less the cost of discharging any caveat placed against the property as a result of the agreement for sale.

The provisions of the Act, as now amended, do not apply where the purchaser or mortgagor is a corporation. This denies the protection to the large number of farmers and small businesses who are incorporated.

A common practice, relating to builder loans, is for a finance company to take the mortgages as security when lending to construction companies. When the transfer is made to an individual purchaser he may be required to assume the mortgage. As the mortgage was given by a corporation, it is outside the protection of the Act.

A perennial abuse not caught by the amendment occurs in dealings with second mortgages. A company holds a first mortgage which covers the property almost to the hilt and then takes a large second mortgage on the property. This second mortgage may then be sold to a *bona fide* purchaser. On foreclosure and sale he has very little security on his investment in the second mortgage.

The conclusion is that the Act does not accomplish its purpose. It does not apply in circumstances where its protection is deserved, and where it does apply it is easily circumvented.

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COMPANIES—COMPULSORY TRANSFER OF SHARES BY DISSENTING SHAREHOLDERS—S. 128 CANADA CORPORATIONS ACT R.S.C. 1952 C. 53—*RE CANADIAN BREWERIES LIMITED.*

The comparatively recent decision by F. T. Collins, J. in *Re Canadian Breweries Limited,*[1] does little to clarify the law respecting compulsory transfer of shares by dissenting shareholders as provided for in section 128 Canada Corporations Act. Section 128 provides as follows:

> (1) *Notice to dissenting shareholder.*—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 is, 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, 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.
>
> (2) *Shares acquired by transferee company*—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

1 [1964] Que. C.S. 600.

the amount or other consideration representing the price payable by the transferee company for the shares that 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) *Sums to be kept in trust.*—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) *"Contract" and "dissenting shareholder" defined.*—In this section

(a) "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

(b) "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.[2]

The case of comment is, essentially, the adjudication of an *ex parte* petition presented by Canadian Breweries Limited. The petition asked the court to prescribe a form of notice to be given, and the manner of giving such notice, to the shareholders of a company who have not accepted an offer pursuant to section 128.

The petitioner is a company incorporated under the Ontario Corporaitons Act and has its head office in Toronto. In June 1951 the petitioner made an offer to all the preference shareholders and all the common shareholders of National Breweries Ltd., a company incorporated under the Dominion Companies Act and having its head office in Montreal. (In 1952 the name was changed to Dow Brewery Limited.) As a result of this offer the petitioner acquired all the preference shares in Dow Brewery. The offer to the common shareholders was not accepted by a sufficient number of shareholders to enable the petitioner to take advantage of the provisions of section 124 (now section 128) of the Dominion Companies Act. The petitioner, through nominees, continued to purchase common shares of Dow Brewery on the open market until June 14, 1963 when it owned 642,034 out of the 721,372 common shares issued, or 89% of the total common shares issued. Under the date of June 14, 1963 the petitioner made an offer to the remaining shareholders which stated:

> Canadian Breweries is desirous of acquiring all the outstanding common shares of Dow and if the conditions of section 128 of the Companies Act (Canada) are complied with, intends to invoke the provisions of such section.

As a result of the offer, common shareholders holding 93.4% of the shares affected by the offer, accepted it before October 14, 1963 and 94.7% had accepted the offer before the date of the petition, Dec. 2, 1963.

Before discussing the decision in *Canadian Breweries Limited* the history and interpretation of 128 should be reviewed.

The section was first enacted in Canada in the Companies Act 1934, c. 33 as sec. 124. This section was taken almost verbatim from the English Companies Act 1929,[3] sec. 155. Dennistoun, J. A. in *Re Canadian Food Products Limited and Picardy Limited,*[4] stated:

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[2] Canada Corporations Act, R.S.C. 1934, c. 33, s. 124.
[3] (1929) 19 & 20 Geo. 5, c. 23.
[4] [1945] 2 W.W.R. 65, 68.

. . . The Canadian section is a reproduction of the English section with slight variations which do not affect the meaning of purpose of the Act.

In reference to the section and its purpose Dennistoun, J. A. states at the same page:

The powers invoked are quite new and are drastic in the extreme. They have frequently been used in England, where there was great activity in the amalgamation of companies and the corporate expansion of businesses before the present war; but it would seem that this has been accomplished as a rule without contest in the Courts.

When a company desires to extend its business by the acquisition of the business of another company, there appear to be two ways of accomplishing the purpose. The first is the old method of transfer of assets, and involves a contract between the vending company and the purchasing company. This method left the shareholders of the vending company in possession of their shares, with the right to divide the purchase-price and wind up or start business afresh unless restrained from doing so by the terms of the contract. The second is the new method of acquiring the entire share capital of the vending company: The Companies Act, 1929, c. 33, sec. 155 (Eng.).

The Canadian section has not been amended since its incorporation into the Companies Act in 1934. The English section was amended in 1948 to include special provisions where the transferee company owns shares in the transferor company. The result of these amendments is that if the transferee company owns less than 10% of the shares in the transferor company these shares shall be disregarded when computing the required 90% acceptance; that is, reference is only made to the acceptances of independent shareholders. If the transferee company owns more than 10% of the shares, the number of shares owned are not only disregarded in computing the 90% acceptance, but there is an added requirement that at least three quarters of the total number of independent shareholders accept the offer. This section is now sec. 209, Companies Act, 1948.[5]

The case of *Re Hoare and Company Limited*[6] is the first reported case to deal fully with this section and, as such, has become the foremost authority in the area. The case involved an offer, under section 155 of the English Companies Act, which was accepted by 99% of the shareholders within four months. The dissentients contended that the offer was not a fair one and that they should not be compelled to accept it. In reaching his decision, Maugham, J., made several important observations on the power of the court under the section:

. . . the Legislature has not thought fit to indicate in any way, however remote, the grounds on which the court is to intervene and to make an order preventing the transferee company from acquiring the shares of the dissenting shareholders . . . But there is this phrase inserted as a sort of parenthesis after the verb "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". I have some hesitation in expressing my view as to when the court should think fit to order otherwise. I think, however, the view of the Legislature is that where not less than nine-tenths of the shareholders in the transferor company approve the scheme or accept the offer *prima facie*, at any rate, the offer must be taken to be a proper one, and in default of an application by the dissenting shareholders, which includes those who do not assent, the shares of the dissentients may be acquired on the original terms by the transferee company. Accordingly, I think it is manifest that the reasons for inducing the court to "order otherwise" are reasons which must be supplied by the dissentients who take the step of making an application to the court, and that the onus is on them of giving a reason why their shares should not be acquired by the transferee company.

One conclusion which I draw from that fact is that the mere circumstance

5 (1948) 11 & 12 Geo. 6, c. 38.
6 (1934), 150 L.T. 347.

that the sale or exchange is compulsory is one which ought not to influence the court. It has been called an expropriation, but I do not regard that phrase as being very apt in the circumstances of the case. The other conclusion I draw is this, that again *prima facie* the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned. Accordingly, without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders the scheme is unfair. There may be other grounds, but I see no other grounds available in the present case for the interference of the court.[7]

The decision in *Re Hoare* has been applied and followed in *Re Evertite Locknuts Limited*, in *Re Press Caps Ltd.*,[9] in *Re Sussex Brick Co. Ltd.*[10] and in *Re Canadian Food Products Limited and Picardy Limited.*[11] A similar line of reasoning is adopted in the case of *Re Castmer—Kellner Alkali Company Limited*[12] and in the recent cases of *Re Grierson Oldham Adams*[13] and *Re Claridge Holt & Co., Claridge* v. *Peninsular & Oriental Steam Navigation Co.*,[14] which, as yet, are not fully reported.

The decision of the Supreme Court of Canada in *Rathie* v. *Montreal Trust Company and British Columbia Pulp and Paper Co. Ltd. et. al.*,[15] does not follow the *Hoare* case. The decision is based on the Court's interpretation of the words "within four months" in section 124 (1) of the Dominion Companies Act, 1934. The court was unanimous in its finding that section 124 is confiscatory in nature and as a result anyone hoping to invoke the act must comply strictly with its terms. As the court was of the opinion that the Legislature intended an offer under section 124 to remain open for a minimum of four months, and the offer in this case was open for only two weeks, the scheme was not held to fall within the provisions of section 124.

On the basis of the very persuasive reasoning of Wynn-Parry, J., in *Re Western Manufacturing (Reading) Ltd.*,[16] it is questionable that the words "within four months" can have the meaning attributed to them by the Supreme Court of Canada.

It is respectfully submitted that the Court did not, on this occasion, fully consider the section before them. The *Hoare* case, which is the basis of all English decisions in the area, was not considered by the Court, and, as a result, I am of the opinion that the court had a tendency to place too much emphasis on the protection of the individual shareholder's rights. In general a court cannot be criticised for considering individual rights to be of prime importance. A problem arises, however, when a court begins to pass judgment on the business considerations and the goodness of the bargain, or unnecessarily to restrict the statute in an effort to protect an individual from expropriation. Maugham, J., dealt with the problem at page 376 of the judgment in *Re Hoare*:[17]

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7 *Id.*, at 375.
8 [1945] 1 Ch. 220.
9 [1949] 1 Ch. 434.
10 [1961] 1 Ch. 289.
11 *Supra*, at n. 4.
12 [1930] 2 Ch. 349.
13 (1966), 110 S.J. 887.
14 *The Times*, November 23, 1966.
15 [1953] 2 S.C.R. 204.
16 [1956] 1 Ch. 436.
17 *Supra*, at n. 6.

> I confess I have some sympathy with people in the position of the applicants. I am myself not quite able to understand why the Legislature should ever have passed sect. 155 at all, and therefore I am not at all indisposed to consider the objections of such applicants as I have before me.

And at page 375:

> . . . the mere circumstance that the sale or exchange is compulsory is one which ought not to influence the court . . . it seems to me impossible to suppose that the court, in the absence of very strong grounds, is entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders concerned.

It would appear that a court must take a very objective view when dealing with offers under section 128.

If a court were to agree with the above reasoning, the ratio of the *Rathie* case could be limited to the Supreme Court finding that an offer under section 128 must be open for approval for a minimum of four months.

That an offer can run no longer than four months was decided shortly thereafter in the case of *Re Waterous and Koehring-Waterous Limited.*[18]

The only English case reported in which the court has granted total relief from the operation of a take-over bid under section 209 of the Companies Act 1948 is the case of *Re Bugle Press Ltd.*[19] In this case the transferor company was a private company which consisted of three shareholders, one owning 10% of the share capital, the other two owning the remaining 90%. The two major shareholders formed another private company to which they transferred their shares pursuant to an offer under section 209. They then sought to invoke section 209 to obtain the minority shareholder's shares. The Court of Appeal found the section to be inapplicable in the situation. The decision, referring to the judgment in *Re Hoare,* held this to be a situation in which a dissenting shareholder had discharged the onus on him to show that the scheme was unfair. By showing the substantial identity of interest between the transferee company and the major shareholders, the dissenting shareholder had, *prima facie,* shown the court that it ought to "order otherwise". As the transferee company was different in law than the majority shareholders the 1948 amendments to the section, concerning independent shareholders, could not be applied.

The *Bugle Press* case was applied and followed in the Supreme Court of Canada decision in *Esso Standard (Inter-America) Inc.* v. *J. W. Enterprises Inc. et al and Morrisroe.*[20] The facts in this case were almost identical. The transferee company was a subsidiary of Standard Oil Co. (New Jersey) who held 96.75% of the shares in the transferor company. During the four months which the offer was open, less than 90% of the remaining 3.25% were sold pursuant to the offer. The transferee company was, however, relying on the acquisition of the large block of shares held by Standard Oil Co. and made this fact known to the remaining shareholders. The extent of acquisition of the remaining shares, evidence of value of the shares and the importance of the wording of the offer were mentioned in the judgment, but as stated by Judson, J., at page 604 of the report:

18 [1954] O.W.N. 445.
19 [1961] 1 Ch. 270.
20 (1963), 37 DLR (2d) 598.

> The extent of the acquisition and evidence of value are, however, irrelevant in this case and I found my judgment solely on the principle set out in *Bugle Press*....

The decision in the case of comment is unusual in the fact that it is an *ex parte* application on behalf of the transferee company. It is respectfully submitted that an adjudication on the merits of the take-over offer is not within the jurisdiction of the judge at this level. Section 128 contemplates intervention of the court only in the event of an application to the court by a dissenting shareholder and then only if the dissenting shareholder can show the scheme to be unfair to all the shareholders. In the present hearing a dissenting shareholder is not present or represented. In such a petition it is, of course, necessary that a transferee company produce evidence to show that the situation is one which is covered by section 128. It is respectfully submitted that these requirements would be met if a copy of the offer and affidavit evidence in respect to the number of acceptances received in the four month period were produced in evidence. This information would be sufficient to show *prima facie* compliance with the section.

In his judgment Collins, J. finds the present case and the *Bugle Press* case to be analagous. It is respectfully submitted that this is not the case as here the transferee company is at the time of the offer holding 89% of the common shares. In the *Bugle Press* case and the *Esso Standard* case the transferee company was not a shareholder but was closely identified with major shareholders, who, in both cases, owned 90% of the shares in the transferor company. The transferee companies depended on the major shareholders selling their interests to the transferee company in order to bring the scheme within the section. In the *Canadian Breweries* case the offer was made to all the remaining shareholders and was accepted by over 93% of them. Canadian Breweries Limited appears to be relying on the large acceptance of the independent shareholders rather than including its own large holding in computing the required 90% acceptance. The situation here is the situation comtemplated in the amended section 209 of the English Companies Act, where a transferee company owns shares in the transferor company at the time of the offer.

As to whether such a situation is contemplated by section 128 of the Canadian Corporation Act Collins, J. states:

> . . . section 128 contemplates only contracts involving a whole class or classes of shares and not a lesser number of one or more shares of a class. Section 128 does not contemplate the acquisition of the shares of a company on a piece-meal basis, that is, on the basis that a transferee company can make an offer at any time for a selected group of shares out of a class and then apply the provisions of section 128 to acquire the remaining shares in that group if nine-tenths of the shares in such group have been so acquired. If it were so, it would be possible for any shareholder to be forced out of the ownership of his shares by the making of an offer to a selected group of shareholders and including therein the shares owned by such shareholders. . . .[21]

It is difficult to understand how this interpretation applies to the case. If Collins, J. is referring to the situation of an offer to a selected number of the total number of independent shareholders and then another offer to the remaining independent shareholders in the group, his interpretation of section 128 is beyond criticism. The facts in the

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[21] *Supra* note 1, at 602-603.

present case do not however, lend themselves to this situation. The fact that the petitioner had tried to invoke section 128 twelve years before the present offer could not be a material consideration because then, as now, the offer was extended to the entire class of shareholders. Furthermore the first offer was never within section 128 as the offer was not accepted by the required 90%.

One could, on the other hand, interpret the above statement as meaning that a transferee company could not take advantage of section 128 if it had acquired any shares in the transferor company prior to the offer. This meaning could be derived from the emphasis that Collins, J. places on the words "all the shares" found in sec. 128(4) (a). This interpretation does not seem consistent with Colilns', J. illustration of a transferee company making separate offers to different groups of shareholders within a class.

Favoring the former interpretation of the statement, it is submitted that Canadian Breweries Limited did not acquire shares on the piecemeal basis envisioned by Collins, J.

The remainder of the judgment is concerned with the purchase price offered, the reasons why a particular shareholder acquired and wished to retain shares in Dow Brewery Ltd., and the reasons why Canadian Breweries wished to purchase the entire share capital of Dow. It is respectfully submitted, relying on the authorities previously discussed, that these are improper considerations. As Evershed, L. J., stated in *Re Press Caps Ltd.*:

> *Prima facie* then we should take the offer as fair for, to borrow the language of Maugham, J., the court ought not to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned; secondly, as already stated by my brother, the price offered does in fact give a substantial addition to the price which would be arrived at by a simple calculation on *Stock Exchange* bases.[22]

Re Grierson Oldham Adams,[23] is further authority for the proposition that a stock exchange valuation of a share is *prima facie* a good indication of the value of that share. The offer in the *Canadian Breweries* case was above the stock exchange value and therefore should be assumed to be fair unless otherwise shown by a dissenting shareholder.

The letter admitted in evidence and reproduced in the judgment, stating the views of a dissenting shareholder can hardly be taken as establishing the unfairness of the offer to the extent required by the English authorities. The letter stated that the shareholder had purchased the shares for an investment and in his estimation the shares were worth twice the stock exchange evaluation. The letter could not be said to establish that the offer was in fact unfair: it was merely a statement of the shareholder's opinion.

The reference to and the quotation from the *Rathie* case, found on page 605 of the report, should also be noted. The quotation was an *obiter dictum* by Rand, J., which stated that section 128, being confiscatory in nature, ought to be construed very strictly. It has been suggested earlier in this paper that a court may become too zealous in its efforts to protect an individual shareholder's rights and may lose sight of the

22 *Supra* note 9, at 445.
23 *Supra*, at n. 13.

functions of the court as defined in the early English decisions. The decisions in the *Bugle Press* case and the *Esso Standard* case are good examples of courts acting within their defined limits and also protecting the rights of the individuals involved. It is respectfully submitted that the court in the *Canadian Breweries* case seemed to be preoccupied with the fact that section 128 is confiscatory.

Although the soundness of the decision is questioned, justice may have been done. It is submitted that the real issue here is whether section 128 envisions a take-over offer under the section when a transferee company owns a large block of shares in the transferor company. It is certainly possible that a court may decide that such a situation is not in fact contemplated by that section although it would seem that the basic principle of a large majority accepting the offer is still present in this situation would thereby still be within the purport of the section.

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JUS QUAESITUM TERTIO IN THE COMMON LAW—RIGHT OF THIRD-PARTY BENEFICIARY TO SUE ON CONTRACT—COLLATERAL CONTRACTS—LETTERS OF CREDIT—EXEMPTION CLAUSES

In *Beswick* v. *Beswick* Lord Denning made another unsuccessful assault upon the doctrine of privity of contract. In that case the plaintiff's husband, who was a coal merchant, had transferred his business to the defendant, who was his nephew, on condition that he was employed as a consultant for the rest of his life at a salary of £6-10-0 a week, and that on his death his widow should be paid an annuity of £5-0-0 a week out of the business for the rest of her life. On the death of the plaintiff's husband the defendant paid to the plaintiff the annuity for one week, and then stopped payment. The plaintiff sued him personally and as her husband's administratrix. She failed in the Chancery Court of the County Palatine of Lancaster,[1] but succeeded on appeal to the Court of Appeal.[2] All three members of the Court of Appeal (Lord Denning, M. R., Danckwerts and Salmon, L. JJ.) allowed the appeal on the ground that the plaintiff was entitled to succeed as her husband's personal representative, while Lord Denning, M.R., and Danckwerts, L. JJ., held that by virtue of section 56 (1) of the Law of Property Act, 1925 (U.K.) the plaintiff could enforce the agreement in her personal capacity, even though she was not a party to it. Lord Denning, M. R., however, went farther and said:[3]

> Although the third pesron cannot as a rule sue alone in his own name, nevertheless there is no difficulty whatever in the one contracting party suing the other party for breach of the promise. The third person should, therefore, bring the action in the name of the contracting party, just as an assignee used to do.

The defendant appealed to the House of Lords,[4] who unanimously dis-

1 [1965] 3 All E.R. 858.
2 [1966] 3 All E.R. 1.
3 *Id.*, at 7.
4 [1967] 2 All E.R. 1197.