respondent.

It is well at the outset in a matter of such importance to consider the extent of the liability which, it is asserted, exists. It is neither suggested in the pleadings or the argument that the respondent acted maliciously or with any intent to injure the appellant, or that the statement was published recklessly without caring whether it was true or false, upon proof of which malice might be inferred. The case is to be decided upon the footing that the respondent acted honestly and in good faith. The appellant's contention, put bluntly, amounts to this that newspapers owe a duty to all those who may read their publications to

(1) (1924) 40 T.L.R. 201. (2) [1933] 1 Ch. 427.

exercise reasonable diligence to see that any items they publish are true, and are accordingly liable for a negligent misstatement should damage result from its publication.

The statement complained of was a misrepresentation. A misrepresentation may be either innocent or fraudulent. If innocent, it may be a ground for rescission of a transaction or a good defence to an action for specific performance but, subject to the certain exceptions to be noted, it gives no right of action sounding in damages (*Heilbut v. Buckleton*) (1). In *Taylor v. Ashton* (2), an action was brought against directors of a bank for fraudulent misrepresentations as to its affairs. The jury found the defendants not guilty of fraud but expressed the opinion that they had been guilty of gross negligence. Baron Parke, who delivered the judgment of the Court, said as to this (p. 415):—

> It is insisted that even that (that is, the gross negligence) accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent; because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind, unless it be fraudulently made.

In *Dickson v. Reuter's Telegram Company* (3), where the defendant, through the negligence of its servant, had delivered to the plaintiffs a message not intended for them and they, reasonably supposing that it came from their agents and was intended for them, acted upon it and thereby incurred a loss, Bramwell, L.J. said that the general rule of law is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. Brett, L.J. said (p. 7) that if the case for the plaintiffs was simply that there was a misrepresentation upon which they have reasonably acted to their detriment, it must fail, owing to the general rule that no erroneous statement is actionable unless it be intentionally false.

The decision in *Derry v. Peek* (4), must be considered together with *Nocton v. Ashburton* (5). *Derry v. Peek* was an action for damages for deceit, but certain statements made in the course of the judgments bear upon the matter

(1) [1913] A.C. 30 at 48.
(2) (1843) 11 M.&W. 402.
(3) (1877) L.R. 3 C.P. 1.
(4) (1889) 14 App. Cas. 366.
(5) [1914] A.C. 932.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Locke J.

to be considered here. When that case was heard in the Court of Appeal (*Peek v. Derry* (1)), Cotton, Hannen and Lopes, L.JJ. had all expressed the view that if a false statement is made without reasonable ground for believing it to be true an action for deceit would lie and considered that, though fraud was not proven, the directors who made the statements were liable on this footing. The judgment of the Court of Appeal was reversed in the House of Lords. All of the law Lords disagreed with this view. Lord Herschell pointed out the essential difference between making a statement careless whether it be true or false and, therefore, without any real belief in its truth, and making a false statement through want of care which is nevertheless honestly believed to be true. For the latter class of statement there was no liability for deceit. Cotton, L.J. had said that when a man makes an untrue statement with an intention that it shall be acted upon without any reasonable ground for believing that statement to be true, he makes default in a duty which was thrown upon him from the position he has taken upon himself and he violates *the right which those to whom he makes the statement have to have true statements only made to them.* Referring to this, Lord Herschell said (p. 362):—

> Now I have first to remark on these observations that the alleged 'right' must surely be here stated too widely, if it is intended to refer to a legal right, the violation of which may give rise to an action for damages. For if there be a right to have true statements only made, this will render liable to an action those who make untrue statements, however innocently. This cannot have been meant.

After a review of the authorities he said further (p. 375):

> But that such an action (i.e. for deceit) could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

The directors of the railway company who had issued a prospectus containing a statement which they believed to be true, but which was in fact untrue, were relieved from the liability imposed upon them by the judgment of the Court of Appeal.

(1) (1877) 37 Ch.D. 541.

In *Angus v. Clifford* (1), decided by the Court of Appeal on an appeal from Romer, J. the effect of the decision in *Derry v. Peek* was considered. The head note which accurately expresses the result of the case reads:—

If a person who makes a false statement entertains a bona fide belief that the statement is true, an action of deceit cannot be maintained against him on the ground that he formed his belief carelessly or on insufficient reasons. If he had formed no belief whether the statement was true or false, and made it recklessly without caring whether it was true or false, an action of deceit will lie against him. But not so if he carelessly made the statement without appreciating the importance and significance of the words used, unless indifference to their truth is proved.

The action was brought by the shareholder of a mining company for damages alleged to have been sustained by his having been induced to take shares in the company by untrue statements contained in the prospectus. The judgment of Romer, J. does not make quite clear the ground upon which he proceeded in holding the directors liable and he did not refer either to *Peek v. Derry* which had already been decided in the Court of Appeal or to *Derry v. Peek*. He found, however, that the statements were untrue, that they were material, and that the plaintiff had relied upon them and said that he thought it was clear that no proper care was taken by the defendants with reference to them. He did not find fraud. The decision was reversed in the Court of Appeal. Lindley, L.J., referring to the judgment of the learned trial Judge and after mentioning the fact that he had not found that the directors were guilty of fraud, said in part (p. 463):—

Then he comes to the conclusion that that statement, being untrue, was material; and then he rather appears to have proceeded upon the theory, that that alone would be enough, without addressing his mind to the further question whether these gentlemen would be liable, supposing that they did make this untrue statement, but made it carelessly, as distinguished from fraudulently. His judgment, when we read it carefully, shews upon the face of it, I think, that his mind was not addressed to that particular point, which was the point mainly argued before us. The judgment, so far as I read it, seems to me quite consistent with his having proceeded upon the view that Peek v. Derry, 37 Ch.D. 541, as decided in this Court, was law, whereas it was reversed by the House of Lords, as we all know.

He said further, referring to the case by its title in the Court of Appeal (pp. 463-4):—

Speaking of Peek v. Derry broadly, I take it that it has settled once for all the controversy which was well known to have given rise to very considerable difference of opinion as to whether an action for negligent

(1) [1891] 2 Ch.D. 449.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Locke J.

misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained. There was considerable authority to the effect that it could, and there was considerable authority to the effect that it could not; and as I understand Peek v. Derry (14 A.C. 337), it settles that question in this way—that an action for a negligent, as distinguished from a fraudulent, misrepresentation in a company's prospectus cannot be supported; I think it is perfectly impossible' to read the judgments which were delivered in that case, especially Lord Herschell's to which I will allude presently, without seeing that that is the broad proposition of law which Peek v Derry has settled, and settled for good.

After considering in detail what had been said by Lord Herschell, Lindley, L.J. concluded (p. 466):—

> If it is fraud, it is actionable, if it is not fraud, but merely carelessness —it is not.

Upon the evidence he found that there was no moral obliquity in what the directors had done, that it was what he described as "pure blundering, pure carelessness", and that being the case the action could not be maintained. Bowen, L.J. said that after reading the evidence he did not feel satisfied that there was any dishonesty at all, though he thought there was very gross and culpable carelessness in the use of their language.

In *Le Lievre v. Gould* (1), mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees, and there was no contractual relation between him and them. In consequence of the negligence of the surveyor, the certificates contained untrue statements as to the progress of the buildings but there was no fraud on his part. Lord Esher, M.R. who had written one of the judgments in *Heaven v. Pender* (2), considered that the later case had no application and that it had been established by *Derry v. Peek* that in the absence of contract an action for negligence cannot be maintained where there is no fraud. This statement must be taken to be qualified by what was later decided in *Nocton v. Ashburton.* Bowen, L.J. said in part (p. 501):—

> Negligent misrepresentation does not amount to deceit, and negligent misrepresentation can give rise to a cause of action only if a duty lies upon the defendant not to be negligent, and in that class of cases of which Derry v. Peek was one, the House of Lords considered that the circumstances raised no such duty.

(1) [1893] 1 Q.B. 491. (2) (1883) 11 Q.B.D. 503.

After referring to *Heaven v. Pender* and cases of that class and to the liability of owners of certain chattels and of dangerous premises, Bowen, L.J. asked himself if they had any application to cases such as the one under consideration and said as to this (p. 502):—

> Only, I suppose, on the suggestion that a man is responsible for what he states in a certificate to any person to whom he may have reason to suppose that the certificate may be shewn. But the law of England does not go to that extent: it does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly.

A. L. Smith, L.J., who agreed in dismissing the appeal, was also of the opinion that the principle of *Heaven v. Pender* had no application to the case.

Nocton v. Ashburton (1), was an action brought against a solicitor claiming damages on the footing that the defendant had improperly and in bad faith advised Ashburton to realease from a mortgage held by him a valuable part of the security, knowing that it would thereby be rendered insufficient, and of having represented untruly that the remaining security would be sufficient. *Derry v. Peek* was considered at length in the judgments delivered.

The trial Judge, Neville, J. had found that the charge of fraud was not proved and dismissed the action. The Court of Appeal had reversed the finding and granted relief on the ground that there had been fraud. It was decided in the House of Lords that upon the evidence the Court of Appeal was not justified in reversing the finding of fact of the trial Judge but that the plaintiff was not precluded by the form of his pleadings from claiming relief on the footing of a breach of a duty arising from the existence of a fiduciary relationship and was entitled to succeed on that ground. The summary of the judgment of Viscount Haldane, L.C., contained in the head note of the report, sufficiently states the effect of the judgments of the Lord Chancellor and of Lord Dunedin and Lord Shaw of Dumferline, a majority of the members of the Court. It reads as follows (p. 932):—

> Per Viscount Haldane L.C.: Derry v. Peek (1889) 14 App. Cas. 337, which establishes that proof of a fraudulent intention is necessary to sustain an action of deceit, whether the claim is dealt with by a Court of Law or by a Court of Equity in the exercise of its concurrent jurisdiction, does not narrow the scope of the remedy in actions within the exclusive

(1) [1914] A.C. 932.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Locke J.

jurisdiction of a Court of Equity, which, though classed under the head of fraud, do not necessarily involve the existence of a fraudulent intention, as, for example, an action for indemnity for loss arising from a misrepresentation made in breach of a special duty imposed by the Court by reason of the relationship of the parties.

Unless innocent misrepresentations made in the course of the negotiations leading up to the formation of a contract or in company prospectuses (before the latter matter was dealt with by statute) are to be distinguished from innocent misstatements of fact made in a newspaper or by an individual orally or in writing, this was the state of the law, as it affects the matter in question here, in 1932 when *Donoghue v. Stevenson* was decided. In that well-known case a shop assistant sought to recover damages from a manufacturer of aerated waters for injuries suffered as a result of consuming part of the contents of a bottle of ginger beer which contained the decomposed remains of a snail. The ginger beer had been purchased in a cafe in Paisley and not from the manufacturer. It was contained in a sealed glass container which would not in the ordinary course of events be opened until required for consumption. The exact point to be determined, and indeed the only point, was as to whether under these circumstances the manufacturer owed a duty to the ultimate consumer to take reasonable care that the contents of the bottle were fit for human consumption.

The present action is one of many, however, which have been undertaken on the footing that much more than this was decided in the judgment of Lord Atkin in the passage to which reference was made by the learned trial Judge. In *Grant v. Australian Knitting Mills Ltd.* (1), the Judicial Committee considered *Donoghue's* case and, after saying that they would follow it and that the only question which they were concerned with was what the case decided, said (p. 102):—

> Their Lordships think that the principle of the decision is summed up in the words of Lord Atkin:—
>
> A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

(1) [1936] A.C. 85.

Shapiro v. La Morta (1), referred to in the reasons for judgment of Sidney Smith, J.A. was decided prior to *Donoghue's* case. The action was brought by a professional pianist against the proprietors of a music hall who had erroneously published a report that she would appear at their hall during a certain week. In consequence, she lost another engagement and brought an action for injurious falsehood. Lush, J. held that as the statement was published bona fide the plaintiff could not recover and this was sustained by the unanimous judgment of the Court of Appeal consisting of Bankes, Scrutton and Atkin, L.JJ. The latter, it will be noted, agreed with Scrutton, L.J. that the statement was not actionable in the absence of malice.

In *Balden v. Shorter* (2), an action for injurious falsehood, Maugham, J. dismissed the action, holding that malice had not been shown and that the words were at the worst made without any indirect motive or any intention of injuring the plaintiff and in the belief that they were true. While this case was decided after the decision in *Donoghue v. Stevenson,* that case was not referred to either in the argument of counsel nor in the judgment.

In *Old Gate Estates v. Toplis* (3), a case referred to by the learned trial Judge and, I think, applied by him to a limited extent, the action was brought against a firm of valuators for negligence in making their valuation of certain real property. The valuation had been made at the request of the promoters of the plaintiff company but it was contended that the defendants knew that it was to be used for the purpose of the company and, therefore, owed a duty to the company to take proper care in making the valuation. Wrottesley, J., after referring to the passage from the judgment in *Donoghue v. Stevenson,* referred to by the learned trial Judge in the present matter, held the principle there stated to be inapplicable, it being confined to negligence which resulted in danger to life, limb or health, while the claim by Old Gate Estate Limited was for pecuniary loss. With respect, I think the true ground for distinguishing Donoghue's case was not that stated but rather that *Le Lievre v. Gould,* above referred to, was still the law and was decisive of the issue. I do not think the question as to whether a duty exists is to be decided by the nature of the injury claimed to have been sustained.

(1) [1924] 40 T.L.R. 201. (2) [1933] 1 Ch. 427.
(3) [1939] 3 All E.R. 209.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Locke J.

The only other reported decision in England to which, I think, reference may usefully be made is *Candler v. Crane* (1), where in an action brought against a firm of accountants for negligence in preparing a financial report it was again attempted to apply the language of Lord Atkin in *Donoghue's* case to a case of negligent misstatement. Cohen and Asquith, L.JJ. following *Derry v. Peek* and *Le Lievre v. Gould,* were of the opinion that the action had been properly dismissed by the trial Judge, the false statements having been made carelessly but not fraudulently, and were not actionable in the absence of any contractual or fiduciary relationship between the parties and that this principle had in no way been qualified by the decision of the majority in Donoghue v. Stevenson. Denning, L.J. dissented.

Sammond on Torts, 10th Ed. 580, states the result of the decision in *Derry v. Peek* as being that a false statement is not actionable as a tort unless it is wilfully false and that mere negligence in the making of false statements is not actionable either as deceit or as any other kind of tort. The exceptions to the rule are then stated as being where there is a contractual duty, a fiduciary relationship as in *Nocton v. Ashburton,* and cases of warranty of authority and certain cases where the rule as to estoppel by representation may operate. It cannot be and is not suggested that the present case falls within any of these exceptions.

In the October 1951 issue of the Modern Law Review there is an article by Lord Wright regarding *Re Polemis* (2), in which, after referring to the difficulty which sometimes arises in distinguishing cases of remoteness of damage from cases of absence of duty, he says in part (14 Mod. L.R. 401):—

> I may here note without developing or discussing or criticising the particular rules which by way of contrast have been applied in the case of negligent misstatements. I think Lord Atkin must have intended to recognize the distinction when in Donoghue v. Stevenson, at pp. 581 and 582, Le Lievre v. Gould was cited in his judgment. Furthermore he could not have intended to lay down a different rule from that stated in Nocton v. Ashburton as defining the extent of duty in regard to negligent misstatements. Negligence in words is distinguished there from negligence in acts. The former, it is there said, involves no breach of duty in the absence of fraud, contract or fiduciary relationship. Recently in the Court of Appeal in Candler v. Crane, Christmas & Co., Asquith, L.J., as he then was, and Cohen L.J. have held (Denning L.J. dissenting) that

(1) [1951] 2 K.B. 164. (2) [1921] 3 K.B. 560.

Le Lievre v. Gould is not qualified by Donoghue's Case and so at the moment the law is fixed. Asquith L.J. observes that Donoghue's Case has never been applied to injury other than physical, by which I apprehend he means to include also material injury. Without being dogmatic this seems to be generally true on the authorities. Perhaps it is more accurate to say that Donoghue's Case has never so far been applied to negligence in words. There may well be a substantial practical reason of a general character for that, as is suggested by Cohen L.J. in a long quotation from the language of Cardozo C.J. in Ultramares Corporation v. Touche (1931) 255 N.Y. Rep. 170. I think that in English law the general duty for purposes of the law of tort should as the law stands be limited so as not to include mere negligence in words and the first part of the rule in Re Polemis should be limited accordingly or at least only applied if it is applied with a difference.

Donoghue v. Stevenson has been referred to in some of the judgments in this Court in *Dozois v. Pure Spring Co. Ltd.* (1): *Marleau v. People's Gas Supply Co.* (2): *Attorney-General v. Jackson* (3): *The King v. Anthony* (4) and *Booth v. St. Catharines* (5), but in none of these cases was there any question as to its application to cases such as the present.

We have been referred to the decision of Wright J. in *Wilkinson v. Downton* (6), which, it is suggested, touches in some manner on the point to be decided here. There a defendant who had falsely represented to the plaintiff that her husband had met with a serious accident, knowing the statement to be untrue and intending that it should be believed, was held liable. The basis upon which liability was found was that the defendant had wilfully done an act calculated to cause physical harm to the plaintiff and had in fact cause such harm to her. In the present matter it is common ground that the defendant published the article in good faith, believing it to be true, and without malice. The matters considered in *Janvier v. Sweeney* (7), appear to me to be equally remote from the question arising in the present action.

If the principle which has been applied in the leading cases to which I have referred, where damage has been occasioned by acting upon the faith of a misstatement innocently made, is applicable to a claim where the damage is nervous shock or some other physical injury resulting from merely reading or hearing the statement, the matter

(1) [1935] S.C.R. 319.
(2) [1940] S.C.R. 708.
(3) [1945] S.C.R. 489.
(4) [1946] S.C.R. 569.
(5) [1948] S.C.R. 564.
(6) [1897] 2 Q.B. 57.
(7) [1919] 2 K.B. 316.

1953

GUAY v. SUN PUBLISHING CO. LTD.

Locke J.

is concluded by authority. It is, however, urged on behalf of the present appellant that since the injury in respect of which damages are claimed was suffered as a result of reading the false report, and not as a result of acting upon it, some different principle applies. If this contention were sound, it would, in my opinion, follow that if, through an error in the stock market reports carried by nearly all daily newspapers, the quoted price of a stock was shown at one-half its true market price on that day, a person whose entire fortune was invested in that stock, reading the report and sustaining a severe nervous shock in finding that he had suffered a calamitous loss, could recover damages but if, believing the report, he immediately sold his shareholdings by private contract for much less than their true worth before discovering the error in the report, there could be no recovery. It will not do, in my opinion, to say that a person negligently, though innocently, publishing a false stock market report would not reasonably contemplate that nervous shock might be sustained by persons whose fortunes would be greatly affected if the report were true. It is a matter of common knowledge that during the depression of 1929 many persons who lost fortunes were seriously affected in health and that many people destroyed themselves. If there is any authority for the distinction other than the language employed by Wrottesley J. in *Old Gate Estates v. Toplis,* we have not been referred to it and I am unable to discover any. Logically, I can see no basis for any such distinction.

In *Heaven v. Pender,* Brett M.R. (later Lord Esher), in considering a claim advanced against a dock owner by a workman in the employ of a ship painter, who had contracted with a ship owner to paint the outside of a ship, for injuries sustained by the collapse of a staging outside of the ship supplied by the dock owner under contract with the ship owner, said in part (p. 509):—

> The proposition which these recognised cases suggest and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

If this language was to be taken literally, it could be applied to the circumstances of the present case and it may be noted that the distinction sought to be drawn here between claims for injury to the person and claims for injury to property is not made. It is perhaps due to the fact that when in *Le Lievre v. Gould* (1), Lord Esher made it clear that, in his view, this statement of the law had no application where the claim was for negligent misrepresentation, that one does not find in the reports either in England or Canada decided cases in which claims were considered of the nature asserted in the present action until after the decision in *Donoghue v. Stevenson* in 1932.

In that case, Lord Atkin, referring to the above quoted statement from the judgment of Brett, M.R. in *Heaven v. Pender* and saying that, as framed, it was demonstrably too wide, said, following that portion of his judgment which I have quoted above at 580:—

> This appears to me to be the doctrine of Heaven v. Pender as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith, L.J. in Le Lievre v. Gould.

After quoting further from what had been said in *Le Lievre v. Gould,* Lord Atkin continued (p. 581):—

> I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

With this limitation Lord Atkin appears to have adopted the statement of Brett M.R. in *Heaven v. Pender.* This is the view taken by the learned author of Salmond on Torts (10th Ed. p. 434, Note X) and, as pointed out by Asquith L.J. in *Candler v. Crane* (p. 188), while Lord Atkin pointedly referred to *Gould's* case in his speech he neither hinted nor suggested that it was wrongly decided or that his statement of the law was inconsistent with it.

As Lindley, L.J. said in the course of his judgment in *Angus v. Clifford,* the controversy as to whether an action for negligent misrepresentation, as distinguished from fraudulent representation, could be maintained, was settled once and for all by the judgment of the House of Lords in *Derry v. Peek.* This statement must be taken to be qualified by the judgment in *Nocton v. Ashburton,* but the

(1) [1883] 1 Q.B. 491.

1953

GUAY
v.
SUN
PUBLISHING
CO. LTD.

Locke J.

present matter does not fall within any of the exceptions which are, in my opinion, accurately enumerated in the passage from the 10th edition of Salmond on Torts above referred to. This was the state of the law when the judgment of Lord Atkin in *Donoghue v. Stevenson* was written and, unless he had changed his mind about the matter after he wrote his judgment in *Shapiro v. La Morta,* this was also his view of the law. I do not think that the passage from his judgment in *Donoghue v. Stevenson* was intended by him to declare the law as to the liability for negligent misstatements or to have any application to such liability. It is inconceivable, in my opinion, that if Lord Atkin and the Law Lords who agree with him in *Donoghue v. Stevenson* had intended to declare a principle of law inconsistent with what had been decided in the House of Lords in *Derry v. Peek* and *Nocton v. Ashburton* and by the Court of Appeal in *Le Lievre v. Gould,* they would not have said so in plain terms. That this is the considered view of Lord Wright is made clear from the article written by him in the Modern Law Review.

This appeal fails, in my opinion, and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Freeman, Freeman & Silvers.*

Solicitors for the respondent: *Russel & Dumoulin.*

EDGAR TAILLON AND DAME LEONA DONALDSON (*Defendants*) } APPELLANTS;

1953
*Jun. 17
*Oct. 6

AND

MARCEL DONALDSON (*Petitioner*) .....RESPONDENT.

AND

THE HONOURABLE MAURICE DUPLESSIS AS ATTORNEY GENERAL FOR QUEBEC ..... } MIS-EN-CAUSE.

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

Infant—Custody—Habeas Corpus—Child left with uncle and aunt for seven years—Right of parents to custody—Interest of child—Whether parents unfit or incapable—Art. 243 C.C.

The natural right of parents to the custody of their children as sanctioned by Art. 243 C.C., is displaced where it is shown that they are unfit or incapable.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing the decision of the trial judge and awarding custody of an infant child to its father, the respondent.

By way of habeas corpus proceedings, the respondent sought to obtain custody of his seven year old son whom, at his birth, he had placed with the appellants, the child's uncle and aunt. The evidence disclosed that both families lived in the same city and had visited each other frequently and that the attitude of the respondent and his wife toward the child had up to the time of these proceedings been one of complete indifference. The trial judge found that the unfitness of the respondent had been established and that finding was accepted by this Court (Taschereau and Fauteux JJ. dissenting).

Jean Mercier Q.C. for the appellants.

Geo. R. Fournier Q.C. for the respondent.

TASCHEREAU, J. (dissenting):—Le principe fondamental qui doit guider les tribunaux dans une cause comme celle qui nous est soumise, découle non seulement de la loi naturelle, mais se trouve consacré par les dispositions de l'article 243 du *Code Civil*, qui veut que l'enfant demeure sous l'autorité de ses parents jusqu'à sa majorité.

*PRESENT: Taschereau, Kellock, Estey, Cartwright and Fauteux JJ.

(1) Q.R. [1953] K.B. 332.

1953

TAILLON v. DONALDSON

Taschereau J.

Cette autorité parentale ou puissance paternelle à laquelle est soumis un enfant mineur, comporte pour les parents différents droits, dont les droits de garde, de direction et de surveillance.

Il peut arriver sans doute en certains cas, que cette puissance paternelle soit l'objet d'une déchéance, car la jurisprudence admet que les tribunaux en cas d'abus, peuvent exercer un droit de contrôle qui les autorise à priver le père ou la mère, selon le cas, de la puissance paternelle.

Comme l'a dit M. le Juge Philippe Demers dans la cause de *Moquin v. Turgeon* (1):

> Le père, et la mère, à son défaut, ont d'après le droit naturel droit à la garde de leur enfant. Pour qu'ils soient privés de ce droit, il ne suffit pas d'un caprice de l'enfant; il faut une raison, soit que le père ait *abusé de son droit, soit qu'il soit indigne ou incapable de l'exercer.* Dans ces cas, étant incapable de remplir son devoir, il ne peut réclamer de son droit. C'est ainsi que les auteurs peuvent logiquement dire que l'intérêt des enfants doit seul guider le juge.
>
> Se baser sur d'autres principes c'est tomber dans l'arbitraire. Qui d'ailleurs peut dire ce qui sera en définitive le plus avantageux pour les enfants, la garde de leur grand'mère ou celle de leur mère? Dieu seul le sait. Il me paraît plus sage, dans le doute, de suivre la loi naturelle.

Dans *Marshall v. Fournelle* (2), M. le Juge Rivard disait:—

> Dans certaines circonstances extraordinaires, quand les parents sont *incapables ou indignes* d'exercer la puissance paternelle, l'intérêt bien compris de l'enfant, d'accord avec la raison, la morale et l'humanité, peut justifier le pouvoir judiciaire d'intervenir dans l'organisation de la famille. Ce n'est alors qu'en apparence que le droit naturel est contrecarré. Le principe reste toujours debout: *c'est au père qu'il appartient d'élever son enfant, et, le père disparu, la mère exerce le même pouvoir, remplit les mêmes obligations.* Telle est la doctrine consacrée par notre Code Civil (art. 83, 113, 165, 242, 243, 244, 245). Seuls des motifs impérieux et exceptionnels peuvent incliner les juges à s'en écarter; car, ainsi qu'un tribunal de France s'est exprimé: "Les droits qui dérivent de la puissance paternelle sont antérieurs à toute législation et ont leur source dans la nature; et un intérêt d'ordre public, qui doit dominer tous les intérêts privés s'oppose à ce qu'il soit porté atteinte à une institution que le législateur n'a pas établie, mais qu'il ne fait que consacrer. (Puy, 10 déc. 1869, B.P. 70. 4.64).

Telle est, je crois, la véritable doctrine où l'on voit que ce n'est que dans les cas *d'incapacité* ou *d'indignité* de leurs parents, que les enfants mineurs sont soustraits à l'autorité paternelle.

Il est certain que l'intérêt de l'enfant doit être considéré, et doit même être le principal souci des tribunaux. En effet, si le père est incapable ou se montre indigne, l'intérêt

(1) Q.R. (1912) 42 S.C. 232. (2) Q.R. (1926) 40 K.B. 391 at 395.

de l'enfant sera évidemment mis en péril. Mais l'intérêt et le bien-être de l'enfant, comme l'a justement dit le Juge Rinfret dans *Stevenson v. Florant* (1), confirmé par le Conseil Privé (2), ne résident pas surtout dans le confort matériel, mais dans les soins et l'affection paternels, les avantages de l'éducation familiale et religieuse.

L'intimé a deux autres enfants qui demeurent avec lui, et avec le concours de son épouse, il les élève convenablement.

Pour les raisons données par mon collègue M. le Juge Fauteux, je suis d'opinion qu'il n'a pas été démontré que l'intimé soit indigne ou incapable d'apporter les mêmes soins à l'éducation de celui qu'il réclame par les présentes procédures.

Je suis d'opinion de rejeter l'appel avec dépens.

KELLOCK J.:—This is an appeal from a judgment of the Court of Queen's Bench, Appeal Side, of the Province of Quebec (3) reversing a judgment of the Superior Court in favour of the appellants in custody proceedings instituted by the respondent, the father of the child, a boy, seven years of age.

It appears that shortly after the birth of the child, the latter was placed by its parents with the appellants, its uncle and aunt and godfather and godmother, the female appellant being a sister of the respondent.

In the Superior Court the respondent alleged that the child had been left with the appellants only temporarily for a few days as a matter of convenience to the respondent and his wife and that when the respondent in due time asked for his son, the appellants refused to give him up. The respondent further alleged that periodically from that time on, throughout the whole seven years, he had endeavoured to obtain possession of his child but without success due to the fact that the appellants hid the child and kept him from the respondent. In November of 1952, the respondent instituted the present proceedings, having in the previous July instituted proceedings for the same purpose in the Family Court which terminated adversely to him. The respondent contends that the last mentioned court was without jurisdiction and I am content to accept that view.

(1) [1925] S.C.R. 532 at 548. (2) [1927] A.C. 211.
(3) Q.R. [1953] K.B. 332.

1953

TAILLON v. DONALDSON

Kellock J.

The story, as detailed in evidence by the respondent and his wife as to the events of the seven years and their desire and efforts to obtain possession of the child, is so improbable on its face that it is not surprising that it did not find acceptance with the learned trial judge.

The inherent frailty of the story may be demonstrated without dealing with the whole of it. It appears, even on the respondent's own showing, that both families lived in the same city, where they met from time to time. Moreover, for a number of summers they occupied cottages within a few feet of each other, while during the summer of 1949, both families actually lived together in the same cottage. This is quite sufficient to show that the respondent's story, both as to his desire and the lack of opportunity to have his child, is completely untrue. It was so regarded by the learned trial judge.

The learned judge found, against the denial of the respondent and his wife, that shortly after the birth, the respondent had asked the male appellant if he would take the child, as otherwise the respondent proposed to give him to strangers. These circumstances are deposed to by a number of witnesses. It will be sufficient to quote the evidence of the appellant, Edgar Taillon, as to what passed between him and the respondent on the occasion referred to. The respondent said:

> 'Edgar, est-ce que tu veux prendre l'enfant' J'ai dit: 'Pourquoi?' Ah bien, il dit: 'on n'en veut pas.' J'ai dit: 'pourquoi que tu veux pas de cet enfant-là? Je n'ai pas eu aucune réponse. Il dit: 'si tu le prends pas, je vais le placer ailleurs.'

It was under such circumstances that the child entered the household of the appellants, who say, and the learned judge accepts their evidence, that from that time until the 9th of July, 1952, when they received a communication from the Family Court, neither the respondent nor his wife made any request of any kind for the return of the child, both being completely indifferent to the child, although they had every opportunity not only to see him but have possession of him had they so desired. In the words of the learned judge:

> ce qui appert indubitablement c'est que, sauf par la présente procédure, le requérant n'a jamais demandé la possession de l'enfant.

During the whole of this period the respondent contributed nothing to its support, although he received and retained the family allowance in respect of the child.

The attitude of the respondent and his wife having thus been that of complete indifference toward the child throughout the whole period, the motive which prompted the launching of these proceedings assumes importance. The story advanced on behalf of the respondent not having been believed by the learned trial judge, and in my opinion being incapable of belief, the reason for their sudden change of front is left completely unexplained so far as the respondent and his spouse are concerned. There is other evidence in the record, however, which is significant.

The respondent in attempting an explanation why he had not instituted proceedings at an earlier date deposed that "j'ai essayé à maintes reprises" but "dans le temps que mon père vivait" he had counselled the respondent "mène donc pas de chicane dans la famille" and that "c'est pour pas faire de chicane" that he had acted on this advice. It appears, however, that upon the death, the family immediately began quarrelling over the estate of the father, the respondent and his wife being ranged on one side and the appellants and the respondent's mother on the other side.

Counsel for the respondent, in the course of the trial, referred to this "chicane ouverte" in the family which had broken out upon the inheritance by the respondent upon the death of his father of certain property of the latter. In the words of respondent's counsel

> *depuis ce temps-là,* entre ce clan Donaldson et le fils Donaldson, il y a eu un débat.

It is contended for the appellant that the existence of this quarrel furnishes the explanation for the seeming change of heart on the part of the respondent and for the institution of these proceedings. The record contains no other explanation. In the course of his judgment the learned trial judge found:

> Qu'il est plus avantageux à l'enfant de le laisser entre les mains des intimés, que de lui bouleverser la vie en l'enlevant d'un milieu où il est tenu en affection par des gens dévoués, qui lui ont prodigué leurs soins, leur affection et leurs biens pendant sept ans, pour le renvoyer dans un milieu *où évidemment il n'existe aucune affection ni égard selon ce qui appert depuis ces sept années;*

It will be observed that this finding completely negatives any suggestion that the institution of these proceedings was due to the existence of any bona fide parental feeling on the part of the respondent toward his child. In my respectful opinion this appraisal of the evidence by the

1953

TAILLON v. DONALDSON

Kellock J.

learned trial judge is eminently sound and, in the interests of the child, ought not to have been disturbed.

In the Court of Appeal, Galipeault C.J., refers to the finding of the learned trial judge set out above and adds:

En autant que l'intérêt de l'enfant est concerné, je partage en tout l'opinion du savant juge.

Il est extraordinaire que pendant sept ans, le père et mère de l'enfant se soient si peu intéressés à ce dernier, bien qu'il ait vécu bien près d'eux, dans l'entourage de sa propre famille, y compris ses frères, lui ont témoigné si peu d'affection. Pendant sept ans, et il n'y a pas contradiction sur le point, le père et la mère n'ont pas songé non seulement à se donner le moindre souci pour agrémenter le sort et la vie de l'enfant, à lui procurer le moindre petit cadeau aux jours d'anniversaire, de Noël ou du Jour de l'An, si ce n'est lors de la dernière année alors qu'on lui aurait fait parvenir une somme de $5.00 qui a été employée à l'achat de choses utiles.

Ils n'ont jamais, sauf en ces derniers temps, sérieusement songé à reprendre leur fils avec eux.

* * *

Au cours même des dépositions de Marcel Donaldson et de son épouse, on ressent bien que ce n'est pas l'affection qui les guide pour réclamer l'enfant: il n'est pas permis d'en discerner. Il est bien sûr que le procès, la mise en exercice de l'autorité paternelle ou la revendication de l'enfant proviennent d'une mésentente entre le père et la mère d'un côté, l'oncle et la tante de l'autre. Un drame de famille dont, à mon avis, l'enfant sera victime.

Il a aujourd'hui sept ans, l'âge de raison, et l'on sait ce qui peut naître et croître dans le cerveau d'un enfant de cet âge quand il se croit injustement traité, victime d'injustice. Ayant reçu pendant sept ans beaucoup d'affection, quelle pourra être l'influence sur sa personnalité s'il ne rencontre que de l'indifférence. Jusqu'ici, pour ses père et mère, il a été un étranger.

* * *

Existe-t-il suffisamment au dossier pour en venir à la conclusion que l'appelant et son épouse sont indignes d'exercer l'autorité paternelle? J'avoue que ce serait mon avis, et le juge de première instance qui ne l'a pas déclaré expressément, le laisse bien entendre dans le Considérant que j'ai rapporté ci-dessus.

Notwithstanding, however, the learned Chief Justice felt that the authorities did not permit him to act upon this view and he therefore concurred in allowing the appeal, but he did so

Avec beaucoup d'hésitation et de répugnance, je crois devoir ne pas enregistrer une dissidence à l'encontre de l'information du jugement.

In my respectful view, the authorities, properly understood, required a different conclusion upon the facts of this case.

St-Jacques J., with whom Gagné J., concurred, was influenced in the conclusion to which he came by certain evidence given by the female appellant in which she had said that if the parents of the child had ever asked for his

return, she would have acceded to it. The learned judge found it difficult to accord this evidence with the course followed by the appellants in defending the proceedings when actually brought.

With respect, I think that what the witness was saying was that if the parents of the child had shown any genuine interest in him throughout the seven years of his life before the proceedings were launched, the appellants would have acceded to their desire, but that the attitude of the parents being what it was, the proceedings were not the result of any genuine parental affection for the child but were prompted by the ulterior motive which the evidence reveals. In such circumstances the appellants had defended.

In my respectful opinion, the real effect of all the evidence as well as the findings of the learned trial judge were not properly appreciated in the court below and there was resulting error.

It is well settled that the normal right of the parents to the custody of a child is displaced where it is shown that "indignité" or unfitness to have such custody exists. The fact that the respondent and his wife were bringing up two other children and had not been shown "indigne" with respect to them appears to have had considerable weight in the court appealed from. It is to be observed, however, that the fitness of the parents to have custody of those children was not an issue in these proceedings, nor does it follow that merely because a parent may be fit to have the custody of some of his children the question is thereby concluded as to all. As was said by the present Chief Justice of this court in *Dugal v. Lefebvre* (1):

> Sans chercher à accabler le requérant, dont il faut, par ailleurs, reconnaître les nombreux mérites et qui évidemment a fort bien élevé ses autres enfants, il est malheureusent difficile (parce que c'est notre devoir) de lui éviter le reproche qu'il paraît avoir négligé et abandonné l'enfant qui est en cause . . .

Rinfret J., as he then was, went on to say:

> L'autorité paternelle n'accorde pas seulement des droits, elle comporte aussi des devoirs. Ils sont inscrits dans le code. Et si les parents désirent que les tribunaux les aident à conserver l'affection et l'attachement de leurs enfants, il faut au moins qu'eux-mêmes s'y intéressent.

In the same case Cannon J., said, at p. 510:

> Je crois qu'il est maintenant admis par la doctrine que les droits et pouvoirs du père et de la mère sur la personne des enfants mineurs ne leur sont accordés que comme conséquence des lourds devoirs qu'ils ont à

(1) [1934] S.C.R. 501 at 508.

1953

TAILLON v. DONALDSON

Kellock J.

remplir et n'ont d'autre but que de leur rendre possible l'entretien et l'éducation de l'enfant. C'est pour la protection de l'enfant que l'autorité 'parentale' existe.

And at page 511:

L'esprit de la loi—et le requérant l'a oublié—n'est pas favorable à l'exercice arbitraire de son autorité quand les circonstances exigent de fortes raisons pour bouleverser la situation faite au mineur par l'acte même du père en le confiant, dès son bas âge, à des parents de sa défunte femme.

In *Dugal's* case the child there in question, who was over fifteen, did not desire to return to the father. That element is not present in the case at bar, which falls to be decided upon the fitness or otherwise of the respondent. In my opinion, if the findings of the learned trial judge be accepted, as in my opinion they should be, such unfitness has been fully made out. I would allow the appeal and restore the judgment at trial with costs.

ESTEY, J.:—The respondent, the father of Joseph-Edgar-Michel Donaldson (hereafter referred to as Michel), by way of habeas corpus proceedings seeks to obtain possession of Michel who, since the date of his birth, has resided with the appellants, his aunt and uncle, Mme. Taillon being the sister of the respondent.

Michel was born October 18, 1945, and was at the time of the trial a little more than seven years of age. The parties hereto have apparently been friendly throughout these seven years and, while the evidence at the trial was most contradictory on many relevant points, it is clear that on the date of his baptism his father asked the appellants to care for him at least for a short ime.

Michel, after his birth, was retained at the hospital for some time and taken directly therefrom by his father to the home of the appellants. The latter have in every way cared for him and provided for his keep. He has always been known by his own name and was so registered at church and school. While the parents have received the mother's allowance, apart from the sum of $5.00 they have contributed nothing to his upkeep. They contend that throughout the years they have been repeatedly refused the custody of their child by the appellants and that the latter have, at times, sought to hide and conceal Michel from them. On the other hand the appellants depose that the parents have never requested his custody and had they done so they

would have surrendered him. Moreover, they depose that they have taken him to visit with his parents at the latter's home, but that his parents have at all times looked to the appellants to care and provide for him.

The evidence is in many respects most contradictory and it is a case in which the language of my Lord the Chief Justice (then Rinfret J.) in *Dugal v. Lefebvre* (1), is applicable:

> La décision qu'il s'agit de rendre est souvent fort délicate et dépend dans une large mesure de l'exercice d'une sage discrétion—discrétion judiciaire, bien entendu, mais que le juge de première instance est mieux placé pour exercer, parce qu'il a l'avantage de voir les personnes et qu'il est mêlé de plus près aux circonstances spéciales de chaque cause.

The learned trial judge accepted the evidence of the appellants wherever there was conflict and finds:

> il n'existe aucune affection ni égard selon ce qui appert depuis ces sept années.

The relevant law is stated by my Lord the Chief Justice (then Rinfret J.) in *Stevenson v. Florant* (2):

> L'intérêt de l'enfant, qu'il faut prendre en considération, son bien-être, ne résident pas surtout dans le confort matériel, mais dans les soins et l'affection paternels, dans les avantages de l'éducation familiale et religieuse. Le chagrin passager que l'enfant va, sans doute, ressentir en laissant ceux avec qui il a vécu et qui furent bons pour lui, et en changeant d'entourage, ne saurait se comparer à la satisfaction permanente et au bonheur solide qu'il ne tardera pas à éprouver en réalisant qu'il est désormais chez lui, dans sa demeure, par droit de naissance et non plus en vertu de la bienfaisance d'un étranger qui n'a pas envers lui d'obligation légale; (Brown v. Partridge, 1925—1 W.W.R. 378, confirmé par cette cour le 13 mai 1925); en grandissant dans l'honneur et le respect pour ses parents (art. 242 C.C.), à l'ombre de leur autorité (art. 243 et seq.). C'est là l'intérêt bien compris de l'enfant d'accord avec celui de la famille et de l'état.

The evidence does not disclose any particular difference between the ability of the respective parties hereto to contribute to the material well-being of Michel but, upon the finding of the learned trial judge, which is supported by the evidence, there does not appear to be present at the home of the respondent that natural parental care and affection which the foregoing statement of the law contemplates but which is present at the home of the appellants. In this regard the learned trial judge stated as follows:

> . . . il est tenu en affection par des gens dévoués, qui lui ont prodigué leurs soins, leur affection et leurs biens pendant sept ans, pour le renvoyer dans un milieu où évidemment il n'existe aucune affection ni égard selon ce qui appert depuis ces sept années.

(1) [1934] S.C.R. 501 at 507. (2) [1925] S.C.R. 532 at 548.

1953

TAILLON v. DONALDSON

Estey J.

While the interests of an infant may normally best be served in the home of his parents, in circumstances such as here present, where the child's welfare must be the paramount consideration, the finding of the learned trial judge, who had the advantage of seeing and hearing the witnesses, that there is absent from the home of his parents one of the most important essentials in the life of a child but which is present in the home of those in whose custody he has been, ought to be accepted, unless there is in his finding some manifest error. In this case the conduct of the appellants, from the date of Michel's birth until at least a short time before these proceedings were commenced, supports the learned trial judge's finding. Moreover, the record does not disclose any fact or circumstance which it can be said the learned trial judge has overlooked or misconstrued and that might constitute a manifest error.

In my opinion the appeal should be allowed and the judgment of the learned trial judge restored.

CARTWRIGHT J.:—The relevant facts out of which this appeal arises are set out in the judgment of my brother Kellock. I agree with his reasons and with those of my brother Estey and I wish to add only a few words.

In my opinion the principles of law applicable to a case in which the Court is called upon to decide whether an infant child is to be returned to the custody of its parents or to remain in that of others with whom it has lived for a long period are well settled. As was said by Middleton J. in *re Steacy* (1):

> In all the law relating to the custody of children, the true welfare of the child is being ever more clearly written as the fundamental axiom to which all other considerations must in the end yield.

It is equally well established that the parental right to the custody of a child is not to be interfered with unless there exist reasons for so doing which are, to use the words of Rinfret J., as he then was, in *Dugal v. Lefebvre* (2), "sérieuses et exceptionnelles", or, to use those of Lord Esher M.R. in *The Queen v. Gyngall* (3) "very serious and important."

I find nothing in the reasons of the learned trial judge to suggest that he did not apply these rules. The salient facts, established by the evidence which he believed, are

(1) (1923) 24 O.W.N. 304 at 305. (2) [1934] S.C.R. 501 at 504.
(3) [1893] 2 Q.B. 232 at 242.

that, for some reason which does not appear, the parents of this child have been throughout his life devoid of all natural affection for him and that they now seek his custody not because of any belated awakening of such affection but by reason of a disagreement with the appellants, who admittedly love the child as dearly and have cherished him as carefully as if he were their own and desire to continue to do so. It is not surprising to find that there was no contradiction of the evidence of the doctor who has attended the child throughout his life-time and expressed the opinion that his removal from the only home he has ever known to that of his parents would cause him grave injury. In the facts thus briefly summarized the learned trial judge, who has had great experience and who had the advantage of seeing all the parties, found the very serious and important reasons necessary to require the Court to refuse to give effect to the *prima facie* right of the parents to have the custody of their child. In my respectful view his decision was right.

I would dispose of the appeal as proposed by my brother Kellock.

FAUTEUX J. (dissenting):—Il s'agit d'un appel d'un jugement unanime de la Cour du Banc de la Reine de la province de Quebec (1) maintenant, avec dépens, un bref d'habeas corpus. Ce bref, émis à l'initiative de l'intimé Marcel Donaldson, employé civil, pour contraindre les appelants à lui remettre son enfant, Michel, âgé de sept ans, fut contesté avec succès, en Cour Supérieure, par ces derniers. En défense, ils plaidèrant, en substance, (i) quant à la procédure:— qu'il n'y avait pas lieu, en l'espèce, au bref d'habeas corpus, l'enfant n'étant pas privé de sa liberté et demeurant libre de retourner chez ses père et mère, s'il le désirait, et (ii) qu'au mérite:— le père était indigne de la garde de cet enfant, abandonné dès sa naissance et, depuis lors, l'objet du désintéressement de ses père et mère.

La Cour Supérieure donna raison aux appelants pour le motif suivant:—

CONSIDÉRANT qu'il est plus avantageux à l'enfant de le laisser entre les mains des intimés, que de lui bouleverser la vie en l'enlevant d'un milieu où il est tenu en affection par des gens dévoués, qui lui ont

(1) Q.R. [1953] K.B. 332.

1953

TAILLON v. DONALDSON

Fauteux J.

prodigué leurs soins, leur affection et leurs biens pendant sept ans, pour le renvoyer dans un milieu où évidemment, il n'existe aucune affection ni égard selon ce qui appert depuis ces sept années.

La Cour d'Appel, cassant ce jugement, et maintenant le bref, déclara au jugement formel et unanime:—

CONSIDÉRANT que la preuve démontre que le requérant est un homme de bonne réputation, qu'il gagne honorablement sa vie et celle de sa famille et qu'il est digne de reprendre son enfant pour l'élever avec deux autres frères plus jeunes.

CONSIDÉRANT que l'autorité paternelle du requérant est absolue qu'il avait droit d'exercer le recours du bref d'habeas corpus au moment où il l'a fait émettre.

Sur la procédure. La disposition du premier moyen invoqué au plaidoyer des appelants n'offre aucune difficulté. En fait, il n'apparaît pas que cet enfant ait la discrétion requise pour exercer un choix judicieux entre les parties. Il n'a pas témoigné et le dossier n'indique pas, par ailleurs, qu'il ait été appelé à faire cette option. Ces deux faits constituent une distinction à noter entre cette cause et la décision de cette Cour dans *Dugal v. Lefebvre* (1), où il s'agissait d'un enfant de quinze ans ayant fait un choix, d'ailleurs non désapprouvé par la Cour. En droit, le fait pour un enfant en bas âge d'être sous la garde d'une personne autre que celle à qui la loi confère cette autorité et ce contrôle, est assimilé à une privation de liberté donnant lieu au bref d'habeas corpus. Voir les autorités citées par M. le Juge Rinfret, maintenant Juge en chef de cette Cour, dans *Stevenson v. Florant* (2). D'ailleurs, à l'audition devant cette Cour, cette proposition de droit n'a été l'objet d'aucune discussion.

Au mérite. Dans la considération de pareils litiges, les tribunaux seraient impuissants à se libérer de l'angoisse s'attachant à la responsabilité de la décision à rendre, n'était-ce la clarté avec laquelle les principes, auxquels ils doivent recourir, ont été établis. On les retrouve formulés particulièrement aux décisions suivantes:— *Stevenson v. Florant* (*supra*) confirmée par le comité judiciaire du Conseil Privé (3); *Marshall v. Fournelle* (4), confirmant le jugement des Cours inférieures (5); *Kivenko v. Yagod* (6); *Dugal v. Lefebvre* (*supra*). De la jurisprudence, il apparaît clairement que ce qui domine la question, c'est l'intérêt de

(1) [1934] S.C.R. 501.
(2) [1925] S.C.R. 532.
(3) [1927] A.C. 211.
(4) [1927] S.C.R. 48.
(5) Q.R. (1926) 40 K.B. 391.
(6) [1928] S.C.R. 421.

l'enfant. Il ne s'agit pas, cependant, d'un intérêt purement matériel, passager ou en quelque sorte étranger à l'organisation de la famille. Dans toutes ces dispositions du Code Civil sanctionnant la reconnaissance, le maintien et le développement de cette institution naturelle qu'est celle de la famille, l'intérêt de l'enfant a été l'objet d'une particulière considération du Législateur et, de cet intérêt, on ne saurait conséquemment se faire une conception nettement juridique sans tenir compte des droits et obligations qui y sont établis. Bref, on peut difficilement traduire et résumer le véritable esprit de la loi sur le point en termes meilleurs que ceux employés par M. le Juge Rivard, de la Cour d'Appel, dans la cause de *Marshall v. Fournelle* (*supra*), termes approuvés par cette Cour dans *Dugal v. Lefebvre* (*supra*):—

> Dans certaines circonstances extraordinaires, quand les parents sont *incapables ou indignes* d'exercer la puissance paternelle, l'intérêt bien compris de l'enfant, d'accord avec la raison, la morale et l'humanité, peut justifier le pouvoir judiciaire d'intervenir dans l'organisation de la famille. Ce n'est alors qu'en apparence que le droit naturel est contrecarré. Le principe reste toujours debout; *c'est au père qu'il appartient d'élever son enfant, et, le père disparu, la mère exerce le même pouvoir, remplit les mêmes obligations.* Telle est la doctrine consacrée par notre Code Civil (art. 83, 113, 165, 242, 243, 244, 245). Seuls des motifs impérieux et exceptionnels peuvent incliner les juges à s'en écarter; car, ainsi qu'un tribunal de France s'est exprimé: "Les droits qui dérivent de la puissance paternelle sont antérieurs à toute législation et ont leur source dans la nature; et un intérêt d'ordre public, qui doit dominer tous les intérêts privés s'oppose à ce qu'il soit porté atteinte à une institution que le législateur n'a pas établie, mais qu'il ne fait que consacrer." (Puy, 10 déc. 1869, B.P. 70.4.64).

Ce n'est donc que dans des circonstances extraordinaires et pour des motifs impérieux et exceptionnels, telles l'incapacité ou l'indignité du titulaire légal aussi bien que naturel du droit à la puissance paternelle, que les Juges peuvent s'écarter de ces principes.

En l'espèce, on ne conteste pas que le père ou, à son défaut, la mère, soit capable d'exercer la puissance paternelle.

On a concédé également, à l'audition, que l'intimé et son épouse élèvent très bien leurs deux autres enfants, les deux frères de Michel. C'est là reconnaître qu'ils sont dignes,—au moins à l'égard de ces deux fils,—de remplir les charges et d'exercer les droits à eux conférés par le droit naturel et reconnus par la loi.

1953

TAILLON v. DONALDSON

Fauteux J.

Quant au cas de Michel, le reproche d'indignité formulé par les appelants reposerait, en substance, sur la double accusation (i) qu'ils l'auraient abandonné quelques jours après sa naissance et (ii) qu'ils s'en seraient, depuis lors, totalement désintéressés.

La preuve ne permet pas d'affirmer que cet enfant a été abandonné à sa naissance par ses parents quand, de fait,—et c'est là l'expression du Juge de première instance,—il *a été confié* par eux à ses oncle et tante, les appelants, et ce dans des circonstances dont il faut tenir compte. A ce temps, les deux époux Donaldson n'avaient pas leur propre résidence. On vivait chez les grands-parents. De plus, la mère était de santé précaire et avait déjà sous ses soins un bébé de dix-sept mois, lui-même malade. Ceux à qui ils confièrent alors leur enfant, soit les appelants, outre d'être oncle et tante de l'enfant, étaient également ses parrain et marraine. Etant eux-mêmes sans enfant et, de toute apparence, sans soucis financiers, ils paraissent avoir accepté cette addition à leur foyer comme un bonheur comblant un vide et compensant plus que la charge nouvelle. Somme toute, il faut reconnaître que meilleur foyer, pour leur enfant, ne pouvait être trouvé par les intimés dans les circonstances. Il est vrai que, suivant certains témoins dont l'hostilité s'avère à son égard, le père aurait, en l'occurrence, fait certaines déclarations qui, tenues comme prouvées et prises au pied de la lettre aussi bien que sans tenir compte des circonstances ci-dessus, seraient aptes à mettre en doute les sentiments qu'il pouvait avoir alors à l'égard de cet enfant. Ces témoignages ne correspondent pas, cependant, au récit de l'incident fait par lui et son épouse. A cela, on pourrait ajouter que la preuve, d'autre part, révèle également certaines déclarations des appelants eux-mêmes à l'enfant Michel,—c'est une dame Beaulieu qui en témoigne,—déclarations dont l'effet est manifestement d'enlever le respect que cet enfant doit à son père et dont la teneur est loin de suggérer l'affection des appelants vis-à-vis l'enfant. Aussi bien, cette accusation d'abandon ne peut être tenue comme sérieuse.

Quant au reproche que, durant sept ans, les intimés n'auraient fait aucune démarche pour reprendre leur enfant en leur domicile et s'en seraient en quelque sorte désintéressés, il faut reconnaître que, dans une certaine mesure, il

n'est pas sans fondement. Durant cette période, les appelants affirment avoir régulièrement conduit l'enfant en visite chez ses père et mère et, de cela, ces derniers paraissent bien, généralement, s'être satisfaits. Et ce n'est que quelques mois avant l'émission du bref qu'ils ont manifestement fait des démarches sérieuses pour reprendre leur enfant. La nécessité des procédés par eux adoptés à la Cour du Bien-Etre Social, avant d'initier la présente action, suggère bien, cependant, la résistance anticipée des appelants à leur remettre leur enfant. Toutes les circonstances révélées par la preuve permettent-elles de frapper, et à tout jamais, les intimés d'indignité de reprendre leur enfant et satisfaire à son endroit à leurs obligations naturelles aussi bien que légales? En présence de l'admission faite à l'audition par les appelants que les intimés élèvent bien leurs deux autres fils et, conséquemment, qu'ils sont dignes de la garde de ces derniers, comment conclure que cette indignité n'existerait que quant à Michel? Le Juge de première instance n'a pas voulu prendre la responsabilité d'exprimer ce motif pour asseoir son jugement. Son refus à ce faire est significatif. Et la Cour d'Appel, dans son jugement formel et unanime, en est venue à conclure:

> . . . que, la preuve démontre que le requérant (l'intimé, père de Michel) est un homme de bonne réputation, qu'il gagne honorablement sa vie et celle de sa famille et qu'il est digne de reprendre son enfant pour l'élever avec ses deux autres frères plus jeunes.

Dans les difficultés qui se seraient élevées entre les parties autour d'une affaire de piètre importance se rattachant à une succession, on a voulu deviner un motif, et même l'unique motif, inspirant les intimés à reprendre leur enfant. Pourrait-on également y trouver celui promouvant l'obstination des appelants à ne pas le rendre? En cela, je ne puis, pour ma part, soit dit en toute déférence, trouver aucun appui pour troubler l'ordre juridique et affecter fondamentalement les droits des parties. En fait, et s'il faut nécessairement, de cette chicane d'affaires entre les parties, déceler des motifs, je croirais plutôt que l'animosité en résultant, et qui aurait elle-même comme conséquence,—suivant la prétention des appelants,—ce débat sur la personne de l'enfant, ne pourrait, si ce dernier continue de demeurer hors son foyer naturel, que se perpétuer au grand désavantage de ce dernier.

1953

TAILLON v. DONALDSON

Fauteux J.

Reconnaître que les appelants ont traité cet enfant comme s'il avait été le leur suscite naturellement à leur endroit une juste sympathie qui ne saurait, cependant, autoriser la mise à l'écart des droits et obligations supérieurs et permanents du père et de la mère, suivant les principes auxquels il a été référé. Également, la reconnaissance du même fait n'ajoute rien à la preuve soumise par les appelants contre les intimés et ne justifie pas, contre ces derniers, une conclusion d'indignité. La loi présume la dignité des parents. Celui qui invoque l'indignité doit la prouver. Devant cette présomption et la gravité de la matière, une preuve claire et solide s'impose. Je ne puis accepter comme suffisante la preuve offerte par les appelants. Le bref d'habeas corpus doit donc être maintenu.

Sans doute l'enfant, comme il arrive en tous ces cas, en subira certains désavantages, mais ces désavantages qu'il faut anticipier, pas plus que ceux que l'expert entendu, à l'initiative des appelants, envisage comme possibles, ne doivent faire obstacle au droit et faire oublier totalement la considération des avantages d'ordre fondamental et permanent que l'enfant doit raisonnablement trouver au foyer naturel avec ses père et mère et ses deux frères. Comme il fut signalé par cette Cour dans la cause de *Stevenson v. Florant:*—

> Le chagrin passager que l'enfant va, sans doute, ressentir en laissant ceux avec qui il a vécu et qui furent bons pour lui, et en changeant d'entourage, ne saurait se comparer à la satisfaction permanente et au bonheur solide qu'il ne tardera pas à éprouver en réalisant qu'il est désormais chez lui, dans sa demure, par droit de naissance et non plus en vertu de la bienfaisance d'un étranger qui n'a pas envers lui d'obligation légale (Brown vs Partridge, confirmé par cette Cour, le 13 mai 1925); en grandissant dans l'honneur et le respect pour ses parents (art. 242 C.C.) à l'ombre de leur autorité (arts 243 et seq.). C'est là l'intérêt bien compris de l'enfant d'accord avec celui de la famille et de l'État." Suivant le mot du chancelier Boyd, in re: D'ANDREA: the normal well ordered home is unquestionably preferable to the foster home, however well ordered. Ce que LAURENT exprime en d'autres termes (vol. LV, p. 368); "Mais il ne s'agit pas ici de la liberté individuelle; il s'agit de sanctionner un droit qui est établi dans l'intérêt même de l'enfant. Son droit à lui consiste à être élevé; or, pour qu'il puisse l'être, il faut qu'il soit sous la garde de son père."

Je confirmerais le jugement de la Cour du Banc de la Reine et renverrais l'appel, avec dépens.

Appeal allowed with costs.

Solicitors for the appellants: *Mercier & Cantin.*

Solicitor for the respondent: *Geo. R. Fournier.*

INDUSTRIAL ACCEPTANCE CORPORATION LIMITED (*Suppliant*) } APPELLANT;

AND

HER MAJESTY THE QUEEN (*Respondent*) ..... } RESPONDENT.

1953

*April 30
*May 1
*Oct. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Constitutional Law—Criminal Law—Conditional Sale—Evidence—Property of innocent 3rd party forfeited under s. 21, The Opium and Narcotic Drug Act, 1929, c. 49—Whether section valid legislation—British North America Act, 1867, ss. 91(27), 92(13)—Whether conviction proved— Cr. Code ss. 827(5), 982—Canada Evidence Act, R.S.C. 1927, c. 59, ss. 12, 23, 24, 25.

The original owner of a motor car sold it subject to a conditional sales contract which provided title should remain in the vendor until the purchase price was paid in full. The owner assigned his title to the appellant, a finance company. An unpaid balance was outstanding when one R., a stranger to the transaction by which the appellant acquired title, was arrested when in possession of the car and on a summary trial before a county court judge, pleaded guilty to a charge of unlawfully selling a narcotic drug contrary to s. 4(1)(*f*) of *The Opium and Narcotic Drug Act, 1929* (Can.) c. 49. Following sentence by the judge, to secure forfeiture of the car under s. 21 of the Act, which provides that when a person is convicted of an offence against the Act, any motor car proved to have been used in connection with the offence shall be forfeited to Her Majesty, counsel for the Crown filed a certificate under the seal of the court, signed by the deputy court clerk certifying that R. had pleaded guilty as charged and had been sentenced. The appellant objected to admission of the certificate as proof of conviction but was overruled and the car declared forfeited. A Petition of Right praying a declaration that the suppliant was the owner of the car as against the respondent, judgment for possession of the car or in the alternative the sum of $1,800, was dismissed by the Exchequer Court. On appeal to this court appellant argued that the trial judge erred:

(i) In adjudging that s. 21, insofar as it operated to forfeit the appellant's motor car, was intra vires Parliament since such forfeiture was not necessarily incidental to the effective exercise of the legislative authority of Parliament over the criminal law.

(ii) In adjudging that the accused had been convicted as charged, in that such conviction was not proved by admissible evidence, and that the document which purported to establish a plea of guilty, did not do so.

Held: (1)—That the forfeiture of property used in the commission of a criminal offence is an integral part of the criminal law, a subject matter of legislation by s. 91 of the British North America Act, 1867, committed to the Parliament of Canada and s. 21 of *The Opium and Drug Act, 1929* is therefore intra vires Parliament.

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

1953

INDUSTRIAL ACCEPTANCE CORPORATION v. THE QUEEN

Per: Kerwin, Taschereau, Estey, and Cartwright JJ. In the circumstances of the case the conviction was sufficiently proved by the certificate which fulfilled all the requirements of s. 982 of the *Criminal Code* and of s. 12(2) of the *Canada Evidence Act*. Had the objection been that it did not strictly comply with s. 23 of the latter Act, it might have been excluded, but since an adjournment could have been granted to permit the obtaining of a copy of the record, certified as contemplated by s. 23, effect should not be given to the objection raised.

Kellock J. agreed with the appellant's contention that neither s. 982 of the Code nor s. 12 of the Canada Evidence Act were relevant but held that the certificate was within s. 23. of the latter.

Held: (2)—(Locke J. dissenting). That the conviction of R. was sufficiently proved by the certificate tendered in evidence.

Per: Locke J. (dissenting). Section 982 of the Code has no application in civil proceedings. The provisions of s. 12 of the *Canada Evidence Act* were irrevelant and the certificate did not comply with s. 23 of that Act. The document tendered in evidence was inadmissible as proof of any fact. Even if its acceptance had not been objected to by the appellant, the Court itself should have disregarded it. (*Jacker* v. *International Cable Co.* 5 T.L.R. 13). The record did not support the contention that counsel for the appellant had consented to the fact of the conviction being proved by the document.

APPEAL from the judgment of the Exchequer Court of Canada, (1), Cameron J., dismissing the appellant's Petition of Right whereby it sought a declaration that it was the owner of a motor car forfeited under s. 21 of *The Opium and Drug Act, 1929* as against the respondent, judgment for possession of the car, or in the alternative damages.

H. F. Parkinson, Q.C. and *W. J. Anderson* for the appellant.

F. P. Varcoe, Q.C. and *J. T. Gray* for the respondent.

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

KERWIN J.:—A Plymouth sedan was seized and forfeited to His Majesty in His right of Canada under the provisions of section 21 of *The Opium and Narcotic Drug Act, 1929*, c. 49:—

> 21. When any person is convicted of an offence against this Act, the opium pipe or other article or the drug in respect of which the offence was committed and all receptacles of any kind whatsoever found containing the same, and any vehicle, motor car, automobile, boat, canoe, aeroplane or conveyance of any description, proved to have contained such opium pipe or other article or drug or to have been used in any manner in connection with the offence for which such person has been so convicted, and any moneys used for the purchase of such drug, shall be forfeited to His Majesty, and shall be delivered to the Minister for disposition.

(1) [1952] Ex. C.R. 530.

The original owner of the sedan has sold it, in the Province of Ontario, under a conditional sale contract to one Ciampi, and later the original owner assigned to the appellant the contract under which a considerable sum remains owing and unpaid. In June, 1951, the sedan was seized at Windsor, Ontario, while in the possession of a stranger to the transaction by which the appellant had acquired its title. That stranger, under the name of Patrick Charles Riley, pleaded guilty to a charge of having illegally sold a narcotic drug contrary to s. 4(1)(*f*) of the Act and was thereupon sentenced in a County Court Judges' Criminal Court. The judge of that Court found, and so certified, that the sedan had been used in the commission of the offence. The forfeiture followed and the appellant by petition of right claims a declaration that it is the owner of the sedan and judgment for possession, or in the alternative, $1,800. For the reasons given by my brother Cartwright I agree that there is no substance in the contention of the appellant that the conviction was not properly proved and that the offender was not shewn to be the same person as Patrick Charles Riley mentioned in the respondent's defence.

On the other question, s. 21 of the Act is, in my opinion, within the competence of Parliament as it is part and parcel of "The Criminal Law . . . including the Proceedings in Criminal Matters" which, by head 27 of s. 91 of the British North America Act, 1867, is within the exclusive jurisdiction of Parliament: *A.G. for Ontario* v. *Hamilton Street Ry.* (1); *Proprietary Articles Trade Association* v. *A.G. for Canada* (2). The mere fact that s. 21 of the Opium and Narcotic Drug Act affects property and civil rights is of no concern since in pith and substance it does not attempt to invade the provincial legislative field. It provides for the forfeiture of property used in the commission of a criminal offence and is, therefore, legislation in relation to criminal law. As early as 1896 this Court in *O'Neil* v. *A.G. of Canada* (3), brushed aside an argument that certain legislation of the Parliament of Canada was invalid as being "so destitute of any reasonable foundation that it calls for no observation." Chief Justice Strong pointed out the peculiar nature of the proceedings but made

(1) [1903] A.C. 524. (2) [1931] A.C. 310.
(3) 26 Can. S.C.R. 122.

1953

INDUSTRIAL ACCEPTANCE CORPORATION v. THE QUEEN

Kerwin J.

the remark quoted with reference to the contention that the confiscation of certain moneys under s. 575 of the 1892 *Criminal Code* was illegal as being an interference with property and civil rights in the Province. That section provided that a magistrate might authorize a constable who had reported in writing that there were good grounds for belief that a house, place, etc., was kept and used as a common gaming house, to enter therein and seize money; and the section also provided that "any money or securities seized under this section shall be forfeited to the Crown for the public uses of Canada."

I do not deal with those sections of the *Criminal Code* providing for forfeiture or dealing with what might be argued are civil rights because they are not in question upon this appeal. Nor do I find it necessary to consider the provisions for forfeiture under the Acts respecting customs and excise since those topics fall within s. 122 of the British North America Act: *A.G. for British Columbia* v. *McDonald Murphy Lumber Co.* (1), referred to in *A.G. for British Columbia* v. *Kingcombe Navigation Co.* (2). The constitutional validity of a provision of the Excise Act was not in issue in *The King* v. *Krakowec* (3), and I mention the decision only because this Court had no difficulty in determining that the relevant enactment governed the vehicle although its legal owner had no knowledge of the illegal use which was being made of it.

The appeal should be dismissed with costs.

RAND J.:—Several questions were raised on the argument of this appeal, but the only one of substance is that which challenges the validity of s. 21 of the Opium and Narcotics Drug Act, c. 24 of the Statutes 1929. The section reads:— (The section is set out at p. 274).

The Industrial Company is the owner under a conditional sale of an automobile which was shown to have been used in connection with an offence committed against the Act by a man named Riley and was seized as forfeited under the section quoted. Riley was not the original purchaser

(1) [1930] A.C. 357 at 364. (2) [1934] A.C. 45 at 57.
(3) [1932] S.C.R. 134.

of the car and no connection between him and the purchaser was shown. No contention is made that the language of the section does not extend to every interest or title in the car, and the case for the appellant is that the section so interpreted is ultra vires of Parliament.

The forfeiture of property used in violation of revenue laws has for several centuries been one of the characteristic features of their enforcement and the considerations which early led to its adoption as necessary are not far to seek. Smuggling, illegal manufacture of liquors, illegal sale of narcotics and like activities, because of their high profits and the demand, in certain sections of society, for them, take on the character of organized action against the forces of law; and with the techniques and devices, varying with the times, that have been open to these enemies of social order, the necessity to strike against not only the persons but everything that has enabled them to carry out their purposes has been universally recognized.

In Canada this view has been followed from the earliest times. By c. 5, statutes of Upper Canada 1801, dealing with goods imported from the United States, s. 11 provided:—

> . . . And where the value, according to the highest market price of the same, shall amount to twenty pounds, the vessel, boat, raft, or carriage, with the tackle, apparel, furniture, cattle, harness, and horse or horses thereto respectively belonging, shall also become forfeited, and shall and may be seized by the said Collector or deputy, subject nevertheless to condemnation by due course of law.

C. 11 of the statutes of 1824, repealing the foregoing Act, provided in s. 9 that

> If any master or person having the charge or command of any vessel, boat, raft, or carriage, shall make a false report, such vessel, boat, raft or carriage, and the tackle, apparel, furniture, cattle, horse or horses, and harness thereunto respectively belonging, shall be forfeited and liable to seizure by the Collector.

and by s. 10:—

> That all the goods, wares or merchandise which shall be imported into this province from the United States of America, and which shall not be entered according to the provisions of this Act shall be forfeited, together with the vessel, boat, raft, or carriage, in or upon which the same shall be found or shall have been imported, and the tackle, apparel, furniture, cattle, horse or horses, and harness thereunto respectively belonging.

These provisions, in varying language and more detailed application, have been continued to the present day.

1953

INDUSTRIAL ACCEPTANCE CORPORATION v. THE QUEEN

Rand J.

The laws dealing with smuggling and excise violations in Great Britain were consolidated by c. 53 of 7-8 George IV, s. 32 of which contains similar language attaching forfeiture to property used in connection with the offences mentioned.

From this uniform legislative judgment, it is at once apparent that forfeiture has from the beginning been treated as one of the necessary conditions for compelling substantial obedience to revenue laws. It was conceded that so far as it applied to the property of the offender, no question of validity arose; but long experience has shown that the seizure of such property cannot be made the starting point for civil contests over ownership. The absolute forfeiture is an inseparable accompaniment of punitive action, and the administration of the law would be seriously impeded were any obstacles to prompt and conclusive action placed in the way of its enforcement.

These considerations apply *a fortiori* to the suppression of such an evil as the narcotics traffic. Here, not the revenue, but the health as well as the moral and social condition of the community are endangered by a most insidious and destructive exploitation of human weakness. The difficulties attending its detection are multiplied many fold and the necessity for these strict and unqualified measures correspondingly greater.

The forfeiture of property used in the commission of such offences is then an integral part of criminal law, a subject matter of legislation by s. 91 committed to the Dominion Parliament and the contention against its validity must be rejected with costs.

KELLOCK J.:—For the reasons given by my brother Rand, I think that s. 21 of *The Opium and Narcotic Drug Act, 1929,* is intra vires the Parliament of Canada. The only other point in the appeal with which I desire to deal is the submission on behalf of the appellant that there is no proof of the conviction of the appellant.

It is provided by s. 4(1) of the statute that

> Every person who . . . sells . . . shall be guilty of an offence, and shall be liable (i) upon indictment, to imprisonment . . . or (ii) upon summary conviction . . . to imprisonment . . .

In paragraph (ii) above, "upon indictment" means unquestionably, "upon conviction upon indictment".

The word "conviction" by itself is ambiguous. It may be used to include both verdict and judgment thereupon, or as meaning verdict only. In my view, it is quite plain that in s. 21 the word is used in the sense of verdict only. The judgment thereupon is quite immaterial for the purposes of the section.

In *The Queen* v. *Blaby* (1), the prisoner was tried for feloniously uttering counterfeit coin upon an indictment under 24 & 25 Vict. c. 99, s. 12, which, after charging her with the misdemeanour of unlawfully uttering a counterfeit coin in 1894, proceeded to charge her with a previous conviction in 1888 for a similar offence. It concluded in the usual form, that the prisoner had feloniously uttered the counterfeit coin on the second occasion. S. 9 of the statute provided that a person who utters counterfeit coin is guilty of a misdemeanour and "being convicted thereof" is liable to imprisonment. By s. 12, a person who has been convicted of a misdemeanour under s. 9 and afterwards commits a misdemeanour mentioned in that section, is guilty of felony, "and being convicted thereof" is liable to penal servitude.

The prisoner was given in charge upon the first part of the indictment only, which charged the unlawful uttering in 1894; to this charge she pleaded guilty. She was then given in charge upon the second part of the indictment, which charged the previous conviction, to which she pleaded not guilty. The certificate as to the earlier conviction showed that she had been released upon finding a recognizance to come up for judgment when called upon.

The prisoner's counsel submitted that in order to constitute a conviction, there must be both verdict and judgment; that the certificate showed that no judgment had been pronounced against the prisoner but only an order made empowering her to be released upon finding a recognizance to come up for judgment, and there was, therefore, no case to go to the jury. It was, however, held by the Court of Crown Cases Reserved that the word "convicted" in ss. 9 and 12 meant "found guilty" and that the sentence was to follow on the conviction. It was also held that a plea of guilty would equally be a conviction. In my view, the statute in question in the case at bar is to be similarly

(1) [1894] 2 Q.B. 170.

1953

INDUSTRIAL ACCEPTANCE CORPORATION v. THE QUEEN

Kellock J.

construed. "Convicted" in s. 21 means "found guilty" and a plea of guilty is equally a conviction. The judgment pronounced upon that plea being quite irrelevant, the only question, therefore, is as to proof of the plea.

I agree with the contention of the appellant that neither s. 982 of the *Criminal Code* nor s. 12 of *The Canada Evidence Act* are relevant but that the relevant provision is to be found in s. 23 of the latter statute, which provides that:

> Evidence of any proceeding or record whatsoever of, in or before any court in . . . any province of Canada . . . may be made in any action or proceeding by an exemplification or certified copy thereof, purporting to be under the seal of such court . . .

In my view, "proceeding" as first used in the section is used in the sense of "step", and the section has been so construed; *Rex* v. *Kobold* (1); *U.S.A.* v. *Watson* (2).

Coming to Exhibit "B", there can be no doubt that the fifth count there set out is a copy of the actual charge. In my opinion, in going on to certify as to Riley that

> On being arraigned on CHARGE NUMBER FIVE (HEREINBEFORE SET OUT) before His Honour Judge Legris on the twenty-first day of February, in the year 1952, he PLEADED GUILTY THEREOF AS CHARGED,

the exhibit is within the section. Its effect is to certify that the plea entered to the charge was "guilty as charged".

I would dismiss the appeal with costs.

LOCKE, J. (dissenting in part):—It is conceded on behalf of the appellant that *The Opium and Narcotic Drug Act, 1929* is in pith and substance criminal law, within the meaning of that expression in s-s. 27 of s. 91 of the British North America Act, but it is contended that the provision of s. 21 authorizing the forfeiture of a motor car used in any manner in connection with the commission of an offence against s. 4 is not "necessarily incidental to make such legislation effective", to adopt the language of the appellant's factum. Thus, while the jurisdiction of Parliament to declare that the sale of narcotic drugs is a crime is not disputed, we are asked to say that one of the penalties provided for the commission of such an offence is not really necessary for the effective prevention and punishment of the crime.

(1) (1927) 37 Man. R. 37. (2) (1924) 63 Que. S.C. 19.

The admission as to the true nature of the statute is, in my opinion, fatal to this contention. It is for Parliament and not for the courts to decide the nature of the punishment which may be imposed for a breach of the prohibitions contained in s-s. 1 of s. 4. While, in my opinion, it is really aside from the point, the provision for the forfeiture is an added punishment to the offender, whether the vehicle be owned by him or by some other person who, as in the present case, is entirely free of any complicity in the matter.

In the latter case, it can scarcely be suggested that it would be an answer to a demand by the owner upon the offender for the return of his motor car that it had been taken from his possession by the Crown and became forfeited under the provisions of s. 21. I am quite unable to understand how, in these circumstances, it can be said that the Court has any jurisdiction whatever in the matter. The fact that the present appellant, the owner of the car in question, knew nothing of the use to which its property was being put by Riley is the basis for the claim that the forfeiture of its property is an interference with its property and civil rights and thus trenches upon the jurisdiction of the Province. On this aspect of the matter, it appears to me to be sufficient to refer to the language of Lord Atkin, in delivering the judgment of the Judicial Committee in *Proprietary Articles Trade Association* v. *A.G. for Canada* (1):—

> If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights.

These proceedings were initiated by a petition of right and the case advanced by the appellant is that it was the owner of the motor vehicle as the assignee of the conditional sale contract signed by one Ciampi as purchaser, that the Crown claimed that the motor vehicle had been forfeited under s. 21 of *The Opium and Narcotic Drug Act, 1929* and retained possession of it. The prayer for relief asked a declaration that the suppliant is the owner of the vehicle, or alternatively damages. The respondent by the amended statement of defence justifies the retention of the vehicle

(1) [1931] A.C. 310 at 326.

1953

INDUSTRIAL ACCEPTANCE CORPORATION v. THE QUEEN

Locke J.

on the ground that it had been used in connection with the sale of a narcotic drug by one Patrick Charles Riley, contrary to the provisions of the Act, and alleged that Riley had been convicted of that offence at Windsor on February 21, 1952. These allegations were put in issue by the reply.

At the trial the suppliant proved its ownership of the motor vehicle. The record is silent as to how it came to be in the possession of Riley at the time the offence was committed. At the conclusion of the suppliant's case, the respondent gave evidence as to the circumstances under which the vehicle had been seized. It appears that Constable La Brash of the Royal Canadian Mounted Police had purchased heroin from Riley at a time when the latter was driving the car in question, which was thus, on his conviction, forfeited to the Crown under the provisions of s. 21 of the Act. It was an essential part of the Crown's case to prove that Riley had been convicted of an offence against the Act. As proof of this fact, counsel for the Crown tendered a document purporting to be signed by Margaret L. Whelan, beneath whose signature there appeared the words "Deputy Clerk C.C.C.E." and to which the seal of the County Court of the County of Essex was affixed. By this document the Deputy Clerk certified, *inter alia,* that Patrick Charles Riley had been committed to gaol for trial and was on bail awaiting trial on the charge, *inter alia,* of having on the 16th day of June 1951, at the City of Windsor in the County of Essex, unlawfully sold a drug, to wit, diacetylmorphine, to one Charles J. K. La Brash, without first obtaining a licence from the Minister or without other lawful authority, contrary to s. 4(1)(*f*) of *The Opium and Narcotic Drug Act, 1929* and amendments thereto, that he had appeared before His Honour Judge Legris, a judge of the County Court of the County of Essex on November 15, 1951, and elected for trial by a judge without the intervention of a jury, and that thereafter, on being arraigned on this charge before the said judge, he pleaded guilty and was thereupon sentenced by His Honour Judge Legris on the said charge to:—

> six months, plus a fine of $200.00, or in default of payment of said fine an additional three months: the same to run concurrently with any other sentence imposed on the said date by His Honour Judge Legris.

On the reverse side of the second page of this document there appeared a notation signed by the County Court Judge finding that the automobile in question in the proceedings was used in the commission of the offence above mentioned.

Before considering the effect of what took place when this document was tendered as proof of the fact of the conviction, the admissibility of the document as proof of its contents is to be considered. S. 982 of the *Criminal Code,* which permits the use of a certificate signed by the Clerk of the Court or other officer having the custody of the records, containing the substance and effect only of any previous indictment and conviction for any indictable offence or a copy of any summary conviction as proof of such prior conviction, provides a means whereby in criminal proceedings such as those of the nature referred to in ss. 963 and 964 of the Code a previous conviction may be proven. The section, however, has no application in civil proceedings. S. 12 of the *Canada Evidence Act* provides a manner by which a conviction may be proved in cases where a witness has been questioned as to whether he has been convicted of any offence and either denies the fact or refuses to answer, but this can have no application to the present matter. S. 23 of the *Canada Evidence Act* permits evidence of any proceeding or record in any court in Canada being made by "an exemplification or certified copy thereof" purporting to be under the seal of such court. But this equally is without application. The word "exemplification" has a well defined legal meaning, being an attested copy or transcript of a record. The document tendered, however, on its face did not purport to be an exemplification or copy of any record but merely stated a series of facts. Presumably when the prisoner pleaded guilty, a record was prepared by the prosecuting officer, as required by s-s. 5 of s. 827 of the Code, and a record in Form 60 signed by the Judge. An exemplification of that document would clearly have been admissible and would have proved the conviction. The document tendered and received in evidence was, however, in my opinion, inadmissible as proof of any fact.

1953

INDUSTRIAL ACCEPTANCE CORPORATION v. THE QUEEN

Locke J.

Constable La Brash gave evidence that he was present when Riley pleaded guilty and was sentenced by His Honour Judge Legris but this evidence was clearly inadmissible as proof of the conviction (*R.* v. *Smith* (1); *Reg.* v. *Bourdon* (2); *Hartley* v. *Hindmarsh* (3) (a civil action); *Mash* v. *Darley* (4)).

There remains the question as to the effect of what took place before the learned trial Judge when the so-called certificate was tendered. Counsel appearing for the suppliant at the trial, having first objected to the oral evidence as proof of the conviction, was asked by the learned trial Judge if he was objecting to proof by admission of a certified copy of the conviction. It is, however, to be noted that this is not what the document purported to be. In reply, counsel said:—

> I am not objecting to my friend putting in the certificate for what it is worth; I am not admitting that it constitutes proof of the conviction.

The document was then marked as an exhibit, whereupon counsel again said that he wanted to make it clear to counsel for the Crown that he was not "admitting his introduction of the certificate as proof of the conviction" and did not want it to be said that he had misled him into believing that he had done so, and that:—

> I do not want my friend to place any reliance on the certificate which he is putting in, based on any apparent compliance on my part.

to which counsel for the Crown is reported to have said:—

> I am not placing the utmost reliance on it as proof of the conviction. In the meantime I submit it.

Following this, the learned trial Judge said to counsel for the suppliant that he understood that he was not objecting to the certificate going in but that he was not admitting that the admission of the certificate proved the conviction of the person, to which counsel replied:—

> I am saying, my lord, that under s. 24 of the Evidence Act, since this document purports to be certified by the clerk of the court that it is admissible for what it is worth. I do not go any further than that.

The reason for the reference to s. 24 of the Evidence Act is not clear since the document tendered did not purport, as I have said, to be a copy of any record.

(1) (1828) 8 B. & C. 341.
(2) (1847) 2 C. & K. 366.
(3) (1866) L.R. 1 C.P. 553.
(4) [1914] 3 K.B. 1226.

Counsel for the respondent has contended before us that the admissibility of the document was not objected to and that, accordingly, it should be received as proof of its contents. I am unable to accept this contention. The passages above quoted make it abundantly clear that counsel for the suppliant objected to the document being accepted as proof of the conviction. If the matter were, however, to be considered on the footing that document had been admitted without objection, since it was, in my opinion, clearly inadmissible as proof of any fact, we should in this Court disregard it. In *Jacker* v. *International Cable Company* (1), on an appeal from Hawkins, J., it appeared that a document admitted in evidence at the trial was wrongly admitted and that no objection had been taken to its admission. The Court consisting of Lord Esher, M.R., Fry, L.J. and Lopes, L.J., were unanimously of the opinion that the evidence should be disregarded. In delivering judgment, the Master of the Rolls said in part that if counsel did not object to the admission of the document at the trial it was the duty of the Judge to reject it when he came to give his judgment and that the Court of Appeal would do so or, if it were objected to and admitted the Court was bound to reject it, their duty being to arrive at a decision upon legal evidence. Lopes, L.J. said that in cases where evidence was improperly admitted before a Judge without a jury it was the duty of the Court of Appeal to disregard it, though it had been received without objection. This case, it may be noted, is cited as authority for the proposition stated in the 9th Edition of Phipson on Evidence at p. 711 and in Taylor on Evidence, 12th Edition, p. 1161.

I am unable, with respect for contrary opinion, to see anything in the record in this case to support a contention that counsel for the suppliant consented, as of course he might, to the fact of the conviction being proved in this manner. I find nothing in the record to support any such contention, indeed the statements made by counsel for the suppliant were to the direct contrary.

I would allow this appeal and set aside the judgment at the trial and direct that judgment be entered declaring that the suppliant was entitled to the possession of the motor

(1) (1888) 5 T.L.R. 13.

1953

INDUSTRIAL ACCEPTANCE CORPORATION v. THE QUEEN

Locke J.

vehicle in question, as against the Crown, at the time of the commencement of the proceedings and that, if such vehicle is not in the possession of the Crown, there be a reference to the Registrar of the Exchequer Court to determine its value at the time of seizure, the appellant to have judgment for the amount so found, together with the costs of the trial, the reference and of this appeal.

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

CARTWRIGHT J.:—For the reasons given by my brother Rand I agree with his conclusion that s. 21 of *The Opium and Narcotic Drug Act* is *intra vires* of Parliament as being an integral part of the Criminal Law. It is therefore unnecessary to consider the authorities dealing with the circumstances in which Parliament may deal with matters which, though otherwise within the legislative competence of the provincial legislatures, are necessarily incidental to effective legislation by Parliament upon a subject of legislation expressly enumerated in s. 91 of the *British North America Act.*

It remains to consider the appellants' argument that the facts necessary to justify a forfeiture under s. 21 were not proved at the trial. The appeal was argued, and I think rightly so, on the assumption that, on the state of the pleadings, the appellant having proved its ownership of the automobile and that the respondent had taken possession of it and refused to give it up, the onus rested upon the respondent to prove (i) that a person had been convicted of an offence against *The Opium and Narcotic Drug Act,* and (ii) that the automobile had contained the drug in respect of which such offence was committed or had been used in some manner in connection with such offence.

The case for the respondent as pleaded was that one Patrick Charles Reilly of the City of Windsor, was on the 21st day of February, 1952, at Windsor, Ontario, convicted of having illegally sold a narcotic drug contrary to s. 4(1)(*f*) of the Act, and that the automobile in question was proved to have contained the narcotic drug or to have been used, and did in fact contain the narcotic drug and was in fact used, in connection with the said offence for which the said

Patrick Charles Reilly was so convicted, whereby the said automobile became forfeited to Her Majesty under the provisions of Section 21 of the Act.

The evidence at the trial related to an offence committed by Patrick Charles *Riley* but it is clear that he was one and the same person as that intended to be described by the words in the Statement of Defence "Patrick Charles Reilly", and if necessary leave to amend the Statement of Defence by striking out the word "Reilly" wherever it occurs and substituting the word "Riley" should now be given.

The more serious and difficult question is whether the evidence of the conviction was legally admissible and sufficient.

To prove the conviction counsel for the respondent at the trial filed as Exhibit "B" a certificate which so far as relevant reads as follows:—

(Crest)

In the County Court Judges' Criminal Court
of the County of Essex

The King against Patrick Charles Riley. This is to certify that Patrick Charles Riley, who was committed to Gaol for trial and who was on bail awaiting trial,

1 . . .

2 . . .

3 . . .

4 . . .

And 5: FURTHER FOR THAT HE, on or about the 16th day of June, 1951, at the city of Windsor, in the county of Essex, did unlawfully sell a drug, to wit, Diacetylmorphine, to one Charles J. K. Labrash, without first obtaining a license from the Minister, or without other lawful authority, contrary to Section 4(1)(*f*) of the Opium and Narcotic Drug Act, 1929, and amendments thereto,

6 . . .

appeared before His Honour Joseph A. Legris, Esquire, a Judge of the County Court of the County of Essex, on the fifteenth day of November, in the year 1951, and elected trial by a Judge without the intervention of a Jury.

On being ararigned on CHARGE NUMBER FIVE (HEREINBEFORE SET OUT) before His Honour Judge Legris on the twenty-first day of February, in the year 1952, he PLEADED GUILTY THEREOF AS CHARGED.

He was thereupon on the said twenty-first day of February, in the year 1952, sentenced by His Honour Judge Legris on the said charge to SIX MONTHS PLUS A FINE OF $200, OR IN DEFAULT OF PAYMENT OF SAID FINE, AN ADDITIONAL THREE MONTHS: THE SAME TO RUN CONCURRENTLY WITH ANY OTHER SENTENCE IMPOSED ON THE SAID DATE BY HIS HONOUR JUDGE LEGRIS.

1953

INDUSTRIAL ACCEPTANCE CORPORATION
v.
THE QUEEN

Cartwright J.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this said Court at the City of Windsor, in the County of Essex, this 21st day of February, 1952.

MARGARET L. WHALEN,
(This is a written signature),
Deputy Clerk, C.C.C.E.

[SEAL]

Presiding Judge
J. A. LEGRIS,
(This is typewritten).

On the back of the Certificate appears the following:—

I FIND THAT AUTOMOBILE BEARING 1951 ONTARIO LICENSE NUMBER 855R4 WAS USED IN THE COMMISSION OF THE WITHIN OFFENSE COUNT NUMBER FIVE (5).

JOSEPH A. LEGRIS,
(This is a written signature),
Judge, County Court,
County of Essex.

Having produced this certificate and read it, Mr. Bagwell, who was counsel for the respondent at the trial, asked the witness who was then in the box, Constable Labrash, who was the Charles J. K. Labrash mentioned in charge number 5 set out above, whether he was in Court when Riley pleaded guilty. The witness replied in the affirmative and the following discussion ensued:—

MR. ANDERSON (counsel for the appellant at the trial): My lord, may I at this juncture say, with respect, that as to proof of the conviction I take the position it cannot be proved by the evidence of anyone who was present, or upon the evidence as to anything they may have heard at the trial. I object to any question directed to that end.

HIS LORDSHIP: You are not objecting to proof by admission of a certified copy of the conviction?

MR. ANDERSON: I am not objecting to my friend putting in the certificate for what it is worth; I am not admitting that it constitutes proof of the conviction.

MR. BAGWELL: I put the certificate in as proof of the conviction. I think it is well established.

HIS LORDSHIP: The certificate of conviction will be Exhibit No. B.

EXHIBIT NO. B.: Certificate of conviction of Patrick Charles Riley on 21st February 1952, on charge under S. 4(1)(*f*) of the Opium and Narcotic Drug Act. Filed by respondent.

MR. BAGWELL: And now, having proved the conviction, I intend to ask the constable to further substantiate it if he can; after having had the conviction read to him, and from sitting in court on the day when the conviction was made, can he identify Mr. Riley as the man convicted?

MR. ANDERSON: Again, my lord, I do not want to interrupt unnecessarily but this is a crucial part of the Crown's case, and I want to make it clear to my friend that I am certainly not admitting his introduction of the certificate as proof of the conviction. And I do not want

it subsequently to be said that I misled him into believing I did so. This is a judicial (sic) statute that is being enforced against us, and the strictest proof of the conviction is called for. I do not want my friend to place any reliance on the certificate which he is putting in, based on any apparent compliance on my part.

MR. BAGWELL: I am not placing the utmost reliance on it as proof of the conviction. In the meantime, I submit it.

HIS LORDSHIP: I understand that you are not objecting to the certificate going in but you are not admitting that the admission of the certificate establishes the conviction of the person for that offence.

MR. ANDERSON: I am saying, my lord, that under sec. 24 of the Evidence Act, since this document purports to be certified by the clerk of the court that it is admissible for what it is worth. I do not go any further than that.

HIS LORDSHIP: I will hear your argument later on.

MR. BAGWELL: With your lordship's permission, I intend to ask the constable further if he was in court when the conviction was made.

HIS LORDSHIP: I see no objection to him stating the fact he was there and heard the conviction.

MR. BAGWELL: Q. Were you in court when the conviction was made?—A. Yes, sir, I was.

MR. ANDERSON: Again, my lord, is my objection clear, that this evidence cannot be directed to the conviction; I submit that it cannot be proved in that way.

HIS LORDSHIP: It probably is not proof under the Evidence Act; he is merely stating that he was present at the time the conviction was rendered.

There is no doubt that the evidence of Labrash, and of other members of the R.C.M.P. who were also called, proved conclusively that the individual Riley who sold the drug to Labrash at Windsor on June 16 1951 in the automobile in question and the individual Riley who, on February 21 1952, was arraigned before His Honour Judge Legris on charge number 5, above set out, pleaded guilty thereto and was sentenced, were one and the same person. The admissibility of this evidence to prove this identity could not be questioned. The case for the appellant is that, under the authorities, neither the evidence of these witnesses nor the certificate Exhibit "B" was legal proof of the conviction.

The statements in *Phipson on Evidence,* 9th Edition, at pages 582 and 583, that the conviction of any person charged with an indictable offence must, at common law, have been proved by production of the record or an examined copy thereof and cannot, where the record is in existence, be proved by the oral evidence of a witness who merely heard it pronounced, are supported by the authorities to which the learned author refers. I think, therefore,

1953

INDUSTRIAL ACCEPTANCE CORPORATION v. THE QUEEN

Cartwright J.

that the appellant's point is well taken that while the evidence of the witnesses Labrash, Bearesdorfer, McIver and Ramsay was admissible to prove identity it would not serve, if objected to, as evidence of the conviction. To hold otherwise, in the words of Lord Tenterden C.J. in *The King* v. *Smith* (1), "would be to break through the established rules of evidence, which is always a dangerous course." I am, however, of opinion that in the particular circumstances of this case the conviction was sufficiently proved by the certificate, Exhibit "B", referred to above. This certificate appears to have been drawn up pursuant to the provisions of s. 982 of the *Criminal Code* or s. 12(2) of *The Canada Evidence Act* and would have been admissible as proof of the conviction in any proceedings to which either of those sections was applicable. I incline however to agree with Mr. Parkinson's submission that neither of such sections applied and that the proper method of proof was by the production of an exemplification or certified copy of the record of conviction pursuant to s. 23 of *The Canada Evidence Act*. Strictly speaking, Exhibit "B" is neither an exemplification nor a certified copy of such record. The record of conviction was presumably drawn up in accordance with Form 60 as required by s. 827(5) of the Code. Exhibit "B" appears to me to contain all the essential matter which would be set out in a record of conviction such as is prescribed in Form 60. It commences by setting out that Patrick Charles Riley was committed to jail. It sets out the very words of all the offences with which he was charged. It sets out that he appeared before the judge and elected trial by a judge without the intervention of a jury, that he pleaded guilty, and that he was sentenced. The sentence is set out in full. It is certified under the hand of the Deputy Clerk and under the seal of the Court, which is a court of record. On the back of the sheet of the certificate to which the seal of the court is affixed is the signature of the judge. There is no doubt as to the authenticity of the document and, as already observed, it fulfills all the requirements of s. 982 of the *Criminal Code* and of s. 12(2) of *The Canada Evidence Act* and would be proof of the conviction in proceedings of a character even more serious than those in the case at bar.

(1) (1828) 8 B. & C. 341 at 343.

In civil cases the rules of evidence may always be relaxed by the consent of parties. As appears from the extract from the proceedings at the trial, set out above, counsel then appearing for the appellant (while making clear his position that the certificate did not prove the conviction) did not contest its admissibility. Had he done so, on the ground now urged that it did not strictly comply with s. 23 of *The Canada Evidence Act*, the learned trial judge might well have excluded it but in that case he would doubtless have allowed an adjournment to permit the obtaining of a copy of the record certified as is contemplated by s. 23. In my opinion effect should not be given to this objection.

One further point remains for consideration. It is submitted for the appellant that a person who has pleaded guilty to a charge of an offence under the Act and has been sentenced following such plea has not been "convicted of an offence" within the meaning of those words as used in s. 21. In my opinion this argument must be rejected. The cases of *The Queen* v. *Blaby* (1) and *The King* v. *Meehan* (2), appear to me to be conclusive against it.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Parkinson, Gardiner, Willis and Roberts.*

Solicitor for the respondent: *W. R. Jackett.*

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(1) (1894) 2 Q.B. 170.

(2) (1905) 2 I.R. 577.

1953

*Jun. 16
*Oct. 6

MAURICE PIPERNO .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal law—Trial by jury—Refusal of motion made by accused for trial by an English jury—Accused fluent in both official languages—What is language habitually spoken by accused—Criminal Code, ss. 923, 924, 987, 1023.

The law does not give to an accused in the Province of Quebec who moves that he be tried by a jury entirely composed of jurors speaking the French language or entirely composed of jurors speaking the English language an unconditional right to be tried accordingly or, at least, tried by a mixed jury. His right is limited to demanding trial by a jury skilled in whichever of the two official languages of the Province is the language habitually spoken by him. (Cartwright J., being of the view that this Court had no jurisdiction, expressed no opinion upon the question).

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Bissonnette and Casey JJ.A. dissenting, the appellant's conviction on a charge of manslaughter arising out of the operation of an automobile.

Lucien Gagnon for the appellant.

Georges Sylvestre Q.C. for the respondent.

The judgment of Kerwin, Taschereau, Estey and Fauteux JJ. was delivered by:—

FAUTEUX J.:—Accusé, dans le district de Joliette, province de Québec, d'y avoir commis l'offense d'homicide involontaire, l'appelant—dont la langue maternelle est l'italien et qui parle aussi le français et l'anglais couramment, depuis plusieurs années,—demanda, lors de la mise en accusation d'être jugé par un jury de langue anglaise. A cette requête, la Couronne fit objection et à la suite d'une enquête ordonnée et tenue pour déterminer la langue parlée par l'accusé, la demande fut rejetée et la cause s'instruisit devant un jury de langue française. Trouvé coupable, Piperno porta la cause en appel (1), invoquant plusieurs moyens qui tous, sauf un, furent unanimement rejetés. Seul

*PRESENT: Kerwin, Taschereau, Estey, Cartwright and Fauteux JJ.

(1) Q.R. [1953] Q.B. 80.

le grief "qu'il avait droit à un jury anglais" donna lieu à une dissidence. La majorité des Juges concluant qu'en fait, le français était la langue habituellement parlée par l'accusé depuis plusieurs années, déclara le grief mal fondé et, comme conséquence, l'appel fut rejeté. Les dissidents adoptèrent sur le point une vue contraire avec, évidemment, une conclusion différente quant au résultat.

Piperno invoque maintenant cette dissidence et les dispositions de l'article 1023 du *Code Criminel* pour en appeler devant cette Cour.

Assumant que nous ayons juridiction, je n'hésiterais pas, vu l'opinion majoritaire et finale de la Cour d'Appel sur la question de fait, à rejeter comme elle ce pourvoi. Car je ne crois pas que la loi ou l'interprétation qu'on en a fait jusqu'à ce jour dans la province de Québec, donnent à un accusé qui demande à être jugé par un jury composé entièrement de jurés parlant la langue française ou par un jury composé entièrement de jurés parlant la langue anglaise, un droit absolu de réussir sur cette demande, ou d'obtenir, à tout le moins, d'être jugé par un jury mixte, i.e., par un jury composé d'au moins six personnes versées dans la langue de l'accusé.

La loi. Il convient de reproduire les dispositions des articles 923 et 924 du *Code Criminel*,—dispositions d'exception, respectivement applicables dans les provinces de Québec et du Manitoba,— et aussi celles de l'article 937 lequel, référant à ces deux dispositions spéciales, les interprète et en donne ainsi la véritable portée:—

923. Dans ceux des districts de la province de Québec où le shérif est tenu par la loi de dresser une liste de petits jurés composée moitié de personnes parlant la langue anglaise, et moitié de personnes parlant la langue française, il doit, dans son rapport, mentionner séparément les jurés qu'il désigne comme parlant la langue anglaise, et ceux qu'il désigne comme parlant la langue française, respectivement; et les noms des jurés ainsi assignés sont appelés alternativement d'après ces listes.

2. Dans tout district, le prisonnier peut, lorsqu'il est mis en jugement, demander par motion, d'être jugé par un jury entièrement composé de jurés parlant la langue anglaise, ou entièrement composé de jurés parlant la langue française.

3. Sur présentation de cette motion, le juge peut ordonner au shérif d'assigner un nombre suffisant de jurés parlant la langue anglaise ou la langue française, à moins qu'à sa discrétion il n'apparaisse que les fins de la justice sont mieux servies par la composition d'un jury mixte. S.R., c. 146 , art. 923; 1925, c. 38, art. 23.

1953

PIPERNO
v.
THE QUEEN

Fauteux J.

924. Lorsqu'une personne mise en jugement devant la Cour du banc du Roi pour le Manitoba demande un jury composé de moitié au moins de personnes versées dans la langue de la défense, si c'est la langue anglaise ou la langue française, elle est jugée par un jury composé, de moitié au moins, des personnes dont les noms se trouvent les premiers à la suite les uns des autres sur la liste générale des jurés, et qui, comparaissant et n'étant point légalement récusées, sont, de l'avis de la cour, trouvées versées dans la langue de la défense.

2. Lorsque par suite du nombre de récusations ou pour toute autre cause, le nombre des personnes versées dans la langue de la défense est insuffisant, la cour remet le procès à un autre jour, et le shérif supplée à l'insuffisance en assignant pour le jour ainsi fixé tel nombre supplémentaire que la cour ordonne de jurés versés dans la langue de la défense et dont les noms se trouvent inscrits après les premiers, à la suite les uns des autres, sur la liste des petits jurés. S.R., c. 146, art. 924.

937. Lorsqu'une personne accusée d'une infraction qui lui donnerait droit à vingt ou à douze récusations péremptoires comme susdit, demande à subir son procès devant un jury composé pour moitié de personnes versées dans la langue de la défense, en vertu des articles neuf cent vingt-trois ou neuf cent vingt-quatre, le nombre de récusations péremptoires auquel elle a droit doit être partagé de manière qu'elle n'ait le droit de récuser péremptoirement que la moitié de ce nombre parmi les jurés de langue anglaise, et la moitié parmi les jurés de langue française, S.R., c. 146, art. 937.

Notons d'abord, incidemment, que dans ces trois articles d'exception, il n'est pas question de la nationalité, des origines, traditions ou mentalité des jurés ou de l'accusé. Seule la question de langue est considérée.

Disons ensuite que suivant ces articles 923 et 924, il est permis, dans les provinces de Québec et du Manitoba respectivement, à un accusé de faire un choix de jurés en tenant compte de la langue qu'ils parlent. Mais alors que l'article 924 indique manifestement que cette faculté donnée à l'accusé se fonde et se conditionne sur la similitude entre sa langue et celle familière aux jurés qu'il réclame, au contraire, l'article 923, considéré isolément, n'indique pas cette raison et ne pose pas cette condition. Au premier abord, le droit donné à l'accusé par ce dernier article paraît donc absolu. On ne voit pas le pourquoi de cette différence. Et on s'expliquerait encore moins les dispositions de l'article 937, où ces deux articles 923 et 924 reçoivent, sur le point, une seule et même interprétation,—interprétation d'ordre législatif,—n'était-ce la disposition suivante d'une loi d'avant la Confédération, demeurée en vigueur dans la province de Québec et qui, encore plus explicitement que

l'article 937 du *Code,* manifeste l'inexistence de cette différence:—

> Si le prévenu, lors de sa mise en accusation, demande un jury composé, pour une moitié au moins, de personnes parlant la langue de sa défense, si cette langue est le français ou l'anglais, il sera jugé par un jury composé pour moitié au moins des personnes dont les noms se trouvent successivement les premiers sur le tableau et qui lors de leur comparution n'étant pas légalement récusées seront, d'après l'opinion de la cour, versées dans la langue du prévenu; (27-28 Vict. cap. 41, art. 7, para. 2).

Ce qui est sanctionné par la loi, c'est une faculté donnée à un prévenu, dans la province de Québec, de demander à être jugé par des jurés familiers avec la langue qu'il parle lui-même—pourvu que ce soit le français ou l'anglais—et le droit d'obtenir alors au moins un jury mixte si, dans la discrétion du Juge, il apparaît que les fins de la Justice soient ainsi mieux servies qu'en faisant droit à sa demande. L'objet évident de ces dispositions assurant à l'accusé, s'il le requiert, l'instruction de son procès devant douze ou au moins six jurés versés dans sa langue, est qu'il puisse facilement en suivre le cours et, alors, exercer plus adéquatement ses droits. En somme, le droit d'un accusé de choisir un jury entièrement composé de jurés parlant la langue française ou entièrement composé de jurés parlant la langue anglaise n'est pas, en ce sens, un droit absolu; et le droit d'obtenir alors un jury mixte—étant lui-même, suivant l'article 923, un droit dépendant de l'existence du droit de choisir un jury entièrement composé de jurés de langue française ou un jury entièrement composé de jurés de langue anglaise—n'est lui-même absolu qu'en tant qu'un choix entre deux tels corps de jurés soit d'abord autorisé par la loi. Disons, enfin, qu'il va de soi qu'un accusé qui procède à cette demande peut être appelé à justifier du droit de ce faire et qu'il appartient alors au tribunal d'adjuger sur la matière. Dans le cas où l'accusé ne parle qu'une des deux langues officielles et dans le cas où, parlant les deux, il est plus familier avec l'une qu' avec l'autre, il est dans les conditions pour exercer la faculté qui lui est reconnue par cet article. Mais, dans l'hypothèse où ces deux langues lui seraient également familières, les dispositions de la loi n'ayant plus d'objet ne sauraient s'appliquer car, alors, qu'un seul, que plusieurs ou que même les douze jurés soient versés dans la langue française ou dans la langue anglaise, ou dans les deux, dans tous les cas, le corps du jury est versé dans une langue familière à l'accusé.

1953

PIPERNO v. THE QUEEN

Fauteux J.

La jurisprudence. Je crois que c'est la première fois que cette Cour est appelée à rendre un jugement sur le point; mais les décisions que la Cour d'Appel de la province de Québec a été appelée à rendre sur la question s'accordent, en substance, avec l'interprétation et les conclusions résultant de cette analyse de la loi. Il suffit, je crois, d'en donner la référence. *Alexander* v. *Regem* (1); *Bureau* v. *Le Roi* (2); *Gouin* v. *Regem* (3); *Duval* v. *Le Roi* (4); *Lacasse* v. *Le Roi* (5).

Pour ces motifs, je renverrais l'appel.

CARTWRIGHT J.:—The appellant was convicted on a charge of manslaughter, arising out of the death of one Denis Deslongchamps caused, as was charged, by the negligent operation of an automobile by the appellant. On appeal to the Court of Queen's Bench (Appeal Side) (6) the conviction was affirmed by a majority judgment. Bissonnette and Casey JJ., dissenting, would have allowed the appeal and directed a new trial.

Special leave to appeal was not sought and our jurisdiction is therefore restricted to a consideration of the point or points of law on which the learned judges mentioned above differed from the majority of the Court.

On the argument before us questions were touched on as to the true construction of section 923 of the *Criminal Code* some of which appear to me, on further consideration, not to be raised in the dissenting judgments. In particular I think we are not at liberty to consider whether that section gives to an accused in the Province of Quebec who moves upon arraignment that he be tried by a jury entirely composed of jurors speaking the English language or entirely composed of jurors speaking the French language an absolute right to be either tried accordingly or tried by a mixed jury, and I wish to make it clear that I am expressing no opinion upon that question.

As I read the judgments of the Court of Queen's Bench in this case, all the learned judges are in agreement that the right given to an accused by subsection (2) of section 923 is limited to demanding trial by a jury entirely composed of

(1) Q.R. (1930) 49 K.B. 215.
(2) Q.R. (1931) 52 K.B. 15.
(3) Q.R. (1937) 43 L.R. N.S.) 149.
(4) Q.R. (1938) 64 K.B. 270.
(5) Q.R. (1938) 66 K.B. 74.
(6) Q.R. [1953] Q.B. 80.

jurors speaking whichever of the two official languages of the Province of Quebec is the language habitually spoken by the accused.

The learned Chief Justice deals with the question as follows:—

D'après certaines décisions, en particulier celle de Alexander v. Le Roi (1930) 49 B.R. 215, la demande pour un jury de medietate linguae est comprise ou incluse dans celle d'un jury entièrement composé de jurés parlant la même langue (anglaise ou française), et le juge qui dans sa discrétion peut refuser la requête pour la formation d'un jury entièrement composé de jurés parlant un seul et même langage (anglais ou français), devait donner en l'espèce un jury mixte s'il en arrivait à la conclusion que la langue habituelle de l'accusé était l'anglais.

En autant qu'il s'agit d'un jury mixte, il y a lieu de retenir que la loi ne se place aucunement au point de vue de l'origine ou de l'ascendance de l'accusé, de l'endroit de sa naissance, du milieu dans lequel il a vécu, de la religion à laquelle il appartient. Et il en est de même en ce qui concerne le jury.

Tout ce que l'accusé, sujet britannique, a droit d'obtenir, c'est que six des jurés soient versés 'skilled in' dans la langue française, six dans la langue anglaise; pour l'accusé lui-même, son droit lui viendra de ce qu'il parle habituellement une des deux langues reconnues au pays, la langue française ou la langue anglaise.

St. Jacques J. agrees with the Chief Justice and says in part:—

. . . L'enquête qui a été faite à ce sujet le démontre d'une façon satisfaisante, et le juge n'a pas erré en permettant que l'enquête soit faite devant un jury de langue française, car on peut dire que c'est la langue habituelle que parle l'inculpé.

Pratte J. who also agrees with the Chief Justice says in part:—

Si la langue maternelle de Piperno était l'anglais, je dirais qu'il a droit à un jury mixte, nonobstant le fait que, depuis plusieurs années, les circonstances ont requis qu'il parlât le français plutôt que l'anglais. Mais tel n'est pas le cas. La langue maternelle de Piperno est l'italien. Dès son jeune âge il a appris l'anglais et le français. A son foyer, il parle les deux langues. Mais en dehors de chez lui il parle surtout le français depuis plusieurs années, et il ne paraît pas, au témoignage qu'il a rendu à l'appui de sa demande, que l'anglais lui serait plus facile à parler ou à comprendre que le français. Dans ces conditions, sa seule affirmation que sa langue habituelle est l'anglais ne me paraît pas suffisante pour lui donner le droit d'exiger un jury anglais ou un jury mixte.

Turning then to the dissenting judgments, Bissonette J. opens his judgment with the words:—

Je partage entièrement l'opinion de monsieur le juge Casey.

1953

PIPERNO
v.
THE QUEEN

Cartwright J.

Casey J. says in part:—

> The decisions then subsequent to the Alexander case have no bearing on the problem presented in the case at Bar, and we are left with the rule that the accused has the right to demand that he be tried by a jury composed exclusively of jurors speaking his language, and if this request is refused by the trial judge, the latter is bound to order the impanelling of a mixed jury. The next step is to determine what is the language of the defence and the test is given by Mr. Justice Rivard in the Alexander case. At page 219 he says:—
>
> 'Ainsi qu'il a été dit dans la cause de Yancey, *the language of the defence,* c'est la langue, anglaise ou française, habituellement parlée par l'accusé.'

If I have understood their reasons correctly the question to which all the learned judges directed their minds and on which they differed was whether on the evidence the learned judge who presided at the trial was right in holding that French was and English was not "la langue habituellement parlée par l'accusé." It is not questioned that the appellant's mother-tongue was Italian and that he speaks both French and English fluently. In such circumstances the question which of the last mentioned languages is that habitually spoken by the appellant appears to me to be one of fact or of mixed fact and law and therefore one into which we can not inquire.

For these reasons I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: *L. Gagnon.*

Solicitor for the respondent: *G. Sylvestre.*

LAURIER SAUMUR.....(*Plaintiff*) APPELLANT;

AND

THE CITY OF QUEBEC.....(*Defendant*) RESPONDENT

AND

THE ATTORNEY GENERAL FOR QUEBEC ..... } INTERVENANT.

1952

*Dec. 9, 10, 11, 12, 15, 16, 17.

1953

*Oct. 6.

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

Constitutional law—Validity of municipal by-law—Prohibition to distribute pamphlets etc. in the streets without permission from chief of police—Whether interference with Freedom of Worship and of the Press—Whether criminal legislation—Statute of 1852 of Old Province of Canada, 14-15 Vict., c. 175—Freedom of Worship Act, R.S.Q. 1941, c. 307—B.N.A. Act, ss. 91, 92, 93, 127—By-Law 184 of City of Quebec —Noncompliance with Rule 30 of Supreme Court of Canada.

By an action in the Superior Court of Quebec, the appellant, a member of Jehovah's Witnesses, attacked the validity of a by-law of the City of Quebec forbidding distribution in the streets of the City of any book, pamphlet, booklet, circular, tract whatever without permission from the Chief of Police. The action was dismissed by the trial judge and by a majority in the Court of Queen's Bench (Appeal Side). In this Court the appellant declined to contend that the by-law was invalid because a discretion was delegated to the Chief of Police.

Held: (reversing the decision appealed from), that the by-law did not extend so as to prohibit the appellant as a member of Jehovah's Witnesses from distributing in the streets of the City any of the writings included in the exhibits and that the City, its officers and agents be restrained from in any way interfering with such distribution.

Per Kerwin J.:—Whether or not the *Freedom of Worship Act* whenever originally enacted (it is now R.S.Q. 1941, c. 307) be taken to supersede the pre-Confederation Statute of 1852 (14-15 Vict., c. 175), the specific terms of the enactment providing for freedom of worship have not been abrogated. Even though it would appear from the evidence that Jehovah's Witnesses do not consider themselves as belonging to a religion, they are entitled to "the free exercise and enjoyment of (their) Religious Profession and Worship" and have a legal right to attempt to spread their views by way of the printed and written word as well as orally; and their attacks on religion generally, and one in particular, as shown in the exhibits filed, do not bring them within the exception "so as the same be not made an excuse for licentiousness or a justification of practices inconsistent with the peace and safety of the Province", and their attacks are not "inconsistent with the peace and safety of the Province" even when they are directed particularly against the religion of most of the Province's residents. As the by-law may have its effect in other cases and under other

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

1953

SAUMUR v. CITY OF QUEBEC

circumstances, if not otherwise objectionable, it is not *ultra vires* the City of Quebec, but since it is in conflict with the freedom of worship of the appellant, it should be declared that it does not extend so as to prohibit the appellant as a member of Jehovah's Witnesses from distributing in the streets any of the writings included in the exhibits.

Furthermore, since both the right to practise one's religion and the freedom of the press fall within "Civil Rights in the Province", the Legislature had the power to authorize the City to pass such by-law.

Per Rand J.:—Since the by-law is legislation in relation to religion and free speech and not in relation to the administration of the streets, and since freedom of worship and of the press are not civil rights or matters of a local or private nature in the Provinces, the subject-matter of the by-law was beyond the legislative power of the Province.

Per Kellock J.:—The by-law is *ultra vires* as it is not enacted in relation to streets but impinges upon freedom of religion and of the press which are not the subject-matter of legislative jurisdiction under s. 92 of the *B.N.A. Act.*

Per Estey J.:—Since the right to the free exercise and enjoyment of religious profession and worship is not a civil right in the province but is included among those upon which Parliament might legislate for the preservation of peace, order and good government, s. 2 of c. 307 of the Revised Statutes of Quebec, 1941, could not be enacted by the province under any of the heads of s. 92 of the *B.N.A. Act.* By-law 184 is legislation in relation to and interferes with that right; it is therefore in conflict with the Statute of 1852 and authority for its enactment could not be given to the City by the Legislature. Even if s. 2 of c. 307 was *intra vires,* the by-law would be in conflict therewith and, therefore, could not be competently passed by the City because it was not authorized by the terms of its charter.

Per Locke J.:—The belief of the Jehovah's Witnesses and their mode of worship fall within the meaning of the expression "religious profession and worship" in the preamble of the Statute of 1852 and in s. 2 of c. 307 of the Revised Statutes of Quebec, 1941.

The true purpose and nature of the by-law is not to control the condition of the streets and traffic but to impose a censorship upon the distribution of written publications in the streets. The right to the free exercise and enjoyment of religious profession and worship without discrimination or preference, subject to the limitation expressed in the concluding words of the first paragraph of the Statute of 1852, is not a civil right of the nature referred to under head 13 of s. 92 of the *B.N.A. Act,* but is a constitutional right of all the people of the country given to them by the Statute of 1852 or implicit in the language of the preamble of the *B.N.A. Act.* The Province was not therefore empowered to authorize the passing of such a by-law restraining the appellant's right of freedom of worship.

The by-law further trenches upon the jurisdiction of Parliament under head 27 of s. 91 of the *B.N.A. Act.* It creates a new criminal offence and is *ultra vires.*

Per Rinfret C.J. and Taschereau J. (dissenting):—The pith and substance of this general by-law is to control and regulate the usage of streets in regard to the distribution of pamphlets. Even if the motive of the City was to prevent the Jehovah's Witnesses from distributing their literature in the streets, that could never be a reason to render the

by-law illegal or unconstitutional, since the City had the power to pass it: usage of the streets of a municipality being indisputably a question within the domain of the municipality and a local question.

Freedom of worship is not a subject of legislation within the jurisdiction of Parliament. It is a civil right within the provinces. The provisions of the by-law are not covered by the preamble to s. 91 of the *B.N.A. Act,* nor have they the character of a criminal law. Furthermore, even if the right to distribute pamphlets was an act of worship, freedom of worship is not an absolute right but is subject to control by the province.

Per Cartwright and Fauteux JJ. (dissenting):—It was within the competence of the Legislature to authorize the passing of this by-law under its power to legislate in relation to (1) the use of highways, since the legislative authority to permit, forbid or regulate their use for purposes other than that of passing and repassing belongs to the provinces; and (2) police regulations and the suppression of conditions likely to cause disorder, since it is within the competence of the Legislature to prohibit or regulate the distribution in the streets of written matter having a tendency to insult or annoy the recipients thereof with the possible result of giving rise to disorder, and perhaps violence, in the streets. An Act of a provincial legislature in relation to matters assigned to it under the *B.N.A. Act* is not rendered invalid because it interferes to a limited extent with either the freedom of the press or the freedom of religion.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Bertrand J.A. dissenting, the decision of the trial judge and holding that By-law 184 of the City of Quebec was valid.

W. Glen How for the appellant.

E. Godbout Q.C. for the respondent.

L. E. Beaulieu Q.C. and *Noël Dorion Q.C.* for the intervenant.

The dissenting judgment of Rinfret C.J. and Taschereau J. was delivered by

The CHIEF JUSTICE: Dépouillée de son extravagante mise-en-scène et réduite à sa véritable dimension, cette cause, à mon avis, est vraiment très simple. Elle n'a sûrement pas l'ampleur et l'importance qu'ont tenté de lui donner les Témoins de Jéhovah par le truchement de M. Laurier Saumur, l'appelant, se désignant comme un missionnaire-évangéliste.

Il s'agit de la validité d'un règlement municipal et il y a probablement eu des centaines et des centaines de causes de ce genre depuis la Confédération. Si, par contre, cette

(1) Q.R. [1952] Q.B. 475.

1953

SAUMUR v. CITY OF QUEBEC

Rinfret C.J.

catégorie de causes n'a pas été soumise très fréquemment à la Cour Suprême du Canada, c'est uniquement à raison de son peu d'importance relative et de son application restreinte, dans chaque cas, au territoire de la municipalité concernée.

Voici le texte du règlement attaqué:

Règlement nº 184

1º Il est, par le présent règlement, défendu de distribuer dans les rues de la Cité de Québec, aucun livre, pamphlet, brochure, circulaire, fascicule quelconque sans avoir au préalable obtenu pour ce faire la permission par écrit du Chef de Police.

2º Toute personne qui contreviendra au présent règlement sera passible d'une amende avec ou sans les frais, et à défaut du paiement immédiat de ladite amende avec ou sans les frais, selon le cas, d'un emprisonnement, le montant de ladite amende et le terme d'emprisonnement à être fixé par la Cour du Recorder de la Cité de Québec, à sa discrétion; mais ladite amende ne dépassera pas cent dollars, et l'emprisonnement n'excédera pas trois mois de calendrier; ledit emprisonnement cependant, devant cesser en tout temps avant l'expiration du terme fixé par le paiement de ladite amende et des frais, selon le cas; et si l'infraction est réitérée, cette récidive constituera, jour par jour, après sommation ou arrestation, une offense séparée.

L'appelant, invoquant sa qualité de sujet de Sa Majesté le Roi et de résident dans la Cité de Québec, alléguant en outre qu'il est un missionnaire-évangéliste et l'un des Témoins de Jéhovah, déclare qu'il considère de son devoir de prêcher la Bible, soit oralement, soit en distribuant des publications sous forme de livres, opuscules, périodiques, feuillets, etc., de maison en maison et dans les rues.

Il prétend que le règlement nº 184, reproduit plus haut, a pour effet de rendre illégale cette distribution de littérature sans l'approbation écrite du Chef de Police de la Cité de Québec. Il ajoute qu'en sa qualité de citoyen canadien il a un droit absolu à l'expression de ses opinions et que cela découle de son droit à la liberté de parole, la liberté de la presse et le libre exercice de son culte envers Dieu, tel que garanti par la Constitution britannique non écrite, par l'*Acte de l'Amérique britannique du Nord* généralement, et également par les Statuts de la province de Québec, spécialement la *Loi concernant la liberté des cultes et le bon ordre dans les églises et leurs alentours* (S.R.Q. 1941, c. 307).

Il allègue que la Cité de Québec et la province de Québec n'ont aucune juridiction, soit en loi, soit constitutionnellement, pour adopter un règlement tel que ci-dessus, et que ce dernier est *ultra vires,* inconstitutionnel, illégal et nul.

D'après lui, ce règlement aurait été adopté, le 27 octobre 1933, expressément pour empêcher les activités évangéliques des Témoins de Jéhovah et ce règlement est arbitraire, oppressif, partial et injustifié; il est, en outre, discriminatoire, vindicatif et constitue un abus de pouvoir.

Il demande qu'il soit déclaré que ce règlement n'est pas autorisé par la Charte de la Cité de Québec et qu'à tout événement, en ce qu'il tente de limiter la liberté de parole et la liberté de la presse, il empiète sur la juridiction du Parlement du Canada et, en particulier, du *Code criminel.*

L'appelant se plaignait, en plus, de la délégation illimitée et arbitraire en faveur du Chef de Police, ainsi qu'elle est contenue dans le règlement, mais à l'audition devant cette Cour il a déclaré qu'il abandonnait ce moyen.

Il allègue que, par application du règlement, il a été illégalement arrêté et poursuivi et qu'à la date de l'institution de l'action, une information était encore pendante contre lui à la Cour du Recorder de la Cité de Québec, bien que la poursuite de cette information ait été arrêtée par bref de prohibition alors inscrit devant la Cour du Banc du Roi (en appel).

La déclaration de l'appelant conclut donc que le règlement n° 184 de la Cité de Québec, du moins en autant qu'il est lui-même concerné, soit déclaré *ultra vires,* inconstitutionnel, illégal et nul; que les Statuts de la province de Québec, en autant qu'ils prétendent autoriser l'adoption de ce règlement par la Cité de Québec, soient également déclarés *ultra vires,* inconstitutionnels et illégaux; et que la Cour émette une injonction permanente empêchant la Cité de Québec, ses officiers, ses agents et ses représentants de tenter de mettre en vigueur le règlement n° 184, à défaut de quoi ils soient condamnés pour mépris de cour et aux pénalités que cela comporte.

L'intimée, la Cité de Québec, a plaidé que le règlement n° 184 était une loi municipale légalement passée dans l'exercice des pouvoirs de réglementation de la Cité et

1953

SAUMUR v. CITY OF QUEBEC

Rinfret C.J.

conforme à son acte d'incorporation; que la loi de la province, en vertu de laquelle le règlement a été adopté, est constitutionnelle, légale et valide; que le règlement concerne la propreté, le bon ordre, la paix et la sécurité publiques, la prévention de troubles et émeutes et se rapporte à l'économie intérieure et au bon gouvernement local de la ville; que le demandeur a systématiquement contrevenu à ce règlement de façon délibérée et s'est obstinément refusé à s'y soumettre; qu'il n'a jamais demandé et, par conséquent, n'a pu obtenir de permis pour distribuer ses pamphlets dans la ville de Québec et qu'il a ignoré d'une manière absolue si le règlement est susceptible de le priver d'aucun de ses droits, ayant préféré y désobéir de son plein gré. Comme conséquence, l'appelant fut condamné suivant la loi par un tribunal compétent.

La plaidoirie écrite allègue, en outre, que l'appelant n'est pas un ministre du culte et que l'organisation dont il fait partie n'est pas une église ni une religion. Au contraire, les pamphlets ou tracts qu'elle insiste à distribuer sans autorisation ont un caractère provocateur et injurieux, ne sont pas des gestes religieux mais des actes anti-sociaux qui étaient et sont de nature à troubler la paix publique et la tranquillité et la sécurité des paisibles citoyens dans la Cité de Québec, où ils risquent de provoquer des désordres. Il est malvenu en fait et en droit d'invoquer des libertés de parole, de presse et de culte, qui ne sont aucunement concernées en l'occurrence; il n'a jamais été persécuté et, si la Cité de Québec a mis en vigueur son règlement, ce ne fut que pour remplir ses obligations envers le bien commun, l'ordre public exigeant que le règlement soit dûment appliqué dans la Cité.

Après une longue enquête et la production de quelque chose comme soixante-quinze exhibits, avec en plus des mémoires rédigés par l'abbé Gagné, le très révérend Doyen Evans, le rabbin Frank et M. Damien Jasmin, le juge de première instance a maintenu la défense et rejeté l'action de l'appelant. Ce jugement a été confirmé dans son intégrité par la Cour du Banc de la Reine (en appel) (1), (les honorables juges Barclay, Marchand, Pratte et Hyde), l'honorable juge Bertrand se déclarant dissident.

(1) Q.R. [1952] Q.B. 475.

L'honorable juge de première instance commence par dire dans son jugement qu'il est d'avis que la preuve offerte en cette cause était en grande partie inutile et illégale, mais qu'il l'a permise parce qu'il n'a pas voulu restreindre la liberté de discussion et qu'il a désiré fournir à toutes les parties l'opportunité d'exposer leurs théories et leur doctrine.

Sur la question de savoir si la doctrine prêchée par les Témoins de Jéhovah est une religion ou non, il déclare qu'il ne se prononce pas parce que, suivant lui, il était appelé à décider seulement si le règlement attaqué était *ultra vires*. Après avoir cité les articles 335, 336 et 337 de la Charte de la Cité de Québec, il se déclare d'avis que le conseil de cette dernière avait obtenu de la Législature de Québec le pouvoir d'adopter le règlement en litige.

Disons tout de suite que le texte de ces articles de la Charte ne laisse aucun doute sur ce point de vue et ce n'est pas là-dessus que l'appelant a insisté.

A ce sujet, cependant, le jugement de la Cour Supérieure contient le paragraphe suivant:

...Il ne s'agit pas d'une prohibition absolue.

De plus, le règlement ne fait aucune distinction. Il s'applique à tous les citoyens et n'a en soi aucun caractère discriminatoire. Naturellement, il peut prêter à des abus, mais dans cette cause, on ne se plaint nulle part qu'il y en ait eus. Il n'a pas été prouvé que ce règlement avait été passé spécialement dans le but de limiter les activités du demandeur et des témoins de Jéhovah; au contraire, il s'applique à tous, quelles que soient leur nationalité, leur doctrine ou leur religion.

L'honorable juge examine ensuite la question de savoir si la Cité avait le droit de déléguer ses pouvoirs à son Chef de Police et il conclut dans l'affirmative. Il cite deux décisions de la Cour d'Appel de Québec sur ce point et arrive à la conclusion que le principe de délégation de pouvoir, en pareil cas, lui paraît admis, du moins dans l'état actuel de la jurisprudence. Mais, comme nous l'avons fait remarquer, nous n'avons plus à nous occuper de ce prétendu motif d'illégalité puisque, à l'audition devant nous, le procureur de l'appelant a déclaré formellement qu'il abandonnait ce moyen.

Le savant juge analyse ensuite le jugement de la Cour Suprême du Canada, rendu en 1938, sur la législation de la province de l'Alberta: *"An Act to Ensure the Publication of accurate News and Information"*; également

1953

SAUMUR v. CITY OF QUEBEC

Rinfret C.J.

l'arrêt de la Cour du Banc du Roi de Québec dans la cause de *Vaillancourt* v. *la Cité de Hull*. A la suite de cette analyse, il déclare en venir à la conclusion que le règlement n° 184 est *intra vires*, valide et légal. Il fait remarquer que l'appelant ne pouvait guère se plaindre sans avoir d'abord demandé un permis, ce qu'il a négligé et refusé de faire. C'est ainsi qu'il aurait pu prétendre que l'officier chargé d'émettre des permis commettait des injustices à son égard et agissait d'une façon discriminatoire en lui refusant l'autorisation requise. C'est alors qu'il aurait eu un recours devant les tribunaux en se plaignant qu'il avait essuyé un refus injuste et arbitraire et que l'on agissait envers lui d'une manière oppressive.

Comme le fait remarquer M. le Juge Barclay:

...The Appellant complains of attacks and disorders. If this state of affairs is brought about by the contents of the pamphlets distributed it may well be that their distribution should be prohibited. I refrain from any comment on the contents of these publications, although they have been put before us by the Appellant. If a demand for a licence to distribute them be refused, then that question will be of importance, but not until then.

Le principal jugement en la Cour du Banc de la Reine (1) a été écrit par M. le Juge Pratte. Il fait remarquer que les arrêts rendus aux États-Unis ne sauraient avoir le moindre effet devant les tribunaux canadiens parce que la constitution des États-Unis garantit en termes formels la liberté d'expression et la liberté des cultes, tandis que chez-nous, au Canada, la situation juridique est différente. "La vérité, ici comme en Grande-Bretagne, c'est que, contrairement à ce qui est aux États-Unis, le peuple n'a pas abdiqué le pouvoir de légiférer en la matière, et que le cadre dans lequel peut s'exercer la liberté que nous connaissons est susceptible d'être modifié par l'autorité législative compétente".

L'honorable juge fait observer:

...que les rues sont destinées à permettre le passage d'un endroit à un autre (*Harrisson* v. *Duke of Rutland* (1893), 1 Q.B., p. 142; *Hickman* v. *Massey* (1900), 1 Q.B. 752. C'est là leur fin première, à laquelle toute autre utilisation qu'on voudrait en faire est nécessairement subordonnée. Et s'il arrive que les rues soient utilisées pour d'autres fins, c'est seulement à la faveur d'un privilège spécialement octroyé, ou en raison d'une tolérance à laquelle l'autorité compétente doit toujours pouvoir mettre fin lorsqu'elle juge que l'intérêt public le requiert. Il faut bien qu'il

(1) Q.R. [1952] Q.B. 475.

en soit ainsi, pour empêcher que l'exercice du droit de se servir des rues suivant leur destination ne soit gêné par ceux qui voudraient détourner les voies publiques de leur fin première, ou que l'usage de la rue pour une fin autre que celle de passer ne devienne une cause de désordre.

Un peu plus loin, l'honorable juge ajoute:

...S'il n'est point douteux que l'usage des rues doive être réglementé, il est aussi certain que, d'une façon générale, ce pouvoir de règlementation est du ressort de l'autorité locale. Il n'est point nécessaire de la démontrer ici, car l'appelant le reconnaît.....

.....

Tandis que les dispositions du Code criminel sont destinées à assurer la sécurité de l'État et à maintenir un degré minimum de moralité par tout le pays, le règlement attaqué lui, a seulement pour but de prévenir l'utilisation des rues de la cité pour une fin contraire à leur destination et que l'autorité locale compétente ne jugerait pas opportun de tolérer.

M. le Juge Hyde s'accorde d'une façon générale avec ses deux collègues, mais il réfère en particulier au jugement de la Cour Suprême dans la cause de *Provincial Secretary of Prince Edward Island* v. *Egan* (1), après avoir dit:

...Here there is no question but that the municipality has the power to enact by-laws for regulation of the use of its public thoroughfares and the prevention of nuisances thereon,

et il cite ce passage du jugement de la Cour, rendu par l'honorable Juge Rinfret, à la page 415:

...The right of building highways and of operating them within a province, whether under direct authority of the Government, or by means of independent Companies or municipalities, is wholly within the purview of the Province (*O'Brien* v. *Allen*, 30 S.C.R. 340), and so is the right to provide for the safety of circulation and traffic on such highways. The aspect of that field is wholly provincial, from the point of view of the use of the highway and of the use of the vehicles. It has to do with the civil regulation of the use of highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous. Such is amongst others, the provincial aspect of section 84 of The Highway Traffic Act.

Disons tout de suite que le règlement en litige n'est rien autre chose qu'un règlement de police; il est basé primordialement sur le fait que les rues ne doivent pas être utilisées pour fins de distribution de documents. L'usage normal des rues est celui de la circulation à pied ou en voiture (Voir *Dillon* "On Municipal Corporations", 5e éd., p. 1083; *McQuillin* "On Municipal Corporations", 2e éd., vol. 3, p. 936 et suivantes; même volume, p. 61, n° 938).

(1) [1941] S.C.R. 396.

1953

SAUMUR v. CITY OF QUEBEC

Rinfret C.J.

Faisons remarquer d'abord que la Charte de la Cité de Québec est antérieure à la Confédération (29-30 Vict. c. 57). La Cité n'est pas régie par la *Loi des Cités et Villes*, S.R.Q. 1941, c. 233, mais il n'est pas hors de propos de référer à cette loi pour se rendre compte de l'étendue des pouvoirs qui y sont conférés pour la réglementation des rues.

Le conseil y est attribué (art. 424) le pouvoir général de faire des règlements "pour assurer la paix, l'ordre, le bon gouvernement, la salubrité, le bien-être général et l'amélioration de la municipalité". Plus spécialement (art. 426, par. 10), il peut "réglementer ou empêcher les jeux et les amusements sur les rues, allées, trottoirs ou places publiques"; il a le pouvoir général de nommer des agents de police ou constables avec autorité et juridiction dans les limites de la municipalité (par. 16a). Il peut (art. 428) "prohiber, empêcher et supprimer les attroupements, rixes, troubles, réunions désordonnées et tous spectacles ou amusements brutaux ou dépravés"; "permettre, moyennant le paiement d'une licence, et réglementer l'affichage de placards"; "empêcher qu'aucune congrégation ou réunion pour le culte religieux ne soit troublée dans ses exercices, même prohiber la distribution, aux portes des églises, le dimanche, de toutes feuilles volantes ou circulaires imprimées". Enfin et spécifiquement, sujet aux dispositions de la Loi relative aux rues publiques (S.R.Q. 1941, c. 242)—à laquelle il n'est pas nécessaire de référer plus amplement—en vertu de l'article 429, le conseil peut faire des règlements de la plus grande étendue pour l'ouverture et l'entretien des rues, des trottoirs et des places publiques, pour en réglementer l'usage, empêcher et faire cesser tout empiétement; prescrire la manière de placer les enseignes, poteaux d'enseignes, auvents, poteaux de téléphone, de télégraphe et d'électricité, abreuvoirs pour chevaux, râteliers et autres obstructions; faire disparaître toute nuisance ou obstruction sur les trottoirs, rues, allées et terrains publics et empêcher qu'ils ne soient encombrés de voitures ou d'autres choses; réglementer la vitesse des véhicules dans les limites de la municipalité; réglementer l'usage des bicycles et des automobiles et les empêcher de circuler sur certaines rues; réglementer ou défendre l'usage de voitures bruyantes dans les rues et places publiques; réglementer ou défendre l'exhibition, ou le port, ou la distri-

bution de bannières, placards, annonces et prospectus ou autres articles dans les, près des, ou sur les rues, allées, trottoirs et places publiques; réglementer ou empêcher le déploiement de drapeaux, bannières et enseignes à travers les rues et places publiques, et réglementer, permettre moyennant un permis, ou défendre la construction et l'usage de tableaux à affiches et enseignes le long ou près des rues, allées et places publiques ou sur les lots vacants ou ailleurs.

Cette longue énumération fait bien voir jusqu'à quel point les municipalités ont le contrôle de leurs rues, en vertu de la loi générale.

Le règlement attaqué est strictement du même ordre d'idée.

Il est non moins clair que *l'Acte de l'Amérique britannique du Nord 1867*, dans la distribution qu'elle fait des pouvoirs législatifs, aux paragraphes 91 et 92 attribue, dans chaque province, à la Législature, le pouvoir exclusif de faire des lois relatives aux institutions municipales dans la province (par. 8), à la propriété et les droits civils dans la province (par. 13) et généralement à toutes les matières d'une nature purement locale et privée dans la province (par. 16).

Il serait vraiment fantastique de prétendre que quelques-uns des pouvoirs ci-dessus mentionnés et que l'on trouve dans la *Loi des Cités et Villes* de la province de Québec, pourraient relever du domaine fédéral. Je ne me représente pas facilement le Parlement fédéral entreprenant d'adopter des lois sur aucune de ces matières (Voir le jugement du Conseil Privé dans *Hodge* v. *The Queen* (1)).

Je ne comprends pas, d'ailleurs, que le procureur de l'appelant dirige son argumentation à l'encontre de ce principe général. Il demande à la Cour de s'écarter du texte du règlement et il cherche à y trouver un motif qui serait celui, qu'il avait déjà allégué dans sa déclaration, "que ce règlement avait été passé spécialement dans le but de limiter les activités du demandeur et des Témoins de Jéhovah".

(1) (1883) 9 App. Cas. 117, 131, 133, 134.

1953

SAUMUR v. CITY OF QUEBEC

Rinfret C.J.

Il est à remarquer que le règlement lui-même ne dit rien de tel; il s'applique à tous, quelle que soit leur nationalité, leur doctrine ou leur religion. Mais, en plus, le juge de première instance a décidé en fait qu'il "n'a pas été prouvé que ce règlement avait été passé spécialement dans ce but". D'autre part, en matière d'excès de pouvoirs, c'est toujours au mérite ("pith and substance") de la législation qu'il faut s'arrêter. Ce que le règlement vise est uniquement l'usage des rues pour fins de distribution. En outre que, ainsi que l'a décidé le juge de la Cour Supérieure, aucun motif, aucune arrière-pensée n'a été dévoilée par la preuve faite à l'enquête, c'est une idée erronée que de chercher à attribuer un motif à une loi qui n'en mentionne pas. Un règlement peut être valide même si le but du conseil municipal est mauvais.

J'avoue trouver étrange que l'on mette même en discussion le pouvoir des corporations municipales de réglementer de la façon la plus absolue l'usage de leurs rues et d'en exercer le contrôle. Notre Cour s'est prononcée là-dessus d'une façon catégorique dans l'affaire de *Winner* v. *S.M.T. (Eastern) Limited & Attorney General of Canada* (1). La majorité des juges a exprimé alors l'avis, même lorsqu'il s'agissait d'un cas de droit international, qu'une loi provinciale pouvait valablement stipuler que, dans les limites de la province du Nouveau-Brunswick, un bureau ("board"), en vertu de "The Motor Carrier Act", pouvait empêcher M. Winner, un propriétaire de ligne d'autobus, demeurant à Lewiston, dans l'État du Maine, États-Unis, de faire des arrêts dans les rues du Nouveau-Brunswick pour y prendre des passagers dont la destination était à l'intérieur du Nouveau-Brunswick.

En ce qui me concerne, je n'ai pas eu à me prononcer sur ce point, parce que je suis arrivé à mes conclusions pour des raisons différentes de celles de la majorité, mais je n'ai aucune hésitation à ajouter que, si j'eusse eu à le faire, je me serais accordé avec la majorité sur ce sujet.

En envisageant le règlement qui nous a été soumis, il est à remarquer, je le répète, que le texte de ce règlement ne fait aucune allusion au caractère religieux des tracts ou des feuillets qui sont visés. Je ne saurais me rendre à l'idée que, pour décider de la validité de ce règlement, il

(1) [1951] S.C.R. 887.

faille aller au-delà de ce qu'il dit et se demander si la Cité de Québec en l'adoptant avait un motif ultérieur. Cela n'importe pas du tout. Si une corporation municipale a le pouvoir de prohiber ou de contrôler l'usage de ses rues, nous n'avons pas à nous demander quel a pu être son motif; pas plus, par exemple, qu'en reconnaissant à tout citoyen le droit d'interdire l'accès de sa maison, on puisse disputer le motif qui le pousse à en agir ainsi. Il se peut que sa raison soit qu'il ne veuille pas laisser entrer un communiste dans sa maison; même si c'est là son motif caché ou son arrière-pensée, cela ne lui enlève pas son droit absolu de défendre l'accès de sa maison à qui que ce soit. La Cité de Québec eut-elle eu même dans l'idée—ce que le règlement ne fait pas voir—de prendre ce moyen d'empêcher les Témoins de Jéhovah de distribuer leurs feuillets et leurs tracts, cela n'aurait jamais pour résultat de rendre sa décision illégale, ni surtout inconstitutionnelle.

La seule question que les tribunaux ont à examiner est celle de savoir si la Cité de Québec avait le pouvoir d'adopter ce règlement. Nous n'avons pas à chercher derrière le texte qu'elle a adopté pour voir quel a pu être son but en ce faisant. J'irai même plus loin et je dirai que l'usage des rues d'une municipalité est indiscutablement une question du domaine municipal et une question locale. Je cherche encore en vertu de quoi on pourrait prétendre que cette matière ne tombe pas exclusivement dans la catégorie des sujets attribués aux provinces en vertu de l'article 92 de l'*Acte de l'Amérique britannique du Nord;* et, dans ce cas, même s'il est admis que le droit de culte est du domaine fédéral, le pouvoir de contrôle des rues municipales, étant un sujet spécifiquement attribué aux provinces, il aurait préséance sur le pouvoir supposé du Parlement fédéral de légiférer en matière de culte. Il est de jurisprudence constante que du moment qu'un sujet est spécialement attribué au domaine provincial par l'article 92, il a préséance et priorité sur tout pouvoir que prétendrait exercer le fédéral, en vertu des pouvoirs généraux mentionnés dans l'article 91.

Il n'y a pas si longtemps que l'on a eu, dans la Cité d'Ottawa, l'exemple d'une loi provinciale qui permettait à une municipalité d'empêcher la pratique des jeux commercialisés le dimanche, qui, cependant, sous un certain aspect,

1953

SAUMUR v. CITY OF QUEBEC

Rinfret C.J.

doit être considérée comme un exercice qui empièterait sur l'observance du Jour du Seigneur et serait donc, si l'on admettait la prétention que je discute, du domaine des cultes et d'un caractère religieux. Cette loi provinciale est dans les statuts de la province d'Ontario et jusqu'ici nul ne s'est avisé d'en soulever l'inconstitutionnalité.

La question de juridiction ne peut jamais dépendre de la valeur des raisons qui sont données, pas plus dans un règlement que dans un jugement. Ce que l'appelant soulève et ce qu'il demande à la Cour de prononcer, c'est que la Cité de Québec n'avait pas le pouvoir d'adopter ce règlement. Il ne pourra jamais justifier cette conclusion en prétendant que la Cité l'a adopté pour un motif erroné.

En réalité, le véritable argument que l'appelant tente de faire prévaloir c'est que ce règlement l'empêche d'exercer son culte ou, comme il l'allègue pour les fins de la cause, sa religion.

Je partage absolument l'opinion du juge de première instance et celle de la majorité de la Cour du Banc de la Reine (en appel) à l'effet que le règlement attaqué ne fait rien de tel. Tout d'abord, ce n'est pas un règlement qui prohibe: c'est un règlement qui permet, sous certaines restrictions.

Je répète que l'appelant devant la Cour se trouve, à cet égard, dans une position défectueuse, parce qu'il n'a pas soumis au Chef de police de la Cité de Québec les pamphlets qu'il avait l'intention de distribuer. Comme l'affirme la défense, il a préféré ignorer absolument le règlement et procéder à faire sa distribution sans en demander la permission. Il en résulte que nous ne savons pas ce que l'appelant voulait distribuer et nous ne connaissons nullement la nature de ces tracts.

Il y a lieu, par conséquent, de limiter notre investigation à la question de savoir si vraiment l'appelant, par ce règlement, est empêché de pratiquer sa religion; et il faut encore restreindre le débat à la question de savoir si l'appelant, par suite de ce règlement, ne peut pas distribuer des pamphlets religieux dans les rues de la Cité de Québec. Car il est évident que, sur ce chapitre, il faut que le règlement prohibe la distribution des pamphlets religieux que

l'appelant voudrait disséminer. Cet argument ne vaut nullement à l'encontre de la prohibition de distribuer tout autre pamphlet.

Ironie du sort, les Témoins de Jéhovah qui, dans leurs publications, affirment catégoriquement non seulement qu'ils ne constituent pas une religion, mais qu'ils sont opposés à toute religion et que les religions sont une invention du démon, sont maintenant devant les tribunaux du Canada pour demander protection au nom de la religion; et, à cette fin, à l'encontre de la constitutionnalité des lois municipales de la province de Québec, ils sont contraints d'invoquer une loi de la province de Québec, à savoir: *la Loi concernant la liberté des cultes et du bon ordre dans les églises et leurs alentours* (c. 307, S.R.Q. 1941).

Cette loi, invoquée par eux, contient l'article suivant:

2. La jouissance et le libre exercice du culte de toute profession religieuse, sans distinction ni préférence. mais de manière à ne pas servir d'excuse à la licence ni à autoriser des pratiques incompatibles avec la paix et la sûreté de la province, sont permis par la constitution et les lois de cette province à tous les sujets de Sa Majesté qui y vivent. S.R. 1925, c. 198, a. 2.

C'est bien ainsi que l'appelant a posé le problème dans sa déclaration:

...his unqualified right as a Canadian citizen to the expression of his views on the issues of the day and in employing thereby his right of freedom of speech, freedom of the press and free exercise of worship of Almighty God as guaranteed by the unwritten British Constitution, by the provisions of the British North America Act generally and, in particular, in its preamble and sections 91, 92 and 129, as well as by the statute of the Province of Quebec generally and in particular, by "An Act Respecting Peddlers", (R.S.Q. 1941, Chapter 230, especially section 8 thereof); and by "An Act Respecting Licences", (R.S.Q. 1941, Chapter 76, especially section 82 thereof); and by "An Act Respecting Freedom of Worship and the Maintenance of Good Order In and Near Places of Public Worship", (R.S.Q. 1941, Chapter 307, especially section 2 thereof);

Il n'y a pas lieu de s'arrêter à la référence à la Loi concernant les colporteurs et à la Loi des licences.

Le procureur de l'appelant ne s'est pas non plus expliqué sur ce qu'il entend par "the unwritten British Constitution" comme gouvernant les pouvoirs respectifs du Parlement canadien et des Législatures provinciales (tels qu'ils sont définis dans les articles 91 et 92 de l'*Acte de l'Amérique britannique du Nord*). C'est cette loi qui contient la Constitution du Canada et le Conseil Privé, à plusieurs

1953

SAUMUR v. CITY OF QUEBEC

Rinfret C.J.

reprises, a déclaré que les pouvoirs ainsi distribués entre le Parlement et les législatures couvraient absolument tous les pouvoirs que pouvait exercer le Canada comme entité politique. Mais l'appelant prétend que la question de l'exercice du culte est exclusivement de la juridiction du Parlement fédéral et, en particulier, que les prescriptions du règlement attaqué seraient couvertes par le début de l'article 91 qui autorise l'adoption de "lois pour la paix, l'ordre et le bon gouvernement du Canada", ou la *Loi criminelle.*

Au sujet de la première prétention, il suffit de poursuivre la lecture de l'article 91 pour constater que le pouvoir du Parlement fédéral relativement à la paix, l'ordre et le bon gouvernement du Canada se bornent à toutes les matières ne tombant pas dans les "catégories de sujets exclusivement assignés par le présent acte aux Législatures des provinces". Comme il a été invariablement décidé par le Conseil Privé et conformément, d'ailleurs, au texte précis que nous venons de citer, dès que la matière est couverte par l'un des paragraphes de l'article 92, elle devient du domaine exclusif des législatures de chaque province et elle est soustraite à la juridiction du Parlement fédéral. Naturellement, nous ne parlons plus ici du contrôle des rues municipales, car il est évident que, dans ce cas, les paragraphes 8, 13 et 16 de l'article 92 (comme d'ailleurs nous l'avons vu plus haut) attribuent cette juridiction exclusivement aux législatures. Mais, si nous comprenons bien la prétention, c'est que la garantie de l'exercice du culte doit venir du Parlement fédéral et n'appartient pas aux législatures. Nous disons bien qu'elle doit venir, car il est très certain que, pour le moment, elle n'existe pas ailleurs que dans la *Loi concernant la liberté des cultes* invoquée par l'appelant dans sa déclaration (S.R.Q. 1941, c. 307).

La difficulté qu'éprouve ici l'appelant résulte de plusieurs raisons:

Premièrement:—Son droit de distribuer des pamphlets religieux ne constitue pas l'exercice d'un culte d'une profession religieuse.

Deuxièmement:—A tout événement, la jouissance et le libre exercice du culte d'une profession religieuse ne jouit pas, en vertu du chapitre 307, S.R.Q. 1941, d'une autori-

sation absolue, mais il faut que ce culte s'exerce "de manière à ne pas servir d'excuse à la licence, ni à autoriser des pratiques incompatibles avec la paix et la sûreté de la province".

Troisièmement:—L'exercice du culte est un droit civil et, par conséquent, tombe sous le paragraphe 13 de l'article 92 de l'*Acte de l'Amérique britannique du Nord*. Il est donc du domaine provincial.

Le premier point ci-dessus dépend d'une question de fait. Or, l'appelant a fait entendre comme témoin un monsieur Hayden C. Covington, qui s'est décrit comme "ordained minister of the gospel, and lawyer, 124 Columbia Heights, Brooklyn, New York". Au cours de ce témoignage, ce témoin a identifié un nombre considérable de publications dont il a déclaré qu'elles contenaient la doctrine des Témoins de Jéhovah, en ajoutant: "They comprise the official view, doctrines and principles advocated and taught by Jehovah's Witnesses at the date of publication of each of such books". Or, dans toutes ces publications, il est affirmé que les Témoins de Jéhovah ne sont pas une religion; que, au contraire, leur but est de combattre toutes les religions et que la religion est une invention du démon. Nous avons déjà, au début de ce jugement, fait allusion à cette doctrine.

Dans les circonstances, il m'est impossible de voir en vertu de quoi les Témoins de Jéhovah pourraient invoquer la liberté du culte qui est prévue dans le chapitre 307 des Statuts Refondus de Québec 1941. D'ailleurs, il serait exagéré de prétendre que, par application du chapitre 307, aucune manifestation religieuse ne pourrait être empêchée par règlement. C'est ainsi qu'il est de pratique courante que les municipalités ne permettent pas la vente d'insignes ("tag-days"), pour fins de bienfaisance, sans une autorisation qui est réservée au conseil; et je n'entretiens pas le moindre doute qu'une corporation municipale a le pouvoir d'interdire les processions religieuses dans ses rues, quelle que soit la nature ou le caractère de ces processions. J'ai même eu connaissance de règlements municipaux qui défendaient aux églises de sonner les cloches pour appeler les fidèles aux exercices religieux.

1953

SAUMUR v. CITY OF QUEBEC

Rinfret C.J.

Pour ce qui est du deuxième point ci-dessus mentionné, il faut réitérer que l'article 2 du chapitre 307 ne permet pas la jouissance et le libre exercice du culte d'une profession religieuse d'une façon absolue. Il faut que cela ne "serve pas d'excuse à la licence, ni à des pratiques incompatibles avec la paix et la sûreté de la province". C'est le texte même de la loi.

Si donc, à l'encontre de la preuve, il fallait décider que les Témoins de Jéhovah pratiquent un culte, il n'en faudrait pas moins, en vertu du texte de la Loi concernant la liberté des cultes, que la province ou la municipalité ait le droit de contrôler cet exercice "de manière à ne pas servir d'excuse à la licence, ni à autoriser des pratiques incompatibles avec la paix et la sûreté de la province".

Puisque les Témoins de Jéhovah prétendent que leur profession religieuse consiste à distribuer des tracts religieux, il s'ensuit que la province ou la municipalité, à laquelle la province délègue ce pouvoir, a le droit d'examiner les pamphlets religieux que l'on entend distribuer, de façon à en autoriser ou non la distribution.

A cet égard, je le répète, les Témoins de Jéhovah, ayant pris la position qu'ils ne demanderaient pas l'autorisation et qu'ils ne soumettraient pas la littérature qu'ils voulaient distribuer, nous n'avons aucune preuve au dossier susceptible de nous permettre de savoir si cette littérature tombait ou non dans les exceptions prévues par l'article 2 du chapitre 307. Mais, si nous nous croyions justifiés de prendre pour acquit que cette littérature serait de la même nature que les livres et les tracts qui ont été produits au dossier, ou encore qu'elle contiendrait les déclarations faites par le vice-président Covington, il serait inconcevable qu'une municipalité ne put empêcher la circulation dans ses rues de cette littérature que son conseil pourrait certainement considérer comme constituant de la licence ou des pratiques incompatibles avec la paix et la sûreté de la province; et, dès lors, comme tombant dans l'exception exprimée dans l'article 2.

Voici, en effet, ce qu'on trouve dans le témoignage de M. Covington:

Q. Are you informed that the religion of a greater part of the people in this province and in this city is Roman Catholic?—A. Yes, I have that information.

En fait, il est notoire que 90 pour cent de la population de la Cité de Québec est catholique romaine et 45 pour cent de la population du Canada appartient à la même religion.

On lui demande alors de lire les passages suivants des publications des Témoins de Jéhovah:

...Religion is the adulteress and idolatress that befriends and commits religious fornication with the political and commercial elements. She is the lover of this world and blesses the world from the balcony of the Vatican and in the pulpits. Religion, whose most powerful representative has ruled from Rome for sixteen centuries, traces her origin all the way back to Babylon of Nimrod's founding, and organized religion deservedly bears the name Babylon.....

I will shew unto thee the judgment of the great whore (or idolatress) that sitteth upon many waters: with whom the kings of the earth have committed fornication, and the inhabitants of the earth have been made drunk with the wine of her fornication.....full of abominations and filthiness of her fornication; and upon her forehead was a name written, MYSTERY, BABYLON THE GREAT, THE MOTHER OF HARLOTS AND ABOMINATIONS OF THE EARTH.

Les citations qui précèdent sont tirées de l'exhibit D-49, aux pages 345 et 346.

Après avoir mis le témoin Covington en présence des extraits ci-dessus, l'avocat de la Cité de Québec lui demande:

Q. Do you consider that writing such books with such insults against another religion, in fact the religion practised by the people of this province or city, a proper means of preaching the gospel?—A. I do.

Et au cours de cette réponse, il dit:

...history abundantly attests to the fact that the Roman Catholic Hierarchy has had relationship with the world and has had part tacitly in the wars between the nations and the destruction of nations.

Un peu plus loin:

Q. Do you consider necessary for your organization to attack the other religions, in fact, the Catholic, the Protestant and the Jews?—A. Indeed. The reason for that is because the Almighty God commands that error shall be exposed and not persons or nations.

La Cour demande au même témoin:

Q. You are the only witnesses of the truth?—A. Jehovah's Witnesses are the only witnesses to the truth of Almighty God Jehovah...

Q. Is the Roman Catholic a true church?—A. No.

Q. Is it an unclean woman?—A. It is pictured in the Bible as a whore, as having illicit relationship with the nations of this world, and history proves that fact, history that all have studied in school.

A un autre point de vue, ce même témoin déclare:

If obedience to a law of the state or nation would compel them (les Témoins de Jéhovah) to thereby violate God's law, they will obey God rather than men.

1953

SAUMUR v. CITY OF QUEBEC

Rinfret C.J.

Ce que, d'ailleurs, il avait déjà affirmé peu de temps auparavant au cours de son témoignage, à une demande de la Cour:

Q. Notwithstanding the laws of the country to the contrary?—A. Notwithstanding the laws of the country to the contrary.

Qui oserait prétendre que des pamphlets contenant les déclarations qui précèdent, distribués dans une cité comme celle de Québec, ne constitueraient pas une pratique incompatible avec la paix et la sûreté de la Cité ou de la province? Quel tribunal condamnerait un conseil municipal qui empêcherait la circulation de pareilles déclarations? Et je n'ai choisi que quelques passages dans des livres et des tracts qui fourmillent de semblables affirmations. La décence, d'ailleurs, me commanderait de ne pas en citer davantage. Et cela ne me paraît pas nécessaire pour démontrer qu'une municipalité, dont 90 pour cent de la population est catholique, a non seulement le droit, mais le devoir, d'empêcher la dissémination de pareilles infamies.

Enfin, le dernier point c'est la question que l'exercice des cultes est un droit civil qui relève de la juridiction des législatures provinciales. C'est ainsi que l'ont considéré les provinces de la Saskatchewan et de l'Alberta, qui ont adopté des lois intitulées: *An Act to Protect Certain Civil Rights* (1947, 11 Geo. VI, c. 35). L'objet de la loi est déclaré dans le préambule comme étant "to protect certain civil rights" et l'article 3 de la Loi stipule:

...Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief, and freedom of religious association, teaching, practice and worship.

La province de l'Alberta a un statut semblable.

Il est intéressant, sur ce point, de référer à l'interprétation donnée par le Conseil Privé de l'expression "civil rights" dans l'Acte de Québec de 1774, dans la cause de *Citizens Insurance Company of Canada* v. *Parsons* (1):

...It is to be observed that the same words, "Civil rights" are employed in the Act of 14 Geo. 3, c. 83, which made provision for the Government of the province of Quebec, Sect. 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreably to the said laws. In this statute the words "property" and "civil rights"

(1) (1881) 7 App. Cas. 96.

are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

Il suffit de signaler la contradiction de l'argumentation du procureur de l'appelant qui, d'une part, allègue l'inconstitutionnalité de la Charte de Québec, en invoquant, d'autre part, qu'elle est en conflit avec la *Loi concernant la liberté des cultes* (S.R.Q. 1941, c. 307) de cette même province de Québec. Il est indiscutable que la législature qui a adopté le chapitre 307 avait la compétence voulue pour adopter la Charte de la Cité de Québec, en vertu de laquelle le règlement 184 a été édicté.

En plus, d'ailleurs, le chapitre 307 n'est rien autre chose qu'une loi déclaratoire d'un statut antérieur à la Confédération, dont le procureur de l'appelant a fait grand cas. On la trouve dans les Statuts Revisés du Canada de 1859, c. 74, qui est lui-même la reproduction d'une loi de 1851.

Et alors entre en cause l'article 129 de l'*Acte de l'Amérique britannique du Nord 1867*, en vertu duquel toutes les lois en vigueur en Canada lors de l'Union continuent d'exister, entre autres, dans la province de Québec, "comme si l'Union n'avait pas eu lieu". Elles peuvent "être révoquées, abolies ou modifiées par le Parlement du Canada ou par la législature de la province respective, conformément à l'autorité du Parlement ou de cette législature, en vertu du présent acte". Mais, il n'y a pas lieu de se demander ici si la révocation était du ressort du Parlement fédéral ou de la Législature de Québec ou d'Ontario, parceque telle révocation n'a pas eu lieu. Le Parlement du Canada a nullement révoqué ou modifié cette loi antérieure à la Confédération et, par conséquent, en vertu même de l'article 129 de la Constitution, cette loi a continué d'être en vigueur dans la province de Québec "comme si l'Union n'avait pas eu lieu". En vain l'appelant a-t-il prétendu qu'un règlement de ce genre avait le caractère d'une *loi criminelle* et serait, dès lors, du domaine du Parlement du Canada, en vertu du paragraphe 27 de l'article 91 de l'*Acte de l'Amérique britannique du Nord*. Ce règlement n'a aucunement l'aspect de la définition d'un acte criminel. On peut voir, sous ce rapport, ce que dit Lord Hewart dans *Thomas* v. *Sawkins* (1), et également, dans la même cause, les commentaires de Avory J.

(1) [1935] 2 K.B. 249.

1953

SAUMUR v. CITY OF QUEBEC

Rinfret C.J.

Nous avons là une situation semblable à celle qui fut étudiée par cette Cour dans la cause de *Provincial Secretary of Prince Edward Island* v. *Egan* (1), déjà citée plus haut. La Cour Suprême du Canada ne faisait alors que réitérer ce qui avait été dit dans *In Re McNutt* (2), et surtout dans *Bédard* v. *Dawson* (3), où cette Cour a maintenu la validité d'un statut de Québec autorisant la Cour à ordonner la fermeture d'une maison de désordre sur le principe qu'il s'agit là d'une matière de propriété et de droit civil et qui ne tombe pas sous le coup de la *Loi criminelle*. D'ailleurs, les provinces ont le pouvoir d'aider à l'application du droit criminel en tentant de supprimer le crime et le désordre, comme le faisait remarquer le Juge en chef Duff dans l'affaire des *Lois de la province d'Ontario relatives aux enfants abandonnés ou négligés* (4).

Sur le tout, je n'ai donc aucune hésitation à dire que le règlement attaqué est légal, valide et constitutionnel et que les jugements qui l'ont déclaré tel doivent être confirmés, avec dépens.

KERWIN J.:—The appellant Saumur is a member of Jehovah's Witnesses and by action, brought in the Superior Court of Quebec, asks that by-law 184 of the City of Quebec, passed October 27, 1933, be declared to be—both on its face and in so far as he is concerned—ultra vires, unconstitutional, illegal, null and void and be quashed and set aside for all legal purposes. The Superior Court, and the Court of Queen's Bench (Appeal Side) (5) with Bertrand J. dissenting, dismissed the action and hence this appeal.

Clause 2 of the by-law provides penalties for the breach of clause 1, the important provision, which is in these words:—

> 1o.—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.

Counsel for the appellant declined to contend that the by-law was invalid because a discretion was delegated to the Chief of Police. Counsel for the respondent, the City of Quebec, and for the intervenant, the Attorney General

(1) [1941] S.C.R. 396 at 415.
(2) (1913) 47 Can. S.C.R. 259.
(3) [1923] S.C.R. 681.
(4) 71 C.C.C. 110 at 112, 113.
(5) Q.R. [1952] Q.B. 475.

of Quebec, did not deal with the point and nothing is therefore said about it. However, an argument was advanced based upon a pre-Confederation statute of 1852 of the old Province of Canada, 14-15 Vict. c. 175, the relevant part of which provides:—

> the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

Section 129 of the *British North America Act, 1867*, enacts:—

> 129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

By virtue of this section that part of the pre-Confederation statute extracted above continued to operate in the Province of Quebec at the time of the coming into force of the *British North America Act*. Since then the Quebec Legislature enacted legislation practically in the same words, and certainly to the same effect, which legislation has been continued from time to time and is now found in section 2 of R.S.Q. 1941, c. 307, *The Freedom of Worship Act*. Whether or not such legislation be taken to supersede the pre-Confederation enactment, no statutes such as the Quebec City Charter, in the general terms in which they are expressed, and whenever originally enacted, have the effect of abrogating the specific terms of the enactment providing for freedom of worship.

It appears from the material filed on behalf of the appellant that Jehovah's Witnesses not only do not consider themselves as belonging to a religion but vehemently attack anything that may ordinarily be so termed but in my view they are entitled to "the free exercise and enjoyment of (their) Religious Profession and Worship." The Witnesses attempt to spread their views by way of the printed and

1953

SAUMUR v. CITY OF QUEBEC

Kerwin J.

written word as well as orally and state that such attempts are part of their belief. Their attacks on religion generally, or on one in particular, do not bring them within the exception "so as the same be not made an excuse for licentiousness or a justification of practices inconsistent with the peace and safety of the Province." While several definitions of "licentious" appear in standard dictionaries, the prevailing sense of that term is said to be "libertine, lascivious, lewd." To certain biblical expressions the pamphlets, etc., of Jehovah's Witnesses which they desire to distribute attach a meaning which is offensive to a great majority of the inhabitants of the Province of Quebec. But, if they have a legal right to attempt to spread their beliefs, as I think they have, the expressions used by them in so doing, as exemplified in the exhibits filed, do not fall within the first part of the exception. Nor in my opinion are their attacks "inconsistent with the peace and safety of the Province" even where they are directed particularly against the religion of most of the Province's residents. The peace and safety of the Province will not be endangered if that majority do not use the attacks as a foundation for breaches of the peace.

Confined to the argument now under consideration, the above reasons do not justify a declaration that the by-law is ultra vires the City of Quebec since, if not otherwise objectionable, the by-law may have its effect in other cases and under other circumstances; but they do warrant a declaration that the by-law does not extend so as to prohibit the appellant as a member of Jehovah's Witnesses from distributing in the streets of Quebec any book, pamphlet, booklet, circular or tract of Jehovah's Witnesses included in the exhibits and an injunction restraining the City, its officers and agents from in any way interfering with such actions of the appellant.

The appellant further contended that the by-law should be declared illegal on the ground that the Provincial Legislature has no power to authorize the Council of the City of Quebec to pass a general by-law prohibiting the distribution of books, pamphlets, etc., in the City streets. At first he argued that the subject-matter of any such legislation and by-law falls under section 91 of the *British North*

America Act and not section 92, but later changed his position by arguing that neither Parliament nor the Provincial Legislatures possessed the requisite power. I am unable to agree with either of these submissions. I do not find it helpful to refer to rights conferred by early treaties or sanctioned by Imperial Statutes dealing with the old colonies and subdivisions of what is now Canada since it is well-settled that the *British North America Act* has conferred all powers of legislation either upon Parliament or the Legislatures of the Provinces and that there is no field in which the one or the others may not operate: *Bank of Toronto* v. *Lambe* (1):

> Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law.

Attorney General for Ontario v. *Attorney General for Canada (Companies Reference)* (2):

> In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.

In my view the right to practise one's religion is a civil right in the Province under head 13 of section 92 of the *British North America Act* just as much as the right to strike or lock-out dealt with by the Judicial Committee in *Toronto Electric Commissioners* v. *Snider* (3). That decision, as has been often remarked, was made inter partes, and at page 403 Viscount Haldane states:—

> Whatever else may be the effect of this enactment (The Industrial Disputes Investigation Act, 1907, of Caanda), it is clear that it is one which could have been passed, so far as any Province was concerned, by the Provincial Legislature under the powers conferred by s. 92 of the British North America Act. For its provisions were concerned directly with the civil rights of both employers and employed in the Province. It set up a Board of Inquiry which could summon them before it,

(1) (1887) 12 App. Cas. 575 at 587. (2) [1912] A.C. 571 at 581.
(3) [1925] A.C. 396.

1953

SAUMUR v. CITY OF QUEBEC

Kerwin J.

administer to them oaths, call for their papers and enter their premises. It did no more than what a Provincial Legislature could have done under head 15 of s. 92, when it imposed punishment by way of penalty in order to enforce the new restrictions on civil rights. It interfered further with civil rights when, by s. 56 it suspended liberty to lock-out or strike during a reference to a Board. It does not appear that there is anything in the Dominion Act which could not have been enacted by the Legislature of Ontario, excepting one provision. The field for the operation of the Act was made the whole of Canada.

For the same reason I also think that freedom of the press is a civil right in the Province. In *Re Alberta Information Act* (1), Sir Lyman Duff stated a short ground considered by him (and Davis J.) sufficient to dispose of the question as to whether Bill No. 9 of the Legislative Assembly of Alberta, "An Act to Ensure the Publication of Accurate News and Information" was *intra vires* the Legislature of that Province. With the greatest respect I am unable to agree with that part of his ensuing reasons for judgment commencing at the foot of page 132 and continuing to the end of page 135, and particularly the following statement:— "Any attempt to abrogate this right of public debate or to express the traditional forms of the exercise of the right (in public meeting and through the press), would, in our opinion be incompetent to the Legislature of the Province." Also, with respect, I must dissent from the views of Cannon J. upon this topic as expressed in the same report.

We have not a Bill of Rights such as is contained in the United States Constitution and decisions on that part of the latter are of no assistance. While it is true that, as recited in the preamble to the *British North America Act* the three Provinces expressed a desire to be federally united with a constitution similar in principle to that of the United Kingdom, a complete division of legislative powers being effected by the *Act*, I assume as it was assumed in *Re Adoption Act* (2), (with reference, it is true, to entirely different matters) that Provincial Legislatures are willing and able to deal with matters of importance and substance that are within their legislative jurisdiction. It is perhaps needless to say that nothing in the foregoing has reference to matters that are confined to Parliament.

(1) [1938] S.C.R. 100. (2) [1938] S.C.R. 398.

As to both freedom of religion and freedom of the press, with relation to the use of highways in the Province, I have already stated my view in *Winner* v. *S.M.T.* (1), that highways, generally speaking, fall within "Property and Civil Rights in the Province" under head 13 of section 92 of the *British North America Act*. As to what are the rights of the public in highways, it is sufficient to refer to Woolrych's Laws of Ways, p. 3:— "The King's highway is a public passage for the King and his subjects" and Pratt and McKenzie's Law of Highways, 19th ed. pp. 1 and 2:— "The right of the public in a highway is an easement of passage only—a right of passing and repassing. In the language of pleading, a party can only justify passing along, and not being in, a highway".

The appeal should be allowed and a declaration and injunction granted in the terms set out above. Although he does not secure all that he claims, the appellant is entitled to his costs of the action and of the appeal to the Court of Queen's Bench (Appeal Side). He is also entitled to his costs of the present appeal except that nothing should be allowed for the preparation of a factum. Rule 30 of the Rules of this Court provides for the contents of the factum or points of argument of each party, Part 3 whereof is to consist of "A brief of the argument setting out the points of law or fact to be discussed." This Rule was not complied with by the appellant filing two volumes containing 912 mimeographed pages together with an appendix thereto of 86 mimeographed pages. The costs awarded the appellant are payable by the respondent, the City of Quebec: No order should be made as to costs for or against the intervenant, the Attorney General of Quebec.

RAND J.:—The appellant seeks a declaration that by-law No. 184, of the City of Quebec, passed in October, 1933, is beyond the legislative power of the province:—

> 1. It is by the present by-law forbidden to distribute in the streets of the City of Quebec any book, pamphlet, booklet, circular, or tract whatever without having previously obtained for so doing the written permission of the Chief of Police.

Contravention is punishable by fine, with imprisonment in default of payment. No question is raised that the by-law is not authorized by the city charter, and the grounds.

(1) [1951] S.C.R. 887 at 908.

1953

SAUMUR v. CITY OF QUEBEC

Rand J.

upon which it is challenged are that it infringes the freedom of religious worship, secured by a statute to which I shall later refer, and that it trenches upon the jurisdiction of the Dominion in restraining freedom of communication by writings.

The practice under it is undisputed and as stated to us by counsel is this: when a license is sought, a copy of the document or writing proposed to be distributed is brought to the police department and there the chief officer, acting with or without the city solicitor or others, or in his absence, an official representing him, peruses the writing; if there is nothing in it considered from any standpoint to be objectionable, the license issues; if there is, suggestions are made that the offending matter be removed, but if that is not done the license is refused.

As in all controversies of this nature, the first enquiry goes to the real nature and character of the by-law; in what substance and aspect of legislative matter is it enacted? and we must take its objects and purposes to be what its language fairly embraces. The by-law places no restriction on the discretion of the officer and none has been suggested. If, under cover of such a blanket authority, action may be taken which directly deals with matters beyond provincial powers, can the fact that the language may, at the same time, encompass action on matters within provincial authority preserve it from the taint of *ultra vires?* May a court enter upon a delineation of the limits and contours of the valid and invalid areas within it? Must the provision stand or fall as one or can it be severed or otherwise dealt with? These are the subsidiary questions to be answered.

What the practice under the by-law demonstrates is that the language comprehends the power of censorship. From its inception, printing has been recognized as an agency of tremendous possibilities, and virtually upon its introduction into Western Europe it was brought under the control and license of government. At that time, as now in despotisms, authority viewed with fear and wrath the uncensored printed word: it is and has been the bête noire of dogmatists in every field of thought; and the seat of its legislative control in this country becomes a matter of the highest moment.

The Christian religion, its practices and profession, exhibiting in Europe and America an organic continuity, stands in the first rank of social, political and juristic importance. The Articles of Capitulation in 1760, the Treaty of Paris in 1763, and the *Quebec Act of 1774,* all contain special provisions placing safeguards against restrictions upon its freedom, which were in fact liberations from the law in force at the time in England. *The Quebec Act,* by sec. 5, declared that His Majesty's subjects,

> professing the religion of the Church of Rome of and in the said Province of Quebec, may have, hold and enjoy, the free exercise of the religion of the Church of Rome, subject to the King's supremacy . . . .

and, by sec. 15, that

> no ordnance touching religion . . . . . shall be of any force or effect until the same shall have received His Majesty's approbation.

This latter provision, in modified form, was continued by sec. 42 of the *Constitutional Act of 1791*:—

> whenever any act or acts shall . . . . . in any manner relate to or affect the enjoyment of or exercise of any religious form or mode of worship

the proposed *Act* was to be laid before both Houses of Parliament and the assent of the Sovereign could be given only if within thirty days thereafter no address from either House to withhold assent had been presented. *The Union Act of 1840,* sec. 42, contained a like provision. In each of the latter Acts existing laws were continued by secs. 33 and 46 respectively. From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.

This is confirmed by a consideration of legislative powers conferred by the same statutes. By sec. 12 of the *Quebec Act,* the legislative council, with the consent of the governor, could make ordnances, generally, for the "peace, welfare and good government" of the province. By sec. 8, the Canadian subjects were to hold their property and possessions "together with all customs and usages relating

1953

SAUMUR v. CITY OF QUEBEC

Rand J.

thereto and all other their civil rights" as before the capitulation so far as they might be consistent with their new allegiance; and in all matters of controversy relating to property and civil rights "resort should be had to the laws of Canada" as the rule for decision. By sec. 11 the criminal law of England was to be administered. The change of sovereignty had necessarily brought with it the public law of England, and so far as its provisions might conflict with the local laws and usages they would prevail.

In 1852, cap. 175 of 14-15 Vict. (Canada) was with the specified assent of Her Majesty enacted:—

> Whereas the recognition of legal equality among all Religious Denominations is an admitted principle of Colonial Legislation; And whereas in the state and condition of this Province, to which such a principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct Legislative Authority, recognizing and declaring the same as a fundamental principle of our civil polity: Be it therefore declared and enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of the United Kingdom of Great Britain and Ireland, and intituled, An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada, and it is hereby declared and enacted by the authority of the same, That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

That law is now embodied in cap. 307, sec. 2 of R.S.Q. 1941.

By cap. 118 of the Imperial Statutes of 1854, sec. 42 of the *Act of Union, 1840,* was repealed and it was provided that the Governor might, in Her Majesty's name, assent to any bill of the Legislature of Canada or for Her Majesty to assent to any such bill reserved for the signification of Her pleasure, although the bill should not have been laid before the Houses of Parliament.

Finally, the *Confederation Act of 1867* effected a distribution of legislative power for the "peace, order and good government of Canada" between the Dominion and the provinces. Sec. 6 of cap. 118, 1854, remains unrepealed save by the effect upon it of that *Act:* and it would appear that its provisions for assent and reservation are incompatible with the provincial status.

The only powers given by sec. 92 of the *Confederation Act* which have been suggested to extend to legislation in relation to religion are nos. 13, Property and Civil Rights, and 16, Matters of a merely local or private nature in the province. The statutory history of the expression "Property and Civil Rights" already given exhibiting its parallel enactment with special provisions relating to religion shows indubitably that such matters as religious belief, duty and observances were never intended to be included within that collocation of powers. If it had not been so, the exceptional safeguards to Roman Catholics would have been redundant.

Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery. Their significant relation to our law lies in this, that under its principles to which there are only minor exceptions, there is no prior or antecedent restraint placed upon them: the penalties, civil or criminal, attach to results which their exercise may bring about, and apply as consequential incidents. So we have the civil rights against defamation, assault, false imprisonment and the like, and the punishments of the criminal law; but the sanctions of the latter lie within the exclusive jurisdiction of the Dominion. Civil rights of the same nature arise also as protection against infringements of these freedoms.

That legislation "in relation" to religion and its profession is not a local or private matter would seem to me to be self-evident: the dimensions of this interest are nationwide; it is even today embodied in the highest level of the constitutionalism of Great Britain; it appertains to a boundless field of ideas, beliefs and faiths with the deepest roots and loyalties; a religious incident reverberates from one end of this country to the other, and there is nothing to which the "body politic of the Dominion" is more sensitive.

1953

SAUMUR v. CITY OF QUEBEC

Rand J.

There is, finally, the implication of sec. 93 of the *Confederation Act* which deals with education. In this section appear the only references in the statute to religion. Subsec. (i) speaks of *"Denominational Schools"* and preserves their existing rights and privileges. Subsec. (ii) extends to the separate schools "of the Queen's Protestant and Roman Catholic subjects" in Quebec the same "powers, privileges and duties" then conferred and imposed upon the separate schools of the "Queen's Roman Catholic subjects" in Upper Canada. Subsec. (iii) provides for an appeal to the Governor-General in Council from any act or decision of a provincial authority "affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education". Subsec. (iv) declares that in the event of any failure on the part of the provincial authority to observe or enforce the provincial laws contemplated by the section, Parliament may provide for the execution of the provisions of the section. On the argument advanced, and apart from the question of criminal law, these vital constitutional provisions could be written off by the simple expedient of abolishing, as civil rights and by provincial legislation, the religious freedoms of minorities, and so, in legal contemplation, the minorities themselves.

So is it with freedom of speech. *The Confederation Act* recites the desire of the three provinces to be federally united into one Dominion "with a constitution similar in principle to that of the United Kingdom. Under that constitution, government is by parliamentary institutions, including popular assemblies elected by the people at large in both provinces and Dominion: government resting ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under license, its basic condition is destroyed: the government, as licensor, becomes disjoined from the citizenry. The only security is steadily advancing enlightenment, for which the widest range of controversy is the sine qua non.

In the Reference re *The Accurate News and Information Act of Alberta* (1), Sir Lyman Duff deals with this matter. The proposed legislation did not attempt to prevent discussion of affairs in newspapers but rather to compel the publication of statements as to the true and exact objects

(1) [1938] S.C.R. 100.

of governmental policy and as to the difficulties of achieving them. Quoting the words of Lord Wright in *James* v. *Commonwealth* (1), that freedom of discussion means "freedom governed by law" he says at p. 133:—

. . . . . it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

He deduces authority to protect it from the principle that the powers requisite for the preservation of the constitution arise by a necessary implication of the *Confederation Act* as a whole. He proceeds:—

But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of The British North America Act, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter of private or local within the province. It would not be, to quote the words of the judgment of the Judicial Committee in *Great West Saddlery Co.* v. *The King* (1921) 2 A.C. 91, at 122, "legislation directed solely to the purposes specified in section 92"; and it would be invalid on the principles enunciated in that judgment and adopted in *Caron* v. *The King* (1924) A.C. 999, at 1005-06.

Conceding aspects of regulation of newspapers to be within provincial powers, he adds that

in this region of constitutional practice, it is not permitted to a provincial legislature to do indirectly what cannot be done directly.

Cannon J. expressed similar views:—

Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy. As stated in the preamble of The British North America Act, our constitution is and will remain, unless radically changed, "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law.

(1) [1936] A.C. 578 at 627.

1953

SAUMUR v. CITY OF QUEBEC

Rand J.

What is proposed before us is that a newspaper, just as a religious, political or other tract or handbill, for the purposes of sale or distribution through use of streets, can be placed under the uncontrolled discretion of a municipal officer; that is, that the province, while permitting all others, could forbid a newspaper or any writing of a particular colour from being so disposed of. That public ways, in some circumstances the only practical means available for any appeal to the community generally, have from the most ancient times been the avenues for such communications, is demonstrated by the Bible itself: in the 6th verse of ch. xi of Jeremiah these words appear: "Proclaim all these words in the cities of Judah, and in the streets of Jerusalem"; and a more objectionable interference, short of complete suppression, with that dissemination which is the "breath of life" of the political institutions of this country than that made possible by the by-law can scarcely be imagined.

But it is argued that the by-law relates not to religion or free speech at all but to the administration of streets. Undoubtedly the city may pass regulations for that purpose but within the general and neutral requirement of license by the by-law a number of equally plausible objects may be conjectured. No purpose whatever is indicated much less specified by the language; its sole effect is to create and vest in a functionary a power, to be exercised for any purpose or reason he sees fit, disclosed or undisclosed. The only practice actually followed is not remotely connected with street regulation: matters of traffic interference, of nuisance, of cleanliness or anything of like character would be within the city's authority, but these are no more to be inferred than others. A suggested possible purpose is to deal with writings that might provoke breaches of the peace by persons who dislike what they contain, but the same observation applies: that matter or purpose is not prescribed, and, assuming it to be within the provincial purview, on which I express no opinion, it would be only one of a number of objects of equal speculative inclusion within the enactment, some of which relate to matters beyond provincial powers. The alternatives of interpretation are whether of that group of objects, one being valid the by-law in its entirety is valid, or whether one being invalid, the

by-law in its entirety falls; or shortly, can legislation embracing such a combination of unspecified possibilities be upheld?

It was urged by Mr. Beaulieu that the city as proprietor of the streets has authority to forbid or permit as it chooses, in the most unlimited and arbitrary manner, any action or conduct that takes place on them. The possibilities of such a proposition can be easily imagined. But it misconceives the relation of the province to the public highways. The public entitled to use them is that of the Dominion, whose citizens are not of this or that province but of Canada. What has been confided to the provinces is the regulation of their use by that public.

Conceding, as in the Alberta Reference, that aspects of the activities of religion and free speech may be affected by provincial legislation, such legislation, as in all other fields, must be sufficiently definite and precise to indicate its subject matter. In our political organization, as in federal structures generally, that is the condition of legislation by any authority within it: the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter *in relation to which* the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism; otherwise, authority, in broad and general terms, could be conferred which would end the division of powers. Where the language is sufficiently specific and can fairly be interpreted as applying only to matter within the enacting jurisdiction, that attribution will be made; and where the requisite elements are present, there is the rule of severability. But to authorize action which may be related indifferently to a variety of incompatible matters by means of the device of a discretionary license cannot be brought within either of these mechanisms; and the Court is powerless, under general language that overlaps exclusive jurisdictions, to delineate and preserve valid power in a segregated form. If the purpose is street regulation, taxation, registration or other local object, the language must, with sufficient precision, define the matter and mode of administration; and by no expedient which ignores that requirement can constitutional limitations be circumvented.

1953

SAUMUR v. CITY OF QUEBEC

Rand J.

I would, therefore, allow the appeal, direct judgment declaring the by-law invalid, and enjoin the respondent City from acting upon it. The costs will be as proposed by my brother **Kerwin.**

KELLOCK J.:—This appeal arises out of an action brought by the appellant against the respondent city, the Attorney General for the province intervening, for a declaration that a by-law, No. 184, of the city, passed October 27, 1933, as well as the provincial legislation constituting the city charter in so far as such legislation may be said to authorize the said by-law, are *ultra vires*. The appellant contends that the said legislation and by-law are neither of them within any of the classes of matters assigned by section 92 to the legislatures of the provinces, but that their subject matter lies exclusively within the legislative jurisdiction of Parliament under section 91. The appellant invokes the provisions of the pre-Confederation statute of 1852, 14-15 Victoria, Ch. 175, which provides for religious freedom throughout the then province of Canada. This statute was continued in force by section 129 of the *British North America Act* and has never been repealed.

The appellant, a member of the sect or denomination "Jehovah's Witnesses", alleges that the right to preach the Christian Gospel both orally and by means of the distribution of printed matter is secured to him by the terms of the statute of 1852 equally with all other religious denominations. Appellant alleges that in so doing by this latter means, he has been illegally arrested and imprisoned under the said by-law at the instance of the respondent and that an additional charge is pending against him thereunder.

In his declaration the appellant also attacked the by-law upon the ground that the delegation of the power of licensing therein contained was incompetent to the city council, but the appellant does not wish to argue this contention in this court.

The learned trial judge considered the by-law in question to be a mere "police" regulation, having to do with the maintenance of order and good government in the city and accordingly within the general powers granted by the city charter. The learned judge did not amplify this statement.

The Court of Appeal (1) dismissed the appeal, Bertrand J., dissenting. Marchand J., did not, so far as the record shows, deliver any reasons. Pratte J., considered the by-law as one relating only to the "use of streets", a subject-matter of legislation he considered to be entirely within provincial jurisdiction. The learned judge also considered that the by-law did not trench upon such an exclusive mater of legislative jurisdiction as criminal law.

Barclay J., concurred generally with Pratte J. and he affirmed a statement he had made in an earlier decision, viz., "I fail to see how a mere police regulation governing the distribution in the streets or public places" of printed matter "without previously obtaining a written permission is, per se, an attack upon the freedom of the press."

Hyde J. also agreed with Pratte J. The learned judge also referred to the Reference with respect to the *Accurate News and Information Act of Alberta* (2), and, in particular, to the judgments of Duff J., as he then was, and of Cannon J., and distinguished the case at bar on the ground that the by-law in question was one dealing merely with the "use of streets".

Bertrand J., dissenting, considered the by-law to be in essence one of censorship, and as trenching upon the right of freedom of worship and profession. In his opinion the by-law was not within the city's charter, which does not mention such matters. The learned judge regarded the argument put forward on behalf of the respondent and the intervenant that the by-law was merely "une simple mesure de protection contre l'encombrement des rues et place publiques" as involving too great confidence on their part in the naiveté of the court. With respect to the construction of the Act of 1852, he was of opinion that the words "mais de manière à ne pas servir d'excuse à des actes d'une licence effrénée, ni à autoriser des pratiques incompatibles avec la paix et la sûreté de la province" had reference only to "des actes criminels en soi ou tellement contraires aux moeurs des pays chrétiens qu'ils puissent faire l'object de règlements spéciaux pourvu toutefois qu'ils ne portent pas atteinte à la liberté des cultes." In this view, the learned judge did not consider it necessary to deal with the question of the freedom of the press.

(1) Q.R. [1952] Q.B. 475. (2) [1938] S.C.R. 100.

1953

SAUMUR v. CITY OF QUEBEC

Kellock J.

Before this court the respondent seeks to support the by-law as legislation in relation to the "use of streets" or as police regulations with relation to public order, and reliance is placed upon section 92(8), (13) and (16) of the *British North America Act.*

For the appellant it is contended that the by-law is so wide in its terms that even if authorized by the relevant provisions of the city charter, both the by-law and the charter provisions are *ultra vires* as trenching upon freedom of religion, the subject-matter of the statute of 1852, and liberty of the press, both subject-matters of legislation, in the appellant's contention, exclusively within the jurisdiction of Parliament.

The question, therefore, which lies at the threshold of the case is as to the true nature and character of the by-law. Paragraph 1 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.

Paragraph 2 provides a penalty for distribution without license.

It will be observed that the by-law is perfectly general in its terms and that while it prohibits in the absence of a licence, at the same time it contemplates, fully as much, distribution at the unfettered will of the municipal official to whom is delegated the power to grant or to refuse to grant licences. The by-law affords no guide whatever for the regulation from any standpoint of the prohibition or permission for which it provides. To borrow language used in another connection by Lord Watson in *Union Colliery Company* v. *The Queen* (1), "the leading feature" of this by-law consists in this that it establishes no rule or regulation for its application except that nothing but that which is permitted by the censor may be distributed. What he permits will appear in the streets. What he refuses will not. The grant or refusal of a licence will depend upon the contents of the document proposed to be distributed and the will of the censor. To equate such a by-law to by-laws which are purely prohibitory is to lose sight of the real

(1) [1899] A.C. 580 at 587.

nature of the by-law here in question. This has largely contributed to the error into which the courts below have, in my opinion, fallen.

Counsel not only for the respondent but for the intervenant as well, agree that such is the character of the by-law, and counsel for the respondent stated that it had been so administered by the respondent, its officers and servants. In so stating counsel has admitted nothing more than is clear from the record itself. A single illustration will suffice.

In case No. 51647 in the Superior Court, *Saumur* v. *Recorder's Court,* referred to by the respondent in its factum, the plaintiff was convicted under the by-law here in question. A writ of habeas corpus subsequently issued was quashed by the Superior Court, whose judgment was affirmed by the Court of Appeal, Galipeault J., dissenting. In the course of his reasons, the learned judge of first instance, Boulanger J., in quashing the writ, said:

> J'admets que le règlement est rédigé *en termes assez généraux pour servir à restreindre la liberté de parole ou la liberté de religion, ou la liberté tout court* quand cela devient nécessaire *comme mesure de police* et quand *la liberté menace de tourner à la licence et de* compromettre la paix de la municipalité.
>
> J'admets aussi que les pourvoirs donnés au directeur de la police sont larges et qu'ils peuvent servir *à censurer* des publications de caractère religieux.

I shall have something to say subsequently with respect to the limitation upon the exercise of the power given to the chief of police which the learned judge reads into the by-law. For the moment, I quote his language for the purpose of showing that the administration of the by-law is from the standpoint of the contents of the literature proposed to be distributed. Galipeault J. had this to say in the same case:

> Comme on le voit, le savant juge lui-même (Boulanger J.) est d'avis que le règlement dans sa rédaction comme dans sa substance quel que soit la but que la cité de Québec ait voulu obtenir, peut porter atteinte "à la liberté de parole, ou la liberté de religion, ou la liberté tout court" . . .
>
> J'estime que la législation se rapportant aux droits ou à liberté de parole, de pensée, de critique, de la presse en général, n'est pas du domaine de la législature, mais relève du Parlement du Canada qui, par son droit statutaire, le Code Criminel, a légiféré en la matière.

The learned judge reads the by-law as it is itself expressed, without any limitation whatever.

1953

SAUMUR v. CITY OF QUEBEC

Kellock J.

Speaking for the majority of the court below, Pratte J., says:

> En effet, il suffit seulement de songer ce que pourrait . . . . . résulter de la distribution à tout venant d'écrits offensants pour les habitants de la localité; ou encore, au sort fait aux parents dont les enfants seraient sans cesse exposés à recevoir dans la rue des écrits susceptibles de troubler leur esprit, ou propageant des doctrines réprouvées par ceux qui ont non seulement le droit mais le devoir de veiller à leur éducation . . .

Clearly, therefore, the by-law is not directed to the mere physical act involved in the handing to another of a document but has in view the contents of the document and the desirability or otherwise, in the view of the chief of police, as to its circulation. A document refused a licence would not involve anything more from the standpoint of obstruction of the highway or the impeding of those using it, than one with respect to which a licence is granted, and both documents, if discarded by the recipients, would equally be a source of litter. The by-law, however, is not concerned with such matters. Nothing more is needed, in my opinion, to discern the real nature and character of the by-law, namely, to provide that some material may reach the public using the streets, while the rest may not.

Being perfectly general in its terms and setting no standard by which the official it names is to be governed in granting or refusing licences, the by-law can be used, as it has been, to deny distribution of its literature to one religious denomination, while granting that liberty to another or others. The by-law is equally capable of being applied so as to permit distribution of the literature of one political party while denying that right to all others, or so as to refuse to allow the selling in the streets of some newspapers while permitting others. In any or all of these cases, the same physical acts would be involved occasioning the same degree of obstruction, if obstruction there would be. Nothing more is needed to demonstrate, in my opinion, that such a by-law was not enacted "in relation to" streets but in relation to the minds of the users of the streets.

If the by-law were one which prohibited all distribution in the streets, entirely different considerations would very well apply. It is a confusion of thought, in my opinion, to regard by-law 184 as in the same category with purely prohibitive by-laws, as the intervenant seeks to do and as was done by the court below. Pratte J., for example, refers to

In re Kruse (1). The by-law in question in that case, however, provided that "no person" should play any musical instrument on a highway within a specified distance of a house after being requested by the occupant to desist. Entirely different considerations are applicable to such by-laws, and judgments with respect to them have no application, in my opinion, to a by-law such as No. 184, which is as much permissive as it is prohibitory.

Assuming, for the purposes of argument, that the by-law here in question might, in actual administration by the official mentioned therein, be administered solely to prevent literature reaching the streets which might cause disturbance or nuisance therein, and that a by-law expressly so limited would be within provincial competence, the present by-law is not so limited in its terms. Its validity is not to be judged from the standpoint of matters to which it might be limited, but upon the completely general terms in which it in fact is couched.

No citation of authority is needed to establish the proposition that civil regulation of the use of highways is a matter within the jurisdiction of provincial legislatures, but there is a distinction between legislation "in relation to" a subject-matter within s. 92 and legislation which may have an effect upon such matters; *Attorney General for Saskatchewan* v. *Attorney General for Canada* (2), per Viscount Simon. It is only legislation "in relation to" matters within section 92 which is committed to the provincial legislatures.

In the judgment in the court below and in argument on behalf of the intervenant in this court, some relevance was found to the case at bar in the decision of this court in *Provincial Secretary of Prince Edward Island* v. *Egan* (3). In that case it was held that a provincial statute providing for suspension of a licence to drive a motor car upon conviction under section 285(4) of the Criminal Code of driving while intoxicated, was valid. In my opinion it would be impossible to draw any analogy between the provincial legislation there in question and legislation such as by-law No. 184. It would scarcely be argued that the decision in

(1) [1898] 2 Q.B. 91. (2) [1949] A.C. 110 at 123.
(3) [1941] S.C.R. 396.

1953

SAUMUR v. CITY OF QUEBEC

Kellock J.

Egan's case would afford any ground of support for provincial legislation which sought to make the grant or refusal of a licence to operate a motor car on a highway dependent upon the religious denomination to which the driver belonged or the sectarian character of the literature carried in the vehicle. Such legislation would not be legislation in relation to highways at all, although no doubt it would affect traffic seeking to use the highways. There can be no question but that the legislation in question in *Egan's* case was "in relation to" highways and safety on the highways. Legislation which is concerned not primarily with highways at all but with other subjects must depend for its validity upon the legislative competence of the legislature with respect to such subjects.

There is equally no analogy, in my opinion, between a by-law restricting a designated area in a municipality to private residences, for example, and one which would exclude from such a designated area buildings erected by one religious denomination. By-laws of the former character, being purely prohibitory, are usually recognized as valid provincial legislation, but they would be in an entirely different category from the latter, if it could be conceived that a by-law of the latter type would be enacted. Reference may be made to *Toronto* v. *Roman Catholic Separate Schools Trustees* (1), per Viscount Cave L.C.

The same may be said of the type of by-law in question in *In re Cribbin and the City of Toronto* (2), which provided that

> No person shall on the Sabbath Day, in any public park . . . . . in the City of Toronto publicly preach, lecture or declaim.

Had the by-law there in question been expressed to be applicable to persons of a particular religious persuasion only, entirely different considerations would have applied to the question of its constitutional validity.

Bedard v. *Dawson* (3), is also relied upon by the intervenant. Again it is to be observed that the legislation there in question provided that

> It shall be illegal for *any* person who owns or occupies *any* house or building . . . to use or allow *any* person to use the same as a disorderly house.

(1) [1926] A.C. 81 at 88. (2) (1891) 21 O.R. 325.
(3) [1923] S.C.R. 681.

It is perfectly true, as stated by Duff J., as he then was, at p. 685, that

> The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate.

If, however, the legislation there under consideration had been operative so as to interfere with rights which are not the subject of legislative jurisdiction under s. 92, other considerations would have applied. The question in the case at bar is as to whether by-law 184 impinges upon such matters.

This brings me to the first ground upon which the by-law is attacked, namely, the rights granted by the Act of 1852. That statute, so far as material, is as follows:

> Whereas the recognition of legal equality among all Religious Denominations is an admitted principle of Colonial Legislation; And whereas in the state and condition of this Province, to which such a principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct Legislative Authority, recognizing and declaring the same as a fundamental principle of our civil policy: Be it therefore declared and enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada . . . That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

The respondent strenuously argued that the Jehovah's Witnesses were not entitled to rely upon the *Act* as they were not a "religious denomination" within the meaning of the statute. It was further contended that because the appellant had refused to apply for a licence under the by-law before bringing the present action, this amounted to an "act of licentiousness" or a "practice inconsistent with the peace and safety of the province" within the meaning of the statute. With respect I am of opinion that neither contention is tenable. So far as the second is concerned, in my opinion, the language of the statute has no effect beyond removing protection from particular "acts" or "practices" which are in themselves illegal by the common or statute law. The statute does not mean, for instance, that if a sect practises polygamy, it becomes disentitled to rely on the statute for all purposes. It merely means that the statute

1953

SAUMUR v. CITY OF QUEBEC

Kellock J.

affords no defence to polygamy. The same would apply in the case of any literature circulated by the appellant or those associated with him.

Mr. Beaulieu argues that "the free exercise and enjoyment of Religious Profession and Worship" in the statute do not cover more than the carrying on of religious exercise in some place of worship. In that view the statute would have nothing to say with regard to such a matter, for example, as the dissemination of religious views or material, e.g., the Scriptures themselves, outside such places of worship.

I do not think the statute is to be so narrowly construed. It recites that "the recognition of legal equality among all Religious Denominations" was an admitted principle of colonial legislation and that it was desirable that that principle should receive legislative sanction "as a fundamental principle of our civil polity". By sec. V of the Act of 1774 it was "the free exercise of the Religion of the Church of Rome" which was granted. The principle of legal equality provided for by the Act of 1852 can mean no less than this. I would adopt the language of the writer in Volume II, "La Revue Critique", p. 130, where he says:

> From this principle of our public law flow the rights and liberties which are dearest to our mixed population; liberty of conscience, freedom of public worship and freedom of the press in religious matters . . . . Every person has a right to speak, write and print his opinion upon any religious question or point of controversy, without permission from the government or from any one else.

The Christian religion would hardly have survived had it permitted itself to be circumscribed in accordance with the argument of Mr. Beaulieu. From the beginning it has propagated itself by the written as well as the spoken word. The Scriptures themselves are a sufficient illustration of this. That propagation by such means was not, however, limited to the Scriptures is a matter of common knowledge. This is conveniently illustrated by the Canadian Act of 1843, 7 Victoria, c. 68: "An Act to Incorporate the Church Societies of the United Church of England and Ireland in the Dioceses of Quebec and Toronto." By the preamble one of the purposes of incorporation was "for circulating in the said Dioceses, respectively, the Holy Scriptures, the Book of Common Prayer of the said Church, and such other

Books and Tracts as shall be approved by the Several Central Boards or Managing Committee."

It is undoubted that, under a by-law of the nature of by-law 184, the circulation of such material as the above would be impossible except with permission of the censor. This aspect of religious freedom would thereby be interfered with. The question is, therefore, as to the competency of provincial legislation in this field. In support of the by-law, it is said that this is a subject matter within the category of "civil rights in the province."

In considering this contention certain historical matters are relevant. Under the *Quebec Act of 1774*, 14 Geo. III, c. 83, provision is made for the government of the Province of Canada, which included, inter alia, all of the present provinces of Ontario and Quebec. By section VIII it is provided that all His Majesty's Canadian subjects within the province, with the exception of religious orders and communities, might hold and enjoy "their Property and Possession, together with all Customs and Usages relative thereto, and all other their *Civil Rights*, in as large, ample and beneficial Manner" as if certain previously made proclamations, etc., had not been made. And it was further provided that in all matters of controversy "relative to *Property and Civil Rights*" resort should be had to the laws of Canada as the rule for decision of the same and that all causes which might thereafter be instituted in any of the courts of justice should, with respect to "such Property and Rights" be determined agreeably to the said laws and customs of Canada until varied by subsequent enactment.

It is plain from other provisions of the statute that "Property and Civil Rights" do not include the right of exercise and profession of religion, as to which express provision was made elsewhere.

By section V it is enacted

> That his Majesty's Subjects, professing the Religion of the Church of Rome of and in the said Province of Quebec, may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome, subject to the King's supremacy, declared and established by an Act, made in the first year of the Reign of Queen Elizabeth . . . . and that the Clergy of the said Church may hold, receive, and enjoy, their accustomed Dues and Rights, with respect to such Persons only as shall profess the said Religion.

1953

SAUMUR v. CITY OF QUEBEC

Kellock J.

Section VI enacts that

> Provided nevertheless, That it shall be lawful for his Majesty, his Heirs or Successors, to make such Provision out of the rest of the said accustomed Dues and Rights, for the Encouragement of the Protestant Religion, and for the Maintenance and Support of a Protestant Clergy within the said Province, as he or they shall, from Time to Time, think necessary and expedient.

Section XII provides for the government of the province by a council, but Section XV provides that "no Ordinance touching Religion . . . ." is to be of any force or effect until the same shall have received the approval of His Majesty. Section XI confirms English criminal law as the law of the province.

By section XVII provision is made for "Courts of Civil, Criminal and Ecclesiastical" jurisdiction.

In 1791 the *Constitutional Act,* 31 Geo. III, c. 31, was passed. This statute provided for the division of the province into two separate provinces of Upper and Lower Canada, and for a separate legislative council and assembly for each, with power to make laws for the peace, welfare and good government of each of the provinces. All laws previously existing were to continue until repealed or varied under the authority of the *Act.*

Section XLII provided, however, that with respect to any Act or Acts which might be passed by the legislative council or assembly of either of the provinces varying or repealing the matters covered by Sections V and VI of the Act of 1774 or which "shall in any Manner relate to or affect the Enjoyment or Exercise of any religious Form or Mode of Worship; or shall impose or create any Penalties, Burthens, Disabilities, or Disqualifications in respect of the same" or should affect the enjoyment of the dues or rights of any "Minister, Priest, Ecclesiastic, or Teacher, according to any religious Form or Mode of Worship in respect of his said Office or Function" should, before assent should be given to it, be laid before both Houses of Parliament in Great Britain, and His Majesty was prohibited from assenting to any such Act in case either House within thirty days should present an address to His Majesty to withhold assent therefrom.

In 1792, by 32 Geo. III, c. I, the Legislature of Upper Canada, after reciting the provision in the Imperial Act of 1774 providing "that in all matters of controversy relative to Property and Civil Rights, resort should be had to the laws of Canada, as the rule for the decision of the same", and that that part of the former Province of Quebec then included within Upper Canada having become inhabited principally by persons familiar with the laws of England, this provision was repealed and it was enacted by Section III that "from and after the passing of this Act, in all matters of controversy relative to *Property and Civil Rights,* resort shall be had to the Laws of England, as the rule for the decision of the same." Section VI, however, expressly provided that nothing in the statute should vary or interfere or be construed to vary or interfere, with any "of the subsisting provisions respecting *Ecclesiastical rights* or dues within this Province."

In 1840, by 3-4 Victoria, c. 35, the two provinces were reunited under one legislative council and assembly. Section XLII again provided that whenever any bill should be passed containing any provisions

> which shall in any Manner relate to or affect the Enjoyment or Exercise of any Form or Mode of Religious Worship, or shall impose or create any Penalties, Burdens, Disabilities, or Disqualifications, in respect of the same,

every such bill, prior to assent, should be laid before both Houses of Parliament of the United Kingdom, and within thirty days thereof, in case either House of Parliament should address Her Majesty to withhold Her assent from any such bill, it should not be lawful for Her Majesty to signify Her assent. This section was altered in 1854, by 17-18 Vic., c. 118, s. 6, empowering the Governor to give the Queen's assent.

In the meantime, the Act of 1852, c. 175, was passed by the local legislature in 1851 and, as required by the statute of 1840, was assented to by Her Majesty at Westminster on May 15, 1852.

It would therefore appear plain from all this legislation that, commencing with the statute of 1774, the phrase "property and civil rights" did not include the right to the exercise and enjoyment of religious profession, that being a

1953

SAUMUR v. CITY OF QUEBEC

Kellock J.

matter the subject of special provision in each case, and, by the statute of 1852, made a *fundamental principle* of the *constitution* of the entire country.

It is, of course, well settled that the right to hold any view in matters of religious belief is not a civil right at all except in relation to title to property. In *Forbes* v. *Eden* (1), the appellant, a clergyman of the Episcopal Church of Scotland, brought action for a declaration that it was *ultra vires* of the church to amend its canons and that he was entitled to celebrate Divine Worship and to administer the sacraments and other rites of the church in accordance with the original canons. The appellant had not been deprived of his status and had sustained no damage. The respondents, in their defence, relied upon the principle that courts of civil jurisdiction will not take cognizance of questions as to religious doctrine or discipline except for the purpose of enforcing "civil rights" or redressing "civil wrongs".

The following from the opinions of members of the House are sufficient:

Lord Chelmsford L.C. at 573:

> The Court had therefore, to consider whether it could properly entertain the question of the reduction of the canons upon the ground that they were a departure from the doctrine and discipline of the Scotch Episcopal Church at the time the appellant became its minister. Now this it refused to do, as it was a mere abstract question involving religious dogmas, and resulting in no civil consequences which could justify the interposition of a Civil Court.

Lord Colonsay, 588:

> A Court of Law will not interfere with the rules of a voluntary association unless to protect some civil right or interest which is said to be infringed by their operation. Least of all will it enter into questions of disputed doctrine, when not necessary to do so in reference to civil interests.

The same principle underlies the decision in the *Free Church* case (2); see the judgment of Lord James of Hereford at p. 655.

This principle was well understood in Canada before 1867. In 1857, by the statute 20 Victoria, c. 43, provision was made for the appointment of commissioners to reduce into one code "those provisions of the laws of Lower Canada which relate to *civil matters* and are of a general and permanent character." In their second report, dated May 22,

(1) (1867) L.R I Ex. App. 568 (2) [1904] A.C. 515.

1860, the majority of the commissioners, in discussing the scope of their terms of reference, refer to a disagreement among the commissioners on this point.

At page 149 of Vol. I, the majority say:

> On one hand, it is pretended that the laws to be codified are exclusively those upon which the provincial parliament has the right to legislate, and therefore that all those which proceed from or make part of the imperial laws should be omitted. On the other hand it is pretended that the codification required should extend to all classes of categories of laws in force in the province, provided they refer to *civil matters,* from whatever source they come, and that the objection would only be valid in case it should be proposed to repeal or alter these laws, which has never been contemplated; but is without force, for a case like the present, where it is only intended to announce their existence.

The latter view was that of the majority and, while the draft code in its first title" is concerned with the enjoyment and loss of "civil rights", it does not deal with the subject matter of the Act of 1852, although it does deal with the loss of civil rights occasioned by the taking of religious vows upon entry into a religious order. The majority view was adopted by the legislature in the code of 1866, the relevant provisions being found in Articles 18, 30 and 34 of the first title.

In speaking of the loss of civil rights consequent upon the taking of religious vows, the majority say also, at page 153:

> One of the Commissioners is, however, of opinion that the religious profession no longer exists legally in this province, at least so as to produce civil death; that the cession of the country has abolished it, by putting an end to the state of things upon which its existence depended; that, moreover, it is contrary to the laws of public order and incompatible with certain *civil* and *religious* rights pertaining equally to all classes of the population. For these reasons set forth in the special report already mentioned, the present article 20 and the second paragraph of article 17 are only adopted by two of the Commissioners.
>
> They are of opinion that whatever may have been the principle, the origin and the source of the laws on this subject, to establish that it is in force in this country, it is only necessary to show that it was admitted and put into execution in France, until its abolition in 1789, *as forming part of the civil laws;* that as such it was introduced into Canada at its settlement, and that since it has been constantly followed and practised as well before as since the cession of the country, which, far from abolishing it by implication or otherwise, has, on the contrary, given rise to treaties and legislative provisions, which by granting to the inhabitants of the country the free exercise *of their religion* and the enjoyment *of their civil laws,* have thereby confirmed and continued the existence of the law in question, which makes *part of the one* and is *intimately connected* with the other.

1953

SAUMUR v. CITY OF QUEBEC

Kellock J.

In the view of the codifiers, therefore, and in that of the legislature, freedom of worship and profession was not a "civil right" and certainly not a civil right "within" the province of Lower Canada.

It has been decided by the Judicial Committee that "Property and Civil Rights" in the Act of 1774, although "used in their largest sense" have exactly the same meaning in the statute of 1867; *Citizens Insurance Company* v. *Parsons* (1), per Sir Montague Smith. Section 94 of 1867 authorizes Parliament to make provision for the uniformity of all or any of the laws relative to "property and civil rights" in Ontario, Nova Scotia and New Brunswick with the consent of those provinces.

As pointed out in the *Parsons* case, at page 110:

> The Province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces.

It is equally obvious that so far as the law relating to freedom of worship and profession is concerned, that law was not the French law but rather the statute of 1852, which applied equally to both of the Canadas.

Mr. Justice Mignault in Volume I has the following at p. 131:

> Les droits sont les facultés ou avantages que les lois accordent aux personnes. Ils sont *civils, politiques* ou *publics*. . . . .
>
> Certains droits existent qui, à proprement parler, ne sont ni *civils* ni *politiques;* tels sont les droits de s'associer, de s'assembler paisiblement et sans armes, de pétitionner, de manifester sa pensée par la voie de la presse ou autrement, la liberté individuelle et enfin la liberté de conscience. Ces droits ne sont point des droits *civils,* car ils ne constituent point des rapports de particulier à particulier; ce ne sont pas non plus de véritables droits *politiques,* puisqu'on les exerce sans prendre aucune part au gouvernement du pays. Quelques personnes les rangent dans une classe particulière sous la dénomination de *droits publics.*

"I consider" says Lord Bacon, "that it is a true and received division of law into *ius publicum* and *ius privatum,* the one being the sinews of property, and the other of government." See *Holland, "Jurispurdence"* 13th ed. p. 366. The same learned author places

"the relation, if any, between church and state" as in the realm of constitutional law, which is, of course, a branch of public law.

(1) (1881) 7 App. Cas. 96 at 111.

Pagnuelo, in his work "de la Liberté Religieuse en Canada" treats the subject-matter of the Act of 1852 (correctly in my opinion) as within this field. At p. 257 the learned author says:

> Cependant le droit public s'etablissait dans le pays, et finalement la législature Bas-Canadienne, anticipant les décisions des premiers juges et légistes d'Angleterre, déclarait en 1851 par la seule force de la conscience intime de l'état social de la colonie, quels sont les principes de notre constitution politique quant aux affaires religieuses.

Similarly, the writer in La Revue Critique Vol. II, which I have already quoted in part, says at p. 130:

> To sum up the discussion, it may confidently be concluded that it is a fundamental maxim of law in Canada, consecrated both by the French and the British constitutions of the country, by imperial statutes and treaties, by the peculiar jurisdiction and by repeated decisions of our courts, that all the churches in the colony are free and independent of civil or judicial intervention in spiritual matters.
>
> From this principle of our public law flow the rights and liberties which are dearest to our mixed population: liberty of conscience, freedom of public worship and freedom of the press in religious matters.

Galipeault J., also, in *Saumur* v. *la Cité de Québec* (1), in referring to the subject-matter of the very by-law here in question, says, (and in my opinion, with respect, perfectly correctly)

> Et il convient de nous rappeler que nous sommes ici en matière de droit public plutôt qu'en matière de droit.

Any contention that the right to the exercise of religion is a mere "civil right" is, therefore, for these reasons, quite untenable in my opinion. Even if such a matter could be so regarded, it would not be a civil right "within the province".

The British North America Act itself indicates, in my opinion, that the subject-matter of religious profession is not a matter of provincial legislative jurisdiction within any of the heads of s. 92.

By s. 93 it is enacted that a provincial legislature may legislate "in relation to" education but subject, inter alia, to the provision that

> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union.

(1) (1948) 26 Can. Bar. Rev. 780.

1953

SAUMUR v. CITY OF QUEBEC

Kellock J.

The "class" in s-s. (1) must, as stated by the Judicial Committee in *Ottawa Separate Schools* v. *Mackell* (1), be a class determined "according to religious belief". The right or privilege preserved by s-s. (1) to such a class with respect to its denominational schools is such only as existed "by law" at the time of Union. It would in my opinion be absurd to say that a provincial legislature, while it cannot strike at the right of any such class to impart religious instruction to its adherents, may nevertheless legislate so as to affect or destroy the religious faith of the denomination and thus affect or entirely do away with all necessity for religious instruction in that faith.

S-ss. (3) and (4) of s. 93 provide that

> (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:
>
> (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

In *Roman Catholic Separate School Trustees* v. *The King* (2), Viscount Haldane said:

> Their Lordships are of opinion that where the head of the executive council in Canada is satisfied that injustice has been done by taking away a right or privilege which is other than a legal one from the Protestant or Roman Catholic minority in relation to education, he may interfere. The step is one from mere legality to administrative propriety, a totally different matter. But it may be that those who had to find a new constitution for Canada when the British North America Act was passed in 1867, came to the conclusion that a very difficult situation could be met in no other way than by transferring the question from the region of legality to that of administrative fairness.

Accordingly, even though its legislation in matters of education may be *intra vires*, a provincial legislature may be restrained by the federal executive if, in the view of the latter, its intervention is called for within the terms of s. 93. It can hardly be that although the express power of the

(1) [1917] A.C. 62 at 69. (2) [1928] A.C. 363 at 370.

provincial legislatures as to education is thus restricted where matters of religious belief are involved, there nonetheless exists a jurisdiction under some head of s. 92 to legislate as to matters of religious profession and worship itself which could, conceivably, reduce s-ss. (3) and (4) to a dead letter. In my view any such view is untenable.

I therefore conclude that it is incompetent for a provincial legislature to legislate with respect to the subject-matter of the statute of 1852 and that by-law 184, couched as it is in general terms, purports to interfere with the rights granted by the statute, and is consequently *ultra vires*.

I have not overlooked that the Legislatures of Ontario and Quebec have, since Confederation, purported to re-enact the statute of 1852. The question of the competency of this legislation has, however, so far as I am aware, not been previously judicially considered. No doubt the provisions of the 1852 statute relating to rectories were matters of provincial legislative jurisdiction.

There are other standpoints also from which the by-law is equally invalid. In so far as the by-law may be said to have in view the prohibition of the publication of blasphemous libel, it would be clearly outside the comptence of a provincial legislature as impinging upon the criminal law. As pointed out by Lord Parker in *Bowman* v. *Secular Society Limited* (1):

> In my opinion to constitute blasphemy at common law there must be such an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace. I cannot find that the common law has ever concerned itself with opinion as such, or with expression of opinion, so far as such expression is compatible with the maintenance of public order. Indeed there is express authority that heresy as such is outside the cognizance of a criminal Court unless the heretic by setting up conventicles or otherwise endangers the peace: see Hawkins' pleas of the Crown, vol. 1, p. 354.

Again, at page 451, Lord Parker adopted the language of Coleridge J. in *Shore* v. *Wilson* (2), as follows:

> There is nothing unlawful at common law in reverently doubting or denying doctrines parcel of Christianity, however fundamental. It would be difficult to draw a line in such matters according to perfect orthodoxy, or to define how far one might depart from it in believing or teaching without offending the law. The only safe, and, as it seems to me, practical rule, is that which I have pointed at, and which depends on the sobriety and reverence and seriousness with which the teaching, or believing, however erroneous, are maintained.

(1) [1917] A.C. 406 at 446. (2) 9 Cl. & F. 355 at 539.

1953

SAUMUR v. CITY OF QUEBEC

Kellock J.

The offence of blasphemy is, of course, expressly covered by section 198 of the *Criminal Code*.

Again, in so far as the by-law may be said to be directed at seditious literature,

> nothing short of direct incitement to disorder and violence is a seditious libel;

Rex v. *Aldred* (1), per Coleridge J.

Lower down on the same page the learned judge said:

> The test is this: was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of state.

The same result obtains in so far as the by-law could be said to be directed against the publication of libelous matter regarded from the standpoint of public law. Libel in its aspect other than as giving rise to an action for damages as at the instance of the person defamed, is a crime. Odgers, Sixth Edition, at page 7, has the following: "A libel is a crime: a slander on a private individual is not." On the same page the authors refer to the judgment of Lush J., in *R.* v. *Holbrook* (2), as follows:

> Libel on an individual is, and has always been, regarded as both a civil injury and a criminal offence. . . . It is ranked amongst criminal offences because of its supposed tendency to arouse angry passion, provoke revenge, and thus endanger the public peace . . . . .

However this may be, the by-law is not limited in terms to such matters but extends to all matters to which the censor may see fit to apply it. As it is capable of application to matters beyond the ambit of s. 92, it must be held to be invalid.

In the Reference re the *Alberta Accurate News and Information Act* (3), there was in question a bill the relevant provisions of which, for present purposes, imposed upon those concerned in the publication of newspapers in the province, at the direction of the chairman of a provincial board, the obligation of publishing statements furnished by him having for their object the correction or amplification of any statement relating to any policy or activity of the government of the province which had already been published by the newspaper concerned, and requiring the newspaper to make returns setting out every source from which any information had emanated with respect to any statement contained in the newspaper, and

(1) 22 Cox C.C. 1 at 3. (2) (1878) 4 Q.B.D. 42 at 46.
(3) [1938] S.C.R. 100.

the names, addresses and occupations of all persons by whom such information had been furnished as well as the name and address of the writer of any editorial, article or news item.

Three members of this court dealt with this legislation from a standpoint which is relevant to the case at bar. Duff, C.J., with whom Davis J., agreed, after referring to the provisions of the *British North America Act* relating to the Senate and the House of Commons, said at page 133:

> The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. . . . .
>
> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James* v. *Commonwealth,* (1936) A.C. 578, at 627, "freedom governed by law".
>
> Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.
>
> We do not doubt that (in addition to the power of disallowance vested in the Governor General) the Parliament of Canada possesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from The British North America Act as a whole (*Fort Frances Pulp & Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* (1923) A.C. 695); and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.
>
> But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of The British North America Act, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject-matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter private or local within the province. It would not be, to quote

1953

SAUMUR v. CITY OF QUEBEC

Kellock J.

the words of the judgment of the Judicial Committee in *Great West Saddlery Co.* v. *The King,* (1921) 2 A.C. 91, at 122, "legislation directed solely to the purposes specified in section 92"; and it would be invalid on the principles enunciated in that judgment and adopted in *Caron* v. *The King,* (1924) A.C. 999, at 1005-06.

The learned Chief Justice then referred to the question as to the validity of the legislation before the Court, considered as an independent enactment with no relation to the other provincial legislation there in question and, conceding that there was "a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers", continued:

> But the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of The British North America Act and the statutes of the Dominion of Canada. Such a limitation is necessary, in our opinion, "in order," to adapt the words quote above from the judgment in *Bank of Toronto* v. *Lambe* (1887) 12 A.C. 575, "to afford scope" for the working of such parliamentary institutions. In this region of constitutional practice, it is not permitted to a provincial legislature to do indirectly what cannot be done directly *(Great West Saddlery Co.* v. *The King* (1921) 2 A.C. 91, at 100).

Whether the learned Chief Justice was of opinion that the legislation in question in that case was incompetent to parliament as well as to a provincial legislature, it is not necessary to consider. It was clearly, in the opinion of the learned Chief Justice, beyond provincial competence.

I respectfully agree with this view, in the light of which it is plain that by-law 184 cannot be supported as within any of the heads of legislative jurisdiction conferred upon the provinces by section 92. If provincial legislation could validly authorize a by-law such as that here in question, it could legislate so as to prevent the distribution within the whole or any part of the province, of pamphlets or newspapers published elsewhere within or without the province. This is clearly contrary to the law as envisaged by Duff, C.J.

In the same case, Cannon J. said at p. 144:

> The bill does not regulate the relations of the newspapers' owners with private individual members of the public, but deals exclusively with expressions of opinion by the newspapers concerning government policies and activities. The pith and substance of the bill is to regulate the press of Alberta from the viewpoint of public policy by preventing the public from being misled or deceived as to any policy or activity of the Social Credit Government and by reducing any opposition to silence or bring upon it ridicule and public contempt.

I agree with the submission of the Attorney-General for Canada that this bill deals with the regulation of the press of Alberta, *not from the viewpoint of private wrongs or civil injuries* resulting from any alleged infringement or privation of civil rights which belong to individuals, considered as individuals, *but from the viewpoint of public wrongs or crimes*, i.e., involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity.

The learned judge referred to the sections of the *Criminal Code* dealing with seditious words and publications and pointed out that while at first in England criticism of any government policy was regarded as a crime, since the passing of Fox's Libel Act in 1792 it is not criminal, as the Canadian Criminal Code now provides, to point out errors in the government of the country and to urge their removal by lawful means. The learned judge then continued:

Now, it seems to me that the Alberta legislature by this retrograde Bill is attempting to revive the old theory of the crime of seditious libel by enacting penalties, confiscation of space in newspapers and prohibitions for actions which, after due consideration by the Dominion Parliament, have been declared innocuous and which, therefore, every citizen of Canada can do lawfully and without hindrance or fear of punishment. It is an attempt by the legislature to amend the Criminal Code in this respect and to deny the advantage of sec. 133(*a*) to the Alberta newspaper publishers.

Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy. As stated in the preamble of The British North America Act, our constitution is and will remain, unless radically changed, "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law. Every inhabitant in Alberta is also a citizen of the Dominion. The province may deal with his property and civil rights of a local and private nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern. The mandatory and prohibitory provisions of the Press Bill are, in my opinion, *ultra vires* of the provincial legislature. They interfere with the free working of the political organization of the Dominion. They have a tendency to nullify the political rights of the inhabitants of Alberta, as citizens of Canada, and cannot be considered as dealing with matters purely private and local in that province. The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press

1953

SAUMUR v. CITY OF QUEBEC

Kellock J.

in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion. These subjects were matters of criminal law before Confederation, have been recognized by Parliament as criminal matters and have been expressly dealt with by the criminal code. No province has the power to reduce in that province the political rights of its citizens as compared with those enjoyed by the citizens of other provinces of Canada. Moreover, citizens outside the province of Alberta have a vital interest in having full information and comment, favourable and unfavourable, regarding the policy of the Alberta government and concerning events in that province which would, in the ordinary course, be the subject of Alberta newspapers' news items and articles.

With the same reservation already made with respect to the judgment of Duff C.J., in the same case, I agree that such a subject-matter of legislation is at any rate beyond the jurisdiction conferred by any of the heads of s. 92 and, accordingly, the provisions of the by-law here in question cannot stand. With respect to the charter, I would construe its provisions as not intended to authorize such a by-law; Reference re *Minimum Wage Act* (1).

I would therefore allow the appeal. The appellant is entitled to a declaration that the said by-law is *ultra vires* the respondent and the respondent, its officers and agents are restrained from in any way attempting to enforce its provisions. I agree with the order as to costs proposed by my brother Kerwin.

ESTEY, J.:—The City of Quebec, on October 23, 1933, enacted By-law 184, the material portion of which 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 appellant submits that the by-law is legislation that interferes with "the free exercise and enjoyment of religious profession and worship," authority for the enactment of which the Province could not give to the City of Quebec as under the *B.N.A. Act* only the Parliament of Canada can competently enact such legislation.

Counsel for the City and the Province of Quebec submit that the by-law is but legislation on the part of the City in relation to its power over the public streets and in particular was enacted to avoid a nuisance and to protect the health of the citizens and the cleanliness of the City.

(1) [1948] S.C.R. 248.

That a by-law passed for such purposes would be competently authorized by ss. 335, 336 and 337 of the charter granted by the Province to the City of Quebec (19 Geo. V. S. of Q., Ch. 95) is not contested. It is, therefore, unnecessary to set forth these provisions further than to point out that it is expressly stated in s. 337 that the by-laws of the City of Quebec shall not be "inconsistent with the law of Canada or of this Province . . ."

In this regard it is important to observe that s. 2 of Ch. 307, R.S.Q. 1941, reads:

> 2. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, provided the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, are by the constitution and laws of this Province allowed to all His Majesty's subjects living within the same.

This s. 2 has been in the statute law of the Province of Quebec since at least 1888 (R.S.Q. 1888, Art. 3439). With some minor changes in expression this provision is found in a statute enacted in 1851 (S. of C. 14-15 Vict., Ch. 175) at a time when the problems arising out of clergy reserves were engaging the minds of the Members of Parliament.

Under s. 42 of the *Act of Union, 1840,* it was provided, inter alia, that a bill in relation to or affecting the enjoyment or exercise of any form or mode of religious worship should not come into force until assented to by Her Majesty. This was in force when the legislation of 1851 was enacted which, in accordance therewith, was transmitted to London and Her Majesty assented thereto on May 15, 1852.

It is also significant, and its importance was stressed throughout the hearing of this appeal, that in the Treaty of Paris, 1763, the following is included:

> 4. . . . His Britannick Majesty on his side, agrees to grant the liberty of the Catholick religion to the inhabitants of Canada: he will in consequence give the most precise and most effectual orders that his new Roman Catholick subjects may profess the worship of their religion according to the rites of the Romish Church, as far as the laws of Great Britain permit. . . . . .

While the treaty, in Art. 4, refers to Nova Scotia, or Acadia, and Canada as separate entities and is open to the construction that the foregoing applied only to Canada, this is clarified when the boundaries of the British and

1953

SAUMUR v. CITY OF QUEBEC

Estey J.

French territories on the Continent of America are fixed in Art. 7, which concludes with the words:

> The stipulations inserted in the IVth article, in favour of the inhabitants of Canada, shall also take place with regard to the inhabitants of the countries ceded by this article.

It, therefore, appears that the foregoing portion of Art. 4 was intended to apply to all of the British Dominions in North America.

This right granted by the Treaty of Paris has been preserved by *The Quebec Act of 1774, The Constitutional Act of 1791,* and *The Act of Union of 1840.* The existence of this right and the provisions of the Act of 1851 would be present to the minds of those who drafted and the Members of Parliament who enacted the *B.N.A. Act.* It must be assumed, therefore, that it was intended legislation in relation thereto would come within the provisions of the *B.N.A. Act* and be competently enacted either by the Parliament of Canada or the provincial legislature as therein provided. The circumstances under which the Treaty of Paris and the legislation of 1851 were prepared and adopted suggest the provisions of each of these here referred to were both intended to promote peace, order and good government in the country as a whole. This conclusion finds support from the fact that the foregoing quotation was placed in Art. 7 of the Treaty of Paris, which commences with the words "In order to re-establish peace on solid and durable foundations, ..." It is also emphasized both by the preamble of the Act of 1851 and in the operative part by the limitation imposed upon the free exercise and enjoyment of religious profession and worship. In the preamble it is set out that

> the recognition of legal equality among all Religious Denominations is an admitted principle of Colonial Legislation; And . . . . in the state and condition of this Province . . . . it is desirable that the same should receive the sanction of direct Legislative Authority, recognizing and declaring the same as a fundamental principle of our civil polity:

and then in the operative part a limitation is imposed to the effect that its exercise and enjoyment should not be "made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province."

It will also be observed that in the declaration of this right in the Act of 1851 no penalty is provided for infraction thereof. That would indicate that such was left to the field of criminal law where, in principle, it would seem to belong. The right of the free exercise and enjoyment of religious profession and worship, is a personal, sacred right for which, history records, men have striven and fought. Wherever attained they have resisted restrictions and limitations thereon in every possible manner. In one sense it may be styled a civil right, but it does not follow that it would be included within the phrase "Property and Civil Rights in the Province" within the meaning of s. 92(13) of the *B.N.A. Act*. On the contrary it would rather seem that such a right should be included among those upon which the Parliament of Canada might legislate for the preservation of peace, order and good government.

Moreover, having regard to the nature and character of the right which was, by the Treaty of Paris, given "to the inhabitants of the countries ceded" and the legislation of 1851 where it is in the preamble thereto stated "legal equality among all Religious Denominations is an admitted principle of Colonial Legislation" and such "a fundamental principle of our civil polity" that legislative sanction should be given thereto, it would appear that if the draftsmen and those enacting the *B.N.A. Act* had intended that legislation in relation to this right should be enacted by the province and effective in a part, rather than by the Parliament of Canada and, therefore, effective in the country as a whole, that express language to that effect would have been embodied in that enactment, more particularly as by that Act "one Dominion under the Crown . . . . . with a constitution similar in principle to that of the United Kingdom" was created.

Furthermore, if such had not been the intention of those preparing and enacting the *B.N.A. Act* it would seem most unlikely that under s. 93 thereof they would have given, in relation to education, the exclusive legislative authority to the provincial legislature and then have specifically reserved an appeal "to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic

1953

SAUMUR v. CITY OF QUEBEC

Estey J.

minority of the Queen's subjects in relation to education" and given power to the Parliament of Canada to enact legislation, in the absence of appropriate provincial legislation, requisite for the due "Execution of the Provisions" of s. 93 and necessary to give effect to its decision upon any appeal under that section.

It, therefore, appears that legislation in relation to this right comes within the description and classification referred to by Sir Montague E Smith in *Russell* v. *The Queen* (1), where his Lordship, when considering the competence of the Parliament of Canada to enact *The Canada Temperance Act, 1878,* stated:

> Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada. It was said in the course of the judgment of this Board in the case of the *Citizens Insurance Company of Canada* v. *Parsons* (7 App. Cas. 96) that the two sections (91 and 92) must be read together, and the language of one interpreted, and, where necessary, modified by that of the other. Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects "Property and Civil Rights" within the meaning of sub-sect. 13.

The provision of the enactment of 1851 (assented to in 1852), being legislation under s. 91 of the *B.N.A. Act,* by virtue of s. 129 thereof continued in force after Confederation and thereafter could be repealed, abolished or altered by the Parliament of Canada but not by a provincial legislature. It has never been repealed or altered by that Parliament and, therefore, remains in force. The enactment, therefore, of s. 2 of ch. 307 by the Province of Quebec, being legislation in relation to this right, could not be enacted under either heading (13) (Property and Civil

(1) (1882) 7 App. Cas. 829 at 839.

Rights in the Province) or (16) (Generally all Matters of a merely Local or Private Nature in the Province) of s. 92 of the *B.N.A. Act*.

The Act of 1851 being still in force, it is necessary to examine the by-law to determine whether, in its true nature and character, it is legislation in relation to the free exercise and enjoyment of religious profession and worship or to the exercise of power over the public streets.

The by-law contains neither preamble nor language that expressly sets forth with what intent and purpose it was passed. It is contended, as already stated, that it was passed to prevent the existence of a nuisance, to protect the health of the people and the cleanliness of the city. Distribution of pamphlets and other printed matter has taken place since time immemorial and it is significant that no instance was mentioned where the distribution of such ever constituted a nuisance or an interference with the health of the people or the cleanliness of the city. If, as it may be conceded, the distribution of pamphlets or other printed matter might be done in a manner to create a nuisance, impair the health and make the city unclean, such an unusual circumstance could be dealt with apart from any such by-law as here in question. Moreover, it is pertinent to observe that the by-law contains no direction to the Chief of Police that might guide or assist him in determining whether in a given instance the distribution might constitute a nuisance, undermine the health of the people or impair the cleanliness of the city. This would appear a significant omission, more particularly as the by-law was passed in 1933 at a time when Jehovah's Witnesses were being brought before the courts of the Province for various offences, and in the course of the hearing of this appeal it was stated and not contradicted that distribution under this by-law has been refused only to Jehovah's Witnesses. The fact that the appellant had made no application does not, therefore, affect the issues in this appeal. In these circumstances Mr. Justice Bertrand appears to accurately state the real intent and purpose or pith and substance of this by-law:

La tentative de la dite Cité de Québec de présenter son règlement comme une simple mesure de protection contre l'encombrement des rues et places publiques ne nous oblige pas d'être naïfs au point de croire à leurs protestations de bonne foi, car en étudiant mes notes, j'ai été obligé de

1953

SAUMUR
v.
CITY OF
QUEBEC

Estey J.

prendre connaissance des différentes causes qui nous ont été soumises, ainsi qu'à la Cour Suprême du Canada. Sur le sujet, j'y ai constaté que les personnes en autorité dans plusieurs villes de cette province ont traité les témoins de Jéhovah comme des criminels. Les notes du savant Juge Rand, dans la cause de Boucher, entre autres, m'ont convaincu d'une véritable persécution religieuse.

It is, however, contended that the by-law does not interfere with any act of worship on the part of Jehovah's Witnesses. It is conceded that the appellant and other citizens may believe what appears to them to be consistent with their conception of truth and that they have the right "to worship God in their own way." In this connection it is important to observe that the statute of 1851 protects "the free exercise and enjoyment of religious profession and worship." This provision contemplates that subject to the proviso contained therein individuals may select their own form of religious profession and worship. It is hardly necessary to observe that the foregoing does not in any way prevent a provincial legislature enacting legislation within its own jurisdiction that may affect the right of religious profession and worship.

Moreover, the language of the foregoing provision ought not to receive a narrow or restricted construction. History plainly indicates that in England the Roman Catholics and other religious bodies and in France the Protestants were denied that which is declared in the foregoing section. Indeed, it was a religious controversy in this country, mainly in respect of clergy reserves and matters incident thereto, that led to the enactment of this provision in 1851.

In clear and unambiguous language the Legislature of that day ensured freedom of religious profession and worship and the Parliament of Canada has not seen fit to repeal, alter or amend this statutory provision. In these circumstances it is the duty of the courts to give effect thereto and, in particular, in the adjudication of particular cases, to see that it is not used to defeat the very end the statute was intended to maintain.

It may be pointed out that even if s. 2 of ch. 307, R.S.Q. 1941, was *intra vires*, this By-law 184 would be in conflict therewith and, therefore, could not be competently passed by the City of Quebec because it was not authorized by the terms of its charter.

The parties hereto expressly asked that the decision be reached quite apart from any issue that might be raised with respect to delegation of authority within the terms of By-law 184.

I am, therefore, of the opinion that the appeal should be allowed and a judgment directed declaring the by-law invalid and an injunction restraining the City from acting thereunder. I agree with my brother Kerwin as to the disposition of costs.

LOCKE J.:—The preamble to chapter 175 of the Statutes of the Province of Canada for the year 1851 reads as follows:—

> Whereas the recognition of legal equality amongst all Religious Denominations is an admitted principle of Colonial Legislation: And whereas in the state and condition of this Province, to which such a principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct Legislative Authority recognizing and declaring the same as a fundamental principle of our civil polity: Be it therefore declared and enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of the United Kingdom of Great Britain and Ireland, and intituled, An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada, and it is hereby declared and enacted by the authority of the same, That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

The statute was reserved for the signification of Her Majesty's pleasure and the Royal assent given by Her Majesty in Council on May 15th, 1852.

This statute was in force when the *British North America Act of 1867* was passed by the Imperial Parliament. It could not, in my opinion, be repealed by the Province of Quebec or by the Legislature of any other province of Canada (*Dobie* v. *Temporalities Board* (1)). Whether it would be *intra vires* Parliament to repeal the Act, in view of the language of the preamble to the *British North America Act,* is a matter to be decided when that question arises. It does not arise in the present case. Parliament has passed no legislation purporting to repeal the *Act.*

(1) (1882) 7 App. Cas. 136.

1953

SAUMUR v. CITY OF QUEBEC

Locke J.

In the Revised Statutes of Quebec of 1888 there appeared as Article 3439 the following:—

> The free exercise and enjoyment of religious profession and worship without discrimination or preference so as the same be not made an excuse for acts of licentiousness or a justification of practices inconsistent with the peace and safety of the Province are by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

This provision is continued as section 2 of chapter 307 of the Revised Statutes of Quebec 1941. If this section was an attempt to confer substantive rights and not merely a recital of the rights declared by the Statute of 1852, the section dealt with matters which were beyond the powers of the Province unless, as is contended by the respondent in the present matter, under Head 13 of section 92 of the *British North America Act* the Province was empowered to legislate as to the free exercise and enjoyment of religious profession and worship within the Province.

The articles of the City charter under which the by-law attacked in the present proceedings was passed are 335 and 337 and read:—

> 335. The council may, at any of its meetings at which the absolute majority of its members are present, pass by-laws for the following purposes: For the good order, peace, security, comfort, improvement, cleanliness, internal economy and local government of the said city; for the prevention and suppression of all nuisances, and of all acts, matters and things in the said city, opposed, contrary or prejudicial to the order, peace, comfort, morals, health, improvement, cleanliness, internal economy or local government of the said city.
>
> And for the greater certainty, but not so as to restrict the scope of the foregoing provision or of any power otherwise conferred by this charter, it is hereby declared that the authority and jurisdiction of the city council extends and shall hereafter extend to all matters hereinafter mentioned, that is to say:
>
> 1. The raising of money by taxation;
>
> 2. The borrowing of money on the city credit;
>
> 3. Streets, lanes, and highways, and the right of passage above, across, along, or beneath the same;
>
> 4. Sewers, drains and waterworks;
>
> 5. Parks, squares and ferries;
>
> 6. Licenses for trading and peddling;
>
> 7. The public peace and safety;
>
> 8. Health and sanitation;
>
> 9. Vaccination and inoculation;
>
> 10. Public works and improvements;
>
> 11. Explosive substances;
>
> 12. Nuisances;

13. Markets and abattoirs;

14. Decency and good morals;

15. Masters and servants;

16. Water, light, heat, electricity and railways;

17. The granting of franchises and privileges to persons or companies;

18. The inspection of food.

337. In order to give full effect to articles 335 and 336, and to extend and complete the same, so as to secure full autonomy for the city and to avoid any interpretation of such articles or their paragraphs which might be considered as a restriction of its powers, the city is authorized to adopt, repeal or amend and carry out all necessary by-laws concerning the proper administration of its affairs, peace, order and safety, as well as all matters which may concern or affect public interest and the welfare of the citizens; provided always that such by-laws be not inconsistent with the laws of Canada or of this Province, nor contrary to any special provision of this charter.

The by-law attacked was enacted in the year 1933 by the Council of the City and reads:—

IT IS ORDAINED and ENACTED by the by-law of the Municipal Council of the City of Quebec and the said Council ORDAINS and ENACTS as follows, to wit:—

1. 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.

2. Any one contravening the present by-law shall be liable to a fine, with or without costs, and in default of immediate payment of said fine, with or without costs, as the case may be, to an imprisonment, the amount of the said fine and the term of imprisonment to be fixed by the Recorder's Court of the City of Quebec, at its discretion, but the said fine shall not exceed one hundred dollars and the imprisonment shall not exceed three months of the calendar, said imprisonment nevertheless shall cease at any time before the expiration of the term fixed by the said Recorder's Court, upon payment of the said fine or of the said fine and costs, as the case may be, and if said infraction is repeated, said repetition of offence shall constitute day by day, after summons or arrest, a separate offence.

While, on the face of it, the by-law may be said to be directed to the controlling of the condition of the streets of the City by preventing the accumulation of litter from circulars or pamphlets distributed in the streets being thrown away, or of traffic on the streets which might be impeded by the presence of persons distributing such writings, the course of the trial, the factums filed on behalf of the respondent and intervenant and the argument addressed to us make it quite clear that the purpose of the by-law and its real nature are something entirely different.

1953

SAUMUR v. CITY OF QUEBEC

Locke J.

The trial was held before Casgrain, J. Part of the evidence tendered on behalf of the present appellant was that of Mr. H. C. Covington, a minister of the religious organization known as Jehovah's Witnesses and Vice-President of the legal governing body of that organization. In describing the nature of the religious belief of Jehovah's Witnesses and of their activities, he said in part:—

> Jehovah's witnesses are an unincorporated body of missionary evangelists, their primary purpose being to preach the gospel of God's Kingdom throughout the whole world, as a witness, in execution of the commission recorded in Matthew 24:14, and this body is a missionary society preaching throughout the whole world, in every country, under the sun, save and except Russia.
>
> Jehovah's witnesses preach the gospel as missionary evangelists worldwide, including Quebec, by calling from door to door, doing missionary work, visiting the people and explaining to them about God's Kingdom as the only hope of mankind. That's the primary introduction to the people, and if they find people who are disinterested, they pass on to the next house. If they find persons interested, they stay and talk with them about the Bible and concerning God's Kingdom. And if the interested people desire to have them call back or re-visit, they do so. That is what we call re-visiting for back-calls, re-visiting for the purpose of answering questions and explaining Bible prophecy concerning God's Kingdom. And in addition to that method of preaching, Jehovah's witnesses hold Bible studies in the homes of the people where groups of from 2 to 15 or more people attend regularly each week. In these studies, the missionary evangelist presides as minister, and then he explains where these texts are to be found in the Bible. And that work is carried on throughout the whole world, including Canada and Quebec. Jehovah's witnesses, in preaching missionary evangelical work, employ primarily the facilities of the press. Printed literature is prepared by Jehovah's witnesses and left with the people for the purpose of leaving with them printed sermons concerning God's Kingdom as the only hope for mankind, and every one of Jehovah's witnesses employs this facility of the press in addition to the word as a method of preaching and teaching. In addition, Jehovah's witnesses also preach from the pulpit, from the platform, to public gatherings, just like the orthodox clergy.
>
> Jehovah's witnesses differ primarily between themselves and the orthodox clergy in that Jehovah's witnesses go to the people with their message and talk to them in their homes, instead of forcing the people to come to them to some meeting. Jehovah's witnesses do employ public meetings, but in addition to that, the great part of their missionary work is done by Jehovah's witnesses going to the home, and that is exactly the way Jesus Christ and the apostles did it. Jesus Christ and the apostles, according to the Bible, went from house to house and door to door, for instance, St. Paul and St. Luke, and in Matthew 28:20, and 1 Peter, 2nd Chapter, 21st verse, Peter says that all those followers of the Lord Jesus Christ, who was the first minister, should follow in his footsteps, in Christ's steps. The new text uses the word "house" in the gospel more than 120 times. And Jehovah's witnesses therefore employ this primitive method of preaching and teaching. It is not only a biblical way, but we have found from practice that that is the only way of getting this message to the people effectively.

Mr. Covington said further that they considered the distribution of literature in which they sought to convey their belief to others was a necessary and vital part of their activities and way of worship. The Bible he referred to as their text book and declared their belief in God and in his Son Jesus Christ as the Saviour and Redeemer of mankind. Speaking of other religious organizations, he said:—

> We do not judge other people, we emphatically take the view that other religious organizations that have departed from the Christian principles are teaching errors that lead mankind into the battle of destruction at Armageddon, and for that reason we hold the truth of the Bible so that any honest person, whether Catholic, Protestant or Jew, or non-Catholic or non-Jew, will see the truth and get on the highway that leads to life and avoid destruction at Armageddon. We do not pass judgment on any man, we merely act as witnesses to people, preaching what is to be found in the Bible.

By way of defence, the respondent called a number of witnesses, including a Roman Catholic priest, a Rabbi, a Clergyman of the Church of England and a Professor of Philosophy, to give evidence on such diverse subjects as to what were the elements of a religion, as to whether preaching alone was a religious act, whether the belief of the Jehovah's witnesses, as disclosed in a number of periodicals and pamphlets which it was shown were circulated by them, was in fact a religion, whether the activities of the witnesses were in fact religious activities, what was "the meaning in philosophy" of religious freedom "as regards modern civilization", whether the distribution of religious tracts in the homes of the people was a violation of religious liberty and as to whether they thought it permissible to disobey the law if to obey it was contrary to their religious beliefs.

The claim of the appellant included the claim that he was being restrained in his right to the free exercise and enjoyment of religious profession and worship guaranteed to him by the Freedom of Worship Act of the Province. The respondent City had pleaded by paragraph 17 of its Defence that:—

> Le demandeur n'est pas un ministre du culte et l'organisation dont il fait partie n'est pas une église ni une religion; au contraire, les actions illégales du demandeur, en accord avec celles d'autres membres du groupement appelé "Témoins de Jéhovah", lorsqu'ils distribuent des pamphlets ou tracts d'un caractère provocateur et injurieux, ne sont pas des gestes religieux mais des actes anti-sociaux qui ont été et sont de nature à troubler la paix publique et la tranquilité et la sécurité des paisibles citoyens particulièrement dans la cité de Québec, et risquent d'y provoquer des désordres.

1953

SAUMUR v. CITY OF QUEBEC

Locke J.

These witnesses were apparently called as experts. The question for the learned trial Judge to decide on this issue was whether the belief of Jehovah's Witnesses and their mode of worship fell within the meaning of the expression "religious profession and worship" in the preamble of the Statute of 1852. Covington had stated the nature of that belief and his evidence was not contradicted and its truth cannot be questioned. Counsel for the appellant objected to the admission of the evidence of these witnesses, but his objections were overruled. The matter was not one upon which expert evidence was admissible and none of this evidence should have been received.

I see no difficulty in interpreting the simple and clear language of the preamble of the Statute of 1852 nor of section 2 of the Provincial Statute of 1941 if, contrary to my opinion, the latter statute touches the matter. To claim that those who believe in God and in his Son Jesus Christ do not hold a religious belief and that to profess that belief and attempt to communicate it to others, in the manner which the Jehovah's Witnesses believe they are commanded to do by the Bible, is not exercising a religious profession and an act of worship is, in my opinion, untenable.

In the factum filed on behalf of the respondent, lengthy extracts are given from various publications of Jehovah's Witnesses, some of which appear to me to be expressed in intemperate language and are no doubt obnoxious to others who entertain other Christian beliefs as well as to people of the Jewish faith. The purpose of bringing these lengthy quotations to our attention is apparently in an endeavour to establish that the faith of Jehovah's Witnesses and their mode of worship are not entitled to the protection of the Statute of 1852 and the Quebec statute, and also to support the view that the effect of distributing this literature in a province where the people are predominantly of the Roman Catholic faith will be to provoke disorders.

The learned counsel for the respondent, at the commencement of his argument, said with commendable frankness that the by-law was directed against the contents of the documents. This was made abundantly clear by the proceedings at the trial and is, in my opinion, quite beyond dispute. If anything further were needed to demonstrate

that the purpose of the by-law is to impose a censorship, it is to be found in the evidence given on behalf of the respondent. Among the witnesses called by the City was a Mr. Ohman, described as an Evangelist of the Seventh Day Adventist Church, who had obtained a permit which allowed him to sell the religious literature of his faith from house to house. According to this witness, he had received a good reception when he applied for his permit. Saumur did not apply for a permit, being advised apparently that as the by-law was *ultra vires* it was wholly ineffective, but the whole attitude adopted on behalf of the City makes it plain that had he done so the permit would have been refused. Apparently, the Chief of Police of the City of Quebec did not object to the teachings of the Seventh Day Adventists while disapproving that of Jehovah's Witnesses.

On behalf of the intervenant it has been contended before us that, assuming the belief of the Jehovah's Witnesses is one entitled otherwise to the protection of the Statute of 1852 or the Provincial Statute, he may be deprived of that right by or under the authority of a statute of the Provincial Legislature. The argument is based on the contention that the rights so given to the people of Canada to complete freedom in these matters is a civil right of which they may be deprived by appropriate legislation by the Province. It is further contended, though rather faintly, that the legislation may be justified under Head 16 as being a matter of a merely local or private nature in the province.

In the factum of the intervenant the matter is thus expressed:—

> Under our constitution there is no religious freedom except within the limits determined by the competent legislative authority. No such authority is known other than the provincial authority; religious teaching as a matter of fact is part of the realm of education reserved to the provinces; besides, religious freedom is one of the civil rights also reserved to the provinces.

The reference to rights reserved to the provinces in respect of religious teaching refers, of course, to the provisions of section 93 of the *British North America Act*. If the argument is sound, then the holding of religious services by the adherents of any faith designated by the Legislature may be prohibited.

1953

SAUMUR v. CITY OF QUEBEC

Locke J.

This argument put forward, so far as I am aware, for the first time in any reported case in Canada since Confederation raises questions which are of profound importance to all of the people of this country. Not only the right of freedom of worship would be affected but the exercise of other fundamental rights, such as that of free speech on matters of public interest and to publicly disseminate news, subject only to the restraints imposed by the *Criminal Code* and to such civil liability as may attach to the publication of libelous matters, might be restrained or prohibited. The language of the by-law is perfectly general and if this contention of the intervenants be right the Chief of Police might forbid the distribution in the streets of circulars or pamphlets published by one political party while allowing such distribution by that party which he personally favoured. It is well, in my opinion, that it be made clear that this right is involved in the decision of this case. Once a right of censorship of the contents of religious publications is established, the dissemination of the political views of writers by circulars or pamphlets delivered on the streets may equally be prohibited or restrained.

The idea of imposing censorship upon the distribution of political and religious publications is not of course new. After the Restoration in England, the *Licensing Act of 1662* prohibited any private person to publish any book or pamphlet unless it were first licensed: law books by the Lord Chancellor, historical or political books by the Secretary of State and all other books by the Archbishop of Canterbury or the Bishop of London or by the Chancellor or Vice-Chancellor of one of the universities. Authors and writers of works considered obnoxious were liable to capital punishment or to be flogged or fined or imprisoned, according to the nature of the offence (Taswell-Langmead Constitutional History, 10th Ed. p. 739). At the Accession of James II in 1685, the *Licensing Act* was revived for several years and was thus in force at the Revolution and was once more revived in 1692 for one year, but a further attempt to revive it in 1695 was negatived by the Commons and thenceforth the censorship of the press ceased to be part of the law of England. The history of the restriction of religious liberty in England and upon the freedom of the

press is traced in Taswell-Langmead's work, commencing at p. 728. At p. 744 of this work the learned author, after referring to the changes brought about by the *Reform Act of 1832*, said that from that year the freedom of the press has been completely established and the utmost latitude of criticism and invective has been allowed it in discussing the actions of the Government and of all public men and measures.

The purpose of this by-law is to establish a censorship upon the distribution of written publications in the City of Quebec. It is not the distribution of all pamphlets, circulars or other publications in the streets which is prohibited but of those in respect of which the written permission of the Chief of Police has not been obtained.

In the preamble to the *British North America Act* the opening paragraph says:—

> Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom.

and, after reciting that such a union would conduce to the welfare of the provinces, it is said that it is expedient not only that the constitution of the legislative authority in the Dominion be provided for but also that the nature of the Executive Government therein be declared. At the time this *Act* was passed, the Act of 1852 declaring the right to freedom of religious belief and worship was in force in Canada and gave to the inhabitants of the provinces the same rights in that respect as were then enjoyed by the people of the United Kingdom.

It has, I think, always been accepted throughout Canada that, while the exercise of this right might be restrained under the provisions of the saving clause of the statute of 1852 by criminal legislation passed by Parliament under Head 27 of section 91, it was otherwise a constitutional right of all the inhabitants of this country. An examination of the reports of the arguments advanced by the parties to the litigation which ensued following the passing of the *Manitoba School Act of 1890* (*Barrett* v. *City of Winnipeg* (1) and *Brophy* v. *Attorney General of Manitoba* (2)),

(1) (1891) 7 M.R. 273; 19 Can. S.C.R. 374; [1892] A.C. 495.
(2) [1895] A.C. 202.

1953

SAUMUR
v.
CITY OF
QUEBEC

Locke J.

makes it clear that it was common ground as between the litigants that the Province might not in any manner limit or restrict the right of the Roman Catholic minority to the free exercise and enjoyment of Religious Profession and Worship. Dubuc, J., later Chief Justice of the Court of King's Bench for Manitoba, who dissented from the judgment of the majority on the appeal from Killam, J. is the only one of the Judges who considered *Barrett's* case who made any reference to the matter. At p. 360 of 7 M.R., he said:—

> The State may hold that ignorance is an evil to be remedied by public instruction and may see that certain secular subjects, which are known to form the basis of a proper education, be taught in schools assisted by public money. But in a community composed of different elements, the State should not ignore the particular conditions, wants and just claims of an important class of citizens, especially when such important class are, in every respect, loyal and law-abiding subjects, and there is nothing in their wants and claims clashing with the rights of other classes, or contrary to, or conflicting with, the letter, the spirit or the true principles of the Constitution. *The liberty of conscience is one of the fundamental principles of our Constitution. What the Roman Catholics ask in claiming the right to maintain their denominational schools is only the carrying out, to the full extent, of that fundamental principle.* The desirability of having religious instruction combined with secular teaching in schools is, as stated by my brother Killam, considered as of the utmost importance by very many Protestants as well as by Roman Catholics.

The constitutional right to which Dubuc, J. referred was either that given by the Statute of 1852 or that which, in my opinion, is implicit in the language of the preamble of the *British North America Act.*

Whether the right to religious freedom and the right to free public discussion of matters of public interest and the right to disseminate news, subject to the restrictions to which I have above referred to, differ in their nature, it is unnecessary to decide. The former of these rights is, however, certainly not the lesser of them in Canada. Unless they differ, had the powers of censorship vested by the by-law in the Chief of Police of the City of Quebec been exercised by preventing the distribution of the written views of a political party (and they may be so used) rather than the religious views of Saumur, the opinion of Sir Lyman

Duff, C.J. in the Reference as to *The Accurate News and Information Act of the Province of Alberta* (1), would be directly to the contrary of the argument advanced on behalf of the intervenant.

It is true that in that case *The Accurate News and Information Act* was considered by all of the members of the Court who considered the various matters referred to them, as a bill which was a part of the general scheme of social credit legislation, the basis of which was the *Alberta Social Credit Act* and presupposed as a condition of its operation that the latter *Act* was validly enacted and that since it was *ultra vires* the ancillary and dependent legislation must fall with it. Nonetheless, Sir Lyman Duff expressed his considered view as to the right of a province to restrain public discussion upon affairs of public interest and Davis, J. agreed with him. The Act in question set up what was in effect a censorship of the newspapers of the province and would have imposed upon them the obligation of publishing a statement to be prepared by an official appointed by the Government "as to the true and exact objects of the policy of the Government." The learned Chief Justice, after referring to the manner whereby under the constitution established by the *British North America Act* legislative power for Canada is vested in one Parliament consisting of the Sovereign, the Senate and the House of Commons, said in part (p. 133):—

> It can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. . . .
>
> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James* v. *Commonwealth*, 1936 A.C. 578 at 627, 'freedom governed by law.'

(1) [1938] S.C.R. 100 at 132.

1953

SAUMUR v. CITY OF QUEBEC

Locke J.

We do not doubt that (in addition to the power of disallowance vested in the Governor General) the Parliament of Canada possesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from The British North America Act as a whole (*Fort Frances Pulp & Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* 1923, A.C. 695), and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.

But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of The British North America Act, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter private or local within the province. It would not be, to quote the words of the judgment of the Judicial Committee in *Great West Saddlery Co.* v. *The King,* 1921, 2 A.C. 91, at 122, 'legislation directed solely to the purposes specified in section 92'; and it would be invalid on the principles enunciated in that judgment and adopted in *Caron* v. *The King,* 1924, A. C. 999 at 1005-6.

The question, discussed in argument, of the validity of the legislation before us, considered as a wholly independent enactment having no relation to the Alberta Social Credit Act, presents no little difficulty. Some degree of regulation of newspapers everybody would concede to the provinces.

Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of the British North America Act and the statutes of the Dominion of Canada. Such a limitation is necessary, in our opinion, 'in order,' to adapt the words quoted above from the judgment in *Bank of Toronto* v. *Lambe,* 1887, 12 A.C. 575, 'to afford scope' for the working of such parliamentary institutions. In this region of constitutional practice, it is not permitted to a provincial legislature to do indirectly what cannot be done directly (*Great West Saddlery Co.* v. *The King,* 1921, 2 A. C. 91 at 100).

After quoting section 129 of the *British North America Act* which, inter alia, continued all laws in force in Canada, Nova Scotia and New Brunswick at the Union, until repealed, abolished, or altered by the Parliament of Canada or the Legislature of the respective Province,

according to the authority of the Parliament or of that Legislature under this Act, he continued:—

> The law by which the right of public discussion is protected existed at the time of the enactment of The British North America Act and, as far as Alberta is concerned, at the date on which the Alberta Act came into force, the 1st of September, 1905. In our opinion (on the broad principle of the cases mentioned which has been recognized as limiting the scope of general words defining the legislative authority of the Dominion) the Legislature of Alberta has not the capacity under section 129 to alter that law by legislation obnoxious to the principle stated.

With this opinion in its entirety I respectfully agree and I have heard no reasoned argument against any of its conclusions. It may be said, with at least equal and I think greater force, that the right to the free exercise and enjoyment of religious profession and worship without discrimination or preference, subject to the limitations expressed in the concluding words of the first paragraph of the Statute of 1852, existed at the time of the enactment of the *British North America Act* and was not a civil right of the nature referred to under Head 13 of section 92 of the *British North America Act.*

Cannon, J. considered the question of the validity of the bill independently of the fact that it was part of the general scheme of social credit legislation and must accordingly be held *ultra vires,* since the *Alberta Social Credit Act* was itself beyond the powers of the Legislature. He expressed the view that *The Accurate News and Information Act* was an attempt by the Legislature to amend the *Criminal Code* and deny the advantage of section 133(*a*) to the Alberta newspapers' publishers, and so *ultra vires.* He was further of the opinion that the powers of the Province to deal with the property and civil rights of its citizens did not enable it to interfere with their fundamental rights to express freely their untrammelled opinion about Government policies and discuss matters of public concern. Crocket, Kerwin and Hudson, JJ., considering that the bill must of necessity be held *ultra vires,* since the *Alberta Social Credit Act* was found to be beyond the powers of the Legislature, did not express any opinion on the matters which I have referred to above. If there has been expressed any judicial opinion on this subject, however, contrary to that expressed by Sir Lyman Duff and by Davis and Cannon, JJ., we have not been referred to it.

1953

SAUMUR v. CITY OF QUEBEC

Locke J.

The right of which Dubuc, J. spoke in *Barrett's* case in the passage above referred to was a right of the subjects of Her Majesty under the constitution of the United Kingdom referred to in the preamble of the *British North America Act* when that statute was passed in 1867. The effect of the Statute of 1852 and that of 1867 was to continue that right in the people of Canada as a constitutional right and one which, in my opinion, did not fall within the category of civil rights under Head 13 of section 92. I have had the advantage of reading the opinion of my brother Kellock and I agree with his reasons and with his conclusion on this aspect of the matter.

The distinction between this and the by-law considered in *In Re Cribbin and the City of Toronto* (1), and in *Toronto Corporation* v. *Roman Catholic Separate Schools Trustees* (2) is, in my opinion, quite clear. In *Cribbin's* case the City of Toronto had passed a by-law providing that no person should on the Sabbath Day in any public park, square, garden, etc. in the City publicly preach, lecture or declaim. One of the objections to the by-law was apparently that it violated what is referred to in the judgment of Galt, C.J. as the constitutional right of all persons to hold meetings and make speeches in public parks. The argument on behalf of Cribbin does not indicate that it was objected that the by-law infringed any religious right of the applicant and the matter was not considered on that basis. What completely distinguishes the case, however, is that it applied to all persons of every religious denomination or belief. Had it applied to those of one religious denomination only while not to others and had the point been argued and decided, the case would have some application to the present matter.

In *City of Toronto Corporation* v. *The Trustees of the Roman Catholic Separate Schools* (2), a by-law passed by the City under section 399a of the *Municipal Act* prohibited the erection of buildings in a certain district, except for use as private residences. The by-law was attacked by the trustees who desired to erect a separate school in the

(1) (1891) 21 O.R. 325. (2) [1926] A.C. 81.

area. Dealing with an argument based upon section 93 of the *British North America Act,* Viscount Cave, L.C. said (p. 88):—

> In their Lordships' opinion this provision has no application to the present case. It is a restriction upon the power of the Province to make laws in relation to education, but does not prevent the provisions of the Municipal Act with reference to building, and other matters relating to the health and convenience of the population, from applying to denominational schools as well as to other buildings.

Had the by-law prohibited the erection of a Roman Catholic school in the area while permitting those of other religious denominations, the case would directly touch the present matter.

The appellant further contends that the by-law is *ultra vires* the City and to authorize it *ultra vires* the Province of Quebec, since it trenches upon the jurisdiction of Parliament under Head 27 of section 91. The answer of the intervenant and of the City to this contention is that in pith and substance the by-law does not deal with crime but is directed to the prevention of crime. On the strength of decisions such as *Hodge* v. *The Queen* (1) and *Bedard* v. *Dawson* (2), they contend the by-law to be *intra vires.*

An examination of the history of the legislation dealing with offences against religion in Taswell-Langmead's Constitutional History and Hallam's History of England shows that the statutes dealing with what were declared to be offences against religion were all penal in their nature. In the *Criminal Code,* under the heading "Offences against Religion", sections 198 to 201 deal with the offence of blasphemous libel and acts interfering with the free exercise of religious worship by the people of Canada. Section 198 provides that whether any particular published matter is a blasphemous libel or not is a question of fact and does not define the offence. It does, however, declare that no one is guilty of a blasphemous libel for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject.

The *Criminal Code* also deals with libels in terms that go far to express in statutory form the rights of the Canadian people to freedom of speech in regard to matters of public

(1) (1883) 9 App. Cas. 117. (2) [1923] S.C.R. 681.

1953

SAUMUR v. CITY OF QUEBEC

Locke J.

interest. After defining a defamatory libel by section 317, sections 322, 323 and 324 provide that it is not an offence to publish in good faith, for the information of the public, a fair report of the proceedings of the Senate and House of Commons, or any committee thereof, or of the public proceedings before any court exercising judicial authority, or any fair comment upon any such proceedings: that no one commits an offence by publishing in good faith, in a newspaper, a fair report of the proceedings of any public meeting if such meeting is lawfully convened for a lawful purpose and is open to the public, and if such report is fair and accurate, and if the publication of the matter complained of is for the public benefit and if the defendant does not refuse to insert in a conspicuous place in the newspaper in which the report appeared a reasonable letter or document of explanation or contradiction by or on behalf of the prosecutor: and that no one commits an offence by publishing any defamatory matter which he, on reasonable grounds, believes to be true, and which is relevant to any subject of public interest, the public discussion of which is for the public benefit.

I am quite unable to accept the contention of the intervenant that the real purpose of this by-law is to prevent public disorders, or that it is other than to provide a means to prevent the dissemination of religious views which are not approved by the authorities. The publication of religious writings which offend people entertaining different religious beliefs to those of the publisher is not confined to any particular religious denomination or to those which adhere to any particular religious belief. It is also a matter of common knowledge that political writings expressed in pamphlets, circulars and newspapers have many times in the past, and no doubt will many times in the future, cause anger and resentment on the part of those entertaining different political views. If it be accepted for the purpose of argument that the distribution of such literature might induce some persons to commit acts of violence, it is for Parliament to decide whether this should be declared an offence in the *Criminal Code*. Parliament has not seen fit to pass such legislation and the Province is without any jurisdiction to do so. The appellant in the present matter has exercised what, in my opinion, is his constitutional

right to the practice of his religious profession and mode of worship, and if doing so provokes other people to commit crimes of violence he commits no offence (*Beatty* v. *Gilbanks* (1)).

In *Hodge* v. *The Queen,* the Judicial Committee held that the Liquor License Act of 1877 of Ontario, which prescribed regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, did not in respect of those sections interfere with the general regulation of trade and commerce, but came within the jurisdiction of the Province to legislate in regard to municipal institutions in the Province under Head 8, the imposition of punishment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in section 92 under Head 15, and generally all matters of a merely local or private nature under Head 16. In *Bedard* v. *Dawson,* a Quebec statute which authorized the Judge to order the closing of a disorderly house was held *intra vires,* as it dealt with a matter of property and civil rights by providing for the suppression of a nuisance and not with criminal law by aiming at the punishment of a crime. I think these cases have no application to the present matter, where the true purpose of the by-law is not to regulate traffic in the streets but to impose a censorship on the written expression of religious views and their dissemination, a constitutional right of all of the people of Canada, and to create a new criminal offence.

I would allow the appeal and direct that judgment be entered declaring the by-law invalid and enjoin the respondent city from acting upon it. I agree with the order as to costs proposed by my brother Kerwin.

The dissenting judgment of Cartwright and Fauteux, JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Queen's Bench, Appeal Side (2), affirming the judgment of Casgrain J. whereby the action of the appellant, asking that by-law 184 of the City of Quebec, passed on the 27th October, 1933, be declared to be—both on its face and insofar as the plaintiff is concerned—*ultra vires,*

(1) (1882) 9 Q.B.D. 308 at 314. (2) Q.R. [1952] Q.B. 475.

1953

SAUMUR v. CITY OF QUEBEC

unconstitutional, illegal, null and void and be quashed and that the Statutes of the Province of Quebec insofar as they purport to authorize the enactment of such by-law be similarly declared *ultra vires,* was dismissed.

Cartwright J.

At the outset it is to be observed that the question submitted to us for decision has been narrowed in the following respect. Counsel for the appellant, at an early stage of the hearing before us, expressly abandoned the argument that the by-law in question is invalid because of unlawful delegation of discretion to the Chief of Police and stated that it was his position that if it is within the powers of the Legislature of the Province of Quebec to authorize the City of Quebec to pass the by-law it has done so. The question was thereupon raised from the bench whether the Court should permit counsel to take this position, since to do so might well bring about the result that the Court would be giving its opinion on a constitutional issue of importance which did not require decision in this particular proceeding. However, it was the view of the majority of the Court that counsel for the appellant was entitled to limit his attack on the judgment of the Court of Queen's Bench to such grounds as he chose to put forward and this view was made clear to all counsel. Consequently counsel for the appellant did not discuss the questions whether there was an unauthorized delegation to the Chief of Police and whether the enabling statutes conferred the power upon the City to enact the by-law and counsel for the respondent and for the intervenant were not called upon to deal with these aspects of the matter and said nothing about them. In answer to a question from the bench put to counsel for the appellant during his reply he stated explicitly that he invited the Court to deal with the matter as if the relevant legislation of the Province of Quebec had expressly conferred upon the City power to pass the by-law in the very words in which it has been passed.

Under these circumstances the question we are called upon to decide is simply whether it is within the powers of the Provincial Legislature to authorize the City to pass the by-law, which, so far as relevant, reads as follows:—

> 1. 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.

Section 2 of the by-law prescribes penalties for its breach.

It is first necessary to determine the proper construction of the by-law. In doing so we must give to the words used their plain meaning in everyday language and when this is done I think it clear that what is prohibited is the distribution, without the permission of the Chief of Police, of printed matter of the kind described in the by-law in the streets of the City. The distribution of such matter anywhere else, as for example in private houses is not affected by the by-law. There is evidence in the record to indicate that the officials charged with the enforcement of the by-law have not so construed it and have instituted proceedings against persons, as for an infraction of the by-law, on the ground that such persons had distributed written matter at private residences in the City. Such evidence does not seem to me to be relevant to the proper construction of the by-law. It is only if the words of the by-law are ambiguous that we may resort to extraneous aids in its interpretation and the words used appear to me to be clear and unambiguous. The fact, if be the fact, that the by-law has been misinterpreted, can affect neither its proper construction nor the question of its validity.

In my view, legislation authorizing the city to pass this by-law is *prima facie,* in relation to either or both of two subjects within the provincial power which may be conveniently described as (i) the use of highways, and (ii) police regulations and the suppression of conditions likely to cause disorder. I propose to deal with these in the order mentioned.

The judgments of this Court in *O'Brien* v. *Allen* (1) and in *Provincial Secretary of Prince Edward Island* v. *Egan* (2), establish that the use of highways in the province is a subject matter within the provincial power. The following passages may be referred to. In *O'Brien* v. *Allen* (*supra*) at page 342, Sedgewick J., delivering the unanimous judgment of the Court said:—

> . . . It has never been doubted that the right of building highways, and of operating them, whether under the direct authority of the Government or by means of individuals, companies or municipalities, is wholly within the purview of the provincial legislatures, and it follows that whether they be free public highways or subject to a toll authorized by legislative enactment, they are none the less within the provincial power.

(1) (1900) 30 Can. S.C.R. 340. (2) [1941] S.C.R. 396.

1953

SAUMUR v. CITY OF QUEBEC

Cartwright J.

In *Provincial Secretary of Prince Edward Island* v. *Egan* (*supra*) at page 417, the present Chief Justice of Canada, then Rinfret J., delivering the judgment of himself, Crocket and Kerwin, JJ. referred to the last quoted passage with approval and continued:—

> The aspect of that field is wholly provincial, from the point of view both of the use of the highway and of the use of the vehicles. It has to do with the civil regulation of the use of highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous.

In a separate judgment, at page 403, Sir Lyman Duff C.J.C. expressed his concurrence with Rinfret J.

At page 417, Hudson J. said:—

> The Province undoubtedly has the right to regulate highway traffic and, for that purpose, to license persons to use highways. The right to license also involves a right to control and, when necessary, to revoke the licence.

It is said, however, that it is beyond the power of the Province to deny the ordinary use of the highways to any member of the public. Certain passages in the judgment of Rand J. in *Winner* v. *S.M.T. (Eastern) Ltd.* (1), particularly at pages 918 to 920, would require careful consideration if the by-law purported to deny to any persons or classes of persons the right to use the highways for the purpose of passing and repassing, but the by-law in no way interferes with this right. Its operation is limited to prohibiting the distribution of printed matter in the streets, without a licence. In my opinion, the common law is correctly stated in Pratt and Mackenzie's Law of Highways (19th Edition) at pages 1 and 2:—

> The right of the public in a highway is an easement of passage only—a right of passing and repassing. In the language of pleading, a party can only justify *passing along,* and not *being in,* a highway.

In 1 Roll. Abr. 392 tit. "Chimin", cited in Halsbury (2nd Edition) Vol. 16 page 238, it is said:—

> In a highway the King hath but the passage for himself and his people.

In *Ex Parte Lewis* (2), Wills J. said:—

> The only 'dedication' in the legal sense that we are aware of is that of a public right of passage, of which the legal description is a 'right for all her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance.

(1) [1951] S.C.R. 887.

(2) (1888) 21 Q.B.D. 191 at 197.

I agree with the submission of counsel for the intervenant that a member of the public has no legal right in or on a highway beyond such right to pass and repass and that the use of the highway for other purposes is a mater not of right but of tolerance. In *Ex Parte Lewis* (*supra*) at page 197, Wills J. says:—

> Things are done every day, in every part of the kingdom, without let or hindrance, which there is not and cannot be a legal right to do, and not unfrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right.

It appears to me to follow from the judgments in *O'Brien* v. *Allen* (*supra*) and *Provincial Secretary of Prince Edward Island* v. *Egan* (*supra*) that the legislative authority to permit, forbid or regulate the use of the highways for purposes other than that of passing and repassing belongs to the Province.

Dealing next with the subject of police regulations and the suppression of conditions likely to cause disorder, it appears that this Court has decided that the Province has power to legislate in relation to such manners.

In *Bedard* v. *Dawson* (1), Idington J. said:—

> As to the argument addressed to us that the local legislatures cannot legislate to prevent crime, I cannot assent thereto for in a very wide sense it is the duty of the legislature to do the utmost it can within its power to anticipate and remove, so far as practicable, whatever is likely to tend to produce crime;

and on the same page he continued:—

> There are many instances of other nuisances which can be better rectified by local legislation within the power of the legislatures over property and civil rights than by designating them crimes and leaving them to be dealt with by Parliament as such.

At the same page Duff J., as he then was, said:—

> The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate.

In *Reference re the Children's Protection Act of Ontario* (2), Sir Lyman Duff C.J., delivering the unanimous opinion of the Court said at page 403:—

> Moreover, while, as subject matter of legislation, the criminal law is entrusted to the Dominion Parliament, responsibility for the administration of justice and, broadly speaking, for the policing of the country, the

(1) [1923] S.C.R. 681 at 684. (2) [1938] S.C.R. 398.

1953

SAUMUR v. CITY OF QUEBEC

Cartwright J.

execution of the criminal law, the suppression of crime and disorder, has from the beginning of Confederation been recognized as the responsibility of the provinces and has been discharged at great cost to the people; so also, the provinces, sometimes acting directly, sometimes through the municipalities, have assumed responsibility for controlling social conditions having a tendency to encourage vice and crime.

Reference may also be made to the decision of the Judicial Committee in *Lymburn* v. *Mayland* (1).

It follows from these authorities that it is within the competence of the Legislature of the Province to prohibit or regulate the distribution, in the streets of the municipalities in the Province, of written matter having a tendency to insult or annoy the recipients thereof with the possible result of giving rise to disorder, and perhaps violence, in the streets.

It is said, however, if I have correctly apprehended the argument for the appellant, that even if the legislation in question appears *prima facie* to fall within the powers of the Provincial Legislature under the two heads with which I have dealt above it is in reality an enactment destructive of the freedom of the press and the freedom of religion both of which are submitted to be matters as to which the Province has no power to legislate. In support of such submission counsel referred to a large number of cases decided in the Courts of the United States of America but I am unable to derive any assistance from them as they appear to be founded on provisions in the Constitution limiting the power to make laws in relation to such matters. Under the *British North America Act,* on the other hand, the whole range of legislative power is committed either to Parliament or the Provincial Legislatures and competence to deal with any subject matter must exist in one or other of such bodies. There are thus no rights possessed by the citizens of Canada which cannot be modified by either Parliament or the Legislature, but it may often be a matter of difficulty to decide which of such bodies has the legislative power in a particular case.

(1) [1932] A.C. 318.

It will be convenient to first examine the appellant's argument in so far as it deals with the freedom of the press. In Blackstone's Commentaries (1769) Vol. 4, at pages 151 and 152 it is said:—

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free-man has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.

Accepting this as an accurate description of what is commonly understood by the expression "the liberty of the press", as heretofore enjoyed by the inhabitants of Canada, it is clear that By-law No. 184 does infringe such liberty to a limited extent. It does, to adapt the words of Blackstone, lay some previous restraint upon publication. So far as the by-law is concerned every individual is left free to print and publish any matter he pleases except that one particular method of publication is conditionally denied to him. He is forbidden to publish such matter by distributing it in the streets of the City of Quebec without having previously obtained for so doing the written permission of the Chief of Police. I will assume, as is argued for the appellant, that the by-law contemplates that the Chief of Police will examine the written matter in respect of which he is asked to grant a permit and that his decision, whether to grant or refuse it, will be based on the view which he takes of the contents of such matter; that if he regards it as harmless, he will grant the permit, and that if he thinks it is calculated to provoke disorder by annoying or insulting those to whom it is distributed he will refuse the permit. It is urged that power to restrict the liberty of the press even to the limited extent provided in the by-law, is committed exclusively to Parliament under the opening words of section 91 or under head 27 of that section and further that Parliament has fully occupied the field by enacting those

1953

SAUMUR v. CITY OF QUEBEC

Cartwright J.

provisions of the Criminal Code which deal with blasphemous libel, seditious libel, speaking seditious words, spreading false news, defamatory libel, and publishing obscene matter. If I have followed the argument correctly, it is that as Parliament has enacted that certain publications are to be deemed criminal it has by implication declared that all other publications are lawful and that consequently the Legislature has no power to deal with any other type of publication. I am unable to accept this conclusion.

In my view, freedom of the press is not a separate subject matter committed exclusively to either Parliament or the Legislatures. In some respects, Parliament, and in others, the Legislatures may validly deal with it. In some aspects it falls within the field of criminal law, but in others it has been dealt with by Provincial legislation, the validity of which is not open to question, as for example "The Libel and Slander Act" R.S.O. 1950 Cap. 204, and the similar acts in the other provinces. If the subject matter of a Provincial enactment falls within the class of subjects enumerated in section 92 of the *British North America Act* such enactment does not, in my opinion, cease to be *intra vires* of the legislature by reason of the fact that it has the effect of cutting down the freedom of the press. The question of legislative competence is to be determined not by inquiring whether the enactment lays a previous restraint upon publication or attaches consequences after publication has occurred but rather by inquiring whether in substance the subject matter dealt with falls within the Provincial power. I have already indicated my view that the Province has power under the two headings which I have discussed above to authorize the passing of the by-law in question.

It is next necessary to consider the argument that the by-law is invalid because, as it is alleged, it interferes with freedom of religion. While it was questioned before us, I will, for the purposes of this argument, assume that the system of faith and worship professed by the body to which the plaintiff belongs is a religion, and that the distribution of printed matter in the streets is a practice directed by its teachings.

It may well be that Parliament alone has power to make laws in relation to the subject of religion as such, that that subject is, in its nature, one which concerns Canada as a whole and so cannot be regarded as of a merely local or private nature in any province or as a civil right in any province; but we are not called upon to decide that question in this appeal and I express no opinion upon it. I think it clear that the provinces, legislating within their allotted sphere, may affect the carrying on of activities connected with the practice of religion. For example, there are many municipal by-laws in force in cities in Ontario, passed pursuant to powers conferred by the Provincial Legislature, which provide that no buildings other than private residences shall be erected on certain streets. Such by-laws are, in my opinion, clearly valid although they prevent any religious body from building a church or similar edifice on such streets. Another example of Provincial Legislation which might be said to interfere directly with the free exercise of religious profession is that under which the by-law considered in *Re Cribbin* v. *The City of Toronto* (1) was passed. That was a by-law of the City of Toronto which provided in part:—

> No person shall on the Sabbath-day, in any public park, square, garden, or place for exhibition in the city of Toronto, publicly preach lecture or declaim.

The by-law was attacked on the ground, *inter alia,* that it was unconstitutional but it was upheld by Galt C.J. and in my opinion, his decision was right. No useful purpose would be served by endeavouring to define the limits of the provincial power to pass legislation affecting the carrying on of activities connected with the practice of religion. The better course is, I think, to deal only with the particular legislation now before us.

For the appellant, reliance was placed upon the Statute of Canada (1851) 14-15 Victoria, Chapter 175, re-enacted in substantially identical terms as R.S.Q. 1941 Cap. 307. I will assume, for the purposes of the argument, that counsel for the appellant is right in his submission that it is to the pre-Confederation Statute that we should look. In the relevant portion of that statute it is enacted:—

> That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not

(1) (1891) 21 O.R. 325.

1953

SAUMUR v. CITY OF QUEBEC

made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

Cartwright J.

I do not think that, on a proper construction, this statute absolves a religious body or an individual member thereof from obedience to any Act of Parliament or of the Legislature which happens to conflict with the teachings of such body. To give an example, if I am right in my view that *Re Cribbin* v. *City of Toronto* (*supra*) was rightly decided I do not think that an individual could have successfully argued that the by-law, although otherwise valid, did not apply to him because it was one of his beliefs and a teaching of the body to which he belonged that he must preach not only in churches, chapels or meeting houses or on private property but also in parks and public places.

It is argued, on the authority of *Dobie* v. *Temporalities Board* (1), that the Legislature could not repeal this pre-Confederation Statute. I will assume that this is so but I think it clear from the opinions delivered in this Court in *Reference In Re Bowaters Pulp and Paper Mills Ltd.* (2), in which *Dobie* v. *Temporalities Board* was fully considered, that although the Province could not repeal the Act *in toto* it can modify its effects by any subsequent legislation provided such legislation is within the field assigned to the Province. *Leges posteriores priores contrarias abrogant.* I therefore do not think that the by-law is rendered invalid by reason of its alleged interference with the right of the appellant to practise the religion of his choice.

To summarize, I am of opinion that it was within the competence of the Legislature to authorize the passing of the by-law in question under its power to legislate in relation to (i) the use of highways, and (ii) police regulations and the suppression of conditions likely to cause disorder; and that such legislation is not rendered invalid because it interferes to the limited extents indicated above with either the freedom of the press or the freedom of religion. It follows that I would dismiss the appeal.

(1) (1881) 7 App. Cas. 136. (2) [1950] S.C.R. 608.

1953

SAUMUR v. CITY OF QUEBEC

Cartwright J.

Before parting with the matter, I wish, at the risk of repetition, to emphasize that, because of the position taken by counsel at the argument, I am deciding only that it was within the power of the Legislature of the Province of Quebec to authorize the City to pass the by-law in question. I have not considered whether the relevant legislation did actually authorize its passing as that question was withdrawn from our consideration and counsel for the respondent and intervenant were not called upon to deal with it. I wish also to make it plain that I do not intend, by implication or otherwise, to express any opinion as to whether or not it would have been within the powers of the Legislature to authorize the passing of a similar by-law which was not, as I have held the one before us to be, limited in its operation to what may be done in the streets.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the Appellant: *Sam S. Bard and W. G. How.*

Solicitors for the Respondent: *Pelletier, Godbout & Leclerc.*

Solicitor for the Intervenant: *Noël Dorion.*

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

AND

INDEPENDENCE FOUNDERS LIMITED ..... RESPONDENT.

1953

*May 19, 20

*Oct. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income and excess profits tax—Investment trust business by company—Whether profits on securities lying passive in its hands taxable—Income War Tax Act, R.S.C. 1927, c. 97.

The respondent's business consisted of the sale of certificates representing fractional interests in Trust Shares issued by the Royal Trust Co. against "blocks" or "units" of American and Canadian securities deposited with it by the respondent. These certificates could be purchased outright or by periodic payments. The holder of these certificates could exchange them for Trust Shares which in turn could be disposed of on the market. Fees were charged by the respondent on these transactions.

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ.

1953

MINISTER OF NATIONAL REVENUE v. INDEPENDENCE FOUNDERS LTD.

During the taxation years in question, the respondent was unable to buy the American securities required to create new "blocks" or "units" against which further Trust Shares could be issued. Consequently, in order to be able to make further sales of certificates and to meet the requirements of deferred sales already made, the respondent was forced to re-purchase Trust Shares from holders desiring to dispose of them. The profits realized when these re-purchased Trust Shares were sold at prices in excess of their cost to the respondent were assessed by the Minister but held to be not taxable by the Exchequer Court.

Held (reversing the judgment appealed from), that the dealings in the Trust Shares were part of the respondent's business and the profits, therefore, taxable.

APPEAL from the judgment of the Exchequer Court of Canada (1), Sydney Smith, Deputy Judge, holding that the amounts received by the respondent in the years 1943, 1944, 1945 and 1946 from the sale of Independence Founders Trust Shares were not income.

W. R. Jackett Q.C. and *F. J. Cross* for the appellant.

J. L. Lawrence for the respondent.

RAND J.:—The business structure of the respondent consisted of transactions of the following type. A block or unit of selected stocks was purchased and, along with certain money for incidental purposes, deposited with a trust company which I shall call trust company A. Against that unit 2,000 trust shares represented by appropriate transferable certificates were issued to the respondent. These trust shares, in turn, were placed by the respondent in the custody of a second or trust company B, and against them investment certificates were issued, representing fractional interests in one or more trust shares according to the amount paid by an investor. The sale of the certificates was carried on by the respondent and as can be seen, the business lent itself to a wide scale diffusion of small investment. Provision for contract purchases by periodic payments was contained in the certificates. The holder of a sufficient number was entitled to require trust company B to redeem them in cash by way of sale at the current price or to deliver to him their equivalent in trust shares; the holders of trust shares could require their redemption in cash or, in lots of not less than 400, the surrender of stock share certificates of equivalent value. New units might

(1) [1952] Ex. C.R. 102.

from time to time be deposited with trust company A, followed in turn by the issue of trust shares and investment certificates.

The obligations of the respondent were to manage the original investment units which entailed a continuing rapport with market conditions and such substitutions in the shares as might be necessary to preserve the balance in the investments looking to soundness and stability of value; and to maintain sufficient trust shares with trust company B to meet all purchases, present or contracted. The respondent was entitled to a percentage fee for supervising investments and various other fees payable on the sale of trust shares and investment certificates. Fees were payable also to the trust companies.

The shares specified for unit purchases included a number of United States securities, but in the period from 1943 to 1946 dealings in them became difficult by reason of the Foreign Exchange Control regulations. In order, therefore, to meet unexecuted contract purchases of investment certificates, the respondent was obliged to purchase trust shares on the Canadian markets, and this it did on a substantial scale during the taxation years 1943, 1944, 1945 and 1946.

The dispute is whether profits accruing to the respondent from those dealings are taxable. The contention is that since the respondent was under an obligation to maintain a certain capital with trust company B as the subject matter of value represented by the investment certificates, it was not in the position of an ordinary broker; that it was carrying out only an obligation related to capital; and that any resulting increase in value realized is an accretion to capital and not income.

I am unable to attribute to that obligation the effect claimed by Mr. Lawrence. The business of the respondent was one and entire and the profits of a business may consist in what are in one sense capital gains as well as what is strictly income. The business being an entirety, it embraced all those relations, obligations and responsibilities with which its activities were bound up. The duty to keep trust company B supplied with trust shares was just one feature of it. The necessity for maintaining the security

1953

MINISTER OF NATIONAL REVENUE v. INDEPENDENCE FOUNDERS LTD.

Rand J.

followed from the respondent's mode of disposing of investment certificates; if it had not invited contract purchases, the necessity would not have arisen; and the fact that the Exchange Regulations entered into the matter cannot affect the nature of its dealings.

Smith J. (1) states the essence of his judgment against the Crown in these words:—

> What have been assessed in this case are the increases in market value of securities that have been lying passive in the appellant's (respondent's) hands. Appellant claims that these increases in value are capital increments and not income at all; the Minister claims that they constitute a profit in a commodity that it is the appellant's business to deal in, and so are income within the relevant acts.

And he proceeds:—

> As I have said, the appellant has neither profits nor loss on securities while they are the subjects of deals with clients. Though it can gain or lose on securities that are lying passive in its hands, it is as liable to lose as to win, according to the general market . . . The effect of all this is that, though buying and selling interests in securities are essential to the appellant's business, these transactions are not its livelihood. In fact, with regard to these transactions the appellant is in much the position of a broker relying on commissions. It is only on fluctuations on the market for shares not being bought or sold that appellant can make a profit. It does not seek the profit, which is just as likely to be a loss. If profit, it is a fortunate profit.

He likens these securities in the hands of the respondent to timberlands held by a logging company, and rejects the view that in contrast to that situation, here there is a case of dealing in securities and that they are bought for resale. This he does not think "necessarily enough to attach the tax."

No doubt increases in market value accrue while securities are retained in the respondent's hands, but obviously as such they have not been taxed: it is the profit made on selling them that is in question.

He uses the analogy also of maintaining a picture gallery for exhibition purposes only, intended to be supported by admission charges. To sustain the interest of patrons, the proprietor may be obliged to keep the collection revolving and in that way keep buying and selling pictures even though he has no desire to be a dealer and though he is "as likely to lose as to gain by his dealings", and he adds:—

> Simlarly the appellant keeps securites not as a dealer but as an inducement to persuade clients to buy and to pay it commissions. These

(1) [1952] Ex. C.R. 102.

securities are like the tools of a trade; the user of tools must keep replacing them and may be lucky enough to have them rise in value after replacement; but I quite fail to see how the increase could be treated as income.

But, apart altogether from the question of taxability of the art dealer, is the analogy valid? From the initial purchase of stock shares down to the special purchase of trust shares the respondent bought for the specific purpose of reselling by means of investment certificates. The purchase of the trust shares was to protect outstanding contracts but, in effect, by way of resale as instalments were paid. But the exhibitor did not buy pictures for the purpose of resale, even though the course of his business might from time to time require a change of exhibits. The trial judge appears to disregard the obligation to maintain trust share value to meet outstanding contracts; but, in the circumstances, the respondent was bound to make the purchases as part of the transactions under which the contract sales of interests were made: these features cannot be separated.

Once all contracts or sales have been concluded, the respondent can, in a sense, be said to stand by as manager or servicing agent of a trust structure in which the legal and beneficial interests in the property are vested in other persons. The possibility exists that the entire beneficial interests might be converted into the original legal interests and the total structure disappear, but that is not what is contemplated; and a complete liquidation is provided for at the end of twenty years. But the duties of management, the responsibilities associated with redeemed or exchanged certificates or trust shares, the interest of an increasing body of distributed investment: all these, as well as other incidental features, such as that which actually developed in 1943, remain at the charge and for the benefit of the respondent. What was in the minds of those who set this scheme on foot was a business of expanding and recurring transactions of purchase and sale within the period mentioned. The income from the transactions in question, forming part of this totality, whether profits or fees, is taxable income.

I would, therefore, allow the appeal, restore the assessment and dismiss the appeal to the Exchequer Court with costs in both courts.

1953

MINISTER OF NATIONAL REVENUE v. INDEPENDENCE FOUNDERS LTD.

KELLOCK J.:—In the course of its business the respondent company purchases securities which it deposits in "units" or "blocks" with the Royal Trust Company, receiving from that company "trust shares", all as provided for in the agreement relating to this part of the business. These trust shares are, in turn, under the terms of a further agreement, deposited with the Prudential Trust Company and certificates representing an interest in the trust shares are sold as investments to clients of the respondent. Some of the contracts represented by these certificates cover immediate purchases while others provide for deferred purchases. The holders of certificates are entitled to present them to the Prudential Company at any time and to receive in exchange their value in trust shares or in cash.

During the years here in question the respondent, as a result of a change in circumstances which need not be specified, was no longer able to acquire satisfactory securities for the purpose of making deposits with the Royal Trust Company. The respondent accordingly found it necessary to purchase the trust shares which the Prudential Trust Company from time to time were called upon by holders of certificates to realize upon, in order that the respondent might thus be in a position to make further sales of certificates or to meet the deposit requirements of deferred sales already made. From such transactions the respondent realized profits which the Crown claims represent taxable income but which the respondent claims represent capital gains.

The argument on behalf of the respondent is that its real business is the making of the fees provided for under the agreements, namely, for its services with respect to the management of the underlying securities deposited with the Royal Trust Company as well as the various other fees provided for by the agreements upon the issue and surrender of trust shares and certificates. As to the transactions in question, the respondent contends it did not enter into them with the intention of making profit and that this factor is determinative of the character, for taxation purposes, of the profits which are the subject of these proceedings.

In my opinion this contention is insupportable. The dealings in the trust shares were an essential part of the business in which the respondent company was engaged. Without them, what the respondent calls its main business would have been very much contracted if not brought completely to an end. The principle stated by Lord Maugham in *Punjab Co-operative Bank* v. *Income Tax Commissioner* (1), in words used in the *California Copper* case (2), is applicable, namely,

> enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.

I would allow the appeal with costs throughout.

ESTEY, J.:—This is an appeal from a decision in the Exchequer Court (3) holding that the amounts received by the respondent in each of the years 1943, 1944, 1945 and 1946 from the sale of Independence Founders Trust Shares (hereinafter referred to as Trust Shares) were not income within the meaning of the *Income War Tax Act* (R.S.C. 1927, c. 97, and amendments thereto) and the *Excess Profits Tax Act* (S. of C. 1940, c. 32). The appellant here contends that these amounts were income as defined in these statutes and taxable under the provisions thereof.

The respondent, Independence Founders Limited, incorporated under the laws of British Columbia in 1933, invested its capital in Canadian and American securities which, under the terms of an agreement made between it and the Royal Trust Company dated January 1, 1936, were deposited in units or blocks with the Royal Trust Company as trustee. When so deposited these securities were registered in the name of the Royal Trust Company as trustee, which issued to the respondent Trust Shares, each Trust Share representing a $\frac{1}{2000}$th undivided interest in the unit or block of securities.

The respondent, under the terms of an agreement made with the Prudential Trust Company Limited dated March 23, 1933, as amended April 1, 1936, sold trustee investment certificates to persons desiring to invest in Trust Shares, either on a cash or time basis, and deposited with the

(1) [1940] A.C. 1055 at 1072. (2) (1904) 5 T.C. 159.
(3) [1952] Ex. C.R. 102.

1953

MINISTER OF NATIONAL REVENUE v. INDEPENDENCE FOUNDERS LTD.

Estey J.

Prudential Trust Company Limited the Trust Shares. These certificates, signed by the respondent, certified that the investor was the registered holder of the "Investment Certificate evidencing and embodying an agreement for Investment in Trust Shares." Upon each certificate the Prudential Trust Company Limited certified that the investor named therein was registered at the office of the Prudential as holder of the certificate. When the investor had paid one or more instalments he had a right, under the terms of the investment certificate, to surrender that certificate and to be paid in cash the value thereof. The investor who held his certificate until maturity might exercise certain other options not material to the present issues.

Under the foregoing the respondent's income was derived only from certain charges provided for in the agreement under which the investor bought the Trust Shares.

In 1943 Foreign Exchange Control Board regulations first restricted and then prohibited the purchase of United States securities. Thereafter it was impossible for the respondent to purchase United States securities and create further units or blocks of Canadian and United States securities to be deposited with the Royal Trust Company upon which the latter would issue further Trust Shares. The respondent's position then was as stated in its factum:

> To stay in business the Respondent abandoned its former practice of selling securities whenever an Investor wished to cash in and instead paid him in cash.

or, as stated by respondent's Managing Director, Mr. Barker, in referring to the situation after the Foreign Exchange Control Board regulations came into force:

> Yes, it was different, in that the requirements now had to be principally filled by the redemption of old accounts—accounts that were surrendered. We provided the principal part of the trusteed property that was allocated; whereas prior the principal part of which property as we were doing business and opening new accounts came through acquiring an underlying unit with the trust company, creating new trust shares.

The company had the power to purchase and sell these Trust Shares and did so by exercising its option to purchase Trust Shares from those who desired to surrender same.

Mr. Barker agreed that the dealing in these Trust Shares was thereafter a necessary part of the business of the company. It would, therefore, seem that at least in part its business was the buying and selling of Trust Shares. Each purchase and subsequent sale was carried out at the market value of these shares on the day of the respective transactions. In each of the years the company benefited by the fact that the sales totalled an amount greater than the purchase price. In other words, while the Trust Shares were in respondent's hands they appreciated in value in each of the years as follows:

1943	$ 7,498.89
1944	10,876.05
1945	11,798.96
1946	20,727.15

The relevant difference in the nature and character of respondent's business after the Foreign Exchange Control Board regulations prohibited purchase of American securities may be summarized as follows: Prior thereto when an investor desired to surrender and realize the cash value of his trust shares the respondent complied with his request by selling underlying securities. The respondent would then purchase additional underlying securities upon which new Trust Shares would be issued. Under this procedure any fluctuation of the value of the Trust Shares was entirely a loss or gain to the investor. This procedure was abandoned after the Foreign Exchange Control Board regulations came into force. The respondent would then, when the investor desired to surrender and realize the cash value of his Trust Shares, exercise its option to purchase these, which it did in its own right at the current market value, for the purpose of selling or allocating them subsequently to other investors at the then current market price. In the interval between the purchase and sale the Trust Shares were the property of the respondent and it profited or lost according as the Trust Shares fluctuated upwards or downwards.

The respondent, however, contends that the "Trust Shares are only title to these securities which still remain capital" and "What the Respondent did was to allocate an interest in the securities to an investor and thereafter manage his interest for him. What was capital in its hands

1953

MINISTER OF NATIONAL REVENUE v. INDEPENDENCE FOUNDERS LTD.

Estey J.

became capital of the investor." The Trust Shares represented a claim to an undivided interest in the underlying securities. (In certain events not material hereto an investor might, at maturity of the contract, surrender his shares and obtain a proportionate share of the underlying securities.) The title to the underlying securities at all times material hereto remained in the Royal Trust Company as trustee. The respondent, in purchasing these shares, was in reality purchasing the investor's contractual undivided interest in the underlying securities. In these circumstances this is not a sale of a capital asset such as a timber limit purchased by a logging company for the extraction of timber, nor of pictures of an art collector who charges fees for admission to his gallery, nor the instruments of a music teacher used in giving lessons, nor the automobiles of a taxi company. It is rather the purchase of these Trust Shares for the purpose of reselling them at such time as the investor's payments might require them.

The amounts here in question would seem to have been realized in the ordinary course of the respondent's business and taxable as income within the meaning of the oft-quoted statement of Lord Justice Clerk in *Californian Copper Syndicate* v. *Harris* (1):

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.

The part of the foregoing statement material to this discussion was quoted with approval by Duff J. (later C.J.) in the judgment of this Court in *Merritt Realty Company Limited* v. *Brown* (2), where the revenue realized by a private company from the sale of real estate was held not to be accretions to capital but rather profit realized by the company in carrying out a scheme for profit-making. As Duff J. stated at p. 189:

> When the facts proved are taken into consideration, there seems to me no real ground for doubting that the properties in which the company dealt were acquired for the purpose of turning them to account to the profit of the company, by sale, if necessary.

(1) (1904) 5 T.C. 159 at 165. (2) [1932] S.C.R. 187.

See also *Atlantic Sugar Refineries Ltd.* v. *Minister of National Revenue* (1).

In *Punjab Co-operative Bank Ltd.* v. *Commissioners of Income Tax* (2), where the bank sold its securities in order to provide funds to meet the withdrawals of its depositors, it was stated:

> It seems to their Lordships to be quite clear that this is a normal step in carrying on the banking business; in other words, that it is an act done in what is truly the carrying on of the banking business.

The respondent's counsel cites a passage of Lord Buckmaster in *Ducker* v. *Rees Roturbo Development Syndicate* (3). In that case the company was formed for the purpose of purchasing and acquiring patents but without any intention of manufacturing thereunder. The company disposed of patent rights to a United States company which agreed to pay royalties with the option to purchase same. The American company did purchase them and the sum in question of 26,500 pounds represented royalty and purchase price. The company contended that their share of this sum, less proper expenses, represented the sale of a capital asset and that the proceeds arising therefrom should not be brought into account. In the passage quoted Lord Buckmaster, following *Californian Copper Syndicate* v. *Harris, supra,* held the sum to be taxable and, concluding his judgment, His Lordship stated at p. 141:

> It is one of the foreign patents with which this appeal has to do, and the agreements, which are set out, showing the way in which the foreign patents in the case of France and of Canada have also been dealt with, show that that statement was not a statement of a mere accidental dealing with a particular class of property, but that it was part of their business which, though not of necessity the line on which they desired their business most extensively to develop, was one which they were prepared to undertake.

The fact that under this plan for the selling of Trust Shares, prior to Foreign Exchange Control Board regulations becoming effective, respondent's income was derived from the deductions provided for under the terms of the contract upon which the investor purchased Trust Shares does not militate against the fact that revenue earned when the method of providing Trust Shares to the investor is varied may be held to be income within the meaning of the aforementioned statutes. The buying and selling by the

(1) [1949] S.C.R. 706. (2) [1940] A.C. 1055 at 1073.
(3) [1928] A.C. 132.

1953

MINISTER OF NATIONAL REVENUE v. INDEPENDENCE FOUNDERS LTD.

Estey J.

respondent of the Trust Shares here in question was a necessary part of respondent's business as developed after the aforementioned regulations became effective and the revenue derived therefrom was income within the meaning of the above-mentioned statutes.

The appeal should be allowed with costs.

LOCKE, J.:—The business of the respondent company during the four yearly taxation periods in question was the sale of what were designated as Investment Certificates, by which the purchasers acquired either outright or upon the completion of a series of payments a defined undivided interest in shares of stock held by the Royal Trust Company, pursuant to the terms of an agreement entered into between that company and the respondent dated January 1, 1936. In respect of the shares so deposited the Royal Trust Company issued what were called Independence Founders Trust Shares representing, in the terms of the agreement, "an undivided interest in such deposited stocks and other property."

The Investment Certificates acquired by the purchasers (referred to therein as investors) were issued by the respondent and each was endorsed with a statement signed by Prudential Trust Company Limited, declaring that the named person was registered at the office of the trustee as the holder of the certificate.

The Investment Certificates were of two kinds: one, a fully paid certificate which acknowledged the payment to the Prudential Trust Company Limited, as trustee, of a lump sum: the other which recited that the purchaser had made an initial payment and would pay further payments of an amount specified thereafter at stated intervals and that, upon making these payments, the purchaser should become the beneficial owner of what was designated the "Trusteed Property", to the extent that the payment, less certain deductions, would purchase such property at the price prevailing at the close of business on the day the funds were received. The "Trusteed Property" was, by the terms of the agreement, to consist of Trust Shares issued by the Royal Trust Company pursuant to the terms of the agreement first above mentioned.

It was one of the terms of the Investment Certificates that the purchasers might surrender their certificates and obtain the value of the trust property held for the investor by the Prudential Trust Company Limited, less certain deductions. This value was to be ascertained by determining the then market value of the shares of stock held by the Royal Trust Company and referred to in the Trust Shares which had been purchased with the investors' money, a value which, of necessity, would fluctuate.

By the terms of an agreement made between the respondent and the Prudential Trust Company Limited, dated March 23, 1933, as amended by a further agreement dated April 1, 1936, the respondent had agreed at the outset to deposit with that trust company an initial amount of fifty of the Trust Shares, a number which represented a one-fortieth undivided interest in one group of the shares held by the Royal Trust Company. Such groups of shares were referred to in the agreement under which the deposit was made by the respondent with the Royal Trust Company as a stock unit. As payments were made by purchasers under Investment Certificates, the Prudential Trust Company Limited agreed to purchase Trust Shares from the respondent at their current value determined as aforesaid. In the event of the respondent not having Trust Shares available for that purpose when so required, it was provided that the Prudential Trust Company Limited might purchase them from the Royal Trust Company. The agreement further provided that, if and when any of the holders of either class of the Investment Certificates exercised the option to surrender his certificate and take the value of the Trust Shares held on his behalf, the Trust Company would sell such interest and, after making certain defined deductions, pay the amount realized to the owner of the surrendered certificate.

The units of shares deposited with the Royal Trust Company included shares in American companies and, owing to foreign exchange regulations during the time in question, the respondent could not obtain the necessary American exchange to buy shares in such companies in order to constitute new stock units with the Royal Trust Company. The result of this was that, in order to continue its business of the sale of Investment Certificates, the respondent

1953

MINISTER OF NATIONAL REVENUE v. INDEPENDENCE FOUNDERS LTD.

Locke J.

acquired Trust Shares by purchases from the holders of Investment Certificates wishing to surrender them and take the value of the securities held. The taxation period which ended on April 30, 1943, is typical of the four annual periods in question. When the respondent was notified of the assessment made upon it in respect of that period, it filed with the Minister a notice of dissatisfaction and an accompanying statement of facts. This statement, after referring to the arrangements made with the Royal Trust Company for the issuing of the Trust Shares and the manner in which the taxpayer issued the Investment Certificates to purchasers providing that if the purchasers of these certificates wished to sell their Independence Founders Trust Shares the taxpayer was required to take them over at the price thereof as of that day, said in part:—

> As stated above each portfolio comprises a list of selected Canadian and American securities. Upon the coming into force of the Foreign Exchange Control Act the Appellant was prevented by the Regulations from acquiring American Securities to form further portfolios or units. It therefore became necessary for the Appellant to find some means of acquiring Trusteed Property to complete outstanding contracts and this was accomplished by permitting the Prudential Trust Company to hold and apply shares acquired from clients who exercised their right to liquidate. During the taxation period the Appellant thus acquired approximately 24,987 Trust Shares and of the said shares so acquired 22,930 were allocated by the Trustee to satisfy the terms of existing contracts. The difference between the price of the shares so acquired and the price at which the same were so allocated (being the sum of $7,912.90) is claimed by the Minister as income, on the ground that it is a profit on Trading in Securities.

It would have been more accurate had the statement said that the Prudential Trust Company Limited acted on behalf of the present respondent in acquiring Trust Shares from investors who elected to surrender their Investment Certificates and that the shares so acquired enabled the respondent to sell further Investment Certificates and remain in business. That a profit was made during this period is admitted. The manner in which it was made was that the Trust Shares so acquired from investors were sold to the purchasers of Investment Certificates at amounts greater than their cost to the respondent, due, no doubt, to the increase in the value of the underlying shares.

Had the respondent sold Independence Founders Trust Shares directly to the public for amounts in excess of their cost to it, its liability to taxation upon the resulting income

would, in my opinion, have been undoubted. I do not think the fact that, instead of doing so, the plan of selling these shares through the medium of the Investment Certificates upon terms requiring the respondent to repurchase the shares at the owners' election was adopted alters the situation. The respondent in this matter during the taxation periods in question was, in my opinion, in the same position as the seller of any other commodity. What it offered for sale was simply an undivided interest in the shares deposited with the Royal Trust Company, the title to which was evidenced by the Trust Share Certificates. The method of selling these interests in the form of Investment Certificates enabled the respondent to earn certain fees for services, which were deducted from the purchase moneys paid by the investors to the Trust Company. In addition, the Trust Shares purchased by the respondent in the year 1943 were resold at prices in excess of their cost to the respondent and their acquisition and sale and the resulting profit were, in my opinion, part of the business and the income from it, just as were the rendering of services and the fees earned for such services. The fact that the respondent obligated itself to the investors to repurchase their Trust Shares if they wished to liquidate their holdings does not appear to me to affect the matter. The shares were sold at a price calculated in the manner above stated and, if at the time the investor elected to sell his Trust Shares, the then value of such shares was in excess of the amount which the respondent had received from their sale, the resulting loss would properly be taken into account in determining the respondent's income for that year.

In the years following 1943 the respondent had on hand at the end of its fiscal years Trust Shares acquired through the Prudential Trust Company Limited in the manner above described which had not yet been sold and the appellant complains of the value placed upon these shares by the Department of National Revenue. The audited accounts of the respondent for the taxation periods in question showed that they were kept upon an accrual basis and the evidence satisfies me that the valuations placed upon them by the Department were determined in accordance with recognized accounting practice.

1953

MINISTER OF NATIONAL REVENUE v. INDEPENDENCE FOUNDERS LTD.

Locke J.

I would allow this appeal with costs throughout and restore the assessments made by the Minister of National Revenue.

CARTWRIGHT J.:—I agree that, in the particular circumstances of this case, the gains which accrued to the respondent from the purchase and sale of the trust shares described in the reasons of other members of the Court were properly assessable as profits received by it from the carrying on of its business.

I would allow the appeal with costs throughout and restore the assessments made by the appellant.

Appeal allowed with costs.

Solicitor for the appellant: *F. J. Cross.*

Solicitors for the respondent: *Lawrence, Shaw & McFarlane.*

1953

*Jun. 18, 19
*Nov. 25

MONTREAL TRAMWAYS COMPANY (*Defendant*) ..... APPELLANT;

AND

GEORGE CAMPBELL DEEKS (*Plaintiff*) ..... RESPONDENT;

AND

JEAN McGUIRE ..... MIS-EN-CAUSE.

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

Automobile—Collision at intersection between street car and ambulance—Liability—Claim by husband for loss of wife's services and companionship.

This was one of several appeals from decisions of the Court of Queen's Bench (Appeal Side) of the Province of Quebec (1) in actions arising out of a collision between a street car of Montreal Tramways Company and an ambulance conveying Mr. and Mrs. Deeks to a hospital. The Supreme Court restored the judgments of the trial judge by which responsibility for the collision was placed entirely

*PRESENT: Kerwin, Taschereau, Rand, Cartwright and Fauteux JJ.

(1) Q.R. [1951] K.B. 557.

on the Tramway Company by reason of the negligence of its motorman. However, the judgment of the Queen's Bench was affirmed as to the amount of damages to which the husband was entitled for loss of his wife's services and companionship as a result of the injuries sustained by her. The judgment of the Court was delivered by Kerwin J., who with reference to that point said:—

A question arises as to the amount of damages to which Deeks is entitled. It is emphasized that we deal with this point as it was presented in argument. The trial judge fixed the damages at $7,805.81, of which amount the Insurance Company was subrogated to his rights to the extent of $1,000 and judgment was therefore given at the trial for $6,805.81. Deeks admitted that $360 should be deducted and on April 15, 1951, filed a partial desistment for that amount. In addition to reducing the trial judgment by that amount, the Court of Queen's Bench also deducted $214. This was on the ground that "the (Deeks) children had been in the habit of going to summer camps and the disability of Mrs. Deeks in no way increased the expenses in that connection." With that we agree.

A further deduction by the Court of Queen's Bench of $1,000 arose in this way. Deeks claimed damages for the loss of services and companionship of his wife during her period of total disability and also for loss of her services and companionship resulting from her permanent partial incapacity. The trial judge allowed $3,000 in all to cover these claims. The Court of Queen's Bench reduced this to $2,000 on the ground that there was no evidence in the record that a wife's obligations in Ontario extended to helping her husband in his business dealings. The evidence on the subject of the rights of a husband for the loss of consortium and servitium was given by a barrister and solicitor of the Province of Ontario, the domicile of Mr. and Mrs. Deeks. Nothing was asked that witness about this particular feature although Deeks claimed that before the accident his wife had assisted him by receiving his clients at their home and by joining him in outside entertainment, and that as a result of the accident she was unable to take her accustomed part in these activities.

1953

MONTREAL TRAMWAYS CO. v. DEEKS AND OTHERS

In *Best* v. *Samuel Fox and Co. Ld.* [1952] A.C. 716, the House of Lords decided that a married woman whose husband has been injured by a negligent act or omission has no right of action against the negligent person in respect of loss or impairment of consortium consequential on the injury. However, considerable discussion occurred in the arguments of counsel as to the basis of a husband's claim in respect of the loss or impairment of the consortium and servitium of his wife where she had been injured by the negligence of a third party, and reference is made to the subject in some of the judgments. It is unnecessary to consider the basis of such an action because we agree with those who expressed the view that such an action should not be enlarged. Whatever be its foundation and justification, we agree with Mr. Justice MacDougal that there is nothing in the law to justify any allowance by way of damages for such a claim as is advanced by Deeks to cover the $1,000.

APPEALS from the judgments of the Court of Queen's Bench, appeal side, province of Quebec (1) in several actions arising out of a collision in Montreal between a street car and an ambulance.

J. Letourneau Q.C. and G. Raymond for Montreal Tramways Co.

R. Walker Q.C., J. Bumbray Q.C. and J. P. Cardinal for McGuire.

J. P. Charbonneau Q.C., J. B. O'Conner and J. W. Hemens for Mr. and Mrs. Deeks.

F. Mercier for Yorkshire Insurance Co.

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(1) Q.R. [1951] K.B. 557.

1953

THE MINISTER OF NATIONAL REVENUE *(Respondent)* ..... APPELLANT;

AND

SPRUCE FALLS POWER & PAPER COMPANY LIMITED *(Appellant)* RESPONDENT.

*May 1, 4, 5, 6
*Oct. 6

THE MINISTER OF NATIONAL REVENUE *(Respondent)* ..... APPELLANT;

AND

THE JAMES MacLAREN COMPANY LIMITED *(Appellant)* ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Excess Profits Tax—Income Tax—Deduction from income of portion of amount paid under provincial Corporation Tax Act attributable to logging operations—Excess Profits Tax Act, 1940 (Can.) 1940 (2nd Sess.) c. 32—Income War Tax Act, R.S.C. 1927, c. 97 as amended, s. 5(1)(w)—The Dominion-Provincial Tax Rental Agreements Act, 1947, c. 58, s. 3—P.C. 331, Jan. 30, 1948 as amended by P.C. 952.—Interpretation Act, R.S.C. 1927, c. 1, s. 20.

These appeals were argued together. The first respondent carried on in the Province of Ontario, the other in Quebec, the business of manufacturing pulp and paper and as an incident thereto, logging operations. Each in filing Income and Excess Profits tax returns for the year 1947, deducted from its income that portion of taxes it paid under the relevant provincial Corporation Tax Act, it attributed to its logging operations, and claimed such allowance by virtue of s. 5(1)(*w*) of the *Income War Tax Act*, R.S.C. 1927, c. 97 and P.C. 331 as amended by P.C. 952. The deductions were disallowed by the appellant, but on appeal to the Exchequer Court, Cameron J., held that a taxpayer engaged in an integrated business, such as the respondents, had the right to apportion his income as between logging and other operations and claim a deduction for the provincial tax paid in respect thereof.

Held: (Kerwin and Cartwright JJ. dissenting).—That the type of taxation to which s. 5(1)(w) was directed was provincial taxation specifically imposed on income from mining or logging operations and had no reference to general provincial taxes on income.

Per: Kerwin and Cartwright JJ., (dissenting, agreed with the trial judge).—The amount which the respondent claimed to be entitled to deduct from its taxable income was imposed by way of tax on income and the income upon which this amount of tax fell was derived from logging operations. It would be a forced construction of the clause to hold that it had no operation in the case of a tax on income which in fact fell upon income derived from logging operations merely because it also fell on the income of the taxpayer from other sources.

Judgments of the Exchequer Court of Canada [1952] Ex. C.R. 68 and 75 set aside and assessment restored.

*PRESENT: Kerwin, Taschereau, Rand, Kellock, and Cartwright JJ.

1953

MINISTER OF NATIONAL REVENUE v. SPRUCE FALLS POWER & PAPER CO. LTD.

MINISTER OF NATIONAL REVENUE v. JAS. MACLAREN CO. LTD.

APPEALS from two judgments of the Exchequer Court of Canada, Cameron J. (1), allowing the respective appeals of the respondent taxpayers from an assessment for excess profits tax for the year 1947.

David Mundell, Q.C. and *T. Z. Boles* for the appellant.

Roderick Johnston, Q.C. and *Terence Sheard, Q.C.* for Spruce Falls Power & Paper Co. Ltd., respondent.

John Aylen, Q.C. and *J. R. Tolmie* for James MacLaren Co. Ltd., respondent.

The dissenting judgment of Kerwin and Cartwright, JJ. was delivered by:—

CARTWRIGHT J. (dissenting):—These appeals were argued together and raise the same questions relating to taxes demanded on income for the 1947 taxation year. To make clear what these questions are it will be sufficient to refer briefly to the facts in the case of the first appeal.

The respondent Spruce Falls Power and Paper Company Limited carries on the business of manufacturing and selling sulphite pulp and newsprint paper. It has the right to cut the timber on extensive limits in the Province of Ontario. It conducts logging operations on these limits in the course of which it cuts the standing timber into pulpwood logs which it transports to its mill at Kapuskasing, Ontario. At the mill these logs are processed or manufactured into sulphite pulp and newsprint paper. The business of the appellant is thus a wholly integrated operation, in the course of which it acquires a raw product in its natural state, namely standing timber, and through a series of operations converts such raw product into finished or semi-finished products, namely sulphite pulp and newsprint paper, which it sells to the ultimate consumer thereof. In respect of such business the respondent filed a return under *The Corporations Tax Act, 1939,* of the Province of Ontario shewing net income for the year ending December 31, 1947 of $5,807,161.33 and tax payable thereon of $406,501.29. In its amended return of Dominion of Canada Income and Excess Profits Taxes for the year ending December 31, 1947, the respondent claimed to deduct from its taxable income 46·36 per cent of the said tax of

(1) [1952] Ex. C.R. pp. 68 and 75.

$406,501.29, i.e. $188,454.00, as being tax on its income derived from logging operations within the meaning of s. 5(1)(*w*) of *The Income War Tax Act* and the regulations made thereunder. This deduction was disallowed by the appellant but was allowed in full by the learned trial judge.

The two questions which we have to determine are whether the respondent is entitled to any deduction and, if so, whether the amount of the deduction claimed is correctly computed.

The answer to the first question turns on the construction of the relevant provisions of the statute and the regulations. The relevant regulations are P.C. 331, dated the 30th of January, 1948 and P.C. 952, dated the 6th of March, 1948 which amended section one of P.C. 331. It is not necessary to repeat their terms. The meaning of the words used construed in their ordinary sense appears to me to be entirely consistent with the view taken by the learned trial judge and indeed I find the construction he has placed upon them a more natural one than that contended for by the appellant.

At the time both of the Orders in Council referred to were passed the enabling section under which they were made, s. 5, s-s. 1, paragraph (*w*) of the *Income War Tax Act* as amended by 11 Geo. VI c. 63, s. 4, s-s. 5, read as follows:—

> "Income" as hereinbefore defined shall for the purpose of this Act be subject to the following exemptions and deductions:—
>
> (*w*) Such amount as the Governor in Council may, by regulation, allow for amounts paid in respect of taxes imposed on the income, or any part thereof, by the Government of a province by way of tax on income derived from mining operations or income derived from logging operations.

S-s. 6 of s. 4 of 11 Geo. VI, c. 63, reads as follows:—

> (6) Paragraph (*w*) of subsection one of section five of the said Act, as enacted by subsection five of this section, is applicable to income of the nineteen hundred and forty-seven and subsequent taxation years and to tax payable thereon but in the case of the nineteen hundred and forty-seven taxation year no amount may be deducted thereunder greater than that proportion of the total amount that might be deducted in respect of the whole taxation year that the number of days in the said taxation year in the calendar year nineteen hundred and forty-seven is of the number of days in the whole of the taxation year.

1953

MINISTER OF NATIONAL REVENUE v. SPRUCE FALLS POWER & PAPER CO. LTD.

MINISTER OF NATIONAL REVENUE v. JAS. MACLAREN CO. LTD.

Cartwright J.

By s. 2(2) of 11 and 12 George VI c. 53, (assented to on June 30, 1948) Paragraph (*w*) was repealed and the following was substituted therefor:—

> (*w*) such amount as the Governor in Council may, by regulation, allow in respect of taxes on income for the year from mining or logging operations.

As s-s. 6 of s. 4 of 11 Geo. VI, c. 63, quoted above, was not amended it would follow that the expressed intention of Parliament was that paragraph (*w*) as last enacted should be applicable to income of the 1947 and subsequent taxation years and to tax payable thereon.

The appellant contends that the validity of the regulations is to be determined and that they are to be construed, so far as their construction is governed by the terms of the enabling statute, with reference to paragraph (*w*) as it appeared in the 1947 statute rather than that in the 1948 statute and that whichever statute is applicable gave power to the Governor in Council to allow a deduction from income of taxes on income from logging operations only if such tax was specifically imposed as and expressly limited to a tax on income derived from such operations and that no power was given to enact regulations allowing a deduction in respect of taxes on income from logging operations paid under a taxing statute applying to income generally. The learned trial judge has held that the governing statutory provision is paragraph (*w*) as enacted in 1948. Mr. Mundell argues that this is wrong. His submission is that the paragraph as enacted in 1947 was the only enabling statute in force when the regulations were passed, that their validity must be determined with reference to that section and that if they were not authorized by it they were void and there was nothing upon which s. 20(*a*) of the *Interpretation Act* could operate when the 1948 amendment was passed.

I, at present, incline to the view that Mr. Mundell's argument, in this regard, would be unanswerable in a case in which the amending statute was clearly prospective. The question is rendered difficult by the fact that the 1948 amendment is made retrospective in its operation. Parliament could of course by aptly framed legislation validate regulations which had been previously passed but were for some reason invalid. Parliament is assumed to be familiar with the law and with the orders of the Governor in Council

of general application and it is arguable that, when it provided that paragraph (*w*) as enacted in 1948 should apply to the 1947 taxation year, it intended that the already existing regulations should be deemed to have been passed under the new paragraph. I do not, however, find it necessary to decide this question in this appeal, because if it be assumed, as I will now assume, that the statutory provision to which we should have regard is paragraph (*w*) as enacted in 1947 I am of opinion that the decision of the learned trial judge was right. It would have been a simple matter for the draftsman of the paragraph to have made it clear that the operation of the section was to be restricted to a tax specifically and exclusively levied on income from logging operations but Parliament has not seen fit to use such words and the words used seem to me to be apt to authorize the regulations passed by the Governor in Council construed as they have been construed by the learned trial judge.

It is said for the appellant that the words "by way of tax on income derived . . . from logging operations" support the construction for which he contends, but in my view the words "by way of" are not words of art and the ordinary meaning of the words of the clause taken as a whole seems to me to include the tax here in question. Leaving aside for the moment the question of the accuracy of the computation, it is clear that the $188,454 which the respondent claims to be entitled to deduct from its taxable income was imposed by way of a tax on income and that the income upon which this amount of tax fell was derived from logging operations. It would, I think, be a forced construction of the clause to hold that it has no operation in the case of a tax on income which does in fact fall upon income derived from logging operations merely because it also falls on the income of the taxpayer from other sources.

I should have arrived at the above conclusion from a consideration of the words of the statute alone and it appears to me to be fortified by a consideration of the following circumstances. As I have said already, Parliament is assumed to know the existing law including the public statutes of the provinces and we are informed by all counsel that there was not in force in any province in the year 1947 any legislation under which a tax was levied on income

1953

MINISTER OF NATIONAL REVENUE v. SPRUCE FALLS POWER & PAPER CO. LTD.

MINISTER OF NATIONAL REVENUE v. JAS. MACLAREN CO. LTD.

Cartwright J.

derived from logging operations which would answer the description of the only sort of tax to which in the appellant's submission clause (*w*) could have application. It is said for the appellant that this is not significant as the clause and the regulations passed thereunder were intended to look only to the future but if this is so it is difficult to understand why the 1948 amendment was made retrospectively applicable to the 1947 taxation year. So far as logging operations and income derived therefrom are concerned, to adopt the construction for which the appellant contends would have the result of leaving both the legislation and the regulations without subject matter in a year to which they were expressly made applicable. It would further appear that the construction adopted by the learned trial judge avoids, while that contended for by the appellant would bring about, a result involving, to borrow the words of my brother Rand, an apparent discrimination which might seem unjust.

For these reasons, even on the assumption that it is to the 1947 form of paragraph (*w*) that we should look, I agree with the conclusion of the learned trial judge in regard to the first question above mentioned.

In regard to the second question, as to whether the amount of the deduction claimed was correctly computed in accordance with the regulations and particularly whether it was computed in accordance with sound accounting principles with reference to the value of the logs at the time of their delivery at the respondent's mill, I am in agreement with the reasons and the conclusion of the learned trial judge.

I would dismiss both appeals with costs.

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

KELLOCK J.:—These appeals, which were argued together, involve the construction of s. 5(1)(*w*) of the *Income War Tax Act* as enacted by s. 2(2) of c. 53 of the Statutes of 1948, which came into force on June 30 of that year. The question between the parties arises in the determination of the "net taxable income" of each company under *The Excess Profits Tax Act,* which statute, by s. 2(1)(*c*) of the Second Schedule, makes applicable the provisions of the *Income War Tax Act* in determining such income.

The question of construction which arises in each case is as to whether the words "in respect of taxes on income for the year from . . . logging operations" in s. 5(1)(*w*) are limited to a provincial tax imposed specifically on such income, or whether the paragraph contemplates as well, the deduction of a part of a general income tax, apportioned on the basis of the proportion which income from logging bears to total income. In the court below the latter view was taken and the appellant contends that this view is erroneous.

Prima facie the language of the statute is specific. The deduction authorized is the amount "in respect of taxes paid to . . . a province on income derived from logging operations." The respondents' contention really is that this language is to be read as meaning

> in respect of that proportion of taxes paid to a province which corresponds to the proportion which income received from logging bears to the total income taxed.

Both parties sought to interpret the legislation by reference to regulations passed under antecedent legislation, as well as by reference to the earlier legislation itself. Counsel for the appellant also referred us to other Dominion and provincial legislation which it was said formed part of a general scheme which included the legislation which is here directly in question.

S. 5(1)(*w*) was first enacted in 1946 by s. 41 of c. 55, and came into force on August 31, 1946. As so enacted, the section was as follows:

> 5(1) "Income" as hereinbefore defined shall for the purpose of this Act be subject to the following exemptions and deductions,
>
> (*w*) such amount as the Governor in Council may by regulation allow in respect of taxes paid to the government of a province on income derived from mining or logging operations in the province.

At the time of this enactment *The Dominion-Provincial Taxation Agreement Act, 1942,* 6 George VI, c. 13, and complementary provincial legislation, was in force. The agreements provided for thereby were, as provided by s. 2 of the Dominion statute, in force "for the duration of the war and for a certain readjustment period thereafter". In fact, they continued in some cases until the end of the year 1946, and in the remainder until the closing months thereof. Under the terms of these agreements the provinces undertook to repeal or suspend all income and cor-

1953

MINISTER OF NATIONAL REVENUE v. SPRUCE FALLS POWER & PAPER CO. LTD.

MINISTER OF NATIONAL REVENUE v. JAS. MACLAREN CO. LTD.

Kellock J.

poration taxes. It was, however, provided that the provinces might, notwithstanding, levy "taxes, license fees and royalties upon or in respect of natural resources within the Province."

We were advised that in some of the provinces there had been in existence for some years before 1946, taxes on income from mining operations but no similar taxation specifically on income from logging operations. The agreements, however, precluded all provincial taxation on personal or corporation income. Having regard to this legislative background, s. 5(1)(*w*) would appear to have been directed to permitting deduction of specific taxes, and not to have had any reference to general provincial taxes on income which did not then exist and were prohibited under the existing legislation.

On July 17, 1947, s. 5(1)(*w*) was repealed by s. 4(5) of c. 63 of the Statutes of 1947 and the following substituted:

(*w*) Such amount as the Governor in Council may, by regulation, allow for amounts paid in respect of taxes imposed on the income, or any part thereof, by the Government of a Province *by way of tax* on income derived from mining operations or income derived from logging operations.

The French version of the statute is as follows:

(*w*) Le montant que le gouverneur en conseil peut admettre par règlements pour des montants versés à l'égard des impôts établis sur le revenu ou sur une partie du revenu par le gouvernement d'une province *sous forme d'impôt* sur le revenu provenant d'opérations minières ou sur le revenu provenant d'opérations forestières.

The words "by way of tax" and the words "sous forme d'impôt", in my opinion, even more clearly preclude the view that there was in the contemplation of Parliament anything other than a provincial tax specifically imposed on income from logging or mining.

Moreover, on the same day as s. 5(1)(*w*) was amended, namely, July 17, 1947, c. 58 of 11 George VI, was also enacted, by s. 3(1)(*a*) of which authority was given to the Minister of Finance, with the approval of the Governor-in-Council on behalf of the Government of Canada, to enter into agreements with the governments of the provinces under which the latter should refrain from levying personal income taxes, corporation income taxes, and corporation taxes as should be defined in the agreement, in respect of the period of five years commencing January 1, 1947. By

s-s. (2) it was enacted that notwithstanding anything in s-s. (1), such agreements might provide that the provinces might

(*a*) levy, or empower a municipality to levy income tax or corporation income tax on income earned during the whole or any part of the period mentioned in paragraph (*a*) of subsection one derived from mining operations or on income so earned derived from logging operations as defined in the agreement;

(*b*) impose corporation income tax, in such manner as may be agreed upon, at a rate of five per centum on income of corporations earned during the whole or any part of the period mentioned in paragraph (*a*) of subsection one attributable to their operations in that Province . . .

S-s. (6) of s. 4 of c. 63 of the 1947 statutes, which amended the *Income War Tax Act,* had provided that s. 5(1)(*w*) of that Act should be applicable to income of the 1947 and subsequent taxation years.

By July 17, 1947, British Columbia, Saskatchewan, Manitoba, New Brunswick and Prince Edward Island had already enacted enabling legislation with respect to Dominion-Provincial taxation agreements, and on August 27, 1947, Nova Scotia followed suit. Paragraph 8 of the form of agreement provided for by this provincial legislation, of which that enacted by British Columbia is an example, is as follows:

8. (1) Notwithstanding anything contained in clause six British Columbia may, during the period commencing on January 1, 1947, and ending on December 31, 1951, impose, levy and collect royalties and rentals on or in respect of natural resources within the province of British Columbia.

(2) Notwithstanding anything contained in clause six, British Columbia or any municipality authorized by British Columbia may, during the period mentioned in paragraph one of this clause, impose, levy and collect taxes on income derived from mining operations or income derived from logging operations, or from both, carried on in the province of British Columbia during the said period, but no such tax shall be imposed by a municipality except in lieu of a tax on property or on any interest in property, other than residential property or any interest therein, of the person carrying on the said mining or logging operations.

(3) Canada will allow as a deduction in computing income under the *Income War Tax Act* of the period mentioned in paragraph one of this clause, royalties and rentals, and taxes, mentioned in paragraphs one and two of this clause, respectively.

Having regard, therefore, to the situation revealed by this legislation, there can be no doubt in my opinion that the type of taxation to which s. 5(1)(*w*), as enacted in 1947, was directed, was provincial taxation specifically imposed on income from mining or logging operations, that is, for amounts paid in respect of taxes imposed on the income or

1953

MINISTER OF NATIONAL REVENUE v. SPRUCE FALLS POWER & PAPER CO. LTD.

MINISTER OF NATIONAL REVENUE v. JAS. MACLAREN CO. LTD.

Kellock J.

any part of the income of the taxpayer "by way of tax on income derived from mining or . . . logging operations", or in the language of the French version, "sous forme d'impôt" on income so derived.

No regulations had been passed under s. 5(1)(*w*) as enacted in 1946 and when the paragraph was amended in 1947, it did not accord with paragraph 8 of the agreements in that it did not provide for deduction in the case of a municipal tax. On January 30, 1948, by P.C. 331, regulations were, however, passed, the first recital stating that an amendment to s. 5(1)(*w*) would be proposed at the then present session of Parliament to take care of this omission. It was also recited that the proposed amendment would implement the undertaking contained in clause 8 of the agreements relative to taxes on income derived from mining or logging operations. Paragraph 3 of the regulations in so far as they apply to income from logging operations is as follows:

> 3. In these regulations,
>
> (*a*) "Income derived from logging operations" by a person means
>
> (i) where logs are sold by him to any person at the time of or prior to delivery to a sawmill, pulp or paper plant or other place for processing or manufacturing logs, or delivery to a carrier for export from Canada, or delivery otherwise, the net profit or gain derived by him from
>
> (A) the acquisition of the timber or the right to cut the timber from which the logs were obtained, and the cutting and sale, or the cutting, transportation and sale of the logs, or
>
> (B) the acquisition, transportation and sale of the logs, or
>
> (ii) where he does not sell but processes, manufactures or exports from Canada logs owned by him, the net profit or gain reasonably deemed to have been derived by him from
>
> (A) the acquisition of the timber or the right to cut the timber from which the logs were obtained, and the cutting and the transportation of the logs to the sawmill, pulp or paper plant or other place for processing or manufacturing, or to the carrier for export from Canada, as the case may be, or
>
> (B) the acquisition of the logs and the transportation of them to such point of delivery
>
> computed in accordance with sound accounting principles with reference to the value of the logs at the time of such delivery, excluding any amount added thereto by reason of processing or manufacturing the logs.

It is argued for the respondents that this paragraph supports their contention that s. 5(1)(*w*) contemplates the deduction of an apportioned part of a general provincial income tax in that the regulation provides for the segregation of income from logging from other income.

Even if it would be proper to construe the statute by reference to the regulations, I do not think that this contention is sound. Whether s. 5(1)(*w*) referred to a specific tax or a general tax, if a person in the pulp and paper business, for example, who carried on his own logging operations, was to be permitted to deduct the tax in respect of income from the purely logging operations, it was necessary that the regulations should provide a basis for the segregation of that income. Accordingly, the regulations with respect to both logging and mining income are completely colourless so far as this contention is concerned.

P.C. 331 was amended on March 6, 1948, by a new paragraph one, which reads as follows:

> 1. Subject to these regulations the amount that a person may deduct from income under paragraph (*w*) of subsection one of section five, is an amount not exceeding the proportion of the total taxes therein mentioned paid by him to
>
> (*a*) the Government of a Province, or
>
> (*b*) a municipality in lieu of taxes on property or any interest in property other than his residential property or any interest therein
>
> that the part of his income that is equal to the amount of
>
> (*c*) income derived by him from mining operations as defined herein, or
>
> (*d*) income derived by him from logging operations as defined herein
>
> is of the total income in respect of which the taxes therein mentioned were so paid.

This provision substituted deduction of a proportion of the tax paid for the provision of paragraph one as originally passed in January, 1948, under which actual taxes paid by the taxpayer on income from mining or logging operations was deductible, although, in view of the definitions in paragraph three of the original regulations, some difficulty might well have arisen in cases where the ascertainment of the income by a province differed from the basis laid down in that paragraph. It was no doubt to obviate any such difficulty that the amendment was passed. As amended, the deduction authorized was the fraction of the provincial or municipal tax represented by the taxpayer's income from logging operations as defined by the regulations,

1953

MINISTER OF NATIONAL REVENUE v. SPRUCE FALLS POWER & PAPER CO. LTD.

MINISTER OF NATIONAL REVENUE v. JAS. MACLAREN CO. LTD.

Kellock J.

divided by the taxpayer's total income in respect of which the taxes mentioned in s. 5(1)(*w*) were paid, i.e., the total income from logging as defined by the provincial legislation.

The enactment of the statute of 1948, and the repeal of s. 5(1)(*w*) as enacted in 1947, did no more, in my opinion, than remove the limitation on deduction to provincial taxes and permit the deduction of municipal taxes.

In my opinion, therefore, the appeals should be allowed with costs here and below.

RAND J.:—The question raised by these appeals is the right of the respondent companies to a deduction from income and excess profit taxes for the year 1947 under para. (*w*) of s-s. 1 of s. 5 of the *Income War Tax Act*. The deduction is in respect of taxes paid to the governments of Ontario and Quebec on income under the Corporation Taxation Act of each province. Para. (*w*) as enacted in 1947 reads:—

> Such amount as the Governor in Council may, by regulation, allow for amounts paid in respect of taxes imposed on the income, or any part thereof, by the Government of a province by way of tax on income derived from mining operations or income derived from logging operations.

As repealed and re-enacted in 1948, it is in these words:—

> Such amount as the Governor in Council may, by regulation, allow in respect of taxes on income for the year from mining or logging operations.

The provincial taxes were on the income of total operations carried on by the companies which included not only logging operations but also the production of pulp and paper. The companies claim the right to allocate a portion of those taxes to the logging operations; the contention of the Crown is that para. (*w*) applies only to taxes which are specifically imposed in relation to income from logging operations as a separate subject matter, even though the latter may be part of a larger operation as in the cases before us.

On its face, the 1947 version, by the words "by way of tax on income derived . . . from logging operations" indicates a tax related by the province exclusively to the income from those particular activities. But Mr. Johnson lays down as the first component of his argument, the proposition that in interpreting (*w*) we should apply the rule of apportionment approved by the Judicial Committee in

1953

MINISTER OF NATIONAL REVENUE v. SPRUCE FALLS POWER & PAPER CO. LTD.

MINISTER OF NATIONAL REVENUE v. JAS. MACLAREN CO. LTD.

Rand J.

Commissioner of Taxation v. *Kirk* (1), and followed in *International Harvester Co.* v. *Provincial Tax Commission* (2) and *Provincial Treasurer of Manitoba* v. *Wm. Wrigley Co. Ltd.* (3). That rule is this: that when a tax is imposed on a segment of business whose total operations extend beyond the taxing jurisdiction, the income from the whole of the operations is to be treated as distributed over the range of processes which make up that whole. This furnishes a basis on which the taxation of the income attributable to the portion carried on, say, in a province, can be determined: it may be a distribution of the income in relation to the cost of each such process or by means of any other formula that will fairly reflect the share in the end result which it contributes.

The fallacy in this lies in the fact that the rule is one relating to the taxation of a constructively segregated portion of an entire business; but there is no question of taxation here; the paragraph deals only with an allowable deduction of taxes exacted by another authority. What it is directed to is a provincial tax that is imposed upon an exclusive entirety of logging operations, or specifically on logging operations as a part of a larger entirety for which some rule of apportionment is necessary. Mr. Johnson's argument is one, in a proper case, to be addressed to the taxing authority of Ontario when such a tax is imposed as in the decisions mentioned. But there is no such provincial tax here, and there is, therefore, nothing on which the paragraph can operate. What he asks is that the plain language of the clause be complicated by the application of a rule designed for an entirely different purpose.

Then it is said that the regulations made under the authority of the paragraph as it was enacted in 1947 must, because of its repeal by the 1948 enactment, be read with the latter, and that, so read, the companies bring themselves within the provisions of both.

The regulations were made by P.C. 331 on January 30, 1948. The preamble refers to the language of para. (*w*), "by way of taxes on income derived, etc." and the deduction was to be in relation to taxes on income earned only from January 1, 1947, whatever might be the accounting

(1) [1900] A.C. 588. (2) [1949] A.C. 36.
(3) [1950] A.C. 1.

1953

MINISTER OF NATIONAL REVENUE v. SPRUCE FALLS POWER & PAPER CO. LTD.

MINISTER OF NATIONAL REVENUE v. JAS. MACLAREN CO. LTD.

Rand J.

period of the taxpayer ending in that year. It recites the intention to propose an amendment to para. (*w*) in relation to taxes "imposed on the income or any part thereof by any municipality authorized . . . by way of tax on income derived from . . . logging operations." By para. (2) of the operative part, a receipt for payment of the taxes in respect of which the deduction is claimed is required. By para. (3) "income derived from logging operations" is defined for both the case of logs which are cut and prepared and then sold, and where they are carried into further manufacture; and a basis is laid down for computing income "with reference to the value of the logs at the time of such delivery", meaning, where further operations are carried on, the delivery to the sawmill, pulp or paper plant or other place where they commence.

Para. (1) of the regulation was amended on March 6, 1948 by a re-enactment providing that the amount deductible under para. (*w*) shall not exceed

> the proportion of the total taxes *therein mentioned* (in para. (*w*)) paid by him to
>
> (*a*) the government of a province . . . that the part of his income that is equal to the amount of
>
> * * *
>
> (*d*) income derived by him from logging operations as *defined herein* is of the total income in respect of which the taxes *therein mentioned* (para. (*w*)) were so paid.

The important words are "income . . . from logging operations as defined herein" that is, the basis set up in the regulations. In other words, if that basis should produce only one-half of the amount of income taxed by the province ,then only one-half of the taxes paid could be deducted under (*w*). The Dominion did not intend to allow deduction on the basis of larger income than that produced by the application of its own formula. What is clear is that the denominator of that fraction is a figure determined not by the Minister or any court but by the province. This, in turn, is connected with the Dominion-Provincial taxing agreements to which I shall later refer.

But it is argued that (*w*), re-enacted in 1948, is broader than that of 1947, both of which were declared to apply to the taxation year 1947; that it allows an income on logging operations to be ascertained by the Minister or court by apportioning the total income taxed by the province; and

that the regulations must be interpreted in the light of that change. The latter are governed by s. 20 of the *Interpretation Act;* but their meaning must be gathered in the light of the provision by which they were authorized; and if so construed, they are consistent with the repealing enactment, they remain in force, if not, they are so far superseded.

I see no difference in meaning between para. (*w*) of 1947 and that of 1948. The object of the latter was to extend the deduction to similar taxation by municipalities. But if the 1948 language is to be taken to permit a deduction in cases of taxation such as we have in the cases before us, the regulations would be inconsistent with it and would stand repealed, and there would then be none to authorize any deduction. Since the regulations were allowed to stand, it must be taken that the Governor in Council, at least, interpreted the 1948 amendment to the same effect as the language of 1947.

That the intention of Parliament is carried out by this interpretation is confirmed by s. 3(2)(*a*) of c. 58 of the Dominion statutes, 1947. *(The Dominion-Provincial Tax Rental Agreements Act, 1947).* This enactment authorized the Dominion government to enter into taxing agreements with the provinces, one effect of which was that the latter agreed not to impose personal or corporation income taxes for five years, subject to the exception, among others, that the government of a province might

> (*a*) levy or empower a municipality to levy income tax or corporation income tax on income earned during the whole or any part of the period mentioned in para. (*a*) of subsec. 1 derived from . . . logging operations.

I entertain no doubt that this language means a specific tax on the income derived from such an operation, ascertained by the province or municipality and nothing else; all other income was ruled out. The purpose was to apply consistently a principle of not affecting provincial taxation of natural resources in their immediate and direct exploitation. This statute was assented to on July 17, 1947, the day of the enactment of para. (*w*) for that year, and that the one was intended to be consistent with the other is inescapable. The question arises here only by reason of the fact that neither Ontario nor Quebec availed itself of the tax proposals. The apparent discrimination between specific

1953

MINISTER OF NATIONAL REVENUE v. SPRUCE FALLS POWER & PAPER CO. LTD.

MINISTER OF NATIONAL REVENUE v. JAS. MACLAREN CO. LTD.

Rand J.

taxation of ascertained income from logging operations and that involved in total income attributable to them may seem unjust but when the language of the legislation is reasonably free from doubt, that impression becomes irrelevant. The net income of total operations does not necessarily reflect a net return from all of its constituent segments and that was appreciated here by leading evidence to show the logging operations to have been by themselves profitable. But we cannot speculate on that or any other possible element in the policy behind the limitative provision: it is sufficient that Parliament has made its intention clear.

Since, then, in neither case is there a provincial tax on income from the logging operations segregated according to the terms of the taxing statute, the case is not within either the regulations or para. (*w*), and the Minister was right in his refusal to allow the deductions claimed.

The appeals must, therefore, be allowed and the actions dismissed with costs in both courts.

Appeals allowed with costs.

Solicitor for appellant: *T. Z. Boles.*

Solicitors for Spruce Falls Power & Paper Co. Ltd., respondent: *Johnston, Sheard & Johnston.*

Solicitors for James MacLaren Co. Ltd., respondent: *Aylen & Aylen.*

1953

WILLIAM D. ARCHIBALD AND LIONEL GEORGE TALBOT (*Defendants*) ..... APPELLANTS; *May 28, 29 *Nov. 17

AND

EILEEN FLORENCE NESTING AND CLARENCE WILLIAM MADSEN (*Plaintiffs*) ..... RESPONDENTS;

AND

RONALD LESLIE DALTON AND A. E. IRVINE (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Automobile—Collision with approaching car in snow cloud raised by snow plough on wrong side of the road—Liability—Damages—Concurrent findings as to amount of compensation for injuries.

The automobiles of the respondent Dalton and of the respondent Madsen collided when, in order to avoid a snow plough coming toward him on the wrong side of the road, Dalton drove his car to the left and into a cloud of snow which the plough was blowing across the road. The trial judge apportioned the blame between Dalton and the operators of the plough at two-thirds and one- third respectively. The Appellate Division of the Supreme Court of Alberta held that the operators of the plough were solely to blame but refused to increase the amount of the damages awarded to Dalton.

This Court agreed unanimously with the Appellate Division that the accident was occasioned by the sole negligence of the operators of the plough.

On Dalton's cross-appeal for an increase in general damages,

Held: (Locke J. dissenting), that the cross-appeal should be allowed.

Per: Rand, Kellock, Cartwright and Fauteux JJ.: While a second Court of Appeal should be extremely slow to interfere with the assessment of damages made by a judge at trial and affirmed by the first Court of Appeal, it is nonetheless its duty to do so when satisfied that the amount awarded is a wholly erroneous estimate of the damages (*Nance* v. *B. C. Electric Ry Co. Ltd.* [1951] A.C. 601).

Such was the award in this case. The amount was not commensurate with the injuries suffered and it would appear that the trial judge either failed to give due weight to his findings as to the gravity and permanence of the injuries or allowed his assessment to be too greatly influenced by the mere possibility of improvement.

Per: Locke J. (dissenting in part): Since there were concurrent findings on the question of fact as to what sum of money would be a reasonable compensation and since it has not been shown that the Courts below erred on some matter of principle in arriving at their conclusions, this Court, following its well settled practice, should not interfere with the assessment.

*PRESENT: Rand, Kellock, Locke, Cartwright and Fauteux JJ.

1953

ARCHIBALD *et al* v. NESTING *et al*

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), in an action arising out of an automobile collision.

J. J. Frawley Q.C. for the appellants.

R. L. Fenerty Q.C. for the respondents Nesting and Madsen.

H. W. Riley Q.C. for the respondent Dalton.

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

CARTWRIGHT J.:—This litigation arises out of a collision between two automobiles, one driven by the respondent Dalton and the other by the respondent Madsen. The respondent Nesting was riding as a passenger in the last mentioned vehicle. Each driver asserted that the collision was caused by the negligence of the other and also by the negligence of the appellants Archibald and Talbot who were operating a snowplough.

The learned trial judge absolved Madsen from blame, found that Dalton and the appellants were negligent and fixed their degrees of fault at 66⅔ per cent and 33⅓ per cent respectively. He assessed the damages as follows:— Miss Nesting—$5,504, Madsen—$3,382, and Dalton—$9,295. Judgment was entered accordingly. The present appellants and Dalton both appealed to the Appellate Division of the Supreme Court of Alberta (1). Dalton's appeal succeeded as to the finding of negligence on his part but failed in so far as he sought an increase of damages. In this Court, the appellants ask that they be absolved from all blame and alternatively that part of the blame be attributed to Madsen and Dalton. Madsen and Nesting cross-appeal seeking to have the finding of negligence on the part of Dalton restored. Dalton cross-appeals asking an increase in the general damages awarded to him and that Madsen should be found guilty of negligence contributing to the accident.

I find it unnecessary to set out the facts in regard to the happening of the collision, which are fully stated in the judgments below, as I am in respectful agreement with the conclusion of the Appellate Division that the appellants are solely responsible for the damages suffered.

(1) [1952] 5 W.W.R. (N.S.) 419.

This leaves for consideration the cross-appeal of Dalton in so far as it asks that the general damages of $8,000 awarded to him should be increased. The amount claimed for general damages in Dalton's statement of claim was $25,000. The accident happened on the 30th of December, 1949 and the trial took place in the month of December 1951. At the time of the trial the appellant Dalton was thirty-five years of age. He is married and has two young children. Prior to his marriage he had been in the army and after his discharge had been employed as a salesman with the Heinz Company. At the time of his marriage he gave up the last mentioned employment and thereafter worked for the Imperial Oil Company at Leduc until November, 1949, when he set up a clothing business. The evidence as to the extent and prospects of this business is somewhat indefinite and there is no evidence as to the amount of Dalton's earnings in his prior employments. At the date of the trial he was still carrying on the clothing business but under difficulties resulting from his injuries and necessitating assistance from his wife and others which he had not previously required.

While the assistance to be derived from the medical evidence would have been greater had the doctor who testified made a more recent examination, the evidence taken as a whole supports the findings of the learned trial judge as to the injuries suffered by Dalton and his resulting condition. These findings are expressed as follows:—

> . . . There remains only one question, the amount of his general damage. There is no doubt that this man suffered quite severe physical injuries and unfortunately those injuries were sustained to the head, to the skull, and to the brain. As has been described in considerable detail here by Dr. Gardner, an eminent specialist in that field of medical practice, there is no doubt in my mind that Dalton had a great deal of pain and suffering during and immediately after the time he suffered the injuries. Possibly by far the worst injury he suffered is the resultant amnesia which clearly arose from this accident. There is no difficulty in finding that in fact that amnesia occurred, so that he has no real memory even of the impact. His retrograde amnesia, as Dr. Gordon (sic) described it, was a major one, going back as it did, not to just immediately before the impact or an hour or two before the impact, but for seven days. I am, however, aware that there appears to be some improvement. Dalton, when in the witness stand, was able to remember being in Lethbridge on the day of the accident which means that he has made a considerable measure of recovery in his retrograde amnesia, and possibly he may eventually even remember up to the accident. Dr. Gardner is not able to tell. What is perhaps more serious and is associated with it, perhaps one should say 'allied' to the retrograde amnesia, is the amnesia or defective memory

1953

ARCHIBALD *et al* v. NESTING *et al*

Cartwright J.

from which Dalton has continued to suffer and presently suffers. One only has to see him in the witness box and listen to his testimony to realize that that is indeed a serious condition. This man certainly is unable to carry on in a normal way as his wife described it prior to this accident when he had opened up his clothing business and also when he was in the service of Imperial Oil at Leduc for some two or three years. For example, he forgets his customers, or what it was they may have ordered. He has been and is seriously handicapped from this condition and his other injuries in carrying on his present or any other business or occupation. Very naturally the doctors are cautious as to prognostication. In addition, this man's whole nature has been changed from a vigorous, alert, pleasant and kindly one to one tending the opposite direction, dull, listless and uninterested, a condition arising from head injuries of the kind suffered by him well known to medical men. The possibility is that he may subsequently recover something of this change in personality which has occurred and which cannot but excite a considerable amount of sympathy. I think the appropriate award in the circumstances for general damages to Dalton in addition to the special damage which I have already itemized would be the sum of $8,000 and accordingly I award him that sum as general damages.

The unanimous reasons of the Court of Appeal were delivered by Clinton Ford J.A. who deals with the question of Dalton's damages in the following words:—

> Damages were assessed by the learned trial judge after careful consideration of the factors that enter into the question of the amount that should be allowed to each claimant; and, although it was urged that the sum of $8,000 allowed to Dalton was much less than the nature and extent of his injuries should warrant, I would not increase the amount awarded to him.

The principles by which an appellate court should be guided in deciding whether it is justified in disturbing the finding of a court of first instance as to the quantum of damages have recently been re-stated by Viscount Simon giving the judgment of the Judicial Committee in *Nance* v. *B.C. Electric Railway Co. Ltd.* (1). Their Lordships say at pages 613 and 614:—

> Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint* v. *Lovell*, approved by the House of Lords in *Davies* v. *Powell Duffryn Associated Collieries, Ltd.*). The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any

(1) [1951] A.C. 601 at 613 et seq.

figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly 'out of all proportion' (per Lord Wright, *Davies* v. *Powell Duffryn Associated Collieries, Ld.*).

While no doubt a second Court of Appeal should be extremely slow to interfere with the assessment of damages made by a judge at the trial when that assessment has been affirmed by the first Court of Appeal it is nonetheless its duty to do so in a proper case. An example is to be found in *Davies* v. *Powell Duffryn Associated Collieries, Ld.* referred to above.

As I read the findings of fact of the learned trial judge which I have quoted they indicate that ever since the accident Dalton has, to a very substantial extent, been deprived of his ability to carry on efficiently in any business or occupation, that there has been a grave interference with his normal enjoyment of life, that his memory is seriously impaired and his personality sadly altered, and that there is a possibility, rather than a probability, of some improvement. On this state of facts in my respectful opinion the amount awarded was, to use the words of Viscount Simon, "so inordinately low as to be a wholly erroneous estimate of the damage." I am unable to say to what extent the assessment made by the learned trial judge was affected by his finding as to a possibility of improvement. The existence of such a possibility as the evidence indicates does not appear to me a sufficient reason for fixing the damages at the amount mentioned. The medical testimony was that Dalton had suffered "considerable brain damage of important areas". The evidence of Mrs. Dalton indicated the serious effects of these injuries persisting at the date of the trial two years after the accident. Dr. Gardner's evidence shows that in his opinion there was a possibility of limited improvement not of complete recovery. It is true that it is possible that the future will prove better than the evidence appears to indicate but the contrary is also possible and the innocent person who has been gravely injured by the fault of another should not be called upon to bear all the risk of the uncertainties of the future.

I am driven to the conclusion that the learned trial judge either failed to give due weight to his findings as to the gravity of the injuries suffered or allowed his assessment

1953

ARCHIBALD *et al* v. NESTING *et al*

Cartwright J.

to be too greatly influenced by the mere posibility of improvement; and with the greatest respect I am of opinion that the amount awarded can not be allowed to stand. Accepting, as I do, the findings of the learned trial judge as to the nature and extent of Dalton's injuries I am of opinion that the lowest amount at which his general damages can be fixed which is commensurate with the injuries suffered is $15,000, and I would substitute that figure for the $8,000 assessed at the trial.

In the result I would dismiss the appeal and would allow Dalton's cross-appeal to the extent of directing that he recover from Archibald and Talbot $16,295. The order of the Appellate Division as to the payment of costs in the courts below should stand. The respondents Madsen, Nesting and Dalton should recover their costs of the appeal to this Court from the appellants. The respondent Dalton should recover the costs of his cross-appeal to this Court from the appellants. The cross-appeal of Dalton as against Madsen and that of Madsen and Nesting as against Dalton should be dismissed without costs.

LOCKE J. (dissenting in part):—The able argument addressed to us in this matter by Mr. Frawley on behalf of the appellants has not satisfied me that the finding of the Appellate Division (1) that the accident was occasioned by the negligence of the appellants is not supported by the evidence and, accordingly, in my opinion, the appeal fails and should be dismissed with costs.

The respondent Dalton, whose general damages were fixed at the sum of $8,000, by the learned trial Judge, has cross-appealed, asking that this amount be increased. On the appeal to the Appellate Division by the present appellants, a cross-appeal by Dalton in respect of the general damages allowed him was dismissed by the unanimous judgment of the Court.

The evidence as to the prospects of Dalton recovering from the effect of the injuries sustained by him is unfortunately both incomplete and unsatisfactory. The accident occurred on December 30, 1949, and immediately following it he was removed to a hospital at MacLeod, Alberta, where he was under the care of a Doctor Gordon until January 9, when he was removed to the Colonel Belcher Hospital in

(1) [1952] 5 W.W.R. (N.S.) 419.

Calgary. The injuries he had sustained, other than those to his head, were minor in character. Dr. Gordon did not give evidence at the trial nor any one from the MacLeod Hospital, the only medical evidence as to the nature of the injuries being that given by Dr. J. S. Gardner, a surgeon practising in Calgary, who was one of several doctors who examined Dalton between the time of his entry into the hospital and January 21, 1950, when he was discharged.

Dr. Gardner saw Dalton on his admission to the Colonel Belcher Hospital and said that he was then pale and lethargic and did not seem to know just where he was. According to the doctor:—

> He was put to bed and examined by one of our people who are interested in neurological diseases and his conclusion was that he had suffered a very severe head injury ten days previously and was still suffering considerable effects.

Continuing he said that on investigation it had been found that he had suffered a considerable fracture of the left vault of his skull which ran down into the interior phase of the skull and showed evidence of having suffered cerebral concussion:—

> of a fairly major degree and some cerebral contusions and probably laceration in as much as the spinal fluid was straw-coloured and contained a large excess of protein.

He also said that Dalton was suffering from amnesia. Asked as to whether these conclusions were his own as a result of personal examination or as the result of an examination by somebody who was interested in neurological matters, Dr. Gardner said that various members of the staff had seen Dalton and that it was the general consensus of opinion that he had suffered a brain tissue injury. X-rays had been taken in the Calgary Hospital which disclosed the fracture. The witness said further that:—

> We felt he had suffered a considerable brain damage of important areas by his reactions and his slowness in recovery.

Asked to describe what were the usual effects of that type of head injury, he said that the most prominent symptoms that might go on for years were headache and dizziness or vertigo, which was sometimes very persistent after head injuries, and that sometimes there was buzzing in the ears or "high ear whistling." Continuing he said:—

> Then there is a whole group of what we call post-concussional sequilea that have to do with changes in part in intellect but mainly emotional reaction. Some people following a head injury of this nature, appear to

1953

ARCHIBALD *et al* v. NESTING *et al*

Locke J.

be different people. They have a different emotional pattern that makes them like different people. There are all manner of things like tender areas or swollen areas or nerve injuries and all those things.

It was on January 21, 1950, that Dalton left the Calgary Hospital and while Dr. Gardner said that he was under the impression that Mrs. Dalton had brought her husband back to see him some weeks after that, he had no record of the interview. He thought, however, that Dalton had then a poor memory and could not keep his mind on a subject for long and was afraid to return to his business. Dr. Gardner did not see Dalton again until the day the trial commenced at Calgary December 5, 1951.

Cross-examined, Dr. Gardner said that Dalton suffered from what was called "retrograde amnesia", which he explained as a loss of memory of events occurring prior to the accident and said that, as to this, the strange thing was that memory would return up to a point. A further passage in his cross-examination reads:—

Q. As far as being of any assistance to his recovery, on the degree of recovery of paralysis (sic) you cannot assist him at all, can you? You had not seen him for so long?—A. Not at the present time.

Q. He could be perfectly all right at the present time?—A. Yes, indeed, he could.

After the cross-examination by counsel, the trial Judge questioned Dr. Gardner at some length, in an endeavour to clarify his evidence. The doctor said that in Dalton's case there was a retrograde amnesia of about a week and that this was "a fairly large retrograde amnesia." The transcript of this examination reads in part as follows:—

Q. In the light of that, and the fact that you saw this patient at least once a day and perhaps several times a day during the period from the 9th of January until the 21st of January, 1950, are you able to say or would you feel you could make any estimate as to his memory defects and whether there will be any further recovery to any real degree or whether it has now reached its maximum and is stationary?—A. Well, in part, I can say something.

Q. Yes?—A. I would not like to say anything about his present memory defect without examination.

Q. Quite.—A. The man, as I recall seeing him subsequent to his injury, that was the main system (sic), that he could not keep his eye on the ball, as it were, and he could not remember. That is the only knowledge I have of his subsequent memory defect. But I would say in my opinion that it is not likely with that severity of injury and that severity of amnesia at his age that he would get any appreciable improvement in his memory now except by intensive training which might or might not play a part.

After the completion of this examination, counsel for Madsen asked Dr. Gardner if he was aware that Dalton at that time was able to remember to within three hours before the accident and he said that he was not.

The medical evidence was left in this state. The failure to call Dr. Gordon who had attended Dalton at the hospital in MacLeod may have been due to his not having examined Dalton since January 9, 1950. However, according to Dalton, he had gone to "quite a few doctors": their identity, however, was not disclosed nor any explanation given as to why none of them were called. I must assume that the course followed on his behalf was deliberate and that he was advised to rely upon the evidence of a doctor who had not seen him for at least twenty months prior to the trial. It was not apparently suggested to the learned trial Judge that he might then direct a medical examination of Dalton to obtain an opinion as to the prospect of his recovery, under the powers vested in him by Rule 260 of the Rules of the Supreme Court of Alberta. Whether the parties contrary in interest to Dalton had obtained an order for his medical examination prior to the trial under Rule 259 and had him examined is not shown. Neither the present appellants nor the respondents Nesting and Madsen called any medical evidence as to his condition.

Dalton was the owner of a men's clothing store in Leduc, selling amongst other things custom made clothes, the sale of which required him to take measurements of his customers. He had gone back to work in March 1950 following the accident but found that he could not do this particular work without assistance. He had commenced the operation of the store at the end of 1948. According to Dalton, his principal difficulty was his inability to remember people and, on occasions where he had measured people for clothes, he had forgotten both the fact of taking the order and the person who had given it. It was in consequence of this, apparently, that he had got assistance for this work from an older man who was familiar with it. When asked if he suffered from headaches, he said that he did not and he did not complain of dizziness or vertigo. Mrs. Dalton gave evidence as to her husband's difficulties occasioned by his inability to remember orders he had taken and said that before the accident he had been a good salesman. Speaking of his disposition, she said he had been

1953

ARCHIBALD *et al* v. NESTING *et al*

Locke J.

very friendly with people and had a pleasant personality but that now he found it difficult to carry on in this way. She said also that her husband, contrary to what he had said in evidence, complained of severe headaches at times. His disposition which was formerly cheerful and optimistic had changed, according to her, and he was now very nervous and both very despondent and inclined to worry over trifles. While Dalton's counterclaim had claimed a loss of $1,500 for wages paid to others and earnings lost, Mrs. Dalton who alone was asked about the matter said that she could not say what amount had been lost, owing to her husband's absence from the business but that they had a bookkeeper who kept track of these things. The bookkeeper was not called. As to wages paid to others, it appeared that at the time of the accident two young Mormon missionaries occupied a room in the Dalton's house for which they paid $25 a month. During her husband's absence from the store, Mrs. Dalton said that these two missionaries ran the store and, after his return from Calgary, they continued to help being engaged for a period altogether of two months. The missionaries did not accept any payment for their services other than their board and lodging and some clothing. The evidence as to the extent of Dalton's expenditure in this respect appears to me unsatisfactory.

It was upon this evidence that the learned trial Judge was faced with the difficult task of assessing the damages sustained by Dalton. The items for special damage, other than the amount expended in connection with the services of the misisonaries, were apparently not disputed: as to these he allowed a sum of $600. In the absence of any evidence on the point, nothing was allowed for loss to the business. Dealing with general damages, he said that the worst injury was the resultant amnesia which, he considered, clearly arose from the accident. Speaking of the "retrograde amnesia", he said that it was a major one going back, according to Dr. Gardner, to seven days before the accident, but noted that there appeared to be some improvement as to this and that Dalton was able on the witness stand "to remember being in Lethbridge on the day of the accident, which meant that he had made a considerable measure of recovery of his retrograde amnesia and that possibly he might eventually even remember up to the

accident." Speaking as to the loss of memory following the accident, the learned trial Judge said that:—

> One only has to see him in the witness box and listen to his testimony to realize that that is indeed a serious condition. This man certainly is unable to carry on in a normal way as his wife described it prior to this accident when he had opened up his clothing business and also when he was in the service of Imperial Oil at Leduc for some two or three years. For example, he forgets his customers, or what it was they may have ordered. He has been and is seriously handicapped from this condition and his other injuries in carrying on his present or any other business or occupation. Very naturally the doctors are cautious as to prognostication. In addition, this man's whole nature has been changed from a vigorous, alert, pleasant and kindly one, to one tending in the opposite direction, dull, listless and uninterested, a condition arising from head injuries of the kind suffered by him well known to medical men. The possibility is that he may subsequently recover something of this change in personality which has occurred and which cannot but excite a considerable amount of sympathy.

This summary of the result of the head injuries is not unfavourable to Dalton. There was no medical evidence as to the prospect of a further recovery in Dalton's memory, other than what has been quoted from the answers made by Dr. Gardner in answer to the questions directed to him by the learned trial Judge, a statement made after he had already said that he would not like to say anything about the matter without examination. There was no evidence of any loss of trade in Dalton's store during the time between the date when he returned to work in March, 1950, and the trial, some twenty months later, so that presumably, other than his inability to measure customers for clothing, his condition did not affect his ability to manage the business.

In delivering the unanimous judgment of the Appellate Division dismissing Dalton's cross-appeal in respect of the general damages awarded him, Clinton J. Ford, J.A. said:—

> Damages were assessed by the learned trial judge after careful consideration of the factors that enter into the question of the amount that should be allowed to each claimant; and, although it was urged that the sum of $8,000 allowed to Dalton was much less than the nature and extent of his injuries should warrant, I would not increase the amount awarded him.

We have thus concurrent findings on the question of fact as to what sum of money would be reasonable compensation to Dalton for the injuries he had sustained. In *Davies* v. *Powell Duffryn Associated Collieries Ld.* (1), Lord Wright said in part (p. 616):—

> An appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to

(1) [1942] A.C. 601.

1953

ARCHIBALD *et al* v. NESTING *et al*

Locke J.

interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt, this statement is truer in respect of some cases than of others. The damages in some cases may be objective and depend on definite facts and established rules of law, as, for instance, in general damages for breach of contract for the sale of goods. In these cases the finding as to amount of damages differs little from any other finding of fact, and can equally be reviewed if there is error in law or in fact. At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are almost entirely matter of impression and of common sense, and are only subject to review in very special cases. There is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case: *Mechanical and General Inventions Co. Ltd.* v. *Austin* (1935) A.C. 346. Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in *Flint* v. *Lovell* (1935) 1 K.B. 354, 360. In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

Flint v. *Lovell* (1) was a decision of the Court of Appeal in an action for damages for personal injuries which had been tried before Acton J. without a jury and the remarks of Greer L.J., referred to by Lord Wright, stated the principle which, he considered, should be applied by that Court in dealing with an appeal as to the quantum of damages. In *Owen* v. *Sykes* (2), an appeal to the Court of Appeal from the judgment of a single judge in an action of the same nature, the statement of Greer L.J. in *Flint's* case was adopted. In *Rook* v. *Farrie* (3), a libel action tried by a single judge, where there was a cross-appeal by the plaintiff on the ground that the damages awarded were inadequate, Sir Wilfrid Green, M.R., with whom MacKinnon and du Parcq L.JJ. agreed, said that the principle stated by Greer L.J. in *Flint* v. *Lovell* was applicable to actions for damages for libel, while pointing out that in such an action the very nature of the damages which are awarded made the task of

(1) [1935] 1 K.B. 354. (2) [1936] 1 K.B. 192.
(3) [1941] 1 K.B. 507.

establishing error a great deal more difficult than it might be in other types of actions. The learned Master of the Rolls said in part (p. 518):—

> I agree, as I have said, that this is a case where a jury might well have awarded a very much larger sum, and in fact it is not improper to say that if I had been awarding damages here I should have awarded a larger sum. But that circumstance does not entitle me to interfere with the learned judge's judgment, whose opinion upon the appropriate figure is entitled to as much weight as mine. It is a case of different minds taking different views, and sitting in this Court I am not entitled to substitute my view for his.

The statement from *Flint* v. *Lovell,* referred to by Lord Wright in *Davies'* case, was adopted in the judgment of the Judicial Committee in *Nance* v. *British Columbia Electric Railway* (1). In that case, the Court of Appeal of British Columbia had reduced the award of damages made by the jury and the remarks of Viscount Simon in the passage referred to were directed to the principles which should govern the Court of Appeal in such circumstances.

The principle to be followed by Provincial courts of appeal in dealing with questions of this nature has been dealt with in this Court in *Levi* v. *Reed* (2), *Gingras* v. *Desilets* (3), *Cossette* v. *Dun* (4), *Montreal Gas Co.* v. *St. Laurent* (5), and in *Marsden* v. *Pollock* (6), and does not differ from that stated in the cases decided in England. In *Montreal Gas Co.* v. *St. Laurent,* Taschereau J., delivering the judgment of the Court, said (p. 180):—

> As to the amount of damages given by the judgment, we cannot interfere. *Cossette* v. *Dun; Ball* v. *Ray,* 30 L.T.N.S. 1; *Lévi* v. *Reed.* It certainly appears to be large, but, as the Court of Appeal says, there is evidence to support it, leaving out of consideration the evidence given as to problematic or uncertain future damages.

In the case of *Ball* v. *Ray* (7), to which Taschereau J. referred, Selborne L.C. said in part:—

> It is not shown that the Master of the Rolls in deciding upon the quantum of damages has applied to the measure of those damages any wrong principle. It is not shown that the actual amount of damages were or could be demonstrated to the court . . . In that state of things it was surely in an eminent degree for the court to discharge the office of a jury; and it would be easy to refer to authorities such as *Penn* v. *Bibby* (15 L.T.N.S. 399) before Chelmsford L.C. and Grey v. Turnbull in the House of Lords, and to numerous cases before the Privy Council, which show

(1) [1951] A.C. 601 at 613.
(2) (1882) 6 Can. S.C.R. 483.
(3) (1881) Cassel's Digest 213.
(4) (1890) 18 Can. S.C.R. 222.
(5) (1896) 26 Can. S.C.R. 176.
(6) [1953] 1 S.C.R. 66.
(7) 30 L.T.N.S. 1.

1953

ARCHIBALD *et al* v. NESTING *et al*

Locke J.

that where upon questions of fact the court appears to have fairly discharged the same duty which a jury would have to discharge upon conflicting or doubtful evidence, it will be a very difficult thing to induce the Court of Appeal to go into the merits for the purpose of forming that judgment upon the balance of the evidence which possibly might have been formed if it had come before them in the first instance. If that rule has been established and held a satisfactory one as to questions of fact in general which stand in the position which I have described, it appears to me to be of still greater importance to establish and maintain a similar rule as to mere questions of the quantum of damages. In all cases in which you deal with the verdict of a jury, or of a judge in this court, or at common law, giving a verdict properly so called without a jury under the statute which enables that to be done, the verdict is conclusive, unless a principle can be shown in respect of which there is miscarriage, and as to which it ought by a proper proceeding to be disturbed. I think the analogy of that ought to be applied in this court to all these questions of damages, and that if the judge has settled the amount of damages and it cannot be shown that there are grounds for interfering with his judgment, which would be applicable to the verdict either of a jury, or of a judge, properly so called, the Court of Appeal ought not to disturb it.

In the present case the finding of the learned trial Judge has been upheld by the unanimous judgment of the Court of Appeal and I have been unable to find that in any reported case where the finding of the trial judge as to the quantum of damage has been upheld in the Court of Appeal this Court has either varied the amount or directed a new trial upon the question. In *Pratt* v. *Beaman* (1), where the damages allowed by the trial judge for pain and suffering had been reduced in the Court of Appeal, Anglin C.J., delivering the judgment of a Court of which the other members were Duff, Newcombe, Rinfret and Smith JJ. said (p. 287):—

> While, if we were the first appellate court, we might have been disposed not to interfere with the assessment of these damages by the Superior Court, it is the well established practice of this court not to interfere with an amount allowed for damages, such as these, by the court of last resort in a province. That court is, as a general rule, in a much better position than we can be to determine a proper allowance having regard to local environment. It is, of course, impossible to say that the Court of King's Bench erred in principle in reducing these damages.

As pointed out by Lord Wright in *Davies' case,* the finding as to the amount of damages differs little from any other finding of fact and where, as in the present case, there are concurrent findings, I am of the opinion that the rule stated by Duff J. (as he then was) in delivering the judgment of the Court in *Rogers* v. *Davis* (2), should be applied unless, indeed, it can be shown that the trial judge and the

(1) [1930] S.C.R. 284. (2) [1932] S.C.R. 407 at 409.

1953

ARCHIBALD *et al* v. NESTING *et al*

Locke J.

Court of Appeal have erred on some matter of principle in arriving at their conclusions. In *Marsden* v. *Pollock*, above referred to, where damages had been awarded under the *Fatal Accidents Act*, it was my opinion that the finding as to the quantum could not be sustained for the reason that neither the financial circumstances or the ages of the parents, on whose behalf a claim was made, had been proven and I would have directed a new hearing restricted to the assessment. Here the learned trial judge and the learned judges of the Court of Appeal are in agreement as to what amount would be a fair and reasonable compensation to Dalton for the damage sustained by him by reason of this accident, and to interfere would, in my opinion, be contrary to the well settled practice of this Court.

I would dismiss the cross-appeal with costs, if demanded.

Appeal dismissed with costs; cross-appeal of respondent Dalton allowed with costs.

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

Solicitors for the respondents Nesting and Madsen: *Fenerty, Fenerty, McGillivray & Robertson.*

Solicitors for the respondent Dalton: *Macleod, Riley, McDermid, Bessemer & Dixon.*

1953

*June 10, 11, 12, 15
*Nov. 17

F. HOMER ZWICKER, on behalf of himself and all shareholders of Lord Nelson Hotel Co. Ltd. other than the individual Defendants (*Plaintiff*) .... APPELLANT;

AND

H. NORMAN STANBURY, SYDNEY C. OLAND, MELVIN S. CLARKE, GEORGE E. GRAHAM, J. H. WINFIELD, C. B. SMITH, EDITH TURNBULL HOPE and THE EASTERN TRUST COMPANY as Executors of and under the Last Will of D. R. Turnbull, deceased, and LORD NELSON HOTEL COMPANY LIMITED (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Companies—Directors—Fiduciary Position—Liability to account—Shares, surrender of, no reduction of capital involved—validity.

The Lord Nelson Hotel Co. Ltd. was incorporated under the Nova Scotia Companies Act with an authorized capital of 6,400 preference shares, par value $100, and 2,285 common shares, n.p.v. Of the preferred shares issued the Canadian Pacific Ry. Co. held 3,500 and others 2,883. Of the common issued the C.P.R. held 1,600 and others 685. All shares issued were fully paid up. The hotel property was subject to a 1st mortgage to secure $600,000, 6½ per cent sinking fund bonds maturing Nov. 1, 1947. In 1932 the interest rate was reduced to 4 per cent upon the C.P.R. undertaking to guarantee the interest at the new rate until the maturity of the bonds. In consideration thereof a 2nd mortgage was given the C.P.R. on which at the time this action was brought there was outstanding $241,500. At the 1946 shareholders' annual meeting the question of providing for payment or refinancing of the maturing bonds was referred to the directors. The latter authorized C. B. Smith, the president, to discuss the matter with the C.P.R. which took the position that upon the expiration of its guarantee it would take no further part in financing the hotel. Subsequently, at the suggestion of Smith, it transferred all its shares to him for himself and his fellow directors, he undertaking to return the stock if his plan for re-financing failed. The directors, other than one Graham, then purchased on their own behalf $115,000 of the hotel bonds and the stock was divided among them. Subsequently as a result of negotiations with the C.P.R. the directors purchased the 2nd mortgage for $120,000.

*PRESENT: Rand, Estey, Kellock, Cartwright and Fauteux JJ.

Held: 1. That the action was properly brought within the principle of *Menier* v. *Hooper* L.R. 9 Ch. 350.

2. That the respondent directors both in their acquisition of the shares and the 2nd mortgage became trustees for the hotel company and, except as to 200 preferred shares disposed of to one Guptill, liable as such to account therefor. *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 379; *Pearson's* case 5 Ch. D. 336 at 341 followed.

3. That the said shares, other than those held by Guptill, be surrendered to the hotel company, the share certificates to be delivered up for cancellation. *Rowell* v. *John Rowell & Sons Ltd.* [1912] 2 Ch. 609, applied.

4. That the 2nd mortgage be declared to be security for the sum of $120,000 only, with interest at 5 per cent per annum, the said respondents to be accountable for any additional amount received or which may be received by them.

APPEAL from the judgment of the Supreme Court of Nova Scotia *in banco* (1), affirming subject to variation, the judgment of the trial judge, Ilsley C.J. (2).

John Jennings, Q.C. and *A. G. Cooper* for the appellants.

A. S. Patillo, Q.C. and *A. J. MacIntosh* for the respondents.

RAND J.:—I agree with the reasons and conclusions of my brother Kellock, and have only a few words to add.

Shares in a company exist by the fact of incorporation with a capital structure; they are simply fractions of potential interest in the assets and active life of the company, whatever it may be, into which the capital is divided. Their issue gives rise to a title to property which is of the nature of a *chose in action*. Such a title is always susceptible of release. But a company cannot purchase its own shares both because of the underlying obligation to use the funds of the company for the objects for which the company was created, of which the purchase of its own shares is not one; and because it would mean an abstraction of assets of the Company on the strength of which creditors deal with it.

But where shares are fully paid up and are released by way of voluntary surrender, none of these considerations applies. The assets are not affected and the balance sheet position in relation to the payment of dividends would be a matter of accounting accommodation. This latter feature is, in fact, present whenever a share is forfeited and its

(1) (1952) 30 M.P.R. 106. (2) [1952] 3 D.L.R. 273.

1953

ZWICKER *et al* v. STANBURY *et al*

Rand J.

effect cannot be taken to be converted into an ultra vires character according to the number of paid up shares surrendered.

The remaining question is that of the mechanics of surrender. The case must be treated as if the Canadian Pacific Company had itself made a surrender with the intention of extinguishing its title; and the authorities cited show that such a delivery over and cancellation of the certificate effects that result, leaving the shares available for re-issue. This is the practical means for a practical situation with which the principles of company law and the provisions of the Nova Scotia Companies Act are entirely consistent.

The judgment of Kellock and Fauteux, JJ, was delivered by:—

KELLOCK J.:—I agree with the courts below that this action was properly brought by the appellant within the principle of *Menier* v. *Hooper's Telegraph Works* (1), approved by the Judicial Committee in *Burland* v. *Earle* (2).

So far as the shares acquired from the Canadian Pacific Railway are concerned, the only question which need be considered is as to the remedy to which the appellant is entitled, as in my view, in the circumstances of this case, it cannot be successfully maintained that the individual respondents acquired the shares formerly held by the Canadian Pacific Railway, otherwise than under a liability to account for them to the respondent company.

The law is clearly laid down by Viscount Sankey in *Regal (Hastings)* v. *Gulliver* (3), as follows:—

> The respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds *any property* so acquired as trustee, he is bound to account for *it* to his *cestui que trust*.

With respect, the learned trial judge and the full court have failed to appreciate the effect of the above, holding as they do, that the respondents are not liable to account for the property itself, i.e., the shares, but only for any profit which they have made or may make out of the

(1) (1874) L.R. 9 Ch. 350. (2) [1902] A.C. 83.
(3) [1942] 1 All E.R. 378 at 381.

shares. Such a view is quite erroneous. In *Pearson's case*, (1), the Master of the Rolls, Sir George Jessel, had held with respect to a person in the position of the individual respondents, that he is liable

> at the option of the *cestuis (sic) que trust,* to account either for the value at the time of the present he was receiving, or to account for *the thing itself* and its proceeds if it had increased in the value.

In that case, the learned Master of the Rolls was also dealing with the shares of the actual company there concerned. Mellish L.J., also, in *McKay's case* (2), had stated the principle in similar terms as did Lord Esher M.R., in *Eden* v. *Ridsdales* (3).

Had the property which the respondents received been of a nature other than shares of the respondent company there would have been no difficulty in directing the individual respondents to transfer such property to the company, or at the option of the company, to pay to the company its value. In none of the cases above referred to did any question other than the value of the shares arise.

It is quite plain that there would be no difficulty in directing that the respondents transfer the shares here in question to a trustee for the company. In *Cree* v. *Somervail* (4), Lord Hatherley at p. 661 and Lord Blackburn at 667, were of that opinion. The point was the subject of express decision by Romer J., as he then was, in *Kirby* v. *Wilkins* (5). The learned trial judge in the case at bar considered the judgment of Romer J. of doubtful authority but, with respect, I am of opinion the case, so far as is here relevant, was well decided in accordance with principle and authority.

In *Black* v. *Carson* (6), (7), a company had acquired certain assets in consideration of the issue of the whole of its shares. The vendors, subscribers to a syndicate, had agreed among themselves that part of the shares, after their receipt by them, should be transferred to the directors of the company "for the purpose of providing funds for the organizing of the said company, and for working capital, as the said directors may deem prudent from time to time" (article 7). The shares were accordingly transferred to the

(1) (1877) 5 Ch.D. 336 at 341.
(2) (1875) 2 Ch.D. 1 at 5.
(3) (1889) 23 Q.B.D. 368 at 371.
(4) (1879) 4 App. Cas. 648.
(5) (1929) 2 Ch. 444.
(6) (1912) 7 D.L.R. 484.
(7) (1914) 36 D.L.R. 772.

1953

ZWICKER *et al* v. STANBURY *et al*

Kellock J.

president and secretary of the company, their successors and assigns. An action brought by or on behalf of the original subscribers for a declaration that the shares undisposed of were held in their interest and not in the interest of the company, failed. Their Lordships, agreeing with the view taken in the court below, held that the company was not subject to any trust in favour of the appellants and that there was no limitation placed upon the beneficial interest which was transferred. The Court of King's Bench (Appeal Side) had adopted the reasons for judgment of Demers J. at trial who had held that the plaintiffs had "transferred the property in the said disputed shares, absolutely to the company". In the view of the Court of King's Bench the agreement did not

> constitute the company the owner of its own shares, but simply postpones their sale or disposition to a later date, under such sale conditions as it may deem advisable and in the interest of the company . . . Clause 7 . . . has no other effect in our view than that of a by-law of the directors and the shareholders regulating in the interests of the company the distribution of the shares in question.

In the case at bar, while I do not think the court should direct cancellation of the shares here in question, as the appellant asks, I am of opinion that, in the circumstances which obtain, unless there be valid ground of objection in law, the court ought to direct that they be surrendered to the company rather than that they should be left to be held in trust for the company.

In considering the question of the propriety in law of such an order, it is not without relevance to observe that even if held in trust for the company, any profits available for dividend can only enure to the benefit of the shareholders without regard to the shares held in trust. The same would be true in any distribution of the assets of the company on a winding-up. Any objection to an order directing the surrender of the shares to the company itself must therefore be purely technical, resting upon some supposed incapacity on the part of the company. For reasons which follow I am of opinion there is no such incapacity in the case of the company with which we are here concerned.

In *Trevor* v. *Whitworth* (1), in which it was held that a company may not purchase its own shares, Lord Herschell, after differentiating purchase from forfeiture, for which the

(1) (1887) 12 App. Cas. 409.

statute there in question provided, as does the Nova Scotia Companies Act, went on to speak of surrender, at p. 418, as follows:

> Surrender no doubt stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in *In re Dronfield & Co.* (1). "It is not for me to say what the limits of surrender are which are allowable under the Act, because each case as it arises must be decided upon its own merits".

Similarly, Lord Watson at p. 424 said:

> When a share is forfeited or surrendered, the amount which has been paid upon it remains with the company, the shareholder being relieved of liability for future calls, while the share itself reverts to the company, bears no dividend, and may be re-issued.

At a later point in his judgment, Lord Watson said at p. 429:

> There is no reference in the Acts to surrenders of shares; but these have been admitted by the Courts upon the principle, as I understand it, that they have practically the same effect as forfeiture, the main difference being that the one is a proceeding in invitum, and the other a proceeding taken with the assent of the shareholder, who is unable to retain and pay future calls on his shares.

In *Rowell* v. *John Rowell & Sons Limited* (2), Warrington J., as he then was, had to consider the situation with respect to certain 6 per cent fully paid preference shares which had been surrendered, following upon which the company had issued other 5 per cent preference shares. The surrendered shares had not been cancelled but were held by the company, subject to re-issue. At p. 614 the learned judge said:

> Now the case with which I have to deal is the surrender of shares fully paid up and therefore not involving the release of the shareholder from any liability.

At p. 620, he said:

> that while a surrender of fully-paid shares means, of course, a reduction of capital if the shares are surrendered upon terms which do not permit their re-issue, in the present case the shares are surrendered upon terms which do permit their re-issue, and, with all respect, I really fail to see how in that case there is any reduction of capital at all . . . The shares are there ready to be issued, still forming part of the capital, and it would not require any resolution of the company to increase its capital

(1) 17 Ch. D. 76.

(2) [1912] 2 Ch. 609.

1953

ZWICKER *et al* v. STANBURY *et al*

Kellock J.

in order to enable them to re-issue those shares. It seems to me, therefore, that, if the re-issue of these shares would not require any resolution for an increase of capital, there was in fact no reduction of capital in accepting the surrender coupled with the power of re-issuing these shares.

The above decision was referred to in this court with approval in *Alberta Rolling Mills Co.* v. *Christie* (1).

It is quite true that in *Rowell's* case the articles of association empowered the directors to accept surrenders on such terms as they saw fit. Articles of association, however, are merely internal regulations of the company, and cannot empower a company to do anything to which the memorandum of association does not extend.

In my opinion, therefore, the proper order to make is that the shares formerly held by the railway, except 200 preferred shares now held by Guptill, be surrendered by the individual respondents to respondent company, the share certificates to be delivered up for cancellation. It appears that certain of these shares are held in the name of Stanbury and Company Limited as trustees for Oland and Stanbury or either of them. Stanbury & Company Limited should, therefore, be added as a party and if it desires to raise any issue as to the shares so held by it, such issue shall be referred to the trial court to be dealt with according to the rules of that court. In default the said added party shall be bound by this judgment. With respect to the Guptill shares, the evidence indicates that these were applied by Smith in the interests of the respondent company in bringing about the reorganization and therefore do not form any part of the profit acquired by the other directors in breach of their fiduciary obligation.

It should be added, as to Stanbury, that he became a director on June 19, 1947, and his proportion of the railway company shares was transferred to him on July 15. It is, however, immaterial that he was not a director at the time Smith arranged originally for the shares to be given him. He nevertheless received the shares knowing the circumstances and is in no better position than the other directors who participated. *Cookson* v. *Lee* (2).

In considering the question as to the second mortgage, it is necessary to review the relevant circumstances. At a meeting of directors of May 31, 1946, the question of pro-

(1) (1918) 58 Can. S.C.R. 208 at 220. (2) (1854) 23 L.J. Ch. 473.

viding for the retirement or refunding of the company's bonded indebtedness, which had been referred to the directors by the shareholders, was discussed. The directors were unanimously of opinion that before formulating any plan the matter should be discussed with the Railway Company "as the party most directly interested both as being the largest shareholder and also being the second mortgagee". Accordingly, the respondent Smith was directed to take up the matter with the railway "with a view to ascertaining the wishes of that company in the premises".

At this time the respondent company had outstanding $600,000 4 per cent first mortgage bonds, maturing November 1, 1947, the interest being guaranteed by the railway company to that date but not thereafter. The railway company was also the holder of the second mortgage on which $241,500 principal was outstanding. The interest on the bonds and the second mortgage was then in current shape.

In the course of the negotiations with the railway company conducted by Smith, the latter says that it was made very clear to him that

> with the expiration of their guarantee of interest on the First Mortgage bonds, Canadian Pacific had no further interest in the Lord Nelson.

They were "not interested in protecting their investment, most of which had been written off". Their "investment" included the shares and the mortgage.

Ultimately, the bondholders exchanged the existing bonds for new bonds maturing November 1, 1967, and the railway company on its part agreed to reduce the rate of interest on its second mortgage to 3 per cent, payable only if earned, and that, so long as any of the bonds should be outstanding, the mortgage should not be enforceable. These arrangements were concluded in or about October 1947.

During the period that the guarantee of the railway company of the interest on the original First Mortgage bonds had been in operation the respondent company had experienced considerable difficulty in financing. At the end of December 1940, the amount outstanding for principal on the second mortgage had risen to $266,500 principal with $100,901.85 arrears of interest, a total of $367,401.85. Subsequently, however, the business of the hotel improved so

1953

ZWICKER *et al* v. STANBURY *et al*

Kellock J.

that by the end of 1943 the arrears of interest had been paid and in July 1944, $25,000 was paid on account of principal.

Within a few months of the conclusion of the arrangements in October 1947, namely in April 1948, the provincial legislature enacted liquor control legislation following upon an earlier plebiscite. From the resulting situation it would undoubtedly be expected that the hotel would benefit.

In a letter written by the respondent Smith on January 10, 1951, the latter stated that

> since the reorganization, the company, through its directors . . . have all along been of the opinion that it would be in the best interest of the shareholders to effect a sale if a favourable opportunity presented itself.
>
> To this end they have, over the past three years, endeavoured to interest various persons or organizations in the purchase of assets and undertaking of the company . . ."

These efforts culminated in December 1950 in the receipt of an offer to purchase from a well known company operating a large chain of hotels.

In the meantime, in September 1949, Smith and a number of the other respondents had entered into negotiations with the Canadian Pacific Railway for an assignment to them personally of that company's second mortgage and this was duly carried out in November 1949, the railway company assigning the mortgage to Oland and Stanbury as trustees for themselves, Clarke, Smith and a company called Delta Securities Limited, in which J. H. Wingate, formerly a director of the respondent company, was interested as a shareholder, he having previously resigned in 1948. The consideration for the assignment of the mortgage was $120,000. It is in these circumstances the appellant claims that the interested respondents are entitled to claim against the hotel company only the amount actually paid by them for the assignment with interest on that sum from its date.

In my view the position of these respondents with respect to the mortgage is governed by the principle already cited from the judgment of Viscount Sankey in the *Regal* case at p. 381. Lower down on the same page, Viscount Sankey

referred to the headnote to the decision of the House of Lords in *Hamilton* v. *Wright* (1), as follows:

> A trustee is bound not to do anything which can place him in a position inconsistent with the interests of his trust, or which *can have a tendency to interfere* with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.

His Lordship also cited the following passage from the judgment of Lord Brougham in that case, at p. 124:

> the knowledge which he acquires as trustee is of itself sufficient ground of disqualification, and of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust. The ground of the disqualification is not merely because such knowledge may enable him actually to obtain an undue advantage over others.

In the case cited, a trustee had acquired by assignment a bond of annuity which had been granted by his *cestui que trust*. It was held by the Lord Ordinary that the trustee could not sue upon the bond but was bound to give to the *cestui que trust* "any advantage that may have accrued or may yet accrue", from the transaction. This decision was reversed on appeal but was restored in the House of Lords. At p. 124, Lord Brougham said:—

> In *Ex Parte Lacey* (2), Lord Eldon denied the doctrine supposed to have been delivered by Lord Loughborough in *Whichcote* v. *Lawrence* (3), that a trustee must make some advantage of his purchase before it can be set aside; because in ninety-nine cases out of every hundred, he held that it might be impossible for the Court to examine into this matter. So the conduct of the trustee not being blameable in the purchase, is nothing to the purpose; . . .

In *Keech* v. *Sandford* (4), a lease of the profits of a market was devised to a trustee in trust for an infant. Before the expiration of the term the lessor refused to renew an dthe trustee thereupon took a lease for his own benefit. It was however decreed that the trustee should assign the lease to the infant, the trustee to be indemnified from the covenants in the lease and to account for the profits since the renewal. Lord Chancellor King said that "the trustee should rather have let it run out than to have ha dthe lease to himself: that it may seem hard that the trusee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed."

(1) (1842) 9 Cl. & Fin. 111.
(2) 6 Ves. 626.
(3) 3 Ves. 740.
(4) (1726) Sel. Cas. Ch. 61.

1953

ZWICKER *et al* v. STANBURY *et al*

Kellock J.

In the present case the individual respondents participating in the purchase of the mortgage did not acquire it simply as members of the public but "by reason and in course of their office of directors", to employ the language of Lord Russell in the *Regal* case at p. 386. In my opinion the acquisition of the mortgage was due to and prompted by the information which they, as directors, had acquired as to the small value placed by the former mortgagee upon its security, a knowledge they were in duty bound to employ for the advantage of the company and not for themselves. I do not consider that when the adjustments in the affairs of the respondent company with respect to its outstanding bonds and this mortgage were concluded in 1947, the directors ceased to have any duty toward the respondent company with respect to the mortgage. There was in my opinion a continuing duty to manage the affairs of the company, in the interests of the shareholders, including the bringing about of the most advantageous sale possible. This involved giving to the company the benefit of any additional favourable adjustment in the terms of the mortgage which subsequently might prove obtainable.

No attempt appears to have been made to this end. These respondents considered only their own advantage. In acquiring the mortgage for their personal benefit they placed themselves in a position where they had a personal interest conflicting with the interest of the company. The best substantiation of that fact is their subsequent conduct.

As already mentioned, the efforts to sell resulted, on the 11th December, 1950, in the offer presented by the respondent Smith to a meeting of directors of that date at which were present in addition to himself, the respondents Graham, Oland and Clarke. The offer which was then presented, while it provided for the purchase of the asests of the hotel and the assumption of the outstanding first mortgage bonds, stipulated that the sum of $241,500, the face value of the mortgage in question, was to be paid by purchasing or causing the second mortgage to be purchased from its holders at its face amount, in six equal half-yearly instalments. This offer, however, was not accepted, but another offer put forward at the meeting by the respondent Oland was accepted. The only difference

between the Oland offer and the other was that the purchase price of the second mortgage in the Oland offer was to be paid within 2 years instead of 3, the only persons benefiting being the holders of the second mortgage. This action of the directors was subsequently approved at a general meeting of shareholders, on December 29, at which the directors voted the shares acquired from the railway company in favour of the Oland offer.

Subsequently, on January 15, 1951, at a general meeting of shareholders called to confirm this sale and the consequent winding-up of the company, another offer was presented to the directors from an outside party. This offer did not provide for payment of the second mortgage as did the former offers, but only for its assumption. It did, however, provide for an increase of $100,000 cash in the purchase price.

In the result, although this last offer was much more favourable to the shareholders, and although the directors protested that in their opinion a sale and winding-up were in "the best interests of the shareholders", this course was not followed. Oland and Stanbury appear to have determined to acquire control of the undertaking by purchase of shares rather than by direct purchase of the assets. The minutes of the meeting contain the following illuminating entry:

> The Chairman (Smith) then addressed the meeting stating that the directors in recommending to the shareholders the acceptance of the offer made by Col. S. C. Oland and his Associates and in voting for the Special Resolution to wind up the company (at the former meeting) had believed that it was in the best interest of the company and the shareholders generally to do so. He stated that while *they had not changed their opinion in this respect* they had come to the conclusion that in the circumstances that had developed it was not advisable to proceed with the winding-up of the company and they had consequently determined to vote the shares owned or represented by them against confirmation of the Special Resolution. He added that the directors, however, proposed to sell their controlling interest in the company to Colonel Oland and his Associates for the price of $25 per preference share with the common thrown in, that being the estimated amount that they would have received if the company had been wound-up.

The "controlling interest" above referred to was of course that of the directors themselves derived by reason of the shares which they had acquired from the Canadian Pacific Railway.

1953

ZWICKER *et al* v. STANBURY *et al*

Kellock J.

It is transparent in the above resolution that Oland and his "Associates", while quite prepared to dispose of the undertaking to one of themselves on terms which would have yielded the holders the full profit involved in the acquisition of the second mortgage at approximately 50 per cent of its face value, were equally prepared to prevent the shareholders, other than themselves, from participating in any purchase of the assets of the hotel by an outside party even at an enhanced price. A sale and winding-up of the respondent company which was in the best interests of the shareholders generally on the 29th December, became something quite different on the 15th January following by reason of the emergence of a third person desiring to purchase.

In the court below the decision with respect to the mortgage was influenced by the fact that there was no money in the hands of the respondent hotel available to pay off the mortgage at the time when it was acquired by the individual respondents. The decision in *Regal's* case indicates such a question is quite irrelevant. Lord Russell, at p. 389, after referring to *Keech* v. *Sandford* (*supra*) and *Ex Parte James* (1), said:

> It was contended that these cases were distinguishable by reason of the fact that it was impossible for Regal to get the shares owing to lack of funds, and that the directors in taking the shares were really acting as members of the public. I cannot accept this argument. It was impossible for the *cestui que trust* in *Keech* v. *Sandford* to obtain the lease, nevertheless the trustee was accountable. The suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain.

Every word of the above applies, in my judgment, in the case at bar.

It is also suggested in the judgment below that the situation might have been differently regarded had the respondent company been insolvent. Again, the decision in *Regal's* case is a complete answer to any such distinction as are the other authorities discussed above. It is quite true that in *Larking's* case (2), where Malins, V.C., acted upon the principle here in question, the company there

(1) (1803) 8 Ves. 337. (2) (1876) 4 Ch. D. 566.

concerned was in liquidation and the learned Vice Chancellor expressed himself to the effect that the situation might well be otherwise in the case of a solvent company. The mere existence of solvency or insolvency, however, is not the test.

In the case at bar the individual respondents, both in their acquisition of the shares and the second mortgage were arrogating to themselves a secret profit which, as stated by Lord Wright in *Regal's* case, at p. 393, is "nothing more than a profit without the consent of the shareholders". They did not obtain the consent of the shareholders and both transactions, therefore, for the reasons stated, cannot stand.

With respect to the mortgage, there should be judgment declaring that the mortgage is security only for the respective amounts paid by each in respect of its acquisition, with interest thereon at 5 per cent per annum, as asked by appellants, the said respondents to be accountable to the respondent company for any amount or amounts which may have been received or which may be received beyond such amounts and such interest. This order is, of course, subject to the provisions of the deed of trust securing the bonds by which the company may not repay any part of the principal of the second mortgage so long as any of the bonds are outstanding.

As the mortgage is held by the respondents Oland and Stanbury not only for themselves and the respondents Clarke and Smith but also for Delta Securities Limited, the statement of claim should be amended so as to claim against Delta, and that company should be added as a party. If Delta conceives its rights under the said mortgage as differing in any respects from the rights of the other parties as hereby declared, it will be at liberty to raise such issue, in which event the said issue will stand referred to the trial court for disposition according to the practice of that court, the costs to be in the discretion of that court. In default the said added party shall be bound by this judgment.

The appeal should be allowed: the appellant should have his costs throughout.

1953

ZWICKER *et al* v. STANBURY *et al*

ESTEY, J.:—I agree with the reasons and conclusions of my brothers Kellock and Cartwright and, therefore, this appeal should be allowed with costs to the appellant throughout against all the original defendants except the Hotel Company.

CARTWRIGHT J.:—For the reasons given by my brother Kellock, I agree with his conclusions that the respondents, other than Lord Nelson Hotel Company Limited, obtained both the shares and the mortgage referred to under circumstances which render them liable to account to Lord Nelson Hotel Company Limited, hereinafter referred to as "the Company".

As to the shares I agree with the order proposed by my brother Kellock that the shares, other than the 200 preferred shares transferred to Guptill, be surrendered to the Company to be dealt with as unissued shares. Such surrender is in no sense a purchase by the Company of its own shares as it involves neither payment by the Company nor (the shares being fully paid up) the release by the Company of any liability to it. No reduction in capital is brought about as the Company parts with nothing and its authorized capital will remain unaltered, although the number of issued shares will be reduced and the number of unissued shares will be correspondingly increased. In my opinion the authorities referred to by my brother Kellock show that in the circumstances of the case at bar there is no legal objection to such a course but I wish to make it clear that I express no opinion as to whether or not such an order could have been made if the shares in question had not been fully paid up. I see no necessity to order the cancellation of the shares. The Company if it sees fit can take the necessary steps under the Companies Act to effect such cancellation.

The question of the proper order as to the mortgage is a difficult one. The respondents, on November 30, 1949, paid $120,000 in cash for an assignment of a second mortgage dated June 14, 1932 made by the Company on its hotel property and other assets, to the Canadian Pacific Railway Company which, as varied by the terms of an indenture of October 20, 1947, secured $241,500 principal with interest at a rate up to but not exceeding 3 per cent per annum (but not cumulative) payable exclusively out of profits. The

last mentioned indenture contained provisions for calculating the annual profits of the mortgagor for the twelve month period ending on October 31 in each year and for payment of the interest if earned, or so much thereof as might be earned, on the 15th of December following. The indenture further provided that so long as any of the bonds of the Company therein mentioned remained outstanding the mortgagee would not take any steps to foreclose the mortgage or otherwise realize its security or any part thereof. Apart from this provision the principal secured by the mortgage would have been due on May 2, 1947, but as the bonds refererd to do not mature until November 1, 1967 the principal will not be payable before the latter date unless all the bonds should be earlier redeemed.

By an Indenture dated November 1, 1947, made between the Company and The Eastern Trust Company, the Deed of Trust securing the bonds of the Company was amended. Subclause (*s*) of Clause 18 of Article V of the Deed of Trust, as amended, provides:—

> (*s*) That so long as any of the Bonds hereby secured remain outstanding the Company will not declare or pay any dividends in respect of its preference or common shares, and will not repay to Canadian Pacific Railway Company any part of the principal secured by the Mortgage made by the Company in favour of Canadian Pacific Railway Company dated the 14th day of June, 1932.

It will thus be seen that until all the first mortgage bonds have been redeemed not only is the mortgagee restrained from enforcing payment of the principal secured by the second mortgage but the Company, the mortgagor, is prevented from paying any part thereof. It is this circumstance which creates the difficulty as to the proper form of order which should be made in regard to the mortgage.

But for the circumstance just referred to I would have thought that the proper order would have been one similar to that made by the Lord Ordinary and approved by the House of Lords in *Hamilton* v. *Wright* (1), that is, that upon the Company paying to the respondents the price given by them for the mortgage with interest (less any sums received by them on account of the said mortgage) they should deal with the mortgage as directed by the Company. I would have thought, also, that it should be a

(1) (1842) 9 Cl. & Fin. 111.

1953

ZWICKER et al v. STANBURY et al

Cartwright J.

term of the order that the amount found due to the respondents should be promptly paid, because, as was said by Lord Eldon in *Ex Parte Bennett* (1), "the person who is to be delivered from the situation of purchaser shall be speedily delivered". It is obvious that the value in 1949 or at this date of a second mortgage the principal of which is not payable until November 1, 1967 and meanwhile bears non-cumulative interest at the rate of 3 per cent, only if earned, must be very much less than the amount of the principal secured. The Court does not proceed against an accounting trustee by way of punishment (see the observations of Lord Cranworth L.C. in *Attorney-General* v. *Alford* (2) and those of Lord Hatherley L.C. in *Burdick* v. *Garrick* (3)"; and the effect of an order that the respondents can not enforce the mortgage for more than $120,000 principal and must await payment of that sum until 1967 would be not merely to deprive them of all profit but to inflict a heavy loss upon them. It is eminently a case in which the order should provide that they be "speedily delivered" from this situation. This could be simply accomplished by limiting a reasonable time (perhaps the two months fixed by Lord Eldon in *Ex Parte Bennett* (*supra*)) in which the Company should pay the $120,000 and interest, but for the fact, which it is to be remembered was known to the respondents when they purchased the mortgage, that the Company is precluded by the terms of the indenture of November 1, 1947, quoted above, from making any payment on account of the principal of the mortgage while any bonds are outstanding. In such circumstances it is the duty of a Court of Equity to make the order best suited to the actual circumstances and in my opinion it should be directed that the Company do pay to the respondents the said sum of $120,000 as soon as it is able to do so consistently with the terms of the indenture of November 1, 1947, above refererd to, together with interest thereon at the rate of 5 per cent per annum from November 30, 1949, less any sums paid to them as interest under the said mortgage, that until payment of the said sum of $120,000 the interest thereon at 5 per cent be paid annually on the 15th day of December insofar as the terms of the said indenture of November 1, 1947 permit, and that upon payment of the said sum of $120,000 and interest as

(1) (1805) 10 Ves. 380 at 401. (2) (1855) 4 D.M.&G. 843 at 851.
(3) (1870) L.R. 5 Ch. 233 at 241.

aforesaid (including any interest which may be in arrears by reason of the earnings of the Company in any year or years having been insufficient to pay it) the respondents shall deal with the said mortgage as directed by the Company.

Counsel for the appellant, in the memorandum as to the order which he submitted should be made furnished by him at the request of the Court, suggests, very fairly as I venture to think, that the rate of interest on the $120,000 should be 5 per cent. Even if he had not done so I would have held that to be the proper rate. To fix a lesser rate would be to treat the respondents harshly. At such rate the interest accruing each year will amount to $6,000 and under the terms of the mortgage as varied by the indenture of October 20, 1947, the Company was entitled and obligated to pay interest in each year, if earned, of $7,245 (i.e. 3 per cent on $241,500). While the Company is in equity entitled to the benefit of the reduction of the principal of the mortgage by the sum of $121,500, it is the barest justice that it should pay interest at the legal rate of 5 per cent on the money expended by the respondents in securing this advantage. I agree that the order proposed by my brother Kellock adding Stanbury and Company Limited and Delta Securities Limited as parties defendant should be made.

I would allow the appeal and vary the judgments below in the manner indicated above. The appellant should have his costs throughout.

Appeal allowed with costs throughout against all the original defendants except the hotel company.

Solicitor for the appellants: *Russell McInnes.*

Solicitor for the respondents: *F. D. Smith.*

1953

*Mar. 12, 13, 16
*Nov. 25

ALBERT LAMARRE (*Plaintiff*) .....APPELLANT;

AND

DAMIEN BOILEAU LIMITED (*Defendant*) ..... } RESPONDENT.

ALBERT LAMARRE (*Plaintiff*) .....APPELLANT;

AND

DAMIEN BOILEAU LIMITED (*Defendant*) ..... } RESPONDENT.

AND

ULRIC BOILEAU AND ULRIC BOILEAU ET SES FILS LIMITED .... } MIS-EN-CAUSE.

ALBERT LAMARRE (*Plaintiff*) .....APPELLANT;

AND

ULRIC BOILEAU ET SES FILS LIMITED (*Defendant*) ..... } RESPONDENT;

AND

DAMIEN BOILEAU LIMITED .....MIS-EN-CAUSE.

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

Partnership—Object—Cancellation of contract forming object by Statute—Whether partnership dissolved—Statute of Quebec, 1939, 3 Geo. VI, c. 69—Arts. 982, 984, 1200, 1892 C.C.

In 1930, the respondent, Damien Boileau Ltd., having obtained a contract for the erection of buildings for the University of Montreal, entered into a partnership with Ulric Boileau Ltd., for the purpose of exploiting the contract and any other which might be obtained from the University within thirty months following. In 1934, when the University suspended the work, the partnership agreement was amended to embrace all works which could be executed by either of the partners up to October 1943.

In 1939, the Legislature of Quebec, by 3 Geo. VI, c. 69, cancelled all construction agreements into which the University had entered and vested all assets of the latter in a new corporation. In November 1939, the new corporation entered into a contract for the completion of the University buildings with the respondent Damien Boileau Ltd. which the respondent executed without reference to Ulric Boileau Ltd.

*PRESENT: Rinfret C.J. and Taschereau, Kellock, Cartwright and Fauteux JJ.

The appellant, as trustee for Ulric Boileau Ltd., contended, in an action for rectification of the partnership accounts, that the Statute had not had the effect of dissolving the partnership and that the second contract was but a continuation of the first.

Held: The appellant cannot claim any of the benefits of the second contract, since the partnership had ceased to exist in 1939. When the Statute cancelled the construction contract of 1930, the partnership, whose object was the exploitation of that contract, was left without any object. Therefore, by virtue of Art. 1892 CC., the partnership was dissolved ipso facto by the coming into force of the Statute.

APPEALS from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing the decision of the trial judge in an action for rectification of accounts of a partnership taken by the trustee of a bankrupt partner.

Edouard Masson Q.C. for the appellant.

L. E. Beaulieu Q.C. for Damien Boileau Ltd.

B. Bourdon Q.C. for Ulric Boileau et Ses Fils Ltd.

The judgment of the Chief Justice and of Taschereau and Fauteux JJ. was delivered by:

TASCHEREAU, J.:—Il s'agit d'une action en réformation de compte.

Dans le cours du mois de mars 1930, Damien Boileau Limitée, la défenderesse-intimée, a soumissionné pour la construction des immeubles de l'Université de Montréal, et sa soumission a été acceptée sujette à l'obligation de donner un cautionnement pour garantir l'exécution de son contrat. Afin d'obtenir tel cautionnement d'une compagnie d'assurance, l'intimée et Ulric Boileau personnellement, ont convenu que la construction de l'Université serait faite par tous les deux en commun, et que les profits et les pertes seraient partagés également. Il a été prévu au contrat que Ulric Boileau aurait le droit de transporter les droits et les obligations résultant de l'entente, à une compagnie appelée La Compagnie Ulric Boileau Limitée, ce qui a été effectivement fait le 4 avril 1930.

Le 21 mars 1930, le contrat pour la construction de l'Université fut définitivement accordé à l'intimée, et en vertu de ce contrat, cette dernière s'obligeait à fournir tous les matériaux, outillage et main-d'œuvre nécessaires pour

(1) Q.R. [1951] K.B. 387.

1953

LAMARRE v. DAMIEN BOILEAU LTD. AND OTHERS

Taschereau J.

les travaux de l'entreprise générale, et à exécuter les travaux conformément aux plans et devis, et sous la direction de l'architecte Ernest Cormier. L'intimée s'engagea donc à commencer les travaux immédiatement, et à les compléter dans une période de trente mois pour le prix de $3,849,757.17, le tout sujet à certaines additions et déductions, comme il est décrit au cahier des charges et des clauses générales. Le prix était payable par versements mensuels de 85 p. 100 de la valeur des travaux exécutés, et quant à la balance, soit 15 p. 100, elle était retenue par l'université comme garantie pour l'exécution parfaite des travaux, et payable quarante jours après la date d'un certificat comportant l'acceptation des travaux.

Dans le contrat de transport par Ulric Boileau à Ulric Boileau Limitée, il a été stipulé que le contrat pour la construction de l'Université de Montréal serait exécuté par les deux compagnies, Damien Boileau Limitée et Ulric Boileau Limitée en commun, et que les dépenses et obligations d'un côté, et les profits de l'autre côté, seraient divisés en parts égales. Il fut aussi stipulé que les deux compagnies agiraient comme partenaires à partir de la date où le contrat de construction fut signé avec l'Université, soit le 21 mars 1930, et courrait jusqu'à l'expiration du terme fixé pour la fin des travaux. Enfin, il fut compris que tous travaux que l'Université de Montréal pourrait confier à l'une ou à l'autre des deux parties au contrat dans le délai de trente mois, à compter du 21 mars de la même année, seraient également exécutés par les deux parties aux mêmes termes et conditions que ceux mentionnés dans le contrat.

Les travaux ont commencé à la fin de mars 1930, mais furent interrompus le 31 décembre 1931, excepté certains travaux mineurs qui ont continué à être exécutés pour la protection de l'immeuble en 1932, et aussi certains travaux de réparations dans le cours de 1933. En 1934, l'université de Montréal décida de suspendre ces travaux, et Damien Boileau Limitée, l'intimée, et l'Université de Montréal, le 16 janvier de la même année, ont convenu que le contrat du 21 mars 1930, pour la construction de l'Université, demeurerait en vigueur, mais que son exécution serait suspendue jusqu'au ler octobre 1943, "sans frais ni dommages de part et d'autre, sauf le droit de la propriétaire dans l'intervalle, de décider quand elle le jugerait à propos, de

reprendre et de continuer les travaux." Il a été aussi déterminé que si les travaux n'étaient pas continués le ou avant le ler octobre 1943, le contrat deviendrait nul sans que l'entrepreneur puisse exercer aucun recours en dommages.

La réclamation de l'intimée Damien Boileau Limitée fut fixée à $907,725.09 dont $590,436.25 furent payés comptant, la balance étant payable à demande avec intérêts depuis le ler décembre 1933, au taux de 6 per cent, capitalisé chaque mois, taux que l'intimée devait payer aux banques.

Enfin, l'intimée convint d'exécuter certains travaux de protection à être payés sur certificat de l'architecte, sauf un montant de 15 per cent, qui était payable seulement que quarante jours après l'exécution des travaux. Ces travaux de protection commencèrent en janvier 1934, et durèrent jusqu'en janvier 1935.

A ce document du 16 janvier 1934, seule l'intimée Damien Boileau Limitée était partie. Il fut cependant confirmé et ratifié par Ulric Boileau Limitée, en vertu des termes d'un contrat notarié en date du 29 janvier 1934, et qui modifiait le contrat de transport consenti le 4 avril 1930, par Ulric Boileau à Ulric Boileau Limitée, et accepté par l'intimée. En vertu de ce dernier document, il était convenu que tous les travaux confiés à l'un ou l'autre des deux sociétaires par l'Université de Montréal, durant les trente mois déterminés originairement pour la complétion des travaux, seraient considérés comme tombant dans la société.

La nouvelle convention du 29 janvier 1934 étendit cette clause à tous les travaux exécutés par l'une ou l'autre, c'est-à-dire par Damien Boileau Limitée ou par Ulric Boileau Limitée, jusqu'au ler octobre 1943, et il fut convenu que ces modifications seraient consenties sans novation, ni autres dérogations aux termes de la convention du 4 avril 1930, et que cette convention devait continuer à avoir force et effet dans toute sa forme et teneur entre les deux compagnies jusqu'au ler octobre 1943.

En 1939, la Législature de la province de Québec passa une loi (3 Geo. VI chap. 69) qui est entrée en vigueur le 28 avril 1939. En vertu de cette loi, la Législature de la province de Québec a formé une corporation connue sous le nom de Société d'Administration de l'Université de Montréal, et la section 15 de cette loi est à l'effet que toutes

1953

LAMARRE v. DAMIEN BOILEAU LTD. AND OTHERS

Taschereau J.

les propriétés mobilières et immobilières appartenant à l'Université de Montréal sont transférées à la Société, libres de toutes charges, privilèges et hypothèques. La section 23 stipule que tous les contrats signés par l'Université de Montréal concernant la construction de l'Université sur l'Avenue Maplewood, tous contrats d'achat de matériaux, de louage d'ouvrage ou de services personnels, et toutes les obligations découlant de telles ententes, sont annulés à partie du jour de l'entrée en vigueur de la loi, excepté en ce qui concerne le matériel vendu et livré à l'Université de Montréal avant le 1er janvier 1934, que cette dernière a été obligée de payer au prix du marché au moment des achats. Il est formellement déterminé qu'aucun recours en dommages n'existera ni contre l'Université de Montréal, ni contre la Société, par suite de l'annulation prononcée par la loi, mais en ce qui concerne les réclamations pour lesquelles l'Université de Montréal devait demeurer responsable en vertu des dispositions déjà citées, il fut décidé par le même statut qu'elles seraient soumises aux membres de la Société qui agiraient comme arbitres.

Le 9 novembre 1939, le nouveau propriétaire des édifices de l'Université, soit la Société d'Administration de l'Université de Montréal, décida de compléter la construction des immeubles. Ayant été relevée par la loi de la Législature de tous ses engagements antérieurs, elle se croyait parfaitement libre d'accorder le nouveau contrat à n'importe quel contracteur qu'elle pourrait choisir, et elle décida que le nouveau contrat serait accordé à l'Intimée Damien Boileau Limitée. En vertu du contrat qui est intervenu, l'intimée s'engagea à compléter et à terminer la construction des édifices de l'Université, conformément aux plans et spécifications préparés par l'architecte Ernest Cormier, mais sous le contrôle d'un architecte différent, M. Henri S. Labelle, nommé par la Société d'Administration de l'Université de Montréal. Le prix fut fixé à $1,056,776.10 soit la balance due et impayée, sur le prix du contrat original du 21 mars 1930.

Il fut cependant convenu qu'une somme additionnelle de $7,000 serait payée pour remplacer la machinerie, les accessoires, et qu'une somme additionnelle serait également payée, égale à l'augmentation du prix des matériaux, de la

main-d'œuvre, et des taxes de vente, survenue depuis le 21 septembre 1932, et dont le montant devait être fixé par l'architecte Henri S. Labelle.

Si les travaux n'étaient pas terminés dans un an, sans la faute du contracteur, chaque partie aurait le droit de demander une révision du prix à cause de l'augmentation ou de la diminuation dans le prix de la main-d'œuvre, des matériaux et des taxes de vente, et cette demande devait être soumise toujours à l'architecte Labelle, qui encore était nommé le seul arbitre. En vertu du même contrat, la Société accorda des travaux additionnels au contracteur. C'était pour réparer certaines parties des immeubles détériorés durant la suspension des travaux, et le contracteur s'obligea en conséquence à faire tous les travaux de réparation et de réfection que l'architecte Labelle jugerait nécessaires, moyennant le prix que fixerait ce dernier, et qui ne ferait pas partie du prix global de $1,056,776.10.

Le 15 juillet 1941, les travaux n'étaient pas terminés et, tel qu'autorisée, l'intimée demanda une révision du prix déterminé dans le contrat du 9 novembre 1939. Une nouvelle entente fut signée entre l'intimée et la Société, fixant le prix global de l'entreprise à $1,430,991.79. Par une lettre écrite quelques jours plus tard, soit le 18 juillet, la Société a admis que ce montant n'affectait en aucune façon la réclamation de l'intimée pour travaux non payés, exécutés à date, et celle de $27,715.48, pour déboursés occasionnés par la suspension des travaux. L'intimée n'était pas obligée de donner de cautionnement pour garantir l'exécution fidèle des travaux, qu'elle exécuta d'ailleurs, sans la participation ou assistance d'Ulric Boileau Limitée.

Le 24 décembre 1941, Ulric Boileau Limitée tomba en faillite, et le 7 janvier 1942, Georges Duclos fut nommé syndic à cette faillite. Il mourut pendant que la cause était pendante, et Albert Lamarre, le présent appelant es-qualité, fut nommé à sa place, et reprit l'instance.

En janvier 1942, l'appelant réclama une reddition de compte, depuis l'année 1930, en rapport avec le contrat de l'Université de Montréal. L'intimée prépara un compte de tout ce qui a été reçu, et payé en vertu de ce contrat, mais ce bilan a été contesté par l'appelant qui a intenté une action en réformation de compte.

1953

LAMARRE v. DAMIEN BOILEAU LTD. AND OTHERS

Taschereau J.

Dans sa déclaration amendée, après avoir récité les faits ci-dessus, il conclut à ce que le bilan produit dans la reddition de compte soit déclaré informe et irrégulier, et à ce qu'il soit dit et déclaré que l'intimée devait au demandeur es-qualité, à titre de reliquat, la somme de $21,617.67, et à ce qu'elle soit condamnée à lui payer ce montant, avec intérêt composé, mensuellement au taux de 6 p. 100, depuis le 31 décembre 1941.

Le juge au procès a conclu que la Société n'avait pas été dissoute comme conséquence de la loi 3 Geo. VI, ch. 69, que l'intimée n'avait pas droit aux montants de $7,831.69, $27,661.60 et $14,086.40 qu'il réclamait dans sa reddition de compte, et enfin, que l'intimée devait à la Société, pour intérêts, la somme de $8,348.22.

Le juge au procès cependant, se rendit à la demande des avocats des parties et se contenta de décider les questions soulevées dans la contestation et confia aux comptables Ernest Robitaille et Alfred Joseph Doucet, la préparation de l'état final de la reddition de compte.

La Cour d'Appel (1) a unanimement renversé ce jugement. Elle en est venue à la conclusion qu'il s'agissait en réalité d'une action pro socio, que la Société Damien Boileau Limitée n'avait comme unique objet que le contrat d'entreprise accordé par l'Université de Montréal à Damien Boileau Limitée, et qu'en conséquence, la loi 3 Geo. VI, ch. 69 qui a opéré la résiliation du contrat, a fait tomber l'objet de la Société qui s'est trouvée dissoute, sans qu'aucune dissolution conventionnelle ne fût nécessaire. Elle a décidé en outre que l'intimée avait rendu un compte complet, fidèle et intégral, et que Ulric Boileau Limitée en conséquence n'avait pas établi sa qualité de créancière. Elle a statué en outre que les deux compagnies associées sont mutuellement libérées de toutes dettes et obligations découlant de cette société, sauf quant à une somme de $8,436.41 dont l'intimée est restée créancière contre le syndic aux droits de Ulric Boileau Limitée, mais qu'elle ne peut pas recouvrer dans l'action qui a été intentée parce qu'il n'y a pas eu de conclusion à cette fin. L'appel a donc été maintenu avec dépens.

(1) Q.R. [1951] K.B. 387.

La première question qu'il importe de décider, est de savoir que ful l'effet de la loi 3 Geo. VI chap. 69, adoptée par la Législature de Québec qui a créé la Société d'Administration de l'Université de Montréal, et qui lui a transporté tous les biens mobiliers et immobiliers de l'Université, et qui a résilié de plein droit toutes les conventions souscrites ou consenties par l'Université, relativement à la construction des édifices universitaires, ainsi qu'à l'exécution des travaux qui s'y rapportent.

Toute obligation doit avoir un objet (982 C.C.), et un objet est également nécessaire à la validité d'un contrat (984 C.C.). En vertu de l'article 1200 C.C., l'obligation est éteinte lorsque cet objet de l'obligation disparaît, ou que la livraison en devient impossible. Une société, comme tout autre contrat, est gouvernée non seulement par les dispositions spéciales qui s'appliquent à elle, mais aussi par les principes généraux qui s'appliquent à tous les contrats lorsqu'il n'y a pas de conflit. Le principe que la société se termine par la perte de son objet est expressément formulé au paragraphe 2 de l'article 1892, qui est à l'effet que la société finit par l'expiration du terme, par l'extinction ou la perte des biens appartenant à la société, par la consommation de l'affaire pour laquelle la société a été formée, par la faillite, par la mort naturelle de quelqu'un des associés, par la volonté qu'un seul ou plusieurs des associés expriment de n'être plus en société, suivant les dispositions des articles 1895 et 1896, et enfin, *lorsque l'objet de la société devient impossible ou illégal.*

Cet article couvre un nombre plus étendu de cas que l'article 1865 du Code Napoléon, qui prévoit la fin de la société par l'expiration du temps pour lequel elle a été contractée, par l'extinction de la chose ou la consommation de la négociation, par la mort naturelle de quelqu'un des associés, par la déconfiture ou l'interdiction de l'un d'eux, et par la volonté qu'un seul ou plusieurs expriment de n'être plus en société.

Cet article du Code Napoléon n'a pas, comme dans le Code Civil de la province de Québec, la clause que la société finit lorsque l'objet de la société devient impossible ou illégal, mais tous les auteurs qui ont écrit en France sur le sujet s'accordent à dire que, dans tous les cas mentionnés à l'article 1865 du Code Civil, chacune des cinq causes opère

1953

LAMARRE v. DAMIEN BOILEAU LTD. AND OTHERS

Taschereau J.

le même effet, et que la société finit sans qu'il soit nécessaire d'en demander la dissolution. Cette dissolution est opérée ipso facto, et la société est dissoute que les associés le veuillent ou qu'ils ne le veuillent pas. (Merlin, "Questions de Droit" au mot "Société" Vol. 7, p. 577).

Lorsque l'un des cas mentionnés à l'article 1865 du Code Napoléon se présente, les associés ne peuvent pas maintenir l'ancienne société vu qu'elle se trouve dissoute de plein droit. Sans doute, les parties intéressées peuvent maintenir la société quand la chose est possible, mais il faut pour cela une nouvelle convention, et il se trouve par conséquent à y avoir une société nouvelle. (Vide Pothier, vol. 4, No 140, p. 291; Pardessus, vol. 4, No. 1054, p. 311; Guillouard, 'Société' No. 288, p. 376; Fuzier-Herman, "Répertoire alphabétique" 'Société' Nos. 625 à 630 inc.; Baudry-Lacantinerie, 3e éd. vol. 23, No. 371; 26 Laurent, No. 362).

Si l'un des cas mentionnés à l'article 1865 du Code Napoléon se produit, la société finit par la seule opération de la loi. Il s'ensuit nécessairement que la même solution s'impose lorsque les cas additionnels mentionnés à l'article 1892 de notre Code Civil se présentent. C'est d'ailleurs l'opinion des auteurs cités plus haut. Laurent dit qu'il n'y a pas de contrat sans objet et, par conséquent, pas de société (citation supra). Dans le cas qui nous occupe, l'objet du contrat, c'est-à-dire ce à quoi s'étaient engagées les deux compagnies sociétaires, était la construction de l'immeuble de l'Université de Montréal. Comme, par l'opération de la loi 3 Geo. VI, chap. 69, l'objet a cessé d'exister, il s'ensuit que la société a été dissoute de plein droit (Vide Mignault, vol. 8, p. 263).

La Société ayant été dissoute, il s'ensuit nécessairement que bien des questions d'ordre financier relatives à la reddition de compte se trouvent finalement déterminées, vu qu'Ulric Boileau Limitée n'a droit à aucune participation dans les profits résultant du second contrat accordé à Damien Boileau Limitée pour le parachèvement des travaux. L'intimée avait incontestablement le droit de signer cet autre contrat sans l'intervention de sa première associée, et d'en percevoir en conséquence tous les bénéfices.

Comme résultat des jugements rendus et des admissions faites à l'enquête, il ne reste à déterminer que la question de savoir si l'intimée a droit de réclamer de l'ancienne

Société certains items mentionnés à la reddition de compte et se chiffrant respectivement à $7,831.69, $27,661.60 et $14,086.40.

Le premier de ces items, soit $7,831.69, représente la valeur d'une quantité de bois dont on a fait usage pour l'érection d'échafaudages et la construction de formes, mais qui n'ont pas été incorporés à l'édifice lui-même. Ce compte était inclus dans le règlement de janvier 1934, mais il fut considéré non pas comme représentant le prix de vente de ce bois, qui effectivement n'a pas été vendu, mais comme un acompte sur le contrat général, soit sur le second contrat, et dans lequel Ulric Boileau Limitée n'avait aucun intérêt. Ceci d'ailleurs est constaté par le certificat de l'architecte, en date du 13 avril 1936, et il s'ensuit que si le second contrat n'avait pas été signé, comme le dit avec raison M. le Juge Bissonnette, l'Université de Montréal aurait pu réclamer ce montant des deux premières associées. C'est en réalité l'intimée qui a payé cette dette par les travaux qu'elle a faits en exécutant le dernier contrat. Ce bois dont il est question dans cet item fut vendu, le produit en fut partagé entre les deux associées sauf une somme de $200 dont il est tenu compte dans l'actif de la Société.

Quant au montant de $27,661.60, il se rapporte à la pierre de Missisquoi. Le sous-contrat pour la fourniture de cette pierre a été accordé à la Wallace Sandstone Quarries Limited le 20 mai 1930. Il fut stipulé que le prix total serait de $183,000 payables "au fur et à mesure que les livraisons progresseront, moins une retenue de 15 p. 100 qui sera due et payable quarante jours après la livraison finale." Le prix de la soumission était de $189,000, de sorte qu'il restait un profit de $6,000 pour le contracteur général. L'exécution de ce contrat fut suspendue avant le mois de janvier 1935, et l'Université avait, à cette date, payé à la Société $147,375.70, tandis que la Wallace Sandstone Quarries Limited n'avait reçu que $119,714.40, laissant cette différence de $27,661.60. Cette somme représente donc des argents payés par l'Université de Montréal pour des travaux non exécutés, et il s'ensuit nécessairement qu'au moment de la dissolution de la Société, cette dernière devait à l'Université de Montréal ce montant de $27,661.60. C'est pourquoi lorsqu'en vertu du second contrat les travaux ont été

1953

LAMARRE v. DAMIEN BOILEAU LTD. AND OTHERS

Taschereau J.

repris, non pas par la vieille Société mais par l'intimée, on a tenu compte de ce montant de $27,661.60, et on l'a appliqué sur le montant du nouveau contrat.

Le troisième item, se chiffrant à $14,086.40, est en rapport avec un sous-contrat concernant les vitres pour les fenêtres. La Société a reçu de l'Université de Montréal une somme égale à la valeur de 3,968 fenêtres doubles, alors qu'elle ne devait recevoir que le prix d'une même quantité de fenêtres simples. Il ne peut faire de doute que les entrepreneurs n'ont payé leurs sous-contractants que pour les fenêtres simples, et lorsque, par conséquent, le second contrat a été accordé à Damien Boileau Limitée, l'architecte a nécessairement déduit du prix global du contrat original cette somme qui avait été payée en surplus à la Société. Comme l'intimée se trouve à avoir payé la dette de la Société, il est juste qu'elle recouvre sa part.

Quant à la question des intérêts aux montants de $2,150 et $240.42, qui doivent être débités au compte de l'intimée, je crois que la compensation devra s'établir entre le montant dont l'appelant est créancier, et le montant de $8,436.41 qui est dû à l'intimée et pour lequel cette dernière n'a pas obtenu jugement.

Je disposerais des deux autres appels de la manière suggérée par la Cour du Banc de la Reine.

Les appels doivent être rejetés avec dépens.

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

KELLOCK J.:—There are two matters in issue in this appeal. I am of opinion as to the first that the partnership constituted by the agreement of April 4, 1930, came to an end with the passing of the statute of 1939. The partnership was formed only for the purpose of exploiting the building contract of March 21, 1930, although it contained a clause which would have brought into the partnership any further contracts entered into between either of the partners and *the university* within the period of thirty months mentioned in the agreement of April, 1930. I think it is clear also under the agreement of the 29th of January, 1934, that the words "all work which may be executed by them to the buildings of the University of Montreal up to the 1st of October, 1943," set out at page

961, lines 16 and following, are limited, by what follows, to works executed under the original contract of March 21, 1930, and any works executed under any contracts entered into between *the university* and either of the partners on or before the 1st of October, 1943. In other words, the paragraph in question has in view only the matters covered by the original building contract, the original thirty months' period being extended to the 1st of October, 1943. That this is so is, I think, emphasized by the fact that the paragraph above referred to provides that "all work" is to be executed in conformity with the agreement of April, 1930 "under the terms of which" the partners are obligated to share equally all benefits which may result from "such works" as well as all expenses, etc., which may be occasioned in relation to "these same works."

With respect to the second matter in issue the respondent, in its account of the partnership dealings, claims credit for three items:

(*a*) $7,831.69 alleged to be advances made on the certificate of the architect, Cormier, to cover the cost of scaffolding used in connection with the unfinished buildings. As to this the architect had taken the position that the contractor, the respondent, under the terms of the original contract, had to bear this cost, but in view of the possibility that the university might decide to finish the works and to call for their recommencement on or before the 1st of October, 1943, he granted a certificate with respect to this item as an "advance" for which the respondent was to account later;

(*b*) $27,661.60, being overpayment in respect of stone delivered to the job;

(*c*) $14,086.40—overpayment in connection with glazing.

The respondent contends that these amounts represent monies paid to it by the university for which the university received no value and which the respondent was, therefore, liable to repay to the university, and subsequently, by virtue of the statute of 1939, to the Society. The respondent says that when the new building contract was entered into in 1939 between the Society and the respondent, the contract price was arrived at by taking the price provided for by the original contract of March 21, 1930, plus an

1953

LAMARRE v. DAMIEN BOILEAU LTD. AND OTHERS

Kellock J.

amount of $7,000 to cover the cost of restoring certain dilapidations which had arisen after the cessation of work, and deducting therefrom all payments made under the original contract. The respondent claims that the above three amounts have thus been repaid by it, and as these amounts were an obligation of the original partnership, the respondent is entitled to credit therefor in the partnership accounts. This claim has been given effect in the judgment in appeal.

With respect to the first item in dispute, this advance had been specially made in April, 1936, in contemplation of the resumption of the works by the University in which event the amount would have been credited to the University in respect of such future work.

The over-payment covered by the second item of $27,661.60 was discovered in January, 1934, and presumably the same applies to the third item. But in any event all three were known in November 1939, when the new contract with the Society was entered into as the price for that contract, as already mentioned, was fixed on the basis of the original contract price of 1930, deducting therefrom the items here in dispute.

This being so, in my opinion, the arbitration which resulted in the judgment of 1941 can only have proceeded on the basis that these three items had been already allowed to the University. Consequently the respondent is entitled to credit in the partnership accounts for these amounts.

With respect to interest I think the sums of $2,150 and $240.42 allowed by the learned trial judge should be restored, but that the remaining items were properly disallowed in the Court below. It is admitted as to the former that the amount of $8,600 with respect to which this item of interest was allowed was withdrawn from the partnership funds by the respondent for the purpose of paying employees working on jobs in which the respondent was solely interested. As to the smaller amount, the respondent puts forward no answer whatever. The total of these two items

is $2,390.42. I agree with the disposition of the matter of interest as proposed by my brother Taschereau. The appeal should be dismissed with costs.

Appeals dismissed with costs.

Solicitor for the appellant: *E. Masson.*

Solicitors for the respondent: *Beaulieu, Gouin, Bourdon, Beaulieu & Casgrain.*

1953
*Mar. 17, 18
*Nov. 25

THE WABASSO COTTON COMPANY LIMITED AND LAUREAT LECLERC (*Petitioners*) ..... APPELLANTS;

AND

LA COMMISSION DES RELATIONS OUVRIÈRES DE LA PROVINCE DE QUÉBEC (*Defendant*) ..... RESPONDENT.

AND

LE SYNDICAT NATIONAL DES EMPLOYÉS DE LA WABASSO COTTON DE SHAWINIGAN FALLS INC. ..... MIS-EN-CAUSE.

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

Interlocutory injunction—Whether appeal de plano to Court of Appeal from judgment setting it aside—Arts. 43, 46, 957, 961, 966, 969, 1211 C.P.C.

The judgment of the Superior Court of Quebec setting aside, pursuant to Art. 966 C.P.C., an interlocutory injunction granted without notice in a case where the grounds invoked for its justification exhaust all the grounds alleged in support of the action, is a final judgment within the meaning of Art. 43 C.P.C. so as to permit an appeal *de plano* to the Court of Queen's Bench (Appeal Side). (Kerwin and Kellock JJ. dissenting).

Decision appealed from reversed.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), holding that the judgment setting aside an interlocutory injunction was not a final judgment within Art. 43 C.P.C.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Fauteux JJ.

(1) Not reported.

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

P. H. Bouffard Q.C. and *J. M. Bureau Q.C.* for the appellants.

L. P. Pigeon Q.C. and *R. Hébert* for the Syndicat.

The CHIEF JUSTICE:—Le 8 février 1952, les demandeurs appelants intentaient à la Cour supérieure une action contre la Commission des relations ouvrières de la province de Québec en annulation de la décision rendue par cette dernière, le 5 février 1952, autorisant le Syndicat national des Employés de la Wabasso Cotton de Shawinigan Falls, Inc., à poursuivre les demandeurs pour avoir cherché, suivant leur allégation, à dominer le Syndicat et à entraver ses activités.

Le même jour, les appelants obtenaient de la Cour supérieure l'émission d'une ordonnance d'injonction enjoignant au Syndicat de ne pas tenter de se prévaloir de la décision de la Commission.

Cette ordonnance d'injonction fut signifiée au Syndicat en même temps qu'une copie du bref, de la déclaration sur l'action en annulation et de la requête pour injonction.

L'injonction ayant été accordée sans avis préalable au Syndicat, ce dernier fit motion demandant l'annulation de l'ordonnance d'injonction.

Lors de l'audition de cette motion, une admission fut produite par écrit comme suit:

> Les procureurs du mis-en-cause admettent que la motion pour faire annuler l'injonction interlocutoire décernée sans avis est de la nature d'une inscription en droit totale et ils admettent que, dans le cas de leur motion comme dans le cas d'une inscription en droit totale, le Juge devra tenir pour avérés les faits relatés dans la requête des demandeurs. Cette admission ne valant, uniquement, que pour les fins de l'étude et de l'audition de la présente motion pour faire annuler l'injonction interlocutoire décernée sans avis; et cette admission est conforme aux attendus de la motion qui est présentement entendue.

L'honorable juge Belleau maintint la motion et déclara l'injonction illégale et nulle; en conséquence, il l'annula et la mit de côté. Les appelants déclarèrent *ipso facto* qu'ils entendaient porter la question en appel. Acte est donné de cette déclaration dans le jugement qui annule l'injonction.

Ce dernier jugement affirme que, par *la Loi des relations ouvrières,* la législature de la province de Québec a donné à la Commission des privilèges très étendus et qu'elle a voulu, pour ce qui regarde l'administration dont elle est chargée,

la soustraire à la juridiction de la Cour supérieure et aux ordonnances de ses juges. En ce sens il réfère à l'article 41-A de cette loi qui décrète qu'aucun bref de *Quo Warranto,* de mandamus, de certiorari, de prohibition ou d'injonction ne peut être émis contre la Commission, ni contre aucun de ses membres, en raison d'une décision, d'une procédure ou d'un acte quelconque relevant de l'exercice de ses fonctions, et qui ajoute que l'article 50 du *Code de Procédure civile* ne s'applique pas à la Commission. Cet article 50 donne à la Cour supérieure et à ses juges un droit de surveillance et de contrôle sur tous les tribunaux: juges de circuit, magistrats et autres personnes, corps politiques et corporations de la province, à l'exception de la Cour du Banc du Roi.

A raison de ces prescriptions de la Loi des relations ouvrières et également parce que l'honorable juge était d'avis que l'injonction avait pour résultat d'empêcher des procédures judiciaires, il en vint à la conclusion que l'ordonnance d'injonction accordée aux demandeurs est irrégulière, illégale et nulle; il la déclare telle et il l'annule à toutes fins que de droit.

Notons immédiatement l'effet de cette décision: l'ordonnance d'injonction, ainsi mise de côté, avait pour but d'empêcher l'exécution de la décision de la Commission pour la période de temps pendant laquelle l'action directe en annulation de cette décision restait pendante devant la Cour supérieure. Elle maintenait le *statu quo* entre les parties tant que le jugement sur l'action n'aurait pas été rendu. A ce moment-là, l'effet de cette injonction cessait immédiatement, car le jugement sur l'action devait en même temps décider si une injonction permanente serait accordée.

Il est évident que le jugement qui a annulé cette injonction est un jugement final. Le résultat en est que, nonobstant l'action intentée par les appelants, rien n'empêche le Syndicat d'agir en vertu de la décision de la Commission et de poursuivre les appelants pour les raisons qu'ils ont invoquées lors de leur demande à la Commission.

Le jugement sur l'action en annulation de cette décision ne pourra avoir pour effet que, s'il est favorable aux appelants, d'y joindre une ordonnance d'injonction permanente, mais l'injonction au cours de l'action est disparue pour toujours.

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Rinfret C.J.

Saisie de cette question, la Cour du Banc de la Reine (en appel) (1) a accordé la requête des intimés demandant le rejet de cet appel, en donnant pour motif le propre jugement de cette Cour dans la Cause de l'*Association patronale des Manufacturiers de chaussures du Québec* v. *Dependable Slipper and Shoe Mfg. Co. Ltd.* (2). L'appel fut en conséquence renvoyé et la Cour ordonna que le dossier fut transmis à la Cour supérieure.

Si l'on se réfère à cet arrêt de la Cour du Banc du Roi, dans la cause de l'*Association patronale* v. *Dependable Slipper,* l'on constate que, dans cette affaire, l'appel fut rejeté comme irrégulier et illégal pour le motif que le jugement dont il s'agissait là étant un interlocutoire l'appel n'avait pas au préalable été autorisé selon que le veut l'article 1211 du *Code de procédure.*

Cet article décrète que l'appel d'un jugement interlocutoire n'a lieu que sur la permission accordée par un des juges de la Cour du Banc du Roi, sur requête sommaire, accompagnée de copie de pièces de la procédure qui peuvent être nécessaires pour décider si le jugement en question est susceptible d'appel, et tombe dans l'un des cas spécifiés en l'article 46 du *Code.*

A son tour, l'article 46 C.P. spécifie les cas où il peut y avoir appel d'un jugement interlocutoire.

On aurait profité du fait que la Cour du Banc du Roi était alors saisie de l'appel de l'*Association patronale* v. *Dependable Slipper* pour annoncer que, dès lors, les juges de la Cour étaient unanimes à reconnaître "qu'un jugement qui accorde ou refuse l'émission d'une injonction interlocutoire après l'institution d'une action ou instance principale, est un *interlocutoire* soumis quant à l'appel aux règles et conditions des art. 1211 et 46 C.P." et on aurait posé comme règle "qu'il ne peut y avoir en toute instance principale qu'un jugement *final* et des *interlocutoires.* Le jugement *final* est proprement celui qui termine un procès et met fin à l'instance sur le fond; le jugement interlocutoire est celui qui est prononcé durant le procès, savoir entre l'institution de l'action ou de la demande initiale principale et le jugement qui y met fin, et comprend toute décision quant à un incident; le jugement *final* est, sous réserve de l'art. 43

(1) Not reported.

(2) Q.R. [1948] K.B. 355.

C.P., appelable *de plano;* quant aux jugements interlocutoires, ils sont appelables ou non selon qu'ils sont définitifs ou provisoires."

L'article 43 C.P., auquel réfère cette déclaration de la part de la Cour, est celui qui édicte qu'il y a appel à la Cour du Banc du Roi siégeant en appel de tout jugement final rendu par la Cour supérieure, excepté dans certains cas qui y sont mentionnés.

Sans doute, il y aurait lieu de se demander si la Cour d'Appel a d'autres pouvoirs que celui de décider des causes qui lui sont soumises et si elle pouvait, ainsi qu'elle l'a entrepris dans le cas qui nous occupe, rendre un arrêt qui est, en somme, un amendement au *Code de Procédure civile.* Cette question se poserait si nous devions en venir à la conclusion que cette déclaration en marge du jugement *re* l'*Association patronale* v. *Dependable Slipper* serait de nature à lier la Cour suprême du Canada. Mais, comme devant la Cour suprême la question est ouverte, il n'y a pas de raison pour entrer dans la discussion de la juridiction de la Cour d'appel pour procéder comme elle l'a fait dans cette instance.

L'on peut comprendre que la Cour ait voulu par là définir sa situation en l'espèce à raison des jugements contradictoires qui avaient jusque-là été rendus.

Ainsi, dans la cause de *Arnold* v. *Cole* (1), la Cour ne s'était pas prononcée d'une façon aussi catégorique; elle avait bien dit:

> A judgment pronounced in an intermediate state of the cause is an interlocutory judgment within the classification given in article 46 C.P., notwithstanding that it may have definitively adjudicated upon the issue submitted;

mais elle avait précédé cette déclaration des mots: "In general", impliquant nécessairement que ce n'était pas une décision applicable à tous les cas.

En 1929, dans la cause de *Méthot* v. *Town of Montmagny* (2), la Cour du Banc du Roi avait clairement émis l'avis que:

> A judgment dissolving an interlocutory injunction is a final judgment and may be appealed from *de plano.*

Cette décision fut rendue par la majorité composée des honorables juges Tellier, Bernier, Rivard et Hall. L'honorable juge Guérin était dissident.

(1) Q.R. (1915) 21 R. de J. 358. (2) Q.R. (1929) 46 K.B. 338.

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Rinfret C.J.

En 1940, dans la cause de *Liberty Tobacco Shops Ltd.* v. *Lapointe* (1), la même Cour, composée de Sir Mathias Tellier, Juge en chef de la province de Québec, et de MM. les juges Rivard, Hall, St-Germain et Walsh, décidait:

Un jugement prononcé par un juge de la Cour supérieure refusant l'émission d'une injonction interlocutoire est un jugement final dont appel peut être interjeté de plein droit et sans permission.

La Cour est allée même plus loin et elle a ajouté:

La Cour d'appel doit rejeter une requête demandant cette permission.

Dans le rapport, on cite en note plusieurs jugements dans le même sens et l'on réfère entre autres à la décision de la Cour suprême dans la cause de *Ville de St-Jean* v. *Molleur* (2). Dans cette cause, le Juge en chef Fitzpatrick, parlant au nom des honorables juges Davies, Idington, Maclennan et Duff, fait remarquer au cours de son jugement (p. 154):

It has been argued that there can be only one final judgment in each action, that is to say, the judgment that finally disposes of the whole action; but I do not think that such a limited construction should be put upon the words 'final judgment'; although it might be said that if adopted the result would be to give to these words their literal meaning. The French text-writers interpret or define the term 'jugement définitif', which corresponds with 'final judgment', by comparison with and in opposition to 'jugement provisoire, jugement préliminaire et jugement interlocutoire', all of which they include under the general classification of 'jugements avant faire droit'.

Le Juge en chef procède alors à examiner la doctrine des auteurs français: Boitard; Colmet-Daage; Dalloz; Carré et Chauveau; Pigeau. Il fait remarquer que Dalloz, Laurent et Pigeau "all concur in the opinion that there may be several final judgments in the same case, in the sense that there may be several judgments in the same case which finally decide and dispose of particular grounds of action or issues, without finally disposing of the whole action" (p. 155). Et, par la suite, il déclare (p. 156):

The effect of the judgment appealed from was to put an end to the issues raised by the courts with respect to which the demurrer was maintained and to that extent the action was finally disposed of and it was 'chose jugée'.

I réfère ensuite à *Shields* v. *Peak* (3); *Chevallier* v. *Cuvillier* (4); *Baptist* v. *Baptist* (5) et finalement *McDonald* v. *Belcher* (6). Il fait remarquer que, dans chacune de ces causes, la Cour suprême, et dans la dernière, le Con-

(1) Q.R. (1940) 69 K.B. 280.
(2) (1908) 40 Can. S.C.R. 139.
(3) (1880) 3 Can. S.C.R. 579.
(4) (1881) 4 Can. S.C.R. 605.
(5) (1892) 21 Can. S.C.R. 425.
(6) [1904] A.C. 429.

seil Privé, a décidé que les jugements sur les inscriptions en droit partielles pouvaient constituer chose jugée s'il n'y avait pas appel et que, dès lors, il faut nécessairement les considérer comme jugements définitifs.

Suivant l'expression de Lord Halsbury, dans cette dernière cause:

> When by a judgment a distinct and separate ground of action is finally disposed of, it is in the ordinary use of the words a final judgment with respect to that ground of action.

Dans cette cause de *Ville de St. Jean* v. *Molleur*, en conséquence, la Cour suprême fut unanime à juger:

> that each count (of a demurrer) contained a distinct ground on which forfeiture could be granted and a judgment depriving the municipality of its right to rely on any such ground was a final judgment in respect thereof which could be appealed to the Supreme Court of Canada.

Et la Cour entretint dans ce sens un appel d'un jugement sur une inscription en droit partielle.

Référons en particulier à cette phrase du jugement du Juge en chef Fitzpatrick (p. 158):

> The controversy regarding the matters raised by them is as effectually and conclusively disposed of. And it is this quality of conclusiveness which determines the character of a judgment as a final judgment, not its relation in point of time to other proceedings.

Il y aurait lieu, sans doute, de référer également au jugement de cette Cour *re Davis* v. *Royal Trust* (1), mais, sur le point qui nous occupe, nous n'avons fait dans ce jugement que suivre ce qui avait déjà été décidé dans la cause de la *Ville de St-Jean* v. *Molleur* et analyser le jugement *re Davis* ne constituerait que la répétition de notre jugement *re Ville de St-Jean* v. *Molleur*.

Il est peut-être important, cependant, de ne pas oublier l'arrêt de la même Cour du Banc du Roi *re Allard* v. *Cloutier* (2) où cette Cour a adopté des règles fixes sur l'émission des injonctions interlocutoires. Ces règles se trouvent rédigées dans le jugement lui-même, mais je me contenterai d'y référer sans entrer davantage dans la discussion de cette question.

En tout respect, l'article 46 du *Code de procédure* n'a aucune application à l'instance actuelle. Cet article ne fait qu'édicter les cas où un jugement interlocutoire est susceptible d'appel. Mais il faut le remarquer, il s'agit de

(1) [1932] S.C.R. 203. (2) Q.R. (1920) 29 K.B. 565.

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Rinfret C.J.

l'appel d'un jugement interlocutoire. Par conséquent, cet article ne s'applique pas à un jugement final.

Cet article ne prétend pas définir ce qu'est un jugement interlocutoire; il se contente d'énumérer trois cas dans lesquels un jugement interlocutoire est susceptible d'appel.

La question que nous examinons ici n'est pas si nous sommes en présence de l'un des cas où un jugement interlocutoire est susceptible d'appel. Nous nous demandons si nous sommes en présence d'un jugement final. Le chapitre XXXVIII du *Code de procédure,* qui est consacré aux injonctions, nous aide sous ce rapport. Il contient l'article 966 dont se sont prévalus les intimés pour demander l'annulation de l'injonction qui avait été accordée aux appelants, vu qu'elle avait été décernée sans avis. Mais, si l'on réfère à l'article 969, il est significatif qu'il contient la prescription suivante:

> L'injonction interlocutoire reste en vigueur nonobstant le jugement final qui l'annule lorsque le requérant déclare . . . etc.

L'on y définit donc bien le jugement qui annule une injonction interlocutoire sous le qualificatif de "jugement final."

En plus, l'article 969 prescrit une procédure qui semble bien exclure l'appel d'un jugement qui annule une injonction interlocutoire de toutes les règles ordinaires de l'appel. Il énonce, en effet, que lorsque le requérant déclare immédiatement après le prononcé du jugement (n.b.-ce qui a été fait dans le cas actuel) qu'il entend le porter en appel et qu'il fait signifier dans les deux jours qui suivent l'inscription en appel, l'injonction interlocutoire reste en vigueur.

Si l'on devait décider que le jugement qui annule une injonction interlocutoire n'est pas un jugement final, mais rien autre chose qu'un jugement interlocutoire, il serait impossible de suivre cette procédure, car il est évident que faire signifier l'inscription d'appel dans les deux jours qui suivent le jugement deviendrait une impossibilité matérielle. s'il fallait dans l'intervalle obtenir la permission d'appeler de la part d'un juge de la Cour d'Appel, ainsi que le prescrit, pour les cas ordinaires, l'article 1211 du *Code de procédure.*

De toute façon, je suis donc d'avis qu'il faut décider que le jugement qui annule une injonction interlocutoire, en vertu de l'article 966 C.P., est un jugement final. C'est

peut-être un cas d'exception, si l'on veut, aux règles générales posées par la Cour d'appel dans la cause de *l'Association patronale* v. *Dependable Slipper* (*supra*), que l'on a voulu appliquer à la présente espèce. Et le jugement rendu ici n'irait pas nécessairement à l'encontre de l'arrêt de la Cour du Banc du Roi dans cette autre cause; les deux jugements ne sont pas incompatibles. Il s'ensuivrait seulement que le cas qui nous occupe n'est pas couvert par les règles générales qui ont alors été posées.

Dans ces circonstances, je suis d'avis que l'appel doit être maintenu, mais, comme le jugement a quo n'a été rendu que sur le motif de juridiction, il y a lieu de suivre ici la méthode que nous avons adoptée dans la cause de *Montreal Tramways* v. *Creely* (1) et de renvoyer le dossier à la Cour du Banc de la Reine pour qu'elle se prononce, ainsi qu'il est indiqué dans les notes de mon collègue le juge Fauteux; le tout avec dépens, tant de cette Cour que de la Cour du Banc de la Reine (en appel).

KERWIN J. (dissenting):—This Court granted leave to the Wabasso Cotton Company Limited, to appeal from a judgment of the Court of Queen's Bench (Appeal Side) of the Province of Quebec. That judgment dismissed an appeal from a judgment of the Superior Court setting aside an interlocutory injunction which had been granted without notice. The Court of Queen's Bench followed its own decision in *l'Association Patronale* v. *Dependable Slippers* (2). Prior to the latter, judicial opinion in the Province of Quebec had fluctuated upon the question as to what is a final or interlocutory judgment within the meaning of the relevant articles of the *Code of Civil Procedure*. The extent of this variation appears elsewhere and need not be repeated.

In my opinion the answer to the question is to be found in a comparison of Articles 43 and 46 C.C.P. Article 43 provides:—

> 43. (1) Unless where otherwise provided by statute an appeal lies to the Court of King's Bench, sitting in appeal, from any final judgment rendered by the Superior Court,

—with certain stated exceptions.

(1) [1949] S.C.R. 197. (2) Q.R. [1948] K.B. 355.

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Kerwin J.

By Article 46:—

> 46. An appeal also lies from an interlocutory judgment in matters susceptible of appeal, in the following cases:
>
> 1. When it in part decides the issues.

In the present case, if the judgment setting aside the interlocutory injunction is a final judgment, there was an appeal de plano to the Court of Queen's Bench, while, if it is an interlocutory judgment within Article 46, leave is required from one of the Judges of the Court of Queen's Bench (Article 1211) and no leave was obtained.

Upon consideration, I find myself, with respect, unable to agree with the judgment proposed. I do not repeat all the arguments that have been advanced pro and con because my view may be stated very shortly. It is quite true that Article 46 commences "An appeal also lies from any interlocutory judgment" and that, therefore, there still remains the problem to determine what is interlocutory, but I take it that Article 46 contemplates that there are interlocutory judgments which in part decide the issues. Reading Articles 43 and 46 together I conclude that while the judgment of the Superior Court decided an issue, the final judgment from which an appeal de plano is given by Article 43 means a judgment which finally disposes of the entire litigation.

I should dismiss the appeal with costs.

The judgment of Taschereau and Fauteux JJ. was delivered by:—

FAUTEUX J:—L'unique question soumise et à déterminer est celle de savoir si un jugement maintenant la motion autorisée par l'article 966 du *Code de procédure civile* et annulant une injonction interlocutoire décernée sans avis est, au sens de la loi sur la juridiction de la Cour du Banc de la Reine, un jugement final dont on peut appeler *de plano* (art. 43 C.P.C.) ou l'un de ces jugements interlocutoires susceptibles d'un appel (46 C.P.C.), sujet, cependant, à une permission préalable (1211 C.P.C.). Dans la première alternative et contrairement à sa décision, la Cour du Banc de la Reine aurait été régulièrement saisie de l'appel sur le jugement annulant l'injonction interlocutoire et le dossier devra, en conséquence, lui être retourné; dans la seconde,

la permission préalable n'ayant pas été demandée, cet appel doit être renvoyé. La question en est donc une de juridiction et non pas de pratique en matière de procédure.

Il convient, je crois, de bien préciser d'abord la nature de l'injonction interlocutoire et les conséquences de ce jugement qui l'a annulée, en l'espèce.

L'injonction interlocutoire est une mesure dont l'effet et l'objet visent exclusivement au maintien du *statu quo pendente lite*. C'est donc, en soi, un remède manifestement indépendant et distinct de tous ceux dont l'obtention est—et peut être—recherchée par l'action et conditionnée par son succès. Sans doute, et en fonction de la période de temps pour laquelle il est établi, ce remède est, pour cette raison, de nature provisoire; mais la nature du remède ne fait pas la nature du jugement qui en dispose. Les deux ne peuvent être confondus. Le jugement qui, antérieurement à la détermination du litige, refuse ou annule une injonction interlocutoire lorsque, comme ici, les motifs vainement invoqués pour la justifier épuisent tous les moyens allégués au soutien de l'action elle-même, est—sauf appel sur icelui—un jugement écartant avec finalité dans la cause, et le remède et le droit d'y recourir à nouveau. En effet, ni le jugement sur l'action, ni l'appel de ce dernier jugement ne peuvent modifier l'effet de ce jugement refusant ou annulant l'injonction interlocutoire. D'une part, le jugement sur l'action,—sauf appel,—met fin au litige et alors cessent d'exister la raison d'être et l'objet du remède. Ce jugement sur l'action, susceptible d'ordonner des injonctions pour l'avenir, ne prononce donc pas d'injonction interlocutoire; mais, suivant qu'il maintienne ou renvoie l'action, il peut confirmer ou infirmer celles qui, avant son prononcé, étaient en vigueur. D'autre part et au cas d'appel du jugement sur l'action, l'injonction interlocutoire qu'il a confirmée ou celle qu'il a infirmée reste—cette dernière, aux conditions de l'article 969—en vigueur. Mais si aucune injonction interlocutoire n'existait au moment même du prononcé du jugement sur l'action il n'est plus loisible d'en obtenir pour les fins de la cause. De plus, et en tel cas, et à moins que le jugement ne maintienne l'action et ne prononce des injonctions pour l'avenir, il en est fait, dans la cause, du droit de toute injonction pendant l'appel. En effet, l'article 969 autorise bien la Cour d'Appel ou—hors du terme—deux

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Fauteux J.

de ses Juges, à suspendre les injonctions alors en vigueur, mais il ne pourvoit pas, au stage de cette nouvelle instance que constitue l'appel, à l'émission d'injonctions interlocutoires dans la cause. C'est qu'au terme où ce remède particulier pouvait être demandé,—en première instance,—il ne l'a pas été ou s'il l'a été, il a été refusé, ou accordé pour être subséquemment annulé, avant la détermination du litige. En somme, et dans tous ces cas, on n'a pas, en première instance, justifié, lorsque requis, du droit à son obtention et le jugement renvoyant l'action au mérite a implicitement confirmé le bien-fondé du refus ou de l'annulation.

Conséquemment et sauf appel du jugement qui, en l'espèce, a annulé l'injonction interlocutoire, ce jugement dispose avec finalité dans la cause, et de ce remède, et du droit d'y recourir.

Le droit d'appeler de ce jugement dans une cause par ailleurs susceptible d'appel, n'a jamais été mis en doute et il serait, semble-t-il, contre toute conception des raisons donnant lieu à se création que ce remède puisse être aussi définitivement et à toutes fins écarté dans la cause par un jugement sans appel. Ainsi, un défendeur pourrait, par exemple, dans une instance au pétitoire, procéder à la démolition complète d'un immeuble dont la propriété serait ensuite, par jugement sur l'action, attribuée au demandeur. En ce cas, même le droit à l'injonction permanente, judiciairement reconnu, deviendrait illusoire. L'injonction permanente n'ayant plus d'objet, pourrait-elle même être prononcée? La Cour d'Appel s'est prononcée dans la négative dans *Méthot* v. *Town of Montmagny* (1), voir particulièrement p. 340. Aussi bien, la seule question contestée est celle de savoir si l'appel est de plein droit ou s'il doit être préalablement permis.

Il se peut que généralement et suivant la notion qu'on adopte d'un jugement interlocutoire, le jugement en question soit considéré comme tel; mais là n'est pas la question. Il s'agit ici de la juridiction donnée à la Cour du Banc de la Reine et c'est d'après la loi accordant et fixant cette juridiction, que la question de savoir si ce jugement est appelable en vertu des dispositions de l'article 46, plutôt qu'en vertu des dispositions de l'article 43, doit être décidée.

(1) Q.R. (1929) 46 K.B. 338.

L'article 46 prescrit qu'il y a appel de tout jugement interlocutoire dans les matières susceptibles d'appel, dans les cas suivants:

1. Lorsqu'il *décide en partie du litige;*

2. Lorsqu'il *ordonne* qu'il soit fait une chose à laquelle il ne peut être remédié par le jugement final;

3. Lorsqu'il a l'effet de retarder inutilement *l'instruction du procès.*

On ne saurait dire que le jugement en question *décide en partie du litige.* Si, dans un sens restreint, on envisage que *le litige* c'est le débat sur l'injonction interlocutoire, le jugement en dispose en totalité. Si, dans un sens plus large, on envisage que *le litige* c'est l'action, le jugement ne porte pas sur le fond du litige. Sur ce point, il se distingue manifestement d'un jugement maintenant une inscription en droit partielle ou totale. Ce qu'il *décide* est étranger à ce qui devra être décidé à la détermination du litige. Pour refuser l'injonction interlocutoire ou annuler celle qui a été décernée sans avis, le Juge apprécie mais ne décide pas le mérite de l'action; l'appréciation qu'il en fait pour les fins du jugement qu'il doit rendre, pas plus que le jugement qu'il rend, ne décident en partie du litige, le Juge du procès demeurant libre d'adopter, après audition sur le mérite de l'action, des vues diamétralement opposées. Ajoutons qu'on a jugé dans la cause *d'Allard* v. *Cloutier* (1), et, encore, récemment, dans *Parkovnick* v. *Ducharme* (2), qu'il y a appel d'un jugement refusant l'émission d'une injonction interlocutoire même dans le cas où le bref n'est pas encore émis. On ne pourrait affirmer que tel jugement "décide en partie du litige" alors que l'action n'est pas encore prise. De plus, et advenant en ce cas que le jugement de la Cour Supérieure soit maintenu, il ne reste plus aucune procédure pendante devant la Cour.

Le jugement en question ne peut davantage tomber dans le deuxième cas de l'article 46 puisque, refusant ou annulant l'injonction interlocutoire, on ne peut dire "qu'il ordonne qu'il soit fait une chose . . .". Interprétant cette partie de la disposition, le Juge Rivard, dans son Manuel de la Cour d'Appel, p. 100, n° 188, dit:

> Il faut remarquer les paroles de cette loi: . . . 'lorsqu'il *ordonne* qu'il soit fait une chose' . . . Le législateur n'a pas dit . . . 'lorsqu'il a *pour effet de permettre* qu'il soit fait une chose. . .
>
> Quand elle est claire, il convient de s'en tenir à la lettre d'une disposition légale.

(1) Q.R. (1920) 20 K.B. 565. (2) Q.R. [1947] K.B. 524.

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Fauteux J.

Le jugement refusant ou annulant l'injonction interlocutoire n'ordonne rien mais, sur le point, laisse effectivement les parties dans la position où elles se trouvaient avant la demande d'injonction. Dans les deux cas, la partie contre laquelle l'injonction interlocutoire pouvait être décernée ou maintenue ne reçoit, de ce jugement refusant ou annulant, aucun ordre de ne pas faire et aucune permission de faire ce que l'injonction interlocutoire aurait pu l'empêcher de faire si son émission eut été autorisée ou confirmée lorsque attaquée suivant l'article 966. En toute déférence, je ne crois pas qu'on puisse assimiler cette situation à celle décrite par la Cour du Banc du Roi dans *San Martin* v. *Compania Ingeniera* (1). En refusant, en cette cause, d'écarter du dossier une procuration logée à la suite d'un jugement l'ordonnant, on pouvait peut-être dire que l'effet du jugement subséquent refusant le rejet était, à cause du jugement antérieur, de permettre que la cause procède avec la procuration produite. Sans la production de cette procuration, la marche de cette cause était fatalement interrompue et, avec elle, les procédures devaient se poursuivre. Les deux cas ne sont pas assimilables et je ne crois pas que ce jugement puisse s'appliquer en l'espèce.

Enfin, et de toute évidence, on ne peut dire que le jugement refusant ou annulant l'injonction interlocutoire a "l'effet de retarder inutilement *l'instruction du procès*". Il faut donc écarter l'article 46.

Si fondée, cette conclusion n'implique pas d'elle-même que le jugement est couvert par les dispositions de l'article 43 mais il en résulte qu'à moins qu'il ne le soit, c'est à tort qu'on aurait toujours reconnu qu'il y avait appel de ce jugement car, l'article 46 étant écarté, cet appel, en l'absence des dispositions spéciales l'autorisant, ne saurait se fonder que sur l'article 43.

L'article 43—depuis amendé par 1-2 Elizabeth II, chap. 18, art. 7, mais tel qu'il doit se lire pour les fins de la présente cause—prescrit:

> 43. 1. A moins qu'il ne soit autrement édicté par une loi, il y a appel à la Cour du banc du roi siégeant en appel *de tout jugement final* rendu par la Cour Supérieure, excepté:
>
> a. Dans le cas de *certiorari;*
>
> b. Dans les causes où la somme demandée ou la valeur de la chose réclamée est de moins de deux cents piastres.

(1) Q.R. (1918) 27 K.B. 527.

2. Il y a cependant appel à la Cour du banc du roi siégeant en appel, des jugements finals suivants de la Cour supérieure, quel que soit le montant en litige;

a. Lorsque la demande se rapporte à des honoraires d'office, droits, rentes, revenus ou sommes d'argent payables à Sa Majesté;

b. Lorsque la demande se rapporte à des droits immobiliers, rentes annuelles ou autres matières dans lesquelle les droit futurs des parties peuvent être affectés;

c. Lorsqu'il y a contestation sur un titre à des terres ou héritages;

d. Dans les actions en déclaration d'hypothèque.

Incidemment, on notera d'abord que cet article ne dit pas qu'il y a appel "du jugement final", mais "de tout jugement final", et aussi que rien dans ce texte ou dans celui des articles qui suivent, ne suggère que le Législateur ait dit, expressément ou implicitement, qu'il n'y a qu'un seul jugement final en toute cause.

Pour décider que le jugement annulant l'injonction interlocutoire n'est pas un jugement final, la Cour d'Appel s'est reposée sur une décision qu'elle avait rendue en 1948 dans l'*Association Patronale* v. *Dependable Slippers* (1). La seule cause à laquelle on réfère est celle *d'Arnold* v. *Cole* (2), qui est invoquée comme justification d'une directive donnée pour les affaires pendantes et "où déjà le Juge en son cabinet a refusé une permisison d'appeler pour l'unique motif qu'elle n'était pas nécessaire, qu'il y avait ouverture à un appel *de plano*". D'ailleurs, cette décision portait sur une situation différente et le principe établi n'est pas absolu. Il faut regretter que la décision dans l'*Association Patronale* v. *Dependable Slippers* ne soit aucunement motivée en fonction de la procédure spécifique sur laquelle elle porte. En toute déférence, les déclarations qu'on y trouve, en y faisant cependant des réserves,— tel que, par exemple, "qu'il ne peut y avoir, en toute instance principale, qu'un jugement final et des interlocutoires", ne disposent pas de la question, mais la posent véritablement. L'utilité de motifs s'avérait d'autant plus que la décision elle-même, tel que d'ailleurs reconnu au factum de l'intimé, vient en conflit avec la jurisprudence de la Cour d'Appel. Voir les causes suivantes:

(1) Q.R. [1948] K.B. 355.

(2) Q.R. (1915) 21 R. de J. 358.

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Fauteux J.

Cowansville Hotel Co. Ltd. v. *Beatty* (1); *Méthot* v. *Town of Montmagny* (2); *Taylor* v. *Cité de Montréal* (3); *Liberty Tobacco Shops Ltd.* v. *Lapointe* (4); *Parkovnick* v. *Ducharme* (5), voir particulièrement, 527.

Ajoutons que des décisions précitées, les deux premières s'appuient sur le jugement de la Cour Suprême du Canada dans *Ville de St-Jean* v. *Molleur* (6).

Tous ces jugements de la Cour d'Appel supportent la proposition que le jugement refusant ou annulant une injonction interlocutoire est un jugement dont il y a appel de plein droit; et nonobstant la longue période de temps couverte par cette jurisprudence, le Législateur n'est pas intervenu pour la modifier.

D'Autre part, l'intimé, au soutien du jugement *a quo* a cité les causes suivantes:—

(i) de la Cour d'Appel:
Wampole v. *Lyons* (7); *Ottawa and Hull Power Manufacturing Company* v. *Murphy* (8);

(ii) de la Cour Suprême du Canada:
Stanton v. *Canada Atlantic Railway Company* (9); *Faucher* v. *La Compagnie de St-Louis* (10); *Bruce et al* v. *Fuller* (11); *Horner* v. *Marien* (12); (Jugement du 24 février, 1949).

(iii) du Comité judiciaire du Conseil Privé:
Goldring v. *La Banque d'Hochelaga* (13).

La considération de ces causes invite les commentaires suivants.

Les deux décisions de la Cour d'Appel sont antérieures à la jurisprudence contraire plus haut mentionnée et aucune d'elles n'est motivé. Seule, la première porte sur le point car, dans la seconde, il ne s'agit pas d'un jugement refusant ou annulant une injonction interlocutoire, mais—ce qui est bien différent—d'un jugement la confirmant.

(1) Q.R. (1907) 19 P.R. 144.
(2) Q.R. (1929) 46 K.B. 338.
(3) Q.R. (1935) 38 P.R. 162; 56 K.B. 193.
(4) Q.R. [1940] K.B. 280.
(5) Q.R. [1947] K.B. 524.
(6) (1908) 40 Can. S.C.R. 139.
(7) Q.R. (1904) 7 P.R. 339.
(8) Q.R. (1906) 15 K.B. 230.
(9) Cassel's Digest 430.
(10) (1921) 63 Can. S.C.R. 580.
(11) [1936] S.C.R. 124.
(12) Not reported.
(13) (1880) 5 A.C. 371.

Quant aux décisions de la Cour Suprême du Canada, elles portent sur une question étrangère à celle qu'il faut décider. Il s'agissait, dans ces causes, de déterminer la juridiction de la Cour Suprême suivant la loi qui lui est propre, et non celle de la Cour du Banc de la Reine suivant les dispositions qui la régissent. En aucun de ces cas la Cour a-t-elle affirmé qu'au sens de la loi sur l'appel à la Cour du Banc de la Reine, il n'y a en toute instance principale qu'un seul jugement final.

Enfin, dans *Goldring* v. *La Banque d'Hochelaga,* le Comité judiciaire du Conseil Privé décida qu'un jugement de la Cour du Banc de la Reine affirmant un jugement de la Cour Supérieure,—lequel avait rejeté une requête pour faire casser un bref de *capias,*—n'est pas un jugement final au sens de l'article du Code autorisant les appels au Conseil Privé. Jugée sous l'empire de l'ancien Code de procédure civile, où la loi sur l'appel à la Cour du Banc de la Reine était, dans la substance et la forme, manifestement différente de celle établie par le Code de 1897 et de ce qu'elle est depuis lors, je ne crois pas que cette décision soit utile à la considération de l'espèce. La raison de ce jugement apparaît à la partie soulignée de l'extrait suivant où sont indiqués entre parenthèses, pour fins de corrélation, les articles du Code actuel:

> The argument in support of the order of the Court has proceeded chiefly upon s. 822 (923) of the same Code which is one of those which relate to procedure in respect of writs of capias. That article appears to Their Lordships clearly to imply that the decisions to which it relates are no more than interlocutory orders. *If the decision of the Superior Court on the matter therein referred to had been regarded as a final judgment, there would have been no necessity to give by this article special leave to appeal because it would have been appealable under art. 1115 (43) as pointed out by Mr. Digby.*

L'article 1115, tel qu'il se lisait avant l'abrogation et le remplacement, en 1891, des articles 1114 à 1142(*a*), prescrivait:

> 1115. Il y a appel au même tribunal de tout jugement final rendu par la Cour Supérieure, excepté dans les cas de certiorari, de matières concernant les corporations municipales ou offices municipaux, tel que pourvu en l'article 1033.

A ce temps, l'appel était donc la règle; et, ni le montant en litige, ni la nature de la demande n'en affectaient l'opération. L'exception à la règle était limitée aux cas de certiorari ou aux matières concernant les corporations

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Fauteux J.

municipales ou offices municipaux. On pouvait peut-être, alors, argumenter que si le Législateur avait considéré comme final le jugement dont il permettait l'appel à l'article 822, il était inutile d'édicter cet article puisque l'appel de ce jugement était déjà pourvu à la règle générale de l'article 1115.—Le contraire avait été décidé, cependant, par la Cour du Banc de la Reine, en 1874, dans la cause de *The Canadian Bank of Commerce* v. *Brown et al* (1). A tout événement, on ne pourrait faire aujourd'hui le même raisonnement car la loi est maintenant différente en sa forme et substance et, ainsi que le signale le Juge Rivard dans son Manuel de la Cour d'Appel au n° 203, page 115, il n'est plus exact de dire que l'appel chez nous est de règle générale. L'article 44 de notre Code pourvoit bien aujourd'hui à un appel de ce jugement; mais le même article autorisant aussi l'appel des jugements rendus dans les matières non contentieuses, on ne saurait déduire de sa présence que le Législateur a nécessairement traité les jugements qui y sont mentionnés, comme des jugements interlocutoires.

Somme toute, de la jurisprudence citée par l'intimé, seule la cause de *Wampole* v. *Lyons* (*supra*) est au point. Dépourvue, cependant, de tous motifs et antérieure à toute cette jurisprudence établie et subséquemment suivie par la Cour d'Appel, elle n'en justifie pas la mise à l'écart.

Dans *Molleur* v. *La Ville de Saint-Jean* (*supra*) la Cour Suprême était appelée à décider, et décida que le jugement maintenant une inscription en droit partielle était un jugement final, au sens de la loi de la Cour Suprême. En l'occurrence, toutefois, la Cour, appréciant la nature véritable du jugement maintenant l'inscription en droit partielle, considéra le conflit existant chez les auteurs français relativement à la question de savoir s'il pouvait y avoir plus d'un jugement final dans une cause et se rangea avec les tenants de l'affirmative.

Dans *Cité de Québec* v. *Lefebvre Limitée* (2), le Juge Rivard, approuvé par la majorité, disait ce qui suit, au bas de la page 78:

> Il y a des décisions dont on peut dire qu'elles sont interlocutoires à l'égard du procès parce qu'elles sont prononcées durant l'instance, mais qui sont finales à l'égard de l'incident auquel elles mettent fin parce que cet incident est distinct du reste de l'affaire, n'affecte pas le fond du débat, se produit en marge de la procédure régulière et forme, pour ainsi

(1) Q.R. 19 L.C.J. 110. (2) Q.R. (1940) 69 K.B. 77.

dire, un procès particulier indépendant du procès principal. En vue de la formation de l'appel, ces décisions doivent être traitées comme finales. Telle est la décision de la Cour Supérieure sur la validité d'une évocation. Elle est définitive et finale. Appel peut en être interjeté *de plano*.

Le savant Juge, dans son Manuel de la Cour d'Appel, énonce avec autorités à l'appui, la proposition suivante, à la page 96, n° 179:

Certains jugements, quoique rendus durant une instance principale, mettent fin à un incident distinct et pour ainsi parler, à un procès particulier. On les traite comme finals; ils le sont, en effet, quant à l'incident qu'ils terminent.

Cette citation, supportant les prétentions de l'appelant, manifeste aussi le danger d'une règle générale en la matière. Aussi bien convient-il de restreindre à l'espèce les vues ici exprimées.

En somme, il m'est impossible, en l'absence de raisons convaincantes au contraire, d'écarter toutes ces autorités et la valeur qu'il convient d'y attacher pour accepter la proposition que le jugement qui a annulé l'injonction interlocutoire en l'espèce, n'est pas un jugement final.

Je maintiendrais l'appel; avec dépens tant de cette Cour que de la Cour du Banc de la Reine; déclarerais que la Cour du Banc de la Reine a été régulièrement saisie de l'appel par l'inscription en appel, et lui retournerais le dossier pour considération de toute question pouvant être soulevée sur un appel logé *de plano*.

KELLOCK J. (dissenting):—This is an appeal by leave from a judgment of the Court of Queen's Bench, Appeal Side, of the Province of Quebec, dismissing an appeal from a judgment of the Superior Court, dated March 4, 1952, setting aside an interlocutory injunction.

The respondent mis-en-cause obtained from the respondent Commission on February 5, 1952, leave to take proceedings against the appellants for certain conduct of the latter alleged to be prohibited by section 20 of the *Labour Relations Act*, R.S.Q., 1941, c. 162A, as enacted in 1944 by 8 Geo. VI, c. 30, s. 1, provided such proceedings were taken by March 7 following.

On the 11th of February, the appelants commenced this action to set aside the order granting leave on the ground that it had been made without due opportunity on the part of the appellants to be heard. On the same day the appellants obtained an interlocutory injunction restraining the

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Kellock J.

respondent Syndicat from acting upon the said order. This injunction was issued without notice to the respondents, who, on March 4, obtained judgment setting it aside. The appellants inscribed in appeal on March 5 following. The respondent Syndicat thereupon moved the Court of Appeal to dismiss the appeal on the ground that no appeal lay without leave and that no leave had been obtained. The Court of Appeal, following its earlier decision in *L'Association Patronale* v. *Dependable Slipper Company* (1), dismissed the appeal. The appellants now appeal to this court.

The question in issue depends upon the true construction of Articles 43 et seq., of the *Code of Procedure*. The appellants contend that

> Tout jugement qui dispose, d'une façon finale, d'un droit de l'une ou de l'autre des parties ou qui détermine définitivement le droit d'une des parties sur un point, et auquel il ne pourra être remédié par le jugement final, est en lui-même un jugement final, bien qu'ayant été prononcé au cours d'une instance.

The question as to what is a final judgment within the meaning of the Articles above referred to was very carefully considered by the Court of Appeal almost forty years ago in *Arnold* v. *Cole* (2). Cross J., who delivered the judgment of the court, pointed out at p. 360, at an early stage of his judgment, that the provincial legislature in enacting the Code of Procedure of Quebec had

> not adopted arts. 451 and 452 of the Code of Procedure of France which establish a distinction between 'jugements préparatifs' and 'jugements interlocutoires' and between both of these and 'jugements définitifs'.

The learned judge went on to say that if one were to distinguish "(irrespective of the articles of the Code respecting appeals) between a 'jugement interlocutoire' and a 'jugement définitif'," a guide might be found in such statements as, e.g., that of Laurent, Vol. 20, No. 23, namely:

> Quand un jugement interlocutoire en apparence, décide réellement un point contesté entre les parties, il est définitif, et il a, par conséquent, l'autorité de la chose jugée.

Such a test, however, was rejected by the court as having any applicability to the question of determining, for purposes of appeal, what is a final judgment under the appeal provisions of the provincial Code. At p. 362 the learned judge said:

> . . . the first thing to be done is to ascertain in what sense the Code, in the part of it which confers the right of appeal, makes use of the word

(1) Q.R. [1948] K.B. 355. (2) Q.R. [1915] 21 R. de J. 358.

'interlocutory.' Doing so, it can be seen that final judgments are not distinguished from interlocutory judgments by application of any such test as that indicated in the citations above made,

or, it might be aded, by any such test as the present appellants put forward as above set out.

After quoting the provisions of Article 46, the learned judge went on to say, at page 363:

. . . of greater significance as to the question now being considered—we see that, amongst interlocutory judgments, are included judgments which 'in part decide the issues'. Now, if we revert to the test afforded in the citations above made, it is clear that judgments which in part decide the issues are pro tanto 'Jugements définitifs' so that Art. 46 would mean that an appeal lies from interlocutory judgments when they are in part final judgments. In a lesser degree, *the same observation would apply to clause 2 of the Article respecting orders which cannot be remedied by the final judgment.*

Cross J. states his conclusion, on the same page, as follows:

I, therefore, conclude that the effect of the Code of Procedure is to include in the class interlocutory judgments many decisions and orders which *in theory* are final judgments, and that this order of imprisonment is one of such interlocutory judgments.

After referring to certain decided cases which had already been decided in accordance with the view he had expressed, the learned judge also said, at p. 365:

There is therefore authority for the view that the term 'interlocutory' does not stand in contradiction to the term 'definitive' and that a judgment may be both interlocutory and definitive if it does not put an end to the pendency of the action literally, a judgment pronounced in the period between the commencement and the end of the action is inter locutus. *I take it that that is the distinction* which would naturally be acted upon in formulating a practice code, and that in such code on the one hand judgments which put an end to the pendency of the action would be classed as final whereas all others would be considered 'interlocutory'.

At p. 366 Cross J. poses the question:

Is it to be understood then that, as regards appeal, final judgments are to be considered as meaning only those which disseize the Court and end the contestation . . .?

After referring to judgments in actions for partition, for a declaration of partnership, for revocation of deeds or for removal from office, where the judgment which maintains or dismisses the action is the judgment from which, in his view, an appeal lies to the Court of Appeal de plano, the learned judge said, at p. 367:

. . . it may be said, that, in general, any judgment pronounced in an intermediate stage of the cause is, for the purpose of appeal to this Court, an interlocutory judgment, notwithstanding that it may be final in its

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Kellock J.

effect and operation. To express the same thing in other words, such a judgment, though *theoretically* final, is interlocutory in relation to the main action or matter before the Court . . .

The italics are mine throughout.

The words "in general" have reference to the particular cases mentioned above which the learned judge had just discussed.

At p. 368, the learned judge points to the difference between a final judgment for purposes of appeal to the Court of Appeal and a final judgment for purposes of an appeal from that court to the Supreme Court, as follows:

> Thus, it may happen, as it did in La Ville d'Iberville vs Molleur, that, while application for leave to appeal to this Court was *necessary*—and was in fact made,—the action was nevertheless appealable to the Supreme Court of Canada because of its being a final judgment within the meaning of the Supreme Court Act, R.S.C., chap. 139, sec. 2(2). See also Denman vs Clover, Bar Coal Co., 48 Can., 318. It is, in each case, primarily a matter of statutory construction of enactments giving the right of appeal.

In *Molleur's* (1) case this court applied the test adopted by Fitzpatrick C.J., at page 158, namely, that

> When by a judgment a distinct and separate ground of action is, to use Lord Halsbury's words, 'finally disposed of', it is in the ordinary use of the words a final judgment with respect to that ground of action.

This test the learned Chief Justice applied to the definition of "final judgment" in the *Supreme Court Act* as it then stood, R.S.C., 1906, c. 139, sec. 2(*e*), namely:

> any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

The learned Chief Justice was not, if for no other reason than that the point was not before this court, considering whether or not the test he applied to the construction of the *Supreme Court Act* had any application to the construction of the Quebec Code of Procedure. In *Molleur's* case the judgment of the Superior Court had been considered to be an interlocutory judgment and leave to appeal to the Court of Appeal had been granted. To my mind, the reasoning of Cross J. in *Arnold* v. *Cole* as to the proper construction of the *Code of Procedure* is unanswerable. In my view, Article 46, paragraph 2, recognizes that a judgment which, although

> it in part decides the issues.

is nonetheless an interlocutory judgment and renders untenable the contention here put forward by the appellant.

(1) (1908) 40 Can. S.C.R. 139.

This view is, in my opinion, further supported by the Articles of the Code which deal with the subject-matter here in question, namely, injunctions.

This subject-matter is dealt with in chapter 38, commencing with Article 957. That Article authorizes the granting of an interlocutory injunction

(1) at the time of the issue of the writ of summons, or

(2) during the pendency of a suit.

It may be observed at the outset that paragraph 2 of Article 957 makes a clear distinction between "an interlocutory order of injunction" and the "final judgment."

The subsequent Articles of the chapter proceed upon the same view. Article 968 is really a definition. It provides that the "final" judgment adjudicates upon *the conclusions of the petition as well as upon the merits of the action.* There can be no mistake about this. The final judgment is that which terminates the suit. No other judgment rendered while the suit is pending meets the requirements of this definition.

Under Article 969 any final judgment confirming an interlocutory judgment is to remain in force notwithstanding an appeal, while if a final judgment dissolves an interlocutory injunction the latter remains in force if the petitioner immediately upon the rendering of judgment, declares his intention to appeal and within two days serves his inscription in appeal.

It is therefore plain that this chapter proceeds upon the same view of what is a "final" judgment as do Articles 43 and 46.

It is to be observed that by reason of Article 960 the application for an interlocutory injunction is to be made by petition and normally must be on notice; Art. 961. Article 957 contemplates, therefore, that the application for the injunction may be made before the actual issue of the writ, as the injunction may be granted when the writ is issued. Apparently based upon this fact, it has for some time been considered in the courts of the province that if the grant of an interlocutory injunction be refused, the petitioner need not issue the writ but may take proceedings in appeal; *Allard* v. *Cloutier* (1). It was also held that if

(1) Q.R. (1920) 29 K.B. 565.

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Kellock J.

the injunction is issued without the writ and the defendant does not object at the time, he will be considered to have acquiesced, the matter being simply one of procedure. In that particular case, an interlocutory injunction had been granted and presumably leave to appeal had been obtained. It is noteworthy that Lamothe C.J. states in his reasons at p. 568:

> L'injonction est devenue un incident dans une cause, ou une procédure 'interlocutoire'.

It was long ago held by the Court of Appeal in *Wampole* v. *Lyons* (1), that a judgment refusing a petition for an interlocutory injunction made before the issue of the writ was an interlocutory judgment from which no appeal lay without leave. Without noticing this decision, a single judge, Archambeault C.J., in *Cowansville* v. *Beatty* (2), decided in the contrary sense, basing his judgment on *Molleur* v. *St. Jean* (3).

Again, in 1929, the case *Methot* v. *Montmagny* (4), came before the Court of Appeal. This was an appeal from a judgment upon motion dissolving an interlocutory injunction. The respondent had moved to dismiss the appeal upon the ground that the judgment in appeal was interlocutory and that no leave to appeal had been obtained. The motion was dismissed, Guerin J. dissenting. Hall J., who delivered the judgment of the majority, does not discuss any of the Articles of the Code, nor was the decision in *Arnold* v. *Cole* cited. His judgment proceeds upon the view that the judgment in appeal was a final judgment

> since it settles once and for all the incidental issue in connection with the injunction.

The learned judge relies in support of his view upon the decision in *Ville St. Jean* v. *Molleur* (5), which, as already pointed out, was considered in *Arnold* v. *Cole* and dealt with a totally different question.

In 1933 also, St. Jacques J., in *Taylor* v. *Montreal* (6), delivered a similar judgment, but so far as the report shows, the earlier authoritative decisions were not drawn to his attention and the judgment itself contains no reference to the relevant Articles of the Code. In 1940 the Court of

(1) Q.R. (1904) 7 P.R. 339.
(2) Q.R. 19 P.R. 144.
(3) (1908) 40 Can. S.C.R. 139.
(4) Q.R. (1929) 46 K.B. 338.
(5) (1908) 40 Can. S.C.R. 139 at 153.
(6) Q.R. 38 P.R. 162.

Appeal in *Liberty Tobacco Shops Ltd.*, v. *Lapointe* (1), decided the same point in the same way but again, so far as the report shows, without any consideration of the earlier authorities, nor was the Code itself discussed. In all of these cases, as in *Wampole* v. *Lyons,* an injunction had been refused and the writ had not been issued.

In this state of the authorities the *Dependable Slipper* case came before the Court of Appeal, when the provisions of the Code itself, as well as the authorities, were carefully considered. In that case the appellant had launched his petition and had commenced action. The petition for an interlocutory injunction was dismissed and an appeal was taken without leave having been obtained. It was unanimously held that the judgment sought to be appealed was interlocutory and, in the circumstances, no appeal lay. The court expressed its view that had the judgment granted the injunction, it would equally have been interlocutory. In my view, with respect, this judgment is in accord with the true construction of the relevant Articles of the Code as decided in *Arnold* v. *Cole ubi cit,* to which decision the court expressly referred. In the case at bar the Court of Appeal have followed that decision and, in my view, rightly so.

It is objected that a judgment refusing an interlocutory injunction of the character of that here in question, or a judgment setting aside such an injunction before trial, does not come within any of the cases provided for by Article 46, and from this it is sought to be argued that such a judgment must be final for purposes of appeal. Even if the true view should be that such a judgment is not within the terms of Article 46, it would not mean that such a judgment should be considered as final within the meaning of Article 43 but merely that it is not appealable at all.

In *San Martin* v. *Compania Ingeriera* (2), however, the Court of Appeal held that the Article 46(2) was not to be construed as so limited. In that case an action having been brought by the plaintiff, whose head office was outside the jurisdiction, an order was made requiring it to file a power of attorney, and this was complied with. The appellant moved to reject from the record the documents filed, and the motion was dismissed. On appeal, the respondent

(1) Q.R. (1940) 69 K.B. 280. (2) Q.R. (1918) 27 K.B. 527.

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Kellock J.

contended that the judgment appealed from did not fall within any of the paragraphs of Article 46. Cross J. pointed out that if the order stood, the effect would be that the defendants would be obliged to submit to having the action proceed to trial on the merits, though it might turn out not to have been authorized and the plaintiff not to have been properly before the court. At page 528 he said:

> It is true that the judgment does not affirmatively order anything to be done, but having regard to the effect of it, I consider, nevertheless, that it falls within clause 2 of Article 46 as being one of those interlocutory judgments which are made appealable
>
> 'when they order the doing of anything which cannot be remedied by the final judgment'.

If the paragraph may be so read (I do not so decide as it is unnecessary to do so in the present instance) it would seem that an order refusing or quashing an interlocutory injunction would equally be within its terms. If, however, the Article may not be so read, this would not necessarily establish that such a judgment is thereby brought within the terms of Article 43, but merely that, while still interlocutory, there would be no right of appeal at all.

In the case at bar it cannot be argued that the judgment in appeal is to be considered final because there is nothing left to be disposed of by any judgment at trial. That is not so. While a charge was laid by the respondent Syndicat following the judgment of March 4, further proceedings have been adjourned. The merits of the present action have still to be disposed of and their disposition will no doubt govern the proceedings in the court of summary jurisdiction. Moreover, nothing that has been decided by the judgment of March 4 will be binding upon the judge at the trial of the present action: *Faucher* v. *St. Louis* (1); *Davis* v. *Royal Trust* (2).

It may be observed that the remedy by way of injunction is a conception which derives, not from the civil but from English law. It is a remedy by which a person entitled to a right may restrain its invasion or threat of invasion by another. The interlocutory injunction is a temporary conservatory measure designed to protect the alleged right until such time, normally after a trial, when its existence or non-existence can be finally investigated. The granting or refusal of an interlocutory order is determined upon "the

(1) (1921) 63 Can. S.C.R. 580 at 582. (2) [1932] S.C.R. 203.

balance of convenience" as it appears at the time. As stated in Kerr on "Injunctions", 6th Edition, p. 2:

> The interlocutory injunction is merely provisional in its nature, and does not conclude a right . . . In interfering by interlocutory injunction, the Court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime in statu quo.

Should a plaintiff, denied an interlocutory injunction, elect not to proceed further with the litigation, the order refusing the injunction may be termed "final" in the sense of being the last judgment in point of time, but it is not final in the sense of determining the existence or non-existence of the right alleged. The order is, of course, final in the sense that it determines the right of the plaintiff to an interlocutory injunction *on the material filed* but if it should ultimately be decided that the existence of the right alleged is well founded and the remedy by way of injunction is not then appropriate or is ineffective, appropriate remedy by way of damages will be awarded. Denial of an interlocutory injunction, whether the plaintiff elects or does not elect to proceed, cannot convert such an order into a final judgment in the sense of a final determination of the right put forward by the plaintiff. And no interlocutory judgment becomes final in the sense of being the last judgment contemplated by a proceeding merely because a plaintiff does not elect to pursue the normal course of the litigation beyond that stage.

If, in the eye of the Code of Procedure, a judgment issued "during the pendency" of the suit (Article 957(2)), and therefore interlocutory in that sense, is also interlocutory for the purposes of appeal even although "it in part decides the issues" or "le litige" (Article 46(1)), and consequently is not final within the meaning of Article 43, I am unable to accept the view that a judgment, equally interlocutory under Article 957(2), can nonetheless be final within the contemplation of Articles 43 and 46, although merely an incident in the action, purely temporary in nature, and incapable of constituting chose jugée or standing in the

1953

WABASSO COTTON CO. v. QUEBEC LABOUR BOARD AND SYNDICAT DES EMPLOYÉS DE LA WABASSO

Kellock J.

way of another application for the same relief on other material. The converse of this, where an interlocutory injunction has been granted, is precisely similar: Article 967.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellants: *J. M. Bureau.*

Solicitor for the respondent: *V. Trepanier.*

Solicitor for the Mis-En-Cause: *R. Hamel.*

1953

*May 14, 15
*Oct. 6

ARMY AND NAVY DEPARTMENT STORE LIMITED ..... APPELLANT;

AND

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

AND

ARMY AND NAVY DEPARTMENT STORE (WESTERN) LIMITED ... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Related corporations—Whether owners of shares are persons not dealing with each other at arm's length—Persons connected by blood relationship and marriage—Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 36, 127.

One half of the shares of the appellant company W. was owned by the appellant company A. and the other half was owned by company S. All the shares of company A. and company S. were owned by two brothers, their brother-in-law and the son of one of the brothers. The Minister regarded all three companies as related corporations by virtue of s. 36(4) of the *Income Tax Act* and designated company S. to receive the benefit of the lower tax rate for the years 1949 and 1950 under s. 36(1) and companies W. and A. to be assessed under s. 36(2). The assessment was confirmed by the Exchequer Court.

Under s. 36(4), a corporation is related to another if one of them owned directly or indirectly 70 per cent or more of all the issued common shares of the capital stock of the other, or if 70 per cent or more of all the issued common shares of each are owned directly or indirectly by (i) one person, (ii) two or more persons jointly, or (iii) persons not dealing with each other at arm's length, one of whom owned directly or indirectly one or more of the shares of each of the corporations.

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*PRESENT: Taschereau, Estey, Locke, Cartwright and Fauteux JJ.

Held: (Estey J. dissenting), that company W. was not related to either company A. or company S. as neither company owned directly or indirectly 70 per cent of the shares of company W.; nor were 70 per cent of the shares of company W. owned directly or indirectly by one person or by two or more persons jointly; and even though companies A. and S. were persons not dealing with each other at arm's length, neither of them owned any shares in the other.

Per Curiam: Companies A. and S. were related corporations within the meaning of s. 36(4)(*b*)(iii), since the shares of both, being owned by persons connected by blood relationship or marriage, were owned by persons not dealing with each other at arm's length.

Per: Taschereau, Locke and Fauteux JJ.: The two brothers and the son were connected by blood relationship since they stood in lawful descent from a common ancestor (*In re Lanyon* [1927] 2 Ch. 264), and the brother-in-law, since he was married to a sister of the two brothers, was connected with them by marriage within the meaning of s. 127(5)(*c*).

Per Cartwright J.: To be deemed by s. 127(5)(*b*) not to deal with each other at arm's length, corporations must be controlled by the same person; it is not sufficient that they are controlled by the same group of persons.

Per Cartwright J.: Shareholders, either individually or collectively, do not have any ownership direct or indirect in the property of the company in which they hold shares.

APPEAL from the judgment of the Exchequer Court of Canada (1) Archibald J., holding that both appellant companies were related corporations.

M. M. Grossman Q.C. for the appellants.

J. D. C. Boland and K. E. Eaton for the respondent.

The judgment of Taschereau, Locke and Fauteux JJ. was delivered by:—

LOCKE, J.:—These appeals were taken by Army and Navy Department Stores (Western) Limited, a company incorporated under the *Companies Act of British Columbia,* and Army and Navy Department Stores Limited, a company incorporated under the *Companies Act of Alberta,* from judgments delivered by the late Mr. Justice Archibald in the Exchequer Court (1), and were heard together.

The facts to be considered are, however, not identical and the appeals must be considered separately.

The British Columbia company, which I will refer to as the Western Company, carries on business in the City of New Westminster. For its fiscal year ending October 31, 1949, the company filed a return showing a profit of $58,651.96 and computed its tax under the provisions of the

(1) [1952] Ex. C.R. 546.

1953

ARMY & NAVY DEPARTMENT STORE LTD. v. MINISTER OF NATIONAL REVENUE AND ARMY & NAVY DEPARTMENT STORE (WESTERN) LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

Income Tax Act at $17,055.15, which amount was paid. By an assessment dated October 24, 1950, the Minister of National Revenue assessed the company a tax for the said period in the amount of $19,061.08. The dispute is as to its liability for this difference.

Section 36 of the *Income Tax Act* (11-12 Geo. VI, cap. 52) 1948, as amended both before and after the Western company made its return, as it applied to income for the year 1949, reads as follows:—

36. (1) The tax payable by a corporation under this Part upon its taxable income or taxable income earned in Canada, as the case may be, (in this section referred to as the 'amount taxable') for a taxation year is, except where otherwise provided,

(*a*) 15 per cent of the amount taxable if the amount taxable does not exceed $10,000, and

(*b*) $1,500 plus 38 per cent of the amount by which the amount taxable exceeds $10,000 if the amount taxable exceeds $10,000.

(2) Where two or more corporations are related to each other in a taxation year, the tax payable by each of them under this Part for the year is, except where otherwise provided by another section, 38 per cent of the amount taxable for the taxation year.

(3) Notwithstanding subsection (2), where two or more corporations are related to each other, the tax payable by such one of them as may be agreed by them or, if they cannot agree, as may be designated by the Minister shall be computed under subsection (1).

(4) For the purpose of this section, one corporation is related to another in a taxation year if, at any time in the year,

(*a*) one of them owned directly or indirectly 70 per cent or more of all the issued common shares of the capital stock of the other, or

(*b*) 70 per cent or more of all the issued common shares of the capital stock of each of them is owned directly or indirectly by

(i) one person,

(ii) two or more persons jointly, or

(iii) persons not dealing with each other at arms length one of whom owned directly or indirectly one or more of the shares of the capital stock of each of the corporations.

This section is applicable to the 1949 and subsequent taxation years.

(5) When two corporations are related, or are deemed by this subsection to be related, to the same corporation at the same time, they shall, for the purpose of this section, be deemed to be related to each other.

Section 127 as it applied to that period read:—

For the purposes of this Act,

(*a*) a corporation and a person or one of several persons by whom it is directly or indirectly controlled,

(*b*) corporations controlled directly or indirectly by the same person, or

(c) persons connected by blood relationship, marriage or adoption,

shall, without extending the meaning of the expression 'to deal with each other at arms length' be deemed not to deal with each other at arms length.

The difference between the amount of the tax of the Western company for the period as computed by it and the amount of the tax assessed was due to the fact that the Minister assessed the tax under ss. (2) of s. 36, while the company claimed that the tax should be levied under the provisions of ss. (1). The company gave a notice of objection to the assessment to the Minister who confirmed the assessment. The company then appealed to the Income Tax Appeal Board and, in a considered judgment delivered by Mr. R. S. W. Fordham, Q.C. on October 29, 1951, for the Board, the appeal was dismissed.

There is no record of the proceedings before the Board before us and we are not informed as to whether or not evidence was given by the appellant. The Minister of National Revenue, in notifying the company that he had confirmed the assessment, had stated that the assessment rested on the ground that the taxpayer and the Army and Navy Department Stores Limited were related companies, within the meaning of ss. (4) of s. 36: the company referred to was apparently the Alberta company, one of the appellants in these proceedings. The judgment of the Tax Appeal Board found that one half of the shares of the Western company were owned by the Alberta company and that the other half, less two shares, was owned by a Saskatchewan company of the same name. The shareholdings in the Alberta and Saskatchewan companies were found to be as follows:

Alberta company	shares	Saskatchewan company	shares
H. R. Cohen	50,000	H. R. Cohen	100,000
S. J. Cohen	10,000	S. J. Cohen	100,000
S. D. Leshgold	40,000	J. W. Cohen	50,000

1953

ARMY & NAVY DEPARTMENT STORE LTD. v. MINISTER OF NATIONAL REVENUE AND ARMY & NAVY DEPARTMENT STORE (WESTERN) LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

As to the remaining shares in the Western company, it was found that H. R. Cohen was the owner of one and that the remaining share was owned by a stranger. After finding that H. R. Cohen and S. J. Cohen were brothers and Leshgold their brother-in-law and that J. W. Cohen (a son of S. J. Cohen) was a blood relation of the two first named, the reasons for judgment proceeded:—

> While the said 2,500 shares of the appellant company's stock are owned by the Alberta company as such, and not by the individual shareholders of the latter, I find it difficult to escape the conclusion that there was at least indirect control of the appellant company by H. R. Cohen, S. J. Cohen and S. D. Leshgold. Bearing in mind the far-reaching words found in section 36(4)(*b*), 'owned directly *or indirectly*', it does not, I think, conflict with the effect of Salomon v. Salomon, (1897) A.C. 22, to hold that these three holders (sic) of the Alberta company were in a position to exercise full, even if indirect, control over the activities of the appellant company by virtue of their substantial holdings in the former. In the case of H. R. Cohen, his voting power was augmented by his two-fifths interest in the Saskatchewan's company's shares. It is significant too that he was also not at arm's length with its two other shareholders, they being closely related to him.
>
> The Minister's decision did not show which of the two prairie province companies was deemed related to the appellant company. It matters little, however, as both companies' shares were held mostly by the Cohens, and the shareholdings of each company in the appellant company's stock were about equal, as indicated above.

It is apparent from the reasons delivered that there was no evidence before the Tax Appeal Board that the two shares in the Western Company to which reference was made were the property of the Saskatchewan company, as was shown in the evidence taken before Archibald J. It was there shown by the evidence of the secretary of the Saskatchewan company that it was the owner of 2,500 of the shares of the Western company but held a certificate for 2,498 shares only, one share having been issued to H. R. Cohen and one to S. D. Leshgold, in order to qualify them as directors. The transfer form on the back of these two certificates had been signed by Cohen and Leshgold respectively and it was shown that the shares were held by the solicitors for the Saskatchewan company on its behalf. There was no contradiction of this evidence.

Mr. Justice Archibald, who disposed of the appeal of the Alberta company at the same time as he dismissed the appeal of the Western company, did not mention the fact that it had been proven that the ownership of the shares was divided equally between the Alberta and the Saskatchewan companies and I think it is clear that he did not

consider the effect that this had upon the issue in the appeal. His reasons merely stated that he dismissed the appeal of the Western company for the reasons given in his decision on the appeal of the Alberta company. The issue in that appeal, however, was different.

Upon the undisputed evidence the facts accordingly are that during the taxation period in question the 5,000 issued shares of the Western company were owned one half by the Alberta and one half by the Saskatchewan company. The Western company was entitled to be taxed under the terms of ss. (1) of s. 36, unless it lost that benefit by reason of being "related" to one of the other companies, as that expression is defined by ss. (4) of s. 36. Neither the decision of the Minister nor of the Tax Appeal Board nor of Archibald J. mentioned to which corporation the Western company was related but, if I understand correctly the argument addressed to us on behalf of the Minister, the Crown's position is that it was related to both the Alberta and the Saskatchewan companies. Since, however, neither the Alberta nor the Saskatchewan company owned 70 per cent of all the issued common shares of the capital stock of the western company, para. (*a*) of ss. (4) cannot apply. As to para. (*b*) it is not suggested that 70 per cent of the issued common shares were owned by one person or by two or more persons jointly, so that if the Western company is to be deprived of the benefit of ss. (1) it must be under the terms of subpara. (iii) of para. (*b*). The expression "persons" include corporations under the definition of that term in s. 127(1)(*ab*) of the *Act*. If it be assumed that the Alberta and the Saskatchewan companies are persons not dealing with each other at arm's length, there still remains the fact that while each owned half of the shares of the Western company the Alberta company did not own any of the shares of the Saskatchewan company nor did the Saskatchewan company own any shares in the Alberta company. Accordingly, subpara. (iii) has no application. With respect, the reasons for the judgment of the Tax Appeal Board do not appear to me to touch the question to be decided. In my opinion, the Western company was entitled to be taxed under the provisions of ss. (1) of s. 36.

The appeal of the Alberta company raises a quite different issue. As has been shown above, H. R. Cohen and his brother-in-law Leshgold owned 90,000 of the 100,000 issued

1953

ARMY & NAVY DEPARTMENT STORE LTD. v. MINISTER OF NATIONAL REVENUE AND ARMY & NAVY DEPARTMENT STORE (WESTERN) LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

shares of the Alberta company and H. R. Cohen owned 100,000 of the shares of the Saskatchewan company. In addition to this, S. J. Cohen, a shareholder of the Alberta company, was the owner of 100,000 shares of the Saskatchewan company and his son J. W. Cohen 50,000 shares. If, therefore, the Cohens and Leshgold were persons not dealing with each other at arm's length, the conditions of subpara. (iii) are complied with and the two corporations are to be deemed related.

For the appellant it is said that the expression "blood relationship" is so vague and uncertain as to be incapable of interpretation. In support of this contention, the cases on the construction of the words "relatives" or "relations" in matters involving the interpretation of wills such as *Ross* v. *Ross* (1), *In Re Lanyon* (2), and *Sifton* v. *Sifton* (3), are relied upon. *In Re Lanyon,* the testator by his will provided that his trustees should stand possessed of his residuary estate upon trust to pay the income to his son for his life and on his decease upon trust to pay the capital to his children or grandchildren or equally between them if more than one, provided that his son did not marry a "relation by blood." It was contended that the condition was void for uncertainty. Russell, J. by whom the matter was decided, considered that the meaning of "blood relationship" was clear and that it described the relationship existing between two or more persons who stand in lawful descent from a common ancestor. He did not consider the provision in the will void for uncertainty but held it to be ineffective as being contrary to public policy as being a restraint upon marriage. In *Sifton's* case, Lord Romer who delivered the judgment of the Judicial Committee, after referring to the meaning attributed to the expression "blood relation" by Russell J., said that, in their Lordships' opinion, the condition might have been held to be void for uncertainty as, if the testator did not intend by the use of the expression to include the whole human race, he had failed to specify the number of generations in which no common ancestor of the spouses was to be found. I do not think that these decisions are of assistance in determining the present matter. The fact that there would undoubtedly be difficulty in determining the scope of the expression in

(1) (1894) 25 Can. S.C.R. 307. (2) [1927] 2 Ch. 264.
(3) [1938] A.C. 656.

some circumstances does not render the words meaningless. The question here to be determined is whether H. R. Cohen, S. J. Cohen and J. W. Cohen are connected by blood relationship. The three men are shown by the evidence to be descended from a common ancestor, the father of H. R. and S. J. Cohen. Accepting the meaning attributed to the expression by Russell J., which I think to be the correct one, these men are connected by blood relationship.

This does not, however, dispose of the matter since, while the three Cohens owned all of the shares in the Saskatchewan company, Leshgold owned 40 per cent of the shares in the Alberta company. Leshgold is married to a sister of H. R. and S. J. Cohen and the question is, therefore, whether he is "connected by marriage" with them, within the meaning of the subparagraph. The matter is to be considered without reference to the amendment made to s. 127 by s. 31 of c. 29 of the Statutes of 1952, by which the expression was defined. Without overlooking the necessity for clarity in the language of a taxing statute, I am of the opinion that this language is sufficiently clear. One of the meanings assigned to the word "connection" in the New Oxford Dictionary is: relationship by family ties as marriage or distant consanguinity, and a second: a person who is connected by others by ties of any kind, especially a relative by marriage or distant consanguinity. In Webster's New International Dictionary, the word is similarly defined. In this sense, which I think to be the natural and ordinary meaning of the expression, Leshgold and the Cohen brothers were connections and so "connected by marriage", within the meaning of s. 127(5)(*c*). As Leshgold and H. R. Cohen between them owned 90 per cent of the shares of the Alberta company, the conditions of s. 36(4)(*b*)(iii) were complied with and the Alberta and Saskatchewan companies were "related" to each other, within the meaning of s. 36(3).

It is stated in the factum of the appellant that the Minister of National Revenue had of his own motion and without consulting the Alberta and Saskatchewan companies designated the latter as the corporation to be taxed under ss. (1) of s. 36. Subs. (3) provides that when two or more corporations are related to each other the tax payable by such one of them as may be agreed by them shall be computed under ss. 1 and that it is only where they cannot

1953

ARMY & NAVY DEPARTMENT STORE LTD. v. MINISTER OF NATIONAL REVENUE AND ARMY & NAVY DEPARTMENT STORE (WESTERN) LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

agree that the company to be so taxed may be designated by the Minister. We have no record of the proceedings before us in which the Minister is said to have made this direction. In the absence of any evidence on the point, I think we cannot be asked to assume that the Minister acted without evidence satisfactory to him that the parties could not agree which should receive this benefit, if only one was entitled to it.

In the result, the appeal of the Western company should be allowed with costs throughout and judgment entered declaring that, for the taxation period in question, that company was entitled to be taxed under the provisions of ss. (1) of s. 36. The appeal of the Alberta company should be dismissed with costs.

ESTEY, J. (dissenting in part):—There are here two appeals, one by Army & Navy Department Store Limited, an Alberta company (hereinafter referred to as the Alberta Corporation) and the Army & Navy Dept. Store (Western) Limited, a British Columbia company (hereinafter referred to as the Western Corporation). These companies, for the taxation years 1949 and 1950, along with the Army & Navy Department Store Limited, a Saskatchewan company (hereinafter referred to as the Saskatchewan Corporation), were taxed as related corporations. The first two corporations were taxed under s. 36(2) of *The Income Tax Act* (S. of C. 1948, 11-12 Geo. VI, c. 52), while the Minister designated that the Saskatchewan Corporation should be taxed under s. 36(3). All of the corporations filed their returns as unrelated or independent corporations.

It is agreed that the shares in these corporations are held as follows:

(1) The Saskatchewan Corporation—the shareholders are:
40 per cent to S. J. Cohen
20 per cent to J. W. Cohen (his son)
40 per cent to H. R. Cohen (a brother of S. J. Cohen)

(2) The Alberta Corporation—the shareholders are:
50 per cent to H. R. Cohen
10 per cent to S. J. Cohen (his brother)
40 per cent to S. D. Leshgold (brother-in-law of H. R. Cohen and S. J. Cohen)

(3) The Western Corporation has 5,000 shares to the value of $10.00 each, divided as follows:

	shares
to the Alberta Corporation	2,500
to the Saskatchewan Corporation	2,498
to H. R. Cohen	1
to J. F. Bolecon	1

The shares in the name of H. R. Cohen and J. F. Bolecon in the Western Corporation are director's qualifying shares.

Section 36 reads in part as follows:

36. (1) The tax payable by a corporation under this Part upon its taxable income or taxable income earned in Canada, as the case may be, (in this section referred to as the 'amount taxable') for a taxation year is, except where otherwise provided,

(*a*) 15 per cent of the amount taxable if the amount taxable does not exceed $10,000, and

(*b*) $1,500 plus 38 per cent of the amount by which the amount taxable exceeds $10,000, if the amount taxable exceeds $10,000.

(2) Where two or more corporations are related to each other in a taxation year, the tax payable by each of them under this Part for the year is, except where otherwise provided by another section, 38 per cent of the amount taxable for the taxation year.

(3) Notwithstanding subsection (2), where two or more corporations are related to each other, the tax payable by such one of them as may be agreed by them or, if they cannot agree, as may be designated by the Minister shall be computed under subsection (1).

.....

The term "related corporations" is defined in s. 36(4), as amended in 1951 and made applicable to 1949 and subsequent taxation years, as follows:

36. . . .

(4) For the purpose of this section, one corporation is related to another in a taxation year if, at any time in the year,

(*a*) one of them owned directly or indirectly 70 per cent or more of all the issued common shares of the capital stock of the other, or

(*b*) 70 per cent or more of all the issued common shares of the capital stock of each of them is owned directly or indirectly by

(i) one person,

(ii) two or more persons jointly, or

(iii) persons not dealing with each other at arms length one of whom owned directly or indirectly one or more of the shares of the capital stock of each of the corporations.

The phrase "arms length" is defined in s. 127(5) as follows:

127. . . .

k (5) For the purposes of this Act,

(*a*) a corporation and a person or one of several persons by whom it is directly or indirectly controlled,

1953

ARMY & NAVY DEPARTMENT STORE LTD. v. MINISTER OF NATIONAL REVENUE AND ARMY & NAVY DEPARTMENT STORE (WESTERN) LTD. v. MINISTER OF NATIONAL REVENUE

Estey J.

(b) corporations controlled directly or indirectly by the same person, or

(c) persons connected by blood relationship, marriage or adoption,

shall, without extending the meaning of the expression 'to deal with each other at arms length', be deemed not to deal with each other at arms length.

The appellants submit that as the word "relationship" or "related" is not defined in the statute at any time relevant hereto (it is defined subsequently, S. of C. 1952, c. 29, s. 31, ss. 2) that it ought to be construed as meaning the next of kin who would take in the event of intestacy. In their submission appellants' counsel adopted the statement of Chief Justice Strong in *Ross* v. *Ross* (1):

> the word 'relations' standing alone must be restricted to some particular class for if it were to be construed generally as meaning all relations it would be impossible ever to carry out the directions of the Will. The line, therefore, must be drawn somewhere and can only be drawn so as to exclude all persons whom the law in the case of an intestacy recognize as the proper class among whom to divide the property of a deceased person who dies intestate, namely his heirs.

In support of this contention he invokes the rule that where certain words have received a judicial interpretation Parliament, in subsequently adopting or using such words without any indication to the contrary, may be taken to have intended that they be used as so interpreted in the courts. *Barlow* v. *Teal* (2). The respondent points out that the statement of Chief Justice Strong was in relation to the interpretation of a will and that, while Parliament, in legislating in respect to the same or similar matters, might so intend, it does not apply where, as here, the subject matter of the legislation is in relation to income tax, a subject entirely different from that of wills. It is, however, unnecessary to decide this issue. Even if we assume that the word "relationship" means next of kin, these corporations are, within the meaning of the statute, related.

It will be observed that under s. 36(4)(*b*)(iii) there are two requirements: (*a*) at least 70 per cent of the issued common shares in each of the corporations shall be owned directly or indirectly by persons not dealing with each other at arms length; and (*b*) one of the persons must own at least one or more of the shares of the capital stock in each of the corporations. It would appear that under the terms of this section the Saskatchewan and Alberta Corporations are related.

(1) (1894) 25 Can. S.C.R. 307 at 330. (2) (1885) 15 Q.B.D. 403.

In the Saskatchewan Corporation H. R. Cohen and S. J. Cohen own 80 per cent of the shares of stock. These parties, H. R. Cohen and S. J. Cohen, are brothers and the former having no children his brother, S. J. Cohen, would come within those who would take if the former died intestate. In the Alberta Corporation H. R. Cohen and his brother-in-law S. D. Leshgold own 90 per cent of the stock and S. J. Cohen owns 10 per cent. In other words, the shares of the Alberta and Saskatchewan Corporations are owned by persons who are "connected by blood relationship or marriage" within the meaning of s. 127(5)(*c*). The further requirement of s. 36 (4)(*b*)(iii) is found in the fact that H. R. Cohen owns "one or more of the shares of the capital stock of each of the corporations." It follows that the Alberta and Saskatchewan Corporations are related within the meaning of s. 36(4)(*b*)(iii).

In the Western Corporation the shares are held as follows:

	shares
Alberta Corporation	2,500
Saskatchewan Corporation	2,498
H. R. Cohen	1
J. F. Bolecon	1

The issue is again whether this Western Corporation is related to the Alberta and Saskatchewan Corporations and in particular whether 70 per cent or more of all the issued common shares of capital stock of each of these corporations is "owned directly or indirectly by . . . persons not dealing with each other at arms length one of whom owned directly or indirectly one or more of the shares of the capital stock of each of the corporations" within the meaning of s. 36(4)(*b*)(iii).

We are not here concerned with the fact that a corporation is a distinct and separate legal entity nor with any question of corporate capacity or power. The issue here raised is that of direct or indirect ownership of the shares in the Western Corporation. That the Alberta and Saskatchewan Corporations own all the shares in the Western Corporation does not necessarily conclude the matter in determining whether these corporations are related within the meaning of the statute. These corporations are artificial bodies that act as directed by individuals. H. R. and

1953

ARMY & NAVY DEPARTMENT STORE LTD. v. MINISTER OF NATIONAL REVENUE AND ARMY & NAVY DEPARTMENT STORE (WESTERN) LTD. v. MINISTER OF NATIONAL REVENUE

Estey J.

S. J. Cohen and S. D. Leshgold are owners of all the shares in the Alberta Corporation and all but 20 per cent (owned by J. W. Cohen, a son of S. J. Cohen) in the Saskatchewan Corporation.

While the appellants emphasize that s. 36(4)(*b*)(iii) deals with ownership of shares, it should be observed that it is ownership "directly or indirectly" on the part of persons not dealing at arms length. The dictionary defines "indirectly" as circuitous or roundabout. Parliament, by the inclusion of the word "indirectly" in this context, evidenced a clear intention that the share position of a corporation should be so far examined as to ascertain who, in fact, are the owners who effectually exercise the powers of ownership. It is a provision in respect of which the language of Wills J. is appropriate:

> . . . especially in revenue matters, it seems to me that one ought to look at the substance, and not merely at matters of machinery and form;
>
> *The St. Louis Breweries Limited* v. *Apthorpe* (1).

When one examines this situation as suggested by Wills J., the conclusion cannot be avoided that, while directly the Saskatchewan and Alberta Corporations own the Western Corporation, H. R. and S. J. Cohen and S. D. Leshgold are the indirect owners of 70 per cent or more of all the issued common shares of the capital stock and are persons not dealing at arms length within the meaning of s. 36(4)(*b*)(iii). It would seem that Parliament, by the inclusion of the word "indirectly" in s. 36(4)(*b*)(iii) intended to provide for just such situations as here created by the three parties H. R. and S. J. Cohen and S. D. Leshgold.

Then the other requirement of s. 36(4)(*b*) is satisfied by the fact that H. R. Cohen owns at least one share in each of these corporations. The evidence discloses that his share in the Western Corporation is held in trust for the Saskatchewan Corporation. It is described in the evidence as a share given to him in order that he might serve in the capacity as a director and, therefore, one who must act at the instance of the Saskatchewan Corporation, which, in fact, means that he will act at the instance of himself and S. J. Cohen who own 80 per cent of that Corporation. The fact that he has not the beneficial interest in that one share is

(1) (1899) 79 L.T. 551 at 555.

not, under the circumstances of this case, sufficient to take him out of the provisions of s. 36(4)(*b*)(iii).

All of these corporations filed their income tax returns as if they were unrelated or independent corporations and the Minister has designated the Saskatchewan Corporation as the one that might be taxed under s. 36(3), which provides:

> 36. (3) Notwithstanding subsection (2), where two or more corporations are related to each other, the tax payable by such one of them as may be agreed by them or, if they cannot agree, as may be designated by the Minister shall be computed under subsection (1).

It is here contended that, inasmuch as there is no evidence that the parties could not agree, the Minister had no authority to make such a designation. Such an issue might well be raised by the Saskatchewan Corporation, which, however, has not taken an appeal from the Minister's decision. It cannot appropriately be raised by either of the appellants in the appeals here taken, particularly as it is not contended that either of these appellants (Alberta and Western Corporations) should have been so designated.

The appeals should be dismissed.

CARTWRIGHT J.:—These appeals were argued together. The facts out of which they arise and the relevant statutory provisions are fully set out in the reasons of other members of the Court and I shall repeat them only so far as may be necessary to indicate the reasons for the conclusion at which I have arrived.

For the reasons given by my brother Locke I agree that the appeal of the Alberta Company should be dismissed.

Turning to the appeal of the Western Company, the question is whether it is related to either the Alberta Company or the Saskatchewan Company. The notion of one company being related to another is the creation of statute and whether or not the appellant is so related must be ascertained by applying the words of the statute to the facts. To establish the relationship it must appear that two conditions co-existed during the taxation year, (*a*) that as to both the appellant company and the company to which it is said to be related 70 per cent or more of all its issued common shares was owned directly or indirectly by persons not dealing with each other at arms length, and (*b*) that one of such persons owned directly or indirectly one or more of the shares of each of the companies.

1953

ARMY & NAVY DEPARTMENT STORE LTD. v. MINISTER OF NATIONAL REVENUE AND ARMY & NAVY DEPARTMENT STORE (WESTERN) LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

Dealing first with condition (*a*), I agree, for the reasons stated by my brother Locke, that it is established in the case of both the Alberta Company and the Saskatchewan Company that 70 per cent or more of its issued common shares was owned directly by persons not dealing with each other at arms length (viz. in the Alberta Company by H. R. Cohen, S. J. Cohen and S. D. Leshgold and in the Saskatchewan Company by H. R. Cohen, S. J. Cohen and J. W. Cohen). Can the same be said of the appellant company? For the respondent two alternative submissions are made.

First, it is said that the Alberta Company and the Saskatchewan Company own more than 70 per cent of all the issued shares of the appellant company and that they are persons not dealing with each other at arms length as they are both controlled by the same two individuals, H. R. Cohen and S. J. Cohen, whose total holdings amount to 60 per cent of the issued shares of the Alberta Company and 80 per cent of the issued shares of the Saskatchewan Company. If the statute were silent as to the circumstances in which corporations shall be deemed not to deal with each other at arms length this submission would have great force, but when section 127 by clause (*b*) provides that corporations controlled directly or indirectly by the same person shall be deemed not to deal with each other at arms length it appears to me to negative the view that corporations are to be deemed not to deal with each other at arms length when controlled not by the same person but by the same group of persons. *Expressio unius exclusio alterius.* When the wording of clause (*b*) of section 127 is contrasted with that of clause (*a*) it seems to me impossible to read the word "person" in clause (*b*) as including the plural. While the Alberta Company and the Saskatchewan Company may well be said to be controlled by the same persons they are not controlled by the same person and in my opinion they can not on this ground be deemed for the purposes of the Act not to deal with each other at arms length.

Secondly, and alternatively, it is said that more than 70 per cent of the shares of the Western Company while owned directly by the Alberta Company and the Saskatchewan Company are owned indirectly by the shareholders of the two last mentioned companies H. R. Cohen, S. J. Cohen,

S. D. Leshgold and J. M. Cohen who, as shewn in the reasons of my brother Locke, are persons not dealing with each other at arms length. With the greatest respect for those who hold the contrary view, I do not think that shareholders, either individually or collectively, have any ownership direct or indirect in the property of the company in which they hold shares. In *Macaura* v. *Northern Assurance Company* (1), Lord Buckmaster said:—

> . . . Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

and at page 633 of the same report, Lord Wrenbury points out that even a shareholder who holds all the shares in a corporation "has no property legal or equitable in the assets of the corporation."

In *Salomon* v. *Salomon and Company* (2), Lord Macnaghten says at page 51:—

> . . . the company is not in law the agent of the subscribers or trustee for them.

In my respectful opinion these passages correctly state the law.

For these reasons I am of opinion that the existence of condition (*a*) mentioned above has not been established in regard to the Western Company and this is sufficient to dispose of the appeal in its favour; I wish, however, to say a few words as to condition (*b*).

If the argument of the respondent, that all the shares of the Western Company were owned indirectly by the three Cohens and Leshgold, had prevailed, it might have been said that H. R. Cohen and S. J. Cohen, who admittedly own directly shares in both the Alberta and Saskatchewan Companies, fulfilled the requirement of section 36(4)(*b*)(iii) by owning indirectly one or more of the shares of the Western Company, although there would have been manifest difficulty in identifying any share or shares of the last mentioned company as being owned by either of them. However, this point was not pressed by the respondent who relied on the fact that one share of the Western Company was registered in the name of H. R. Cohen. If, then,

(1) [1925] A.C. 619 at 626 (2) [1897] A.C. 22.

1953

ARMY & NAVY DEPARTMENT STORE LTD. v. MINISTER OF NATIONAL REVENUE AND ARMY & NAVY DEPARTMENT STORE (WESTERN) LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

the Alberta Company and the Saskatchewan Company are regarded, as I think they must be, as the owners of at least 4998 of the 5,000 issued shares of the Western Company but, contrary to the view I have expressed above, should be deemed to be persons not dealing with each other at arms length, then I would agree with my brother Locke that it has been shown that H. R. Cohen did not own any share of the capital stock of the Western Company. It is argued for the respondent that even if the Saskatchewan Company is the beneficial owner of the share registered in the name of H. R. Cohen, the latter is its "direct owner" but in my view on the evidence he had no ownership either direct or indirect in this share. *The Companies Act of British Columbia*, R.S.B.C. 1948, c. 58, does not require that a director shall be the owner in his own right of a share in the company but only that his qualification shall be "the holding of at least one share in the company" and by section 90 a certificate is made only *prima facie* evidence of title. In the case at bar the evidence establishes that the share registered in H. R. Cohen's name was the sole property of the Saskatchewan Company. Mr. Cohen could not even have given title by estoppel to a purchaser in good faith and without notice as he did not have the certificate in his possesion but had endorsed it and delivered it to the solicitor of the Saskatchewan Company to hold for it and not for him. I conclude therefore that the existence of condition (*b*), mentioned above, was negatived.

For the above reasons I would dispose of both appeals as proposed by my brother Locke.

Appeal of the Western company allowed with costs; appeal of the Alberta company dismissed with costs.

Solicitors for the appellants: *Grossman & Sharp.*

Solicitor for the respondent: *J. D. C. Boland.*

INDEX

SUCCESSION—*Succession—Effect of will giving income from residue with power to draw from capital—Whether general power of appointment—Whether dutiable succession—Dominion Succession Duty Act, 4 and 5 Geo. VI, c. 4, ss. 4(1), 31.* By her will the testatrix left her estate to her trustees to pay to her husband during his lifetime the income from the residue and "in addition thereto to pay to my said husband from time to time and at any time such portion of the capital of my estate as he may wish or require and upon his simple demand, my husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my executors and trustees shall be obliged to account further for any capital sums so paid to my said husband". Upon the death of the husband, the trustees were to dispose of what was left of the capital among designated legatees. The minister took the position that the will conferred a general power of appointment upon the husband over the residue of the estate and that consequently he became by virtue of s. 31 of the *Dominion Succession Duty Act* liable to duty on the same basis as if the residue had been absolutely bequeathed to him. The Minister's assessment was upheld by the Exchequer Court of Canada. *Held:* (Rinfret C.J. and Locke J. dissenting), that the appeal should be allowed and the assessment set aside; the dutiable value of the succession to the husband in respect of the residuary estate of the testatrix was the value as of the date of her death of the estimated net revenues from such residuary estate and the residuary legatees were assessable as having on the death of the testatrix become beneficially entitled to the capital of the residue in remainder expectant upon the death of the husband, subject to the appropriate adjustment due to his having received a certain amount from the capital. *Per* Estey J.: Assuming that the testatrix created a general power of appointment, it would still appear that no duty upon or in respect to a succession can be imposed to her husband except as to what he has already received from the capital. The giving of a general power of appointment at common law did not of itself constitute a disposition of property. The *Succession Duty Act* does not provide that it constitute a "disposition of property", that is to say, a succession as defined in s. 2(*m*). It is not included under s. 3(1) which defines those dispositions of property which should be deemed a succession. S. 31 does not contain language that would constitute such a power a disposition of the property. On the contrary, Parliament, in that section, would appear to have accepted the common law in relation to dispositions under a general power. Throughout s. 31, there are no words appropriate to the imposition of a levy that would justify a conclusion that this is a charging