1964

*June 9
Nov. 19

HER MAJESTY THE QUEEN .....APPELLANT;

AND

ROSARIO LEMIRE .....RESPONDENT.

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

Criminal law—Fraud—Employee filing false expense accounts as a means of increasing salary—Belief by accused of employer's sanction—Whether intention to defraud—Conviction quashed by Court of Appeal—Whether quashing based on grounds of law—Whether quashing should be upheld—Criminal Code 1953-54 (Can.), c. 51, s. 323(1).

The respondent, the Chief of the Quebec Liquor Police, was convicted at trial under s. 323(1) of the *Criminal Code* on a number of counts charging him with having defrauded the public and the Government of the Province of Quebec of various sums of money. In 1952, he applied for an increase in his salary. He was told by the head of his Department, the Solicitor General who had referred his application to the Attorney General, that he was entitled to an increase but due to the fact that a general survey of salaries in the Civil Service was in progress, an increase could not be granted at the time. However, he was told that he could draw a certain amount per month by way of expenses. A large number of the expense accounts which were thereafter submitted by the respondent were admittedly fictitious. This practice continued until 1960 when his salary was increased. Thereafter the presentation of expense accounts ceased. The Court of Appeal quashed the conviction. The Crown was granted leave to appeal to this Court.

Held (Taschereau C.J., and Cartwright and Spence JJ., *dissenting*): The appeal should be allowed and the verdict of guilty restored.

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

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Per Fauteux, Abbott, Martland and Ritchie JJ.: On the uncontradicted evidence of the respondent himself, no other conclusion could be reached than that he received provincial funds on the basis of the presentation of expense accounts admittedly false and, that being so, no other conclusion in law could be reached save that he had defrauded the provincial government and the public of the amounts which he thus obtained. With the exception of certain counts in the indictment on which he was acquitted, there was no evidence on the basis of which any doubt, let alone a reasonable doubt, could arise as to the respondent having incorporated, to effectuate the agreed scheme, items of expenses which were fictitious and false. On an appeal from a conviction, if an Appellate Court allows the appeal on the ground that certain specified evidence creates a reasonable doubt, when, on a proper view of the law, that evidence is not capable of creating any doubt, there is an error in law. It is no answer to a charge of fraud to say that the fraud was suggested by the superior of the accused nor is the proposition that the province and the public were not defrauded by paying, out of public funds, false expense accounts, merely because the respondent's salary was less than what he and his superiors thought it ought to be. To hold so was an error in law.

The guilt of the respondent in the present appeal depended upon the legal effect of facts found, or inferred, in the Courts below. This raised questions of law in respect of which there was error. There was, therefore, a right of appeal to this Court by the Crown.

Per Taschereau C.J., and Cartwright and Spence JJ., *dissenting*: The judgment of the Court of Appeal was founded on grounds of fact or of mixed fact and law and not solely on any ground of law in the strict sense. It follows that this Court had no power to review the judgment of the Court of Appeal, since it is a well-settled proposition that the Crown's right of appeal to this Court is limited to questions of law in the strict sense and that when a Court of Appeal has quashed a conviction on two grounds of which one is, and the other is not, appealable to this Court, the appeal to this Court must be dismissed.

APPEAL by the Crown from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], quashing the conviction of the respondent. Appeal allowed, Taschereau C.J., and Cartwright and Spence J.J., dissenting.

Yvan Mignault, for the appellant.

René Letarte and *Cyrille Goulet,* for the respondent.

LE JUGE EN CHEF (*dissident*):—Mon collègue M. le Juge Cartwright a résumé tous les faits essentiels à la détermination de cette cause, et il est donc inutile de les relater de nouveau. Il me suffira de dire simplement que le juge de première instance a acquitté le prévenu sous sept des chefs d'accusation, qu'il l'a trouvé coupable de tentative

[1] [1936] Que. Q.B. 697.

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de fraude sous trois chefs distincts et a rendu un jugement de culpabilité sous tous les autres chefs.

La Cour du banc de la reine[1] a cassé le jugement rendu en première instance, et permission spéciale a été accordée au prévenu de loger un appel devant cette Cour. (*Code Criminel* 598).

Cet appel cependant ne peut porter que sur des questions de droit et nullement sur des questions de faits ou des questions mixtes de droit et de faits.

Dans le cas qui nous occupe, il me semble clair que la majorité de la Cour du banc de la reine, en délivrant son jugement, a fait reposer en partie ses conclusions sur des questions de faits, ou au moins sur des questions mixtes de droit et de faits qu'il nous est interdit de reviser.

Il faut, pour que la Cour Suprême du Canada ait juridiction, qu'il s'agisse d'une question de droit stricte dans le vrai sens du mot. (508 C. Cr) (*Rex. v. Décary*[2]).

Comme je crois que cet appel comporte l'appréciation de questions de faits, je suis d'opinion que cette Cour n'a pas juridiction et que l'appel doit être rejeté.

The judgment of Cartwright and Spence JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Queen's Bench, Appeal Side, of the District of Quebec[1], dated July 26, 1963, allowing an appeal from the judgment of His Honour Judge Dumontier dated September 28, 1962, and directing that the respondent be acquitted on all the counts on which he had been convicted.

On July 16, 1962, the respondent, who had elected to be tried by a Judge without a jury, was arraigned before His Honour Judge Dumontier on an indictment containing three counts to which he pleaded "not guilty". We are concerned only with count 3, which reads as follows:

> 3°. entre le 1er janvier 1952 et le 1er juillet 1960, dans les cité et district de Québec, étant Directeur de la Police des Liqueurs, donc Commandant à Québec, par la supercherie, le mensonge et d'autres moyens dolosifs, soit en faisant ou en faisant faire par des subalternes, des comptes de dépenses faux et fictifs pour lui-même, fraudé le public en général et le Gouvernement de la Province de Québec, pour une somme d'au moins $8,999.10, C.Cr. 323, par. 1 et 21.

[1] [1963] B.R. 697.
[2] [1942] R.C.S. 80, 77 C.C.C. 191, 2 D.L.R. 401.

On July 17, 1962, the learned trial judge ordered that this count be divided into 235 separate counts which are set out in his judgment and in that of the Court of Queen's Bench. The first of these reads as follows:—

3.-1. Le ou vers le 31 mai 1952, dans les cité et district de Québec, étant Directeur de la Police des Liqueurs donc Commandant à Québec, par la supercherie, le mensonge et d'autres moyens dolosifs, soit en faisant ou en faisant faire par des subalternes, des comptes de dépenses faux et fictifs pour lui-même, fraudé le public en général et le Gouvernement de la Province de Québec, pour une somme de $50.00, C.Cr. 323, par. 1 et 21;

The remaining 234 counts were similarly worded except as to date and amount; the last charged an offence committed on May 9, 1960.

The learned trial judge acquitted the respondent on counts 15, 18, 38, 46, 89, 100 and 221; he found him guilty of attempted fraud on count 128; on counts 23 and 229 he found him guilty for lesser amounts than those charged; on all the other counts he found him guilty as charged.

While the printed record consists of many volumes the relevant facts may be stated comparatively briefly.

In May, 1940, the respondent was appointed Chief of the Quebec Liquor Police at a yearly salary of $4,000; in August, 1941, this was increased to $4,500. In 1952 the respondent applied for an increase in salary to the then Solicitor-General who referred the matter to Mr. Duplessis who was then both Attorney-General and Prime Minister. Mr. Duplessis told the Solicitor-General that an enquiry was going on before the Civil Service Commission into the question of raising the salaries of the Quebec Liquor Police and of civil servants in general and that if he granted the respondent an increase he would immediately be pressed with requests by others and then said words to the following effect:

Vous direz à Lemire, ou vous lui ferez dire que je l'autorise à retirer cinquante piastres ($50.00) par mois, à titre de frais de représentation, ou de dépenses,

The evidence of the Solicitor-General continued:

De retour à mon bureau, j'ai dit à Lemire—je ne sais pas si c'est à lui personnellement ou si c'est peut-être à Côté, ma mémoire n'est pas assez fidèle pour vous l'affirmer que je l'ai dit à lui—mais je sais qu'il l'a su, ou à son adjoint, qui était Wellie Côté, que le Procureur Général l'autorisait à retirer mensuellement un montant de cinquante dollars ($50.00) à titre de frais de représentation, et que dans le fond, était pour tenir lieu d'une augmentation de salaire qui s'élevait à six cents piastres ($600.00) par année.

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The substance of this conversation was communicated to the respondent by Wellie Côté who had been appointed associate director of the Quebec Liquor Police in January, 1951, and of whom Tremblay C.J. says that unofficially he was the respondent's superior. At this time Côté handed the respondent a cheque of the Québec Liquor Police for $50. Some days later Côté presented a document to the respondent for signature. This was a printed form partially filled in in typewriting. The following phrase was typewritten:

> Déplacement et frais de séjour pour surveillance du travail.

Several blank spaces in the form intended for the insertion of details were left blank. Above the signature of the respondent appeared the following certificate:

> Je certifie que les dépenses plus haut mentionnées ont été nécessairement encourues dans l'intérêt de cette cause et que le tout est conforme aux allocations accordées.

The form did not specify any "cause". It was dated "May".

Thereafter from time to time Côté presented the respondent with a cheque and a similar form which the respondent signed and in this manner the respondent received amounts totalling $50 a month until the form dated February 17, 1953, was returned to the respondent marked "annulé".

On receipt of this the respondent went to the office of the Provincial Auditor and had an interview with an employee. The learned trial judge ruled that evidence of their conversation was inadmissible and we do not know what was said between them. The question whether this evidence was rightly excluded is not before us, and consequently, I express no opinion on it.

Following this interview the forms signed by the respondent were filled up in detail, specifying the place visited, the hotel at which respondent stayed, the amount paid for railway fare and the price paid for meals. There appears to be no doubt that a large number of these forms were entirely false in fact and described trips which the respondent had not taken.

In the year 1954 Côté advised the respondent that he was authorized to draw $100 a month in this manner instead of $50. This practice continued until May, 1960, when the respondent's annual salary was increased to

$7,400 and he ceased to withdraw any further sums in augmentation of his salary.

The learned trial judge finds as a fact that the authorization to withdraw the sum of $50 was given orally by the Attorney-General and communicated to the respondent but concluded as a matter of law that it was "nulle, de nullité absolue". He goes on to hold that the respondent could not have had an honest belief that he was entitled to obtain the moneys which he did obtain by rendering expense accounts which were false in fact. He finds as a fact that the great majority of the expense accounts signed by the respondent were false and fictitious but does not specify which particular ones were false and finds that about twice a year the respondent went on trips of inspection in connection with which he would have been entitled to receive his expenses. He does not make an express finding as to whether Côté told the respondent he was authorized to draw $100 monthly instead of $50. At the time of the trial both the Attorney-General and Côté had died.

The respondent appealed against his convictions. On October 1, 1962, the Court of Queen's Bench, Appeal Side, granted him leave to appeal on questions of fact.

The appeal was heard by a Court composed of Tremblay C.J.P.Q. and Casey and Taschereau JJ. The appeal was allowed and it was directed that the respondent be acquitted on all the counts on which he had been convicted. All the members of the Court reached the same result but each gave separate reasons.

On October 2, 1963, leave was granted to the Crown to appeal to this Court on the following three questions:

1. La Cour d'Appel du district de Québec a-t-elle erré en droit dans l'interprétation et l'application de l'article 592(1)(a) de Code Criminel du Canada?

2. La Cour d'Appel du district de Québec a-t-elle erré si elle a ignoré les lois gouvernant la manipulation et la dépense des deniers publics et a-t-elle mal interprété les lois applicables dans l'espèce?

3. La Cour d'Appel du district de Québec a-t-elle erré en droit dans l'interprétation et l'application de l'article 323(1) du Code Criminel?

This leave was granted pursuant to s. 598(1)(*b*) of the *Criminal Code*. Authority is not required for the well-settled proposition that the Crown's right of appeal is limited to questions of law in the strict sense.

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It is clear from the judgment of this Court in *The Queen v. Warner*[1], that where a Court of Appeal has quashed a conviction on two grounds of which one is, and the other is not, appealable to this Court, the appeal to this Court must be dismissed.

I am satisfied that in the case at bar the judgment of the Court of Appeal was founded on grounds of fact or of mixed fact and law and not solely on any ground of law in the strict sense.

Tremblay C.J. holds that as to the first 17 counts, in regard to which the certificates signed by the respondent named no "cause" and gave no details, the money was paid over to the respondent before he signed the certificates which constituted rather receipts for money paid than demands for payment and that no one was in fact deceived or induced to pay over the money by any representation on the part of the respondent. This is a finding of fact or, at the highest from the point of view of the appellant, a mixed finding of fact and law.

As to the remainder of the counts the learned Chief Justice expresses himself as follows:

> Quant aux autres chefs, entre en jeu une consideration différente qui me paraît péremptoire.
>
> La preuve révèle hors de tout doute—l'appelant l'a d'ailleurs admis—que certains frais inscrits sur les formules n'ont pas été encourus par l'appelant. Mais il résulte aussi de la preuve que la Couronne n'a pas prouvé hors de doute raisonnable qu'aucun de ces frais n'a été encouru. Le malheur, c'est qu'il est impossible de pointer du doigt ceux qui ont été réellement encourus et ceux qui ne l'ont pas été. La seule preuve apportée par la Couronne sur ce point révèle que l'appelant était à son bureau de Québec la plupart du temps. Les témoins admettent cependant qu'il s'absentait quelques fois par année. L'appelant a retrouvé deux formules qui contenaient des frais réellement encourus. Il a juré qu'il y en avait sûrement d'autres mais que sa mémoire ne lui permettait pas de les retracer après tant d'années. Il faut dire que l'appelant était âgé de 74 ans lors de son témoignage. Son assertion, rendue plausible par la preuve de la Couronne, me paraît nettement suffisante pour engendrer un doute raisonnable. D'ailleurs, le premier juge a acquitté l'appelant des deux chefs d'accusation qu'il a pu préciser. De son propre chef, il a retranché du montant allégué dans d'autres chefs les frais du permis de conduire de l'appelant que celui-ci avait le droit de recouvrer.
>
> De ce qui précède il résulte que, même si j'admets l'existence du lien de causalité entre le paiement et les représentations, je ne puis dire quant à quels chefs d'accusation en particulier les représentations sont fausses et quant à quels chefs elles sont vraies, sauf quant au chef numéro 18 qui fait double emploi avec le chef numéro 17 et sur lequel l'appelant a été acquitté. Le substitut du procureur général a d'ailleurs franchement admis

[1] [1961] S.C.R. 144, 34 C.R. 246, 128 C.C.C. 366.

lors de l'audition qu'il est impossible de prouver quels chefs d'accusation précis sont bien fondés. La seule conclusion logique, c'est qu'aucun n'a été prouvé hors de tout doute raisonnable et que l'appelant doit être acquitté sur tous les chefs.

This appears to me to be a finding of fact. The learned Chief Justice has considered the evidence and reached the conclusion that it does not establish, beyond a reasonable doubt, the guilt of the accused upon any of the counts on which he was convicted. I find it impossible to say that the question whether he was right in reaching this conclusion is one of law in the strict sense.

TASCHEREAU J. delivered the following reasons:

Les faits révélés par la preuve et qu'ont exposés M. le Juge en chef et M. le Juge Casey démontrent que de graves irrégularités ont été commises par l'appelant. Mais la question vitale est celle de savoir si Lemire, un homme maintenant âgé de 74 ans qui a été directeur de la police des liqueurs à Québec, pendant vingt ans, avait l'intention coupable de frauder le public et le gouvernement de la Province de Québec, lorsqu'il a posé les actes qu'on lui reproche.

L'étude du dossier m'a convaincu qu'il fallait répondre négativement à cette question. Aussi, commes mes collègues, j'accueillerais l'appel et libérerais l'accusé:

The first paragraph accurately states a question which the Court of Appeal was called upon to answer. It involves an inquiry into the respondent's state of mind. The state of a man's mind is, in the often quoted words of Bowen L.J., as much a fact as the state of his digestion; vide *Edgington v. Fitzmaurice*[1]. The decision of Taschereau J. to allow the appeal appears to me to be based on a finding of fact certainly it cannot be said that the sole ground on which he has proceeded is a question of law in the strict sense.

From this it appears that a majority of the Court of Appeal, in quashing the convictions, have proceeded on grounds which this Court has no power to review and it follows that the appeal must be dismissed.

Having reached this conclusion it becomes unnecessary for me to consider whether it could be said that the judgment of Casey J. was based only on grounds which this Court has jurisdiction to review and I express no opinion on that question.

I would dismiss the appeal.

[1] (1885), 29 Ch.D. 459 at 483, 55 L.J.Ch. 650.

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

MARTLAND J.:—The material facts involved in this case are not in dispute. At all relevant times the respondent Lemire (hereinafter referred to as "Lemire") was the Chief of the Quebec Liquor Police. There was an Associate Chief, one Wellie Côté, who was in fact, though not in name, the real head of the force. In the year 1952 Lemire applied to the Solicitor-General of Quebec for an increase in his salary, which was then $4,500 per annum. The Solicitor-General referred the application to the Attorney-General, Mr. Duplessis, who was then also the Prime Minister of the Province. The latter, while he approved of an increase for Lemire, was not prepared to grant it, because it might provoke other similar requests, and the whole salary structure of the Quebec civil service was then under review. He told the Solicitor-General to tell Lemire that he would authorize Lemire to draw $50 per month by way of expenses. This information was communicated to Lemire by Côté.

I agree with Casey J. in the Court[1] below when he says that the instructions given by the Attorney-General necessarily implied the making of fictitious expense accounts.

Lemire commenced, in May, 1952, to put in expense accounts, initially for $50 per month and then, commencing on July 15, 1952, for $25 for each half month, represented to be for "Frais de déplacement et de séjour pour surveillance du travail." Each of these expense accounts contained the following certificate, signed by Lemire:

> Je certifie que les dépenses plus haut mentionnées ont été nécessairement encourues dans l'intérêt de cette cause et que le tout est conforme aux allocations accordées.

The expense account dated February 14, 1953, was returned to Lemire, by the Provincial Auditor's Department, marked "annulé". Lemire then saw an employee of that Department who is unkown. The learned trial judge ruled that evidence by Lemire as to his interview with the employee was not admissible. In any event Lemire filed an expense account, dated February 15, 1953, purporting to contain the details of his expenditures, totalling $25.

[1] [1963] Que. Q.B. 697.

Thereafter, until the beginning of the year 1954, he proceeded to file two, and occasionally three, expense accounts each month, appearing to contain items of expenditure which he had incurred, each one of which contained the certificate previously quoted. Each of these was for an odd amount and not for an even $25.

Early in the year 1954 Lemire says that he was advised by Côté that his monthly expense accounts could be increased to $100. At the time of the trial Côté was dead. Evidence was given by the former Solicitor-General that he was unaware of any authority having been given for any increase beyond the initial, fixed amount of $50 per month. Commencing in 1954, Lemire's total expense accounts rendered each month became larger. In most instances two accounts were filed in each month, although on some occasions there would be three or more.

This practice continued until the year 1960, when Lemire received a salary increase to $7,400 per annum. Thereafter the presentation of expense accounts ceased.

The procedure respecting expense accounts was that two forms were required to be filed, one white and one yellow, the latter being retained in the office of the Liquor Police. The white one, signed by the person seeking payment of expenses, had to be verified by the accountant of the Liquor Police, was then forwarded to the Department of the Attorney-General and, from there, was transmitted to the office of the Provincial Auditor for approval. Section 17 of the *Provincial Audit Act,* R.S.Q. 1941, c.72, required that such accounts be examined and that it be ascertained that the payments charged be supported by voucher.

It is clear, from this brief outline of the facts, the material portions of which are admitted by Lemire, that, over a period of years, he submitted expense accounts which he knew to be false and obtained payment out of the public funds of the Province of Quebec of those amounts which were claimed in the expense accounts.

Lemire was charged under s. 323(1) of the *Criminal Code,* which provides:

> 323. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security, is guilty of an indictable offence and is liable to imprisonment for ten years.

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The learned trial judge required that the original count, which had charged Lemire with defrauding the public and, in particular, the Government of the Province of Quebec, of the sum of $8,999.10, be divided into 235 separate counts, each dealing with one expense account.

Count No. 1 will serve as an example of the form in which these various charges were made:

> 1. le ou vers le 31 mai 1952, dans les cité et district de Québec, étant Directeur de la Police des Liqueurs dont Commandant à Québec, par la supercherie, le mensonge et d'autres moyens dolosifs, soit en faisant ou en faisant faire par des subalternes, des comptes de dépenses faux et fictifs pour lui-même, fraudé le public en général et le Gouvernement de la Province de Québec, pour une somme de $50.00, C.Cr. 323, par. 1 et 21;

The learned trial judge acquitted the respondent on counts 15, 18, 38, 46, 89, 100 and 221; he found him guilty of attempted fraud on count 128; on counts 23 and 229 he found him guilty for lesser amounts than those charged; on all the other counts he found him guilty as charged.

Lemire's appeal to the Court of Queen's Bench, Appeal Side[1], was allowed by unanimous decision. The Court was composed of Tremblay C.J.P.Q. and Casey and Taschereau JJ., each of whom gave separate reasons.

As to the first 17 counts, which dealt with those expense accounts rendered by Lemire prior to and including that dated February 14, 1953, which was annulled by the Auditor-General, Tremblay C.J. says:

> Pour ces 17 premiers cas, l'appelant témoigne, et il n'est pas contredit, que les chèques lui étaient remis soit avant, soit au moment même où on lui demandait de signer les formules. Ce ne sont donc pas les représentations contenues dans ces formules qui ont amené le consentement au paiement. C'était un reçu que l'appelant signait plutôt qu'une demande de paiement.
>
> De plus, il ne me paraît pas raisonnable de croire que quelqu'un ait pu être trompé par ces formules. Bien que la partie imprimée de la formule l'exigeât, aucune date de départ ou de retour, aucun détail des supposés frais ne sont donnés. Le certificat qui réfère à «l'intérêt de cette cause» n'a pu tromper personne puisqu'aucune cause n'est mentionnée. Il manque donc un élément de l'offense: le lien de causalité entre le consentement au paiement et les représentations de l'appelant. Il est possible que ceux qui ont payé n'avaient pas le pouvoir de disposer ainsi des fonds publics, mais il y aurait alors recours civil en répétition de l'indû mais non crime de fraude.
>
> L'on dira peut-être que ce raisonnement est exact quant au «gouvernement de la province de Québec» mais non quant «au public en général» que l'appelant est aussi accusé d'avoir «fraudé». Si l'on considère le public indépendamment de son mandataire, le gouvernement de la province, il faut décider que, si l'appelant est coupable d'un crime, ce n'est pas de

[1] [1963] Que. Q.B. 697.

celui de fraude, parce que le public n'a jamais consenti au paiement et que le consentement de la personne frustrée est un élément essentiel du crime de fraude.

With respect, I think it is an error in law to construe the forms signed by Lemire as being receipts, rather than demands for payment, merely because, according to his evidence, after the first occasion, the signed form was handed him by Côté at the same time that he received the cheque from Côté. The cheques which were delivered by Côté were drawn on the account of the Liquor Police. They were signed by Côté, as director, and also by the accountant of the Liquor Police. They represented payments from public funds, which, admittedly, could only be validly justified by proper vouchers, and these Côté had to obtain. Expense moneys were payable only on the basis of a certified statement of actual expense. Each such statement had to be verified and thereafter to be approved by the Auditor-General. It is obvious that Lemire could not have continued to receive the cheques without having provided the false statements which were the basis for their issuance. The scheme must be examined as a whole and, when that is done, there is no question but that false expense accounts were submitted by Lemire as a basis for his receipt of public funds. This constitutes the "lien de causalité" between the vouchers and the payments which the learned Chief Justice felt was lacking in this case.

It is suggested that no one was deceived by these expense accounts because they did not contain a detailed list of the expenditures as contemplated by the form. To say this is to say either that the persons required by law to check the forms were themselves also parties to the fraud, or that they failed to perform their duties properly. However, even if this be so, and whichever is the case, this does not provide Lemire with an answer in law to the charges under s. 323(1). Whether or not they deceived the people who were supposed to check and verify them, the point is that, without filing of the expense accounts, the payments to Lemire from public funds could not have been obtained or continued. Section 323(1), in addition to mentioning deceit and falsehood, also refers to "other fraudulent means". Whether or not they deceived the people who saw them, they were the necessary means used to obtain the payments and without them the payments would not have

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been made. They were fraudulent. In my opinion the ground taken in the second paragraph above quoted is wrong in law.

In the third paragraph of the passage above quoted it is said that the public was not defrauded because the public never consented to the payment. There is here an error in law. The public, through its elected representatives, had consented to the expenditure of public funds only on the basis of compliance with the requisite statutory procedures. In my opinion any one who, by fraudulently purporting to fulfill those requirements, obtained payment of public moneys, to which he was not lawfully entitled, would thereby have defrauded the public within the meaning of s. 323(1).

I find it impossible to see how, on the uncontradicted evidence of Lemire himself, any other conclusion can be reached than that he received provincial funds on the basis of the presentation of expense accounts admittedly false and, that being so, I do not see how any other conclusion in law can be reached save that he had defrauded the Provincial Government and the public of the amounts which he thus obtained.

In this connection the reasoning of Cartwright J., who delivered the unanimous decision of this Court in *Cox and Paton v. The Queen*[1], is relevant. In that case the accused were charged with having conspired to commit an indictable offence; i.e., by deceit, falsehood or other fraudulent means to defraud Brandon Packers Limited. It was contended in argument that there was no evidence that any official of that company had been deceived, particularly as the president of the company and its controlling shareholder was fully aware of all that was being done by the accused. Dealing with this argument, Cartwright J., at p. 512, said:

> In the course of argument on this branch of the appeal counsel for the appellants submitted that there was no evidence that the appellants defrauded Brandon Packers Limited or that they intended to do so because, as it was said, there was no evidence of any false representation made to the company or of any official of the company have been deceived into parting with the moneys referred to in the particulars furnished. Assuming, without deciding, that there was a dissent on this point within the meaning of s. 597(1) of the *Criminal Code*, I would reject this argument. I will examine it only in connection with the transaction relating to the $200,000 which is the first item in the particulars. I have already indicated my agreement with the statement of Freedman J.A.

[1] [1963] S.C.R. 500, 40 C.R. 52, 2 C.C.C. 148.

that "implicit in the entire transaction was the representation of the accused that this was a legitimate *bona fide* investment for Brandon Packers Limited to make" and with his view that there was ample evidence to warrant a finding that this representation was false to the knowledge of the accused. If it deceived Donaldson, who was still nominally at least in control of the company into paying over the $200,000 to Fropak that would be a fraud on the company. If, on the other hand, it is suggested that Donaldson was not deceived but paid the money over knowing that the transaction was not *bona fide,* that the Fropak shares were worthless and that their purchase was merely a step in a scheme to enable the accused to buy the shares of Brandon Packers Limited with its own money, that would simply be to say that Donaldson was *particeps criminis*. If all the directors of a company should join in using its funds to purchase an asset which they know to be worthless as part of a scheme to divert those funds to their own use they would, in my opinion, be guilty under s. 323(1) of defrauding the company of those funds. Even supposing it could be said that, the directors being "the mind of the company" and well knowing the true facts, the company was not deceived (a proposition which I should find it difficult to accept), I think it clear that in the supposed case the directors would have defrauded the company, if not by deceit or falsehood, by "other fraudulent means".

As to the expense accounts submitted after February 14, 1953, the learned Chief Justice says:

Quant aux autres chefs, entre en jeu une considération différente qui me paraît péremptoire.

La preuve révèle hors de tout doute—l'appelant l'a d'ailleurs admis—que certains frais inscrits sur les formules n'ont pas été encourus par l'appelant. Mais, il résulte aussi de la preuve que la Couronne n'a pas prouvé hors de doute raisonnable qu'aucun de ces frais n'a été encouru. Le malheur, c'est qu'il est impossible de pointer du doigt ceux qui ont été réellement encourus et ceux qui ne l'ont pas été. La seule preuve apportée par la Couronne sur ce point révèle que l'appelant était à son bureau de Québec la plupart du temps. Les témoins admettent cependant qu'il s'absentait quelques fois par année. L'appelant a retrouvé deux formules qui contenaient des frais réellement encourus. Il a juré qu'il y en avait sûrement d'autres mais que sa mémoire ne lui permettait pas de les retracer après tant d'années. Il faut dire que l'appelant était âgé de 74 ans lors de son témoignage. Son assertion, rendue plausible par la preuve de la Couronne, me paraît nettement suffisante pour engendrer un doute raisonnable. D'ailleurs, le premier juge a acquitté l'appelant des deux chefs d'accusation qu'il a pu préciser. De son propre chef, il a retranché du montant allégué dans d'autres chefs les frais du permis de conduire de l'appelant que celui-ci avait le droit de recouvrer.

De ce qui précède il résulte que, même si j'admets l'existence du lien de causalité entre le paiement et les représentations, je ne puis dire quant à quels chefs d'accusation en particulier les représentations sont fausses et quant à quels chefs elles sont vraies, sauf quant au chef numéro 18 qui fait double emploi avec le chef numéro 17 et sur lequel l'appelant a été acquitté. Le substitut du procureur général a d'ailleurs franchement admis lors de l'audition qu'il est impossible de prouver quels chefs d'accusation précis sont bien fondés. La seule conclusion logique, c'est qu'aucun chef n'a été prouvé hors de tout doute raisonnable et que l'appelant doit être acquitté sur tous les chefs.

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Before this Court, counsel for the appellant impressed upon us that there must have been a misunderstanding with respect to the admission referred to in the last paragraph, in the passage above quoted, as having been made by counsel for the Attorney-General. Counsel before us advised that he did not think that such an admission had been made. It certainly had not been intended to make any such admission on behalf of the Crown, and the record would not support the making of it.

In my opinion the conclusion reached in this passage is also wrong. Lemire was asked, in his evidence, to indicate which of the expense accounts in evidence represented expenditures really incurred by him. He was able to identify only two. The following is the evidence which he gave in chief in this connection:

PAR Me RENÉ LETARTE,

De la part de l'accusé:

Q. Alors, en somme, monsieur Lemire, dans cette période, allant de mai, mil neuf cent-cinquante-deux (1952), à mai, mil neuf cent-soixante (1960), vous dites que vous avez été autorisé à recevoir cinquante dollars ($50.00) par mois jusqu'en mil neuf cent cinquante-quatre (1954)?

R. Oui.

Q. C'est-à-dire huit (8) mois en mil neuf cent cinquante-deux (1952), c'est ça?

R. C'est ça.

Q. Et douze (12) mois, en mil neuf cent cinquante-trois?

R. Oui.

Q. Ce qui fait vingt (20) mois à cinquante dollars ($50.00), soit mille dollars ($1,000.00)?

R. C'est ça.

Q. Et, ce que vous dites, c'est qu'à partir de mil neuf cent cinquante-quatre (1954), jusqu'à mil neuf cent soixante (1960), c'était cent dollars ($100.00) par mois?

R. C'est ça.

Q. Est-ce que vous pourriez nous dire, effectivement, combien vous avez pris sur ces montants-là, pendant cette période-là?

R. Bien, je calcule que je dois avoir pris entre huit mille (8,000) et huit mille six cents piastres ($8,600.00).

Q. Je comprends également qu'il y a des comptes de dépenses, pour plus ce montant-là?

R. Absolument.

Q. Comment expliquez-vous cette différence-là?

R. Bien ça, je ne peux pas le dire, parce que j'ai fait des voyages, et dans les comptes, je ne les ai pas vus.

Q. Alors, est-ce que vous voulez dire que la différence représenterait vos dépenses réelles?

R. Oui.

Q. Et, vous avez dit tout à l'heure que vous êtes même d'opinion qu'il en manque des comptes de dépenses?

R. Je le crois.

PAR LA COUR:

Q. Seriez-vous capable, en examinant chacun des exhibits, nous dire si vous ne pourriez pas reconnaître des comptes, pour des dépenses que vous auriez réellement faites pour des voyages?

R. Bien, j'ai regardé avec Me Letarte, j'en ai vu une couple.

D'autre part, j'ai des comptes qui ont été faits pour des voyages, et je ne les ai pas vus.

Q. Alors, est-ce que vous pourriez m'indiquer ceux-là que vous avez vus?

Si vous avez besoin d'un ajournement pour examiner les comptes attentivement, je vais vous permettre de le faire.

R. On les a examinés tous les deux.

PAR Me RENÉ LETARTE,

De la part de l'accusé:

Moi, je ne peux pas témoigner.

PAR LA COUR:

Q. Mais, vous m'avez dit, si j'ai bien compris, que dans les exhibits produits, il y en aurait deux (2) que vous avez reconnus comme représentant des dépenses que vous auriez réellement faites à l'occasion de voyages?

R. Oui.

Q. Pour le bénéfice de la Police des Liqueurs?

R. Oui.

Q. Alors, pourriez-vous les indiquer à la Cour, dans les exhibits, ces deux-là?

R. Oui, il y a un voyage en Gaspésie, je pense, au commencement de septembre, mil neuf cent cinquante-neuf (1959).

Q. Il s'agit de quel exhibit?

PAR LE GREFFIER:

P.-221.

PAR LE TÉMOIN:

R. Oui, quarante-deux piastres et trent-cinq ($42.35).

PAR LA COUR:

Q. Ce sont des dépenses réelles que vous avez assumées pour du travail à la Police des Liqueurs?

R. Oui.

Et il y en a un autre, je me rappelle pas de la date, c'est un voyage aux environs de La Tuque et Berthier.

PAR Me LETARTE,

De la part de l'accusé:

Q. Maintenant, voici à part ces deux voyages-là, voulez-vous dire qu'intégralement . . .

PAR LA COUR:

J'aimerais bien qu'on le retrace avant de clore la Défense; j'aimerais bien qu'on le retrace.

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PAR Me RENÉ LETARTE,

De la part de l'accusé:

Q. Ce serait en quelle année, çà, celui-là en particulier?

R. Je me rappelle pas, je ne sais pas si c'est en cinquante-six (56), ou en cinquante-sept (57), c'est pas mal loin en arrière.

Q. Est-ce qu'il y aurait eu une note particulière, sur ce compte-là?

R. Oui, il y aurait eu le nom de Letarte et de Laforest, dessus.

PAR LE GREFFIER:

Alors, ce serait P.-38.

PAR Me RENÉ LETARTE,

De la part de l'accusé:

Q. C'est ça, P.-38, en novembre, mil neuf cent cinquante-trois (1953)?

R. Oui, pour un montant de vingt-neuf et vingt-cinq ($29.25).

Q. Alors, ça, ce sont deux comptes, dans les comptes auxquels vous venez de référer, pour lesquels vous vous souvenez positivement qu'il s'agit intégralement de dépenses réelles?

R. Absolument.

Q. Maintenant, dans les autres cas, dans les autres comptes, qu'est-ce qu'il y a là-dedans?

R. C'est parce qu'on a fait un voyage à Saint-Hilaire, aussi, dans le temps, c'est près de Belœil, ça.

PAR LA COUR:

Q. Dans le comté de Rouville?

R. Oui.

Ensuite, j'en ai fait à Chicoutimi.

PAR Me RENÉ LETARTE,

De la part de l'accusé:

Q. Maintenant, est-ce que des comptes séparés et distincts étaient faits pour ces autres voyages-là, ou bien non, si vos dépenses étaient dissimulées dans d'autres comptes?

R. Je ne faisais pas de distinction, des fois je le marquais dans le mois, avec l'autre, là.

Q. Vous mêliez ça ensemble?

R. Oui.

Q. Et ce que nous allons appeler votre allocation, et les dépenses réelles qui vous étaient occasionnées dans le mois?

R. Absolument.

Q. C'était fondu ensemble?

R. Oui.

Q. Maintenant, vous dites que, toutefois, dans cette liste-là, il y a deux cas où ce sont des comptes réellement distincts pour des voyages en particulier?

R. Oui.

This evidence can be summarized as follows:

1. Of the expense accounts which were exhibits, Lemire could identify only two as representing genuine expenses.

2. He thought there were other expense accounts which

he had submitted which were not included among the exhibits at the trial.

3. He thought that some of the expense accounts which were exhibits, apart from the two which he had specifically identified, included both real and false expenses mingled together.

To say that, on this evidence, a reasonable doubt exists as to Lemire's guilt on each and every charge is, in my view, wrong in law.

In the first place, Lemire does not appear to go any further in relation to the expense accounts, other than the two which he identified, than to say that some of them may have contained a mixture of real and false expenditures. Even accepting this evidence, it would be wrong in law to hold that he was entitled to an acquittal in respect of an expense account which contained some real expenditures as well as false expenditures merely because the amount charged in the count would then be larger, by the amount of the real expenditures, than the amount which he actually obtained by fraud. To hold that, in such a case, Lemire was entitled to an acquittal is an error in law.

In the second place, the conclusion of the learned Chief Justice as to the existence of a reasonable doubt on all counts has no basis on the evidence. Lemire admitted that the express purpose of filing the expense accounts was in order to obtain payments to him equivalent to $50 per month, and later $100 per month. An examination of the total of the accounts rendered for each month and also for each year establishes, beyond peradventure, that in practically every month, from 1952 to 1960, inclusive, a part, if not the whole, of each account rendered represented expenses not actually incurred. An example will illustrate the point which I am seeking to make. In October, 1954, after Lemire had increased his expense account payments from $50 to $100 per month, he rendered two expense accounts, one on October 8 for $48.90, another on October 22 for $53.25, making a total for the month of $102.15. This total exceeds the $100 which he was seeking to obtain in lieu of salary increase by only $2.15. Each of the two expense accounts was for more than that amount. Similarly, in the following month of November three accounts were

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rendered, one on November 8 for $35.90, one on November 20 for $41.90, one on November 25 for $29.10, making a total of $106.90. In December the monthly total was $76.50, made up of two accounts, one on December 4 for $33.85, the second on December 16 for $42.65. In view of Lemire's own admission as to the basic purpose for which the accounts were rendered, it seems to me to be impossible to conclude that any one of these seven accounts mentioned related only to expenditures genuinely incurred. This illustration could be repeated many times.

With the exception of those counts on which Lemire was acquitted, in my opinion, there was no evidence on the basis of which, as to each and every expense account submitted by him, any doubt, let alone a reasonable doubt, could arise as to Lemire's having incorporated, to effectuate the agreed scheme, items of expense which were fictitious and false.

In my opinion, on an appeal from a conviction, if an appellate court allows the appeal on the ground that certain specified evidence creates a reasonable doubt as to the guilt of the accused, when, on a proper view of the law, that evidence is not capable of creating any doubt as to his guilt, there is an error in law.

I turn now to the reasons given by Casey J., who said:

> Despite what is said in the judgment and in respondent's factum, the facts of this case are crystal clear and surprisingly simple. Appellant wanted an increase and the one who controlled every aspect of the Government's business and certainly that of appellant's department, the Attorney General and Prime Minister, felt that his request was a legitimate one and that it should be granted. But there was a fly in the ointment. An enquiry into the government's salary structure was under way and it would have been embarrassing to grant an increase at that moment. In fact "that moment" dragged on and on and the results of the enquiry were given effect only in November of 1959. So the means above described were devised.
>
> Without commenting on the propriety or prevalence of this method of granting disguised salary increases, and without asking why appellant's situation was not regularized post factum, I give it as my view that in the circumstances obtaining throughout this whole period appellant was entitled to believe that for reasons of higher policy he was given an increase in this fashion and that the procedure, irregular though it may have been on its face, could and would in the fullness of time be ratified and validated. After all he was dealing with the person who gave the orders, and who had—"l'autorité pour augmenter ou diminuer les salaires".
>
> Since the instructions given by the Attorney General necessarily implied the making of fictitious expense accounts I am unable to find in appellant the intention to defraud contemplated by the *Criminal Code*, nor since we are dealing with a salary increase that his superiors considered

warranted, am I able to see in what respect the public or the Province was defrauded.

The effect of the second paragraph, above quoted, may be rather bluntly summarized in this way. Because the augmentation of Lemire's income by the filing of false expense accounts was suggested and approved by the Attorney-General and Prime Minister of the Province, Lemire, who deliberately filed false documents and thereby obtained payments from the provincial public funds, could not be held guilty of fraud, because he could reasonably anticipate that the fraudulent system would later be somehow validated. In other words, there is no intent to defraud within the requirement of s. 323(1) if the accused person, while deliberately committing an act which is clearly fraudulent, expects that that which he is doing may, at a later date, be validated. To me the very statement of this proposition establishes its error in law.

Incidentally, it may be noted that when, in 1960, Lemire's salary was increased, no attempt was made to validate his receipt of the moneys paid to him on the basis of the false expense accounts in the preceding years.

The implication of the third paragraph is that, because the suggestion for the proposed fraudulent method emanated from the Attorney-General of the Province, Lemire, who was the one who deliberately certified the fraudulent expense accounts, could not be found to have intended to defraud and, further, that because his superiors thought Lemire was entitled to a salary increase (which they would not grant), a fraudulent scheme for the obtaining of payment of fictitious expense accounts did not constitute a fraud on the public.

To me the idea that it is an answer to a charge of fraud to say that the fraud was suggested by the superior of the accused is completely erroneous in law, as is also the proposition that the Province of Quebec and the public of Quebec were not defrauded by paying, out of public funds, false expense accounts, merely because Lemire's salary was less than what he and his superiors thought it ought to be.

In conclusion, with respect to the reasons given by the learned judges to which I have referred, it appears to me that, while each of them contains findings which, viewed in isolation, might, at first glance, be regarded as findings of

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fact, or of mixed fact and law, each judgment is palpably based on a misconception of the effect of s. 323(1) of the *Criminal Code*. We have, in this case, an accused person who admits to having obtained, out of the public funds of the Province of Quebec, between $8,000 and $8,600 and, for that purpose, to have rendered certified expense accounts which were fictitious. These facts are not in dispute. In the reasons given in the Court below, which I have reviewed, certain inferences have been drawn from the facts in evidence, but the fundamental error which exists in each, and which is an error in law, is in holding that, on the basis of those inferences, some element in the offence was lacking.

In *Belyea and Weinraub v. The King*[1], this Court considered a case in which the Appellate Division of the Supreme Court of Ontario had allowed an appeal by the Crown from an acquittal by the trial court in proceedings by indictment. The right of appeal to the Appellate Division was limited, as is the appellant's right to appeal to this Court in the present case, to questions of law. It was contended by the appellants in that case that the issues before the Appellate Division did not involve a question of law alone. Chief Justice Anglin, who delivered the judgment of the Court, said at p. 296:

> The right of appeal by the Attorney-General, conferred by s. 1013(4), *Cr. C.*, as enacted by c. 11, s. 28, of the Statutes of Canada, 1930, is, no doubt, confined to "questions of law". That implies, if it means anything at all, that there can be no attack by him in the Appellate Divisional Court on the correctness of any of the findings of fact. But we cannot regard that provision as excluding the right of the Appellate Divisional Court, where a conclusion of mixed law and fact, such as is the guilt or innocence of the accused, depends, as it does here, upon the legal effect of certain findings of fact made by the judge or the jury, as the case may be, to enquire into the soundness of that conclusion, since we cannot regard it as anything else but a question of law,—especially where, as here, it is a clear result of misdirection of himself in law by the learned trial judge.

In my opinion, the guilt of the respondent in the present appeal depends upon the legal effect of facts found, or inferred, in the Court below. This raises questions of law in respect of which, for the reasons already stated, I think there was error. There is no ground not involving such questions upon which Lemire's appeal could have been allowed. There was, therefore, a right of appeal to this Court and the appeal should succeed. The judgment of the learned trial judge, with respect to the question of guilt, should be restored.

[1] [1932] S.C.R. 279.

Lemire also appealed against sentence, but, in view of the conclusions there reached, no decision was rendered on this point by the Court below. The case should therefore, be returned to the Court of Queen's Bench, Appeal Side, to deal with the appeal from sentence.

Appeal allowed, conviction restored, TASCHEREAU CJ. *and* CARTWRIGHT *and* SPENCE JJ. *dissenting.*

Attorneys for the appellant: Ivan Mignault and Jean Bienvenue, Quebec.

Attorney for the respondent: René Letarte, Quebec.