IN RE THE ESTATE OF WILLIAM JAMES GAGE, DECEASED.
MARY JOY KETTERER, MAZO MARIE IRELAND and DAVIDIANA G. GADSBY .....APPELLANTS;

AND

IRENE G. GRIFFITH, DIANNA GAGE TISDALL, GLORIA GAGE PRUSAC, CARMEN IRENE ANGLIN, W. GAGE GRIFFITH, GAGE H. LOVE, WILHELMINA HORSFALL and CHARTERED TRUST COMPANY, Executors and Trustees of the Estate of William James Gage .....RESPONDENTS.

1961
*Nov. 21, 22
1962
Feb. 6

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Adoption—Life interest bequeathed to daughter with remainder to her children—Daughter survived by three adopted children—Legislation making an adopted child a child for all purposes—Whether applicable where testator died before enactment of statute—The Child Welfare Act, ss. 74 and 75, as enacted by 1958 (Ont.), c. 11, s. 3.

M had a life interest in one-quarter of the residue of the estate of her father, whose will provided that on her death that part of the residue from which she had been drawing the income should be held in trust for her children until the youngest reached the age of 21, when it was to be divided among the children equally. M died on October 25, 1959, survived by three adopted daughters. S. 74 of *The Child Welfare Act*, as enacted by 1958 (Ont.), c. 11, made an adopted child a child for all purposes.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

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On an originating motion for the opinion, advice and direction of the Court, the trial judge held that the fund was divisible among and should be paid in equal shares to M's adopted children. The Court of Appeal in reversing that judgment held that the daughters could not take because they were adopted children and that the share from which M was drawing income must go over to other interests in accordance with the terms of the will as though she had died leaving no child her surviving. In the opinion of the Court of Appeal, the legislature in passing ss. 74 and 75 of *The Child Welfare Act*, thereby defining the status of adopted children, did not, in addition, intend to interfere with the disposition of an estate made by a testator who had died prior to the passing of the legislation. Also, the legislation was not to be construed as interfering with existing property rights in the absence of clear words showing such an intention. The adopted daughters appealed to this Court.

Held (Judson and Ritchie JJ. dissenting): The appeal should be dismissed.

Per Locke and Cartwright JJ.: The question before the Court was not whether the three appellants had for all purposes the status of children born in lawful wedlock to M; it was rather whether on the true construction of the language used by the testator in his will he intended that in the events that had happened they should take as beneficiaries. For the reasons given by the Court below, as a matter of construction, the words "child" or "children" as used in the testator's will did not include the appellants. *Re Blackwell*, [1959] O.R. 377, overruled.

Per Judson and Ritchie JJ., *dissenting*: The class of children who were to take the remainder could not be ascertained until the death of the life tenant and, in the meantime, legislation had intervened to change the meaning of the word "children" and to make the appellants into "children". The meaning of the word in the will could not be considered apart from the statute.

The legislation must be applied to a state of facts as it exists at the time when the class of children is to be ascertained in order to determine who are children. Where this is the problem, and in the absence of any proviso limiting the application of the legislation, there is no basis for rejection of its application to wills made before its enactment, whether or not adoption was known to the law at the time of the execution of the will.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Spence J., declaring that certain adopted children were entitled to share in a bequest to "children" by virtue of ss. 74 and 75 of *The Child Welfare Act* (Ont.). Appeal dismissed, Judson and Ritchie JJ. dissenting.

F. R. Hume, Q.C., for the appellants.

J. J. Robinette, Q.C., for the respondents, Irene G. Griffith, Dianna Gage Tisdall, Gloria Gage Prusac, Carmen Irene Anglin and W. Gage Griffith.

[1] [1961] O.R. 540, 28 D.L.R. (2d) 469.

Stanley C. Biggs, Q.C., for the respondents, Gage H. Love and Wilhelmina Horsfall.

Terence Sheard, Q.C., for the respondent, Chartered Trust Company.

THE CHIEF JUSTICE:—I agree with Roach J.A., speaking on behalf of the Court of Appeal[1], and he has dealt with the matter so satisfactorily I have nothing to add.

The appeal should be dismissed but the costs of all parties in this Court should be paid out of the fund in question, those of the trustee as between solicitor and client.

The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—The relevant facts and the question raised for decision in this appeal are set out in the reasons of my brother Judson.

We have to decide whether the view of the effect of ss. 74 and 75 of *The Child Welfare Act*, as enacted by 1958 (Ont.), c. 11, s. 3 (now ss. 76 and 77 of *The Child Welfare Act*, R.S.O. 1960, c. 53) expressed by McRuer C.J.H.C. in *Re Blackwell*[2], or that of the unanimous Court of Appeal[3] expressed by Roach J.A. in the case at bar is the right one.

This appeal was argued immediately after that in the case of *Re Clement*[4] judgment in which is being given at the same time as this judgment. Counsel in this appeal adopted the arguments of counsel in the *Clement* case whose interests were similar to their own and in addition assisted us with further full and helpful argument.

I agree with the reasons and conclusion of Roach J.A. and wish in particular to adopt the following passages in his reasons:

> No legislation will be construed as thwarting the intention of a testator as expressed in his will, unless the language clearly and unmistakably indicates that the legislature so intended and has effectively brought about that result.

Having quoted the two sections referred to above the learned Justice of Appeal continued:

> Those sections make the status of adopted children, whether adopted prior or subsequent to the passing thereof, that of natural born children of the adopting parents. The question here, however, is not one of status

[1] [1961] O.R. 540, 28 D.L.R. (2d) 469.
[2] [1959] O.R. 377, 20 D.L.R. (2d) 107.
[3] [1961] O.R. 540, 28 D.L.R. (2d) 469.
[4] [1962] S.C.R. 235.

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but of the intention of the testator. In a case of intestacy certainly the status of the adopted children is the governing factor. As I earlier stated, we know without any doubt what the intention of the testator was. The only debatable question here is,—What was the intention of the legislature in passing those two sections? Did it intend thereby, in addition to defining the status of adopted children, to interfere with the disposition of an estate made by a testator who had died prior to the passing of the legislation. Having stated that question, I answer it at once by saying that in my respectful opinion the legislature did not so intend.

* * *

If the 1958 Act is to be construed as entitling the adopted children of Mrs. McCormack to share in this estate, then it means that the legislature has taken from the grandchildren by blood relationship of the testator property rights which he gave exclusively to them and given them to other persons who now, by virtue of the statute, stand in the relationship of grandchildren to the testator but whom he didn't even think of and assuredly had no intention of benefiting.

In my respectful opinion, plainer and more explicit language than is contained in the legislation here in question is necessary to impel the court to reach the conclusion that the legislature intended that result. That result would be tantamount to confiscation by the state and distribution by the state, of the property confiscated, to a class. It is a basic principle of interpretation that the court always leans against any interpretation of a statute as authorizing confiscation. Maxwell, 9th ed., p. 289-90. I think it makes no difference that the property confiscated is not retained by the state but is given, after confiscation, to other persons.

At the risk of repetition of what has already been said by Roach J. A. I propose to add only a few words.

The question before us is not whether the three appellants have for all purposes the status of children born in lawful wedlock to the late Mrs. McCormack; it is rather whether on the true construction of the language used by the testator in his will he intended that, in the events that have happened, they should take as beneficiaries.

In the course of the argument the question was put to counsel from the bench whether the testator could by the use of apt words have excluded the appellants from any share in his estate, the form of words suggested being: "Whenever in this will I use the expression 'child' or 'children' I mean a child or children actually born in lawful wedlock of the body of the parent of such child and I do not mean an adopted child". All counsel answered that such a form of words would effectively have excluded the appellants. I would not found my judgment on the answer of counsel to such a question put during the course of argument if I thought that any other answer were possible, but in my opinion no other answer could be made.

Once it appears that in spite of the terms of the sections of *The Child Welfare Act* referred to above a testator can by apt language exclude from his bounty, whether as individuals or as members of a class, children who have been adopted in favour of issue immediate or remote of his own body or of the body of a designated person, it seems to me that the question of the status of such adopted children becomes irrelevant and the only question is:—"What do the words of the testator's will mean?" For the reasons given by Roach J.A. I agree that, as a matter of construction, those words do not include the appellants.

I would dismiss the appeal and would direct that the costs of all parties in this Court should be paid out of the fund in question those of the trustee on a solicitor and client basis.

The judgment of Judson and Ritchie JJ. was delivered by

JUDSON J. (*dissenting*):—The appellants are three adopted daughters of the late Gladys McCormack, who died on October 25, 1959, after the amendment to Part IV of *The Child Welfare Act* by 1958 (Ont.), c. 11, had come into force. The question in the appeal is whether they can take under the will of Sir William Gage as children of his daughter Gladys McCormack.

Gladys McCormack had a life interest in one-quarter of the residue of the estate of her father, whose will provided that on her death that part of the residue from which she had been drawing the income should be held in trust for her children until the youngest reached the age of 21, when it was to be divided among the children equally. The judgment under appeal holds that the appellants cannot take because they are adopted children and that the share from which Gladys McCormack was drawing income must go over to other interests in accordance with the terms of the will as though she had died leaving no child her surviving.

Sir William Gage made his will on May 5, 1920, and died on January 14, 1921. This was before there was any adoption legislation in the Province of Ontario. The first *Adoption Act* in Ontario came into force on April 18, 1921. Mrs. McCormack adopted Mary Joy Ketterer on January 2, 1930, and Mazo Marie Ireland and Davidiana Gadsby on January 24, 1944. On January 1, 1959, the Ontario legislation

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making an adopted child a child for all purposes came into force and on October 25, 1959, Gladys McCormack died leaving these three adopted daughters surviving her.

The question therefore is precisely the same as the one raised in *Re Blackwell*[1], that is, the right of adopted children to take as a class answering the description of children when the life tenant dies after the coming into force of the 1958 legislation. The judgment in *Re Blackwell* held that after January 1, 1959, adopted children were children for all purposes and that when the class of children was ascertained on the death of the life tenant, adopted children would take as children. This judgment was not appealed. Consequently, when this application came before Spence J., he held himself bound to follow it. On appeal, however, the judgment of Spence J. was reversed[2], the Court of Appeal holding that these adopted children could not take as children and that the part of the residue from which Mrs. McCormack was drawing income must go over to the other interests designated in the will.

If these adopted children are to succeed, it must be because of the 1958 amendment to *The Child Welfare Act*. Sections 74 and 75 of this Act are:

74. (1) For all purposes the adopted child, upon the adoption order being made, becomes the child of the adopting parent and the adopting parent becomes the parent of the adopted child as if the adopted child had been born in lawful wedlock to the adopting parent.

(2) For all purposes the adopted child, upon the adoption order being made, ceases to be the child of the person who was his parent before the adoption order was made and that person ceases to be the parent of the adopted child.

(3) The relationship to one another of all persons, whether the adopted child, the adopting parent, the kindred of the adopting parent, the parent before the making of the adoption order and the kindred of that parent or any other person, shall be determined in accordance with subsections 1 and 2.

(4) Subsections 2 and 3 do not apply for the purposes of the laws relating to incest and the prohibited degrees of marriage to remove any person from a relationship in consanguinity which, but for this section, would have existed.

75. Every person heretofore adopted under the laws of Ontario and every person adopted under the laws of any other province or territory of Canada or under the laws of any other country shall for all purposes in Ontario be governed by this Part.

[1] [1959] O.R. 377, 20 D.L.R. (2d) 107.
[2] [1961] O.R. 540, 28 D.L.R. (2d) 469.

In my reasons for judgment in *Re Clement*[1], I traced in brief outline the history of adoption legislation in Ontario and its effect upon succession to property. The history is one of a progressive development towards equating the position of an adopted child with that of a natural child. There are three steps in this development. The original legislation of 1921 did no more than confer a right of succession on the intestacy of the adopting parent and provided by s. 12 (1921 (Ont.), c. 55) that the word " 'child' or its equivalent in any instrument shall include an adopted child unless the contrary plainly appears by the terms of the instrument."

The first change of any significance was enacted by 1927 (Ont.), c. 53, s. 6(2). It preserved the right of intestate succession and provided that "the expressions 'child', 'children' and 'issue' where used in any disposition made after the making of the adoption order by the adopting parent, shall, unless a contrary intention appears, include an adopted child or children or the issue of an adopted child." Further, subs. (6) of s. 6 stated:

> Save as herein provided and as to persons other than the adopting parent, the adopted child shall not be deemed the child of the adopting parent.

This was the statutory position in R.S.O. 1927, c. 189, s. 5; R.S.O. 1937, c. 218, s. 6; R.S.O. 1950, c. 7, s. 12, until it was changed in 1954 by the enactment of *The Child Welfare Act* of that year (1954 (Ont.), c. 8, Part IV). During this period, it is clear that these appellants could not take under this will because the will was prior to the adoption order. There may also be other disqualifications which it is unnecessary to consider.

One significant change introduced by the legislation of 1954 was the omission of the express limitation of rights of adopted children to those acquired under subsequent instruments. Section 77(6) and (12) of the 1954 legislation stated:

> (6) An adoption order confers upon the adopted child or any issue of the adopted child the same rights to and interests in property under any intestacy of or disposition by the adopting parent or any kindred of the adopting parent as if the adopted child was a child born to the adopting parent in lawful wedlock.
>
> (12) Except as provided in this Part, an adopted child shall not be deemed the child of the adopting parent.

[1] [1962] S.C.R. 235.

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The 1954 legislation was repealed in 1958 by *The Child Welfare Amendment Act*, 1958, c. 11, ss. 74 and 75, both of which are set out above. Again there is no limitation on the rights of adopted children to those acquired under subsequent instruments. The adopted child is now a child for all purposes except the law of incest and consanguinity in relation to marriage. He becomes a full member of the family of his adopting parent including the kindred of the adopting parent, and s. 75 says that this applies to every person heretofore adopted under the laws of Ontario.

When s. 75 of the 1958 legislation speaks of a "person heretofore adopted being governed by this Part" I take it to mean that on January 1, 1959, when the new legislation came into force, he then acquired the status of a child as defined in s. 74. In any case involving the status of an adopted child arising after this date, this Act and this Act alone is to be applied and this is an Act which has omitted a previous limitation on the rights of adopted children but which does not say in so many words that in the construction of all wills, whenever made, the word "child" now includes an adopted child. The question is whether the new legislation has done the same thing when it makes an adopted child a child for all purposes. The judgment of the Court of Appeal holds that it has not for the following reasons:

(a) The word "child" in a will in the absence of some strong context to the contrary means a lawful child of the body of the person named.

(b) There is no context in the will of Sir William Gage to the contrary. Unless the subsequent adopting legislation in force at the date of the death of Mrs. McCormack has the effect of *altering the meaning of the will*, Mrs. McCormack did die leaving no child her surviving. The Court of Appeal, therefore, is dealing with the problem not as one of after-acquired status but as one of alteration of a will by statutory compulsion after the will has been made and has come into effect.

(c) To the Court of Appeal, it must be shown that the will is now to be read as if it had said "leaving no child or adopted child her surviving".

(d) To the Court of Appeal, two basic principles prevent any such statutory alteration of the will. The first is that where a statute is passed altering the law, unless

> the language is expressly to the contrary, it has to be taken as intended to apply to a state of facts coming into existence after the Act. The second basic principle is that a statute should not be construed so as to interfere with existing property rights unless there are clear words showing such an intention.

It appears to me, with respect, that this treatment of the problem imposes a limitation on the application of ss. 74 and 75 which no longer exists. It involves a re-affirmation of the limitation of the rights of adopted children under wills which existed under the legislation from 1927 to 1954 but which no longer exists. My conclusion is that after January 1, 1959, these three appellants were the children of Mrs. McCormack and not adopted children with limited rights; that as children they answer the description in the will, and that Mrs. McCormack died leaving children who take that part of the residue from which she was drawing income.

I do not think that this conclusion is in any way weakened by *Re Donald, Baldwin v. Mooney*[1] and *Re Marshall*[2]. Both cases are concerned with a domestic will and the extent of the recognition to be given to an adoption in a foreign domicile. In the *Donald* case the testator left a share of the residue of his estate to a named individual with a substitutional gift to the children of that beneficiary should he predecease the testator. The beneficiary, who did predecease the testator, died domiciled in the State of Washington where he had adopted a child, who, according to the law of that State, was to all intents and purposes the child and legal heir of the adopting parent as though he were a child of that person born in lawful wedlock. This legislation is indistinguishable from that contained in s. 74 of the Ontario legislation of 1958. This Court held, on appeal *per saltum* from the Court of King's Bench of Saskatchewan, that the child did not take under the Saskatchewan will and that the question was not one of status but whether the adopted child was a person such as was mentioned and described in the bequest. At the date of the death of the testator, as is pointed out in the Reporter's Note at p. 306, there was no adoption legislation in force in Saskatchewan.

[1] [1929] S.C.R. 306, 2 D.L.R. 244.
[2] [1957] 1 Ch. 507.

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The Saskatchewan Court and this Court refused to recognize a status acquired by adoption which was unknown to the law of the province. This was a view that had some acceptance at that time (*vide* Dicey, Conflict of Laws, 3rd ed., 1922, p. 501). There is room for doubt whether this was ever a tenable view but even if it were, it has no application to the present case, where adoption is fully recognized by Ontario domestic law. In the circumstances, I would accept the suggestion made by Falconbridge in Conflict of Laws, 1st ed., p. 587, that the *Donald* case might be treated as a special case dependent on the then condition of provincial legislation and not as being a decision which should preclude reconsideration of the Court's attitude towards recognition of adoption under a foreign law.

Re Marshall, supra, was decided at a time when adoption had received some recognition in England but not to the extent of the Ontario legislation of 1958. The testator made his will in April of 1945 and died in June of that year domiciled in England. He left a life interest to his wife and on her death directed the division of the residuary estate among certain named cousins, with a substitutional gift as follows:

> Provided always that should any of the above cousins be then dead leaving issue then living such issue shall take the share his her or their parent would have taken had such parent survived me and my said wife.

One of the named cousins had acquired a domicile in British Columbia. In March of 1945, which was before the date of the will, he had adopted a child in British Columbia. This cousin died in 1950. The testator's wife died in 1955. The question again was whether the adopted child could take under this substitutional gift.

Both Harmon J.[1] and the Court of Appeal held that he could not. The Court of Appeal, after a detailed examination of the adoption legislation of British Columbia, namely, the Act of 1920, as amended in 1936, held that the rights and privileges conferred by this legislation fell far short of those which characterized the status of a child and that the Court could not find that an English testator in a bequest to "children" could have had in contemplation adopted children with rights so limited. The Court also considered the amending legislation of 1953 and doubted, contrary to

[1] [1957] 1 All E.R. 549.

the opinion of Harmon J., whether it would have been sufficient, even if it had applied. But in considering the 1956 legislation, which is the same as s. 74 of the Ontario legislation of 1958, the Court did say that it appeared to be sufficient to place an adopted child in the position of that of a natural child for all purposes. All this is *obiter* but the plain inference is that the decision would have been different if the 1956 legislation had applied.

We are not concerned here with one of the difficulties that troubled the Court of Appeal. The 1958 legislation is adequate to make an adopted child into a child. There is no such person in Ontario after 1958 as an adopted child. He is a child for all purposes. In order to take, must he be a child according to the law as it stood at the date of the testator's death? In considering the extent of the recognition to be given to a foreign adoption, both Harmon J. and the Court of Appeal held that the testator's death was the relevant date. The Court of Appeal said at p. 525:

> Accordingly, we think that so far as adopted children are concerned, their status and capacity to take under a gift to "children" in an English will is (subject, of course, to British legislation) fixed once and for all at the testator's death and that subsequent legislation in the country of their domicile enlarging their rights is to be disregarded.

Harmon J. had stated the rule without the qualification introduced by the Court of Appeal "subject, of course, to British legislation". It was this omission that led Whittaker J. in his judgment in *Re Stuart, Toronto General Trusts Corp. & Stuart v. Stuart*[1], to question the application of the rule to a purely domestic situation where the will and the adoption were governed entirely by the law of British Columbia.

The only rule enunciated in *Re Marshall,* and it has no application to the present case, was a rule of English conflict of laws that succession to the movables in England of a person dying domiciled abroad is governed by the law of the domicile as that law stood at the date of the death of the individual in question and was unaffected by changes in the law of the domicile subsequent to the death. This principle was applied in determining the extent of the recognition to be given to a foreign adoption but it leaves untouched the effect to be given to domestic legislation subsequent to the testator's death on a domestic adoption also subsequent to the testator's death.

[1] (1957), 10 D.L.R. (2d) 634.

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Re Marshall, therefore, contains no rule that the relevant date for ascertaining the class of persons capable of taking under this will is the date of the testator's death, which was January 14, 1921. The class of children is to be ascertained on the death of the life tenant Gladys McCormack. On that date these appellants, by Ontario legislation, had the status of children and the Court must recognize that status.

On the death of the testator, a gift to the children of A meant *prima facie* a gift to the legitimate children of A and not to illegitimate or adopted children. I can well understand the finding of the Court of Appeal that this is what the testator intended. But the class of children cannot be ascertained until the death of Mrs. McCormack and, in the meantime, legislation has intervened to change the meaning of the word "children" and to make these appellants into "children". The meaning of the word in this will cannot be considered apart from the statute and the statute has made them answer the description contained in the will in the same way that children born of the body of Mrs. McCormack in lawful wedlock would answer the description.

The legislation must be applied to a state of facts as it exists at the time when the class of children is to be ascertained in order to determined who are children. Where this is the problem, and in the absence of any proviso limiting the application of the legislation, I can see no basis for any rejection of its application to wills made before its enactment, whether or not adoption was known to the law at the time of the execution of the will.

I have examined the New Zealand and Australian cases referred to in the judgment in *Re Blackwell.* The New Zealand legislation has always provided that it does not apply to enable rights to be acquired under a prior will unless it is expressly so stated in the prior will. The legislation considered in *Pedley-Smith v. Pedley-Smith*[1], was to the same effect. The significance of these cases is that the enquiry is confined to the question whether the adopted child is claiming under a prior instrument, that is whether the case is within the proviso. If it is not, it seems fundamental to all the decisions that the legislation is of general application. For example, in the *Pedley-Smith* case a will made in 1934 settled property on a beneficiary for life with a special power

[1] (1953), 88 C.L.R. 177.

of appointment in favour of issue of that beneficiary. In 1940 she adopted two children and in 1949, exercised the special power in their favour. The New South Wales legislation made an adopted child a child for all purposes except with respect to prior wills. The judgment in *Pedley-Smith*, following *Muir v. Muir*[1], was that the child would take, if at all, under the prior will and not under the subsequent exercise of the special power. Had it not been for the proviso in the legislation, there would have been nothing to prevent the adopted child, under legislation of this kind, from taking.

I am therefore of the opinion that the sound approach to this problem is that stated in *Re Clark*[2] (Dysart J.); *Re Stuart*[3] (Whittaker J.) and *Re Blackwell*[4] (McRuer C.J.H.C.). For the reasons given, I would follow these decisions. The appeal should be allowed, the judgment of the Court of Appeal set aside and the judgment of Spence J. restored.

As to costs, I would restore the order of Spence J. made on the motion. The respondents in this appeal, other than the trustee, must pay the appellants their costs both in this Court and the Court of Appeal. The trustee's costs were provided for by Spence J. on the motion. In this Court and in the Court of Appeal I would make the same order, namely, that the trustee is entitled to its costs, on a solicitor and client basis, payable out of the estate.

Appeal dismissed, JUDSON *and* RITCHIE JJ. *dissenting.*

Solicitors for the appellants: Hume, Martin & Allen, Toronto.

Solicitors for the respondents, Irene G. Griffith, Dianna Gage Tisdall, Gloria Gage Prusac, Carmen Irene Anglin and W. Gage Griffith: Wegenast & Hyndman, Toronto.

Solicitors for the respondents, Gage H. Love and Wilhelmina Horsfall: Payton, Biggs & Graham, Toronto.

Solicitors for the respondent, Chartered Trust Company: Johnston, Sheard & Johnston, Toronto.

[1] [1943] A.C. 468.
[2] [1947] 1 D.L.R. 371.
[3] (1957), 10 D.L.R. (2d) 634.
[4] [1959] O.R. 377, 20 D.L.R. (2d) 107.