



Notes

DIVORCE REFORM WITHOUT EASIER DIVORCE

The very mention of the subject of divorce reform appears to send shivers down the spine of any government in Canada. The reason, of course, is the large and politically significant section of the population that opposes easier divorce. One wonders whether those who are either so opposed to or so afraid of this topic have ever stopped to consider such reforms of the existing law as might encourage reconciliation of the parties, and avoid the taint of collusive agreements, without necessarily making it easier to break the marriage bond.

An English private member of Parliament, Mr. Leon Abse, (following in the footsteps of that other great private member, Sir Alan Herbert, who steered the English Matrimonial Causes Act of 1937 to the statute books) was responsible for the new English Matrimonial Causes Act, 1963, which incorporates such much-needed reforms.

The first two sections of the new Act deal with the absolute bar of condonation with the object of helping towards reconciliation. Section 1 provides:

Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted on the part of the husband, as well as on the part of a wife, by evidence sufficient to negative the necessary intent.¹

This puts an end to the difference which previously existed in England (and still exists in Canada) between the position of a husband and that of a wife. A single act of intercourse by a husband (unless induced by a fraudulent misstatement of fact) with knowledge of his wife's adultery raised a conclusive presumption of condonation, whereas similar conduct by a wife did not amount to condonation unless there was actual forgiveness. Section 2 of the Act then goes on to provide that adultery or cruelty shall not be deemed to have been condoned for the purposes of matrimonial proceedings in the High Court or in a magistrate's court by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months, or of anything done during such cohabitation, if it took place with a view to effecting a reconciliation.

The effect, therefore, of these two sections is that parties need not be deterred from a trial period of up to three months cohabitation (whether or not accompanied by sexual intercourse) by a fear that their genuine attempts at reconciliation will later prejudice their rights to matrimonial relief if these attempts should not succeed. These sections are in line with a majority recommendation of the English Royal Commission on Marriage and Divorce, though the Act has increased the period to three months from the one month recommended by the Commission.

1. Because the original text of the Act was not available at the time of writing, I have been forced to quote from a secondary source: (1963) 82 *Law Notes* 219.

Section 3 of the Act provides that adultery which has been condoned shall not be capable of being revived. It was in *Beard v. Beard*^{1a} that the English Court of Appeal held that a condoned offence can be revived by an offence insufficient of itself to be grounds for divorce. This was approved by Williams C.J.Q.B. in the Manitoba case of *Fryer v. Fryer*.³ However, in *Beard v. Beard* Mr. Justice Vaisey delivered a forceful dissenting judgment, in which he said:

There seems to me something almost inhuman in a law which enables a wife or a husband to obtain, as of right, a divorce from the other in their old age on the ground of one single act of adultery committed by that other in the time of their far-off youth and immediately condoned, but now raked up from the past on some petty provocation insufficient in itself to be a ground for the relief so tardily sought.³

A partial answer to this apparent inhumanity was given by Denning L. J. (as he then was) in *Beale v. Beale*⁴ when he suggested that it might become impossible to revive a condoned offence after a sufficiently long interval of time. English law, however, has now met Mr. Justice Vaisey's objection in full by abolishing the doctrine of revival of adultery, and has thus come into line the laws of Scotland, where there is no such doctrine.

It should be remembered, of course, that in England there are other grounds for divorce than adultery (cruelty and desertion for three years, for example), so there is more to be said for abolishing the revival of adultery there than for doing so in Canada. In Canada, with our very limited grounds for divorce, abolition of this doctrine could work some hardship. Let us assume that Mrs. X condones a certain act or acts of adultery on the part of her husband of which she has clear evidence, and they resume normal cohabitation. Later on, Mr. X treats his wife with excessive cruelty, or deserts her without actually committing further adultery, or possibly without his wife's being able to obtain evidence of any new adultery. If there were no doctrine of revival Mrs. X would then be unable to obtain a divorce in Canada (except possibly in Nova Scotia), whereas in England she could base her petition on the cruelty or desertion for a period of three years.

Section 4 of the Act deals with the bar of collusion. An English court is still required to inquire whether any collusion exists between the parties, but the law is now amended so that collusion becomes a discretionary instead of an absolute bar. The parties are, however, under a duty to disclose to the court any agreement or arrangement made between them in contemplation of or in connection with the proceedings, and provision may be made by rules of court for enabling the court, on application made before or after any petition for divorce, to take any such agreement or arrangement into consideration, and to give such directions in the matter as it thinks fit.

1a. [1946] P. 8.

2. (1948) 55 M.R. 523.

3. P. 30.

4. [1951] P. 48.

As the late Mr. Kent Power said in his book *The Law and Practice Relating to Divorce in Canada*:

Few, if any, of the principles of divorce law have been as difficult of application and as provocative of discussion and differences of opinion in recent years, as that of collusion.⁵

How true this statement is may be seen in the divergent views of Canadian judges in the last few years. For example, in *Dulko v. Dulko*⁶ the Manitoba Court of Appeal could see nothing collusive in an agreement as to the sharing of costs in a divorce action, while in *Johnson v. Johnson*⁷ the British Columbia Supreme Court strongly disapproved of this decision, and held that even though all details of the agreement in the case before them had been fully disclosed and there might not have been any fraudulent concealment of evidence affecting the suit, nevertheless the agreement was collusive.

The new English Act now not only enables a court to exercise its discretion when collusion is found, but also enables an application to be made to the court for its opinion as to the reasonableness of any contemplated arrangements made before the hearing, about such matters as financial provision for the wife and children, the custody of the children, the division of the matrimonial home and its contents, and of course, costs in general.⁸ Thus legal practitioners who in the past have frequently avoided any such arrangements (practical and necessary though they may have been) for fear of the taint of collusion may now take the opportunity of seeking the court's blessing beforehand.

All in all, it is hard to see what practical objections could be voiced by those generally opposed to divorce reform on religious or other grounds, to the enactment in Canada of provisions similar to Sections 1, 2 and 4 of this new English Act. Surely the first two sections (relating to condonation) could lead to reconciliation in many cases where the present law deters the parties from attempting it, and any reform to this end deserves the closest study. Section 4, relating to collusion, may seem at first sight to be startling, but what possible harm can there be in making open and definite arrangements for the benefit of innocent parties (including the children) when a divorce is pending, and allowing the parties to do decently and properly what is at present so often done furtively and badly?

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5. P. 47.

6. (1946) 54 M.R. 329.

7. (1960) 31 W.W.R. 403.

8. In one of the first cases to be decided under the new Act, *Head v. Head*, [1964] 2 W.L.R. 358, it was held that in considering whether to exercise its discretion in respect of a collusive agreement the court should consider: (1) whether the agreement is likely to lead to a result contrary to the justice of the case, (2) whether any children might be prejudiced by implementing the agreement, and (3) whether the parties have treated the court with complete candour.

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A LIMITATION ON CALLING AN OPPOSITE PARTY AS A WITNESS AT TRIAL

A point of interest to civil litigation practitioners arises out of the recent decision by the British Columbia Court of Appeal in the case of *Milk Board v. Hillside Farm Dairy Limited and Hay Bros. Farm Ltd.*¹ The defendants in the action attempted to call as a witness at trial the chairman of the Milk Board, and thereupon to cross-examine him as an opposite party. The attempt was based on British Columbia practice rule 0. 37, R.25A (M.R. 507a), which rule is substantially the same as Manitoba Queen's Bench Rules 236 and 237. But the Court of Appeal held that where a *corporation* is an opposite party, an officer of the corporation may not be called at trial. (It should here be pointed out that the Milk Board is, by statute, constituted as a body corporate.²)

Mr. Justice Davey, after mentioning that M.R. 507a permits a party to call as a witness at the trial an opposite party . . .", states:

In this instance (the chairman of the Milk Board) was not a party opposite or otherwise and the Rule would have no application.³

Mr. Justice Tysoe says:

In my respectful opinion, the learned trial judge was right in holding that the chairman of the respondent milk board was not an opposite party within the meaning of M.R. 507a and so the appellants could not call him and treat him as a hostile witness. My view is that only a person who is an actual party to the action is an opposite party within the meaning of the rule.⁴

It is suggested that the application given to the rule by the British Columbia Court of Appeal is too restrictive. Admittedly, an officer of a corporation which is a party to litigation is not an actual party to an action in which his company is a party. Nevertheless, all parties to litigation should have the same rights against a corporate party as against an individual, and a corporate party should be subject to the same obligations as a natural person. For what purpose need there be a distinction in regard to this practice rule?

I propose to examine the Manitoba rules of court, and to consider whether it is either necessary or reasonable that the approach of the British Columbia Court of Appeal be followed in Manitoba.

The governing rule is Queen's Bench Rule 236, which provides:

A party who desires to call as a witness at the trial an opposite party . . . may either subpoena him or give him or his solicitor at least five days' notice in writing of the intention to examine him as a witness in the cause . . .

Upon being so called, such witness may, by Rule 327, immediately be treated as a hostile witness. These rules appear to have been created

1. (1963) 43 W.W.R. 131.

2. Milk Industry Act, R.S.B.C. 1960, c. 243, s. 34.

3. *Op. cit.*, at p. 152.

4. *Ibid.*, at p. 159.

to alter the common law position that an opposite party could be called as a witness, but could not immediately be cross-examined without leave.⁵

By Rule 237(2), an opposite party means "a party who is opposite on the record and adverse in fact." A "party" includes a body corporate and politic "unless the context otherwise requires."⁶ But a corporation can only act through its officers and agents. Therefore, it is submitted, Rule 236, read in the light of the interpretation sections, enables an opposite party to compel a corporate litigant to produce as a witness in the cause, an officer or agent for immediate cross-examination.

It is enlightening to examine other analogous practice provisions. It is clear from the rules that an officer of a corporate opposite party may be examined for discovery,⁷ and, in fact, it has been held that it is unnecessary and *improper* to add as a party to an action an officer of a corporation merely for the purpose of discovery.⁸ The evidence given by such officer on the examination may be used against the corporation.⁹ Interrogatories may be delivered to a corporate opposite party, and the answers thereto delivered by an officer of the corporation.¹⁰ These are both methods of obtaining evidence for use against the corporation as a party to litigation. Rule 236 should be read as a part of the same procedural scheme.¹¹ It provides both an inexpensive substitute for discovery and interrogatories, and a supplement to these procedures where they have failed to disclose sufficient evidence. It is submitted that there is no valid reason for treating the rule differently.

There are foreseeable practical difficulties in applying Rule 236 to corporate opposite parties. Should the subpoena or notice be directed to "John Doe, as an officer of X Ltd.", or simply to "an officer of X Ltd."? Regarding examinations for discovery, a corporate defendant can itself select and name the officer to be produced for examination by the plaintiff; a corporate plaintiff apparently must produce the officer named by the defendant. The same principle could apply to Rule 236. In any case, it is submitted that the officer would be obliged, as in the case of examinations for discovery, to testify as to matters within his own knowledge, and to obtain all information possible from other officers and servants of the corporation who may have personal knowledge of the matters in issue. I do not propose to outline what would be the correct practice; I submit only that the rule should be held applicable to a corporate body as a party to litigation, so that an officer of that corporation may be called to be a witness in the cause by a party adverse in interest to the corporation.

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5. *Price v. Manning* (1889) 42 Ch. D. 372.

6. Queen's Bench Rule 4(j).

7. Queen's Bench Rule 236.

8. *Cuthbert v. Commercial Travellers' Assoc.* (1877) 24 Gr. 531;

9. *Cline v. Mountaintop Cheese Factory* (1873) 20 Gr. 227.

10. Queen's Bench Rule 303.

11. Queen's Bench Rule 307.

11. It may be that the Rules should be amended to clarify the right to invoke Rule 236 against corporate parties; the rule makes no special provision as with respect to examinations for discovery and interrogatories. However, there appears no reason why the rule as it stands cannot be interpreted so as to give the right.

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DOUBLE JEOPARDY

The fundamental right protecting the citizen from double jeopardy is manifested in two ways in Canadian criminal procedure. Firstly, an accused person has available the "special pleas" of *autrefois acquit* and *autrefois convict*, which are made and tried before a plea of guilty or not guilty is entered.¹ In addition, an accused is permitted to raise the defence of *res judicata* after entering a plea of guilty or not guilty.²

The law and procedure relating to the special pleas is set out in the Criminal Code.³ These pleas are available where the accused stands charged with an offence of which he either has or might have been acquitted or convicted on a prior occasion.⁴

For example, "A" is charged that on April 6, 1963 he did steal certain goods. If he is acquitted and charged again with the same offence, he can plead *autrefois acquit*. If he is convicted at the first trial, he can succeed on the defence of *autrefois convict* at the second trial. Moreover, even if the latter charge is possession of the same goods,⁵ he can successfully raise the special pleas, because possession of stolen goods is an offence included in a count of theft, and so guilt of possession was before the court at the first trial.

The test of a successful plea of *autrefois* therefore depends on the identity of the offence with which the accused is charged with that of which he was formerly acquitted or convicted.⁶ Mere similarity of the facts proved does not establish the defence. This situation should be contrasted with that in the defence of *res judicata*, which depends on the identity of the facts.

Despite certain decisions to the contrary,⁷ it is well established that the defence of *res judicata* can be raised in a criminal trial, and that its application is not restricted to cases in which the special pleas are available. The

1. S. 516(3) of the Criminal Code of Canada, S.C. 1953-4, c. 51. This plea is tried by the judge in the absence of the jury.

2. This is also tried by the judge in the absence of the jury: *Wright, et al v. The Queen* (1963) 40 C.R. 261, at 288 per Hall, J., dissenting. See to the contrary *Re Cowan v. Affie* (1893) 24 O.R. 358.

3. S. 516 ff. See too s. 11.

4. S. 518(1). It is important to notice, however, that there is required a prior acquittal or conviction in order to plead *autrefois* successfully; the mere fact that the information was quashed because of a defect in it will not support a special plea. This has been the law since *Vaur's Case* (1591) 4 Co. Rep. 44a, 76 E.R. 992. See the cases cited in Tremear, *Criminal Code, Canada*, 5th ed., p. 1136.

5. That is, if he is charged under s. 296 (b) of the Criminal Code with respect to goods which are the subject-matter of the theft charge.

6. *E. v. Barron* [1914] 2 K.B. 570, at 575-6.

7. *E. v. Quinn* (1905) 11 O.L.R. 242, 10 C.C.C. 412, per Teetsel, J. A. (Osler, J. A. concurring) dissenting; *E. v. Bayn* [1932] 2 W.W.R. 113, per Saskatchewan Court of Appeal; *Villemore v. The Queen* (1963) 39 C.R. 297, per Casey J. and Badeaux, J.

courts have so held in Canada,⁸ the United States,⁹ England¹⁰ and Australia.¹¹ Thus the civil doctrine applies in criminal cases:

If in any action findings of fact are made upon which a judgment is based, these facts are *res judicata* in a subsequent action between the same parties.¹²

As Holmes J. once pointed out:

It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.¹³

Although the law is easy to state, it is much more difficult to apply. In the case of a trial before a judge only it is usually easy to determine what issue has been decided, because a judge gives reasons for judgment indicating his findings of fact. In the case of trial by jury a difficult problem arises, because juries bring in general verdicts of guilty or not guilty; they do not give reasons for judgment. The burden then falls on a court in a subsequent proceeding to interpret a jury's verdict in the light of the evidence adduced at the trial, the issues raised, and the directions given by the judge to the jury.

Take this example. "A" is charged with rape of "B". "A" raises the defence of alibi, leading evidence that he was somewhere else at the relevant time. The jury acquits "A", but does not give reasons. "A" is later charged with committing an act of gross indecency with "B" on the same occasion. "A" cannot successfully plead *autrefois acquit* because the second charge is entirely different from the first. If he raises the defence of *res judicata* the court is faced with the problem of deciding whether "A" was acquitted because the jury found that he was not there, or whether the jury decided that "B" consented, or that the Crown failed to prove some other ingredient of the crime.

In the case of simple issues our courts have been willing to interpret a jury's verdict. This was done where the issue was identity in *R. v.*

8. *R. v. Quinn* (1905) 11 O.L.R. 242; *R. v. Gosselin* [1928] 1 W.W.R. 134, per Stubbs, C.C.J.; *R. v. Manchuk* [1938] O.R. 385, at 424-5 (reversed without discussing this point [1938] S.C.R. 341); *R. v. Sweetman* (1939) O.R. 131; *McDonald v. The Queen* [1960] S.C.R. 186, at 195; *Gill v. The Queen* (1962) 38 C.R. 122; *Wright, et al v. The Queen* [1963] 1 O.R. 571, affirmed 40 C.R. 261; *Villemaire v. The Queen* (1963) 39 C.R. 297, at 303, per Montgomery, J. (dissenting); *Boyariski, et al v. R.* (1963) 41 C.R. 63. Also see annotation in (1963) 41 C.R. 66, by A. E. Popple.
9. *Harris v. State* (1941) 17 S.E. (2d) 573; *U.S. v. De Angelo* (1943) 138 F. (2d) 466, at 468; *Frank v. Mangum* 237 U.S. 309, at 334; *Sealfon v. U.S.* (1947) 332 U.S. 575, at 578; *Yates v. U.S.* (1957) 354 U.S. 298, at 335; *State of New Jersey v. Hoag* (1958) 356 U.S. 464. See, too, "Developments in the Law of *Res Judicata*," (1952) 65 Harv. L.R. 818, at 874-78.
10. It is implied in the judgments of Wright, J. in *R. v. Ollis* [1900] 2 Q.B. 758, at 769, and Edmund Davies, J. in *R. v. Connelly* [1963] 3 All E.R. 510.
11. *Mraz v. The Queen* (1956) 96 C.L.R. 62; *Brown v. Robinson* [1960] S.R.N.S.W. 297.
12. *Smith v. Nor. Canada Trust Co.* [1947] 2 W.W.R. 672, 55 M.R. 365. See also *Johansson v. C.P.R.* [1922] 2 W.W.R. 761, 32 M.R. 210. This doctrine is based on two legal maxims: *interest reipublicae ut sit finis litium* and *nemo debet bis vexari pro eadem causa*—*C.P.R. v. Winnipeg (City)* [1949] 2 W.W.R. 881, 58 M.R. 117, reversed 58 M.R. 230, restored [1952] 1 S.C.R. 424. But a decision in a criminal court does not render a point involved therein *res judicata* in a civil action: *Perras v. La Fonciere Compagnie* [1943] S.C.R. 165. Thus in the case of *Bureau v. R.* [1949] S.C.R. 367 and in *R. v. Koschuk* [1950] Ex. C.R. 332, in seizure proceedings the courts made findings of fact exactly opposite to the findings made on the same evidence in criminal proceedings. See the comment on these two cases in (1951) 29 Can. Bar Rev. 305. The American courts, however, have held that a finding of fact in a criminal prosecution can be *res judicata* in a forfeiture proceeding: see *U.S. v. Seattle* (1905) 135 F. 597; *U.S. v. Rosenthal* (1909) 174 F. 652; and the other cases referred to in *Wharton's Criminal Evidence*, 12th ed., p. 528.
13. *U.S. v. Oppenheimer* (1916) 242 U.S. 85, at 87.

Quinn, possession in *Sambasivam v. Public Prosecutor*,¹⁴ and assault in *R. v. Gosselin*. In *R. v. Gill* and *R. v. Sweetman*, where the accused in one act caused the death of two persons, he was acquitted on a charge with respect to the death of one, and the issue was held to be *res judicata* on a subsequent charge with respect to the death of the other.

When faced by a complicated issue, our courts have been more reluctant to give effect to the defence. The case of *Wright, et al v. The Queen*¹⁵ illustrates some of the difficulties which arise. In that case the accused were acquitted by a judge and jury on a charge that they:

. . . did unlawfully agree and conspire to commit an indictable offence under section 101 (b) of the Criminal Code of Canada by corruptly giving money to George Scott, a peace officer of the Ontario Provincial Police, with intent that the said George Scott should interfere with the administration of justice contrary to the Criminal Code of Canada, section 408 (1) (d).

They were subsequently charged that they:

. . . did unlawfully agree and conspire together to effect an unlawful purpose, to wit: to obtain from George Scott, a constable of the Ontario Provincial Police, information which it was his duty not to divulge, contrary to the Criminal Code of Canada, Section 408 (2).

In the first trial the defence admitted all the facts alleged by the Crown except one. It admitted, *inter alia*, the agreement, payment to the policeman, and the fact of obtaining information as to when and where raids on gambling halls would be carried out by the police. It denied, however, the intent to interfere with the administration of justice. In the second trial, all allegations were again admitted except the necessary intent. Moreover, the evidence adduced by the Crown was the same in the second trial as in the first, except that in the first the Crown put in as an exhibit a diary which contained evidence helpful to the accused, and it did not repeat the mistake in the second trial. The Supreme Court of Canada, by a majority of three to two, was unable to determine what issue had been decided in the accused's favor at the first trial, and so upheld the jury's verdict of guilty.

It would seem that the decision of Hall and Cartwright, JJ., dissenting, was more in accord with recognized principles of law than the decision of the majority. In Hall, J.'s thirty page judgment he minutely examined the proceedings in both trials, and after reading his judgment it is difficult to see how the court could come to any other conclusion than that the jury in the first trial found as a fact that there was not the "intent . . . (to) interfere with the administration of justice". Obviously, one conspiracy only was alleged by the Crown, the conspiracy being the same in both indictments. The evidence was identical. As Hall, J. pointed out,¹⁶ the conclusion is inescapable that there was only one agreement or proposi-

14. The *Sambasivam* case is reported in [1950] 2 W.W.R. 817 (P.C.). For the citations of the other cases see *supra*, note 8.

15. (1963) 40 C.R. 261.

16. *Ibid.*, p. 282.

tion between the accused and the policeman. The verdict at the first trial therefore necessarily involved a finding that there was not "an unlawful purpose, to wit: to obtain . . . information which it was his duty not to divulge" because the intent to interfere with the administration of justice was the unlawful purpose to obtain information which it was his duty not to divulge, the latter being only the means by which the former could be achieved.

It is respectfully submitted that Judson, J., on behalf of the majority, was unrealistic in being unable to find what issue had been decided in the accused's favor at the first trial. As defence counsel argued, the view of the majority of the court was erroneous because it approached the case from the standpoint of a comparison of the wording of the two counts, and not the realities of the proceedings in the first trial.¹⁷ This is perhaps a case where logic was twisted to meet the ends of justice.

Certainly the onus is on the accused to establish that in an earlier proceeding there was a determination of a question of fact in his favor vital to the later charge.¹⁸ But in a criminal trial it is submitted that the accused need only raise a reasonable doubt on this issue, as in the case of any issue.¹⁹ In *R. v. Gill*,²⁰ the Court of Criminal Appeal held that such is the case with the defence of duress, and there is no reason why the general rule ought not to be applied to the defence of *res judicata* as well.

It is submitted that the more realistic approach of the United States Supreme Court in *Sealfon v. U.S.*²¹ is to be preferred. The accused were acquitted by a jury on a charge of conspiracy to commit an offence,²² and later charged with the substantive offence of aiding and abetting the uttering and publishing of the false invoices introduced at the conspiracy trial. In the second trial the court had no difficulty in holding that the jury in the first case had found that there was no agreement, and the defence of *res judicata* succeeded. The majority of the court in the *Wright* case, in a very similar situation, was unable to make such a finding.

Another problem which has faced the courts is the extent to which the doctrine of *res judicata* can be applied where a separate offence is alleged involving a different victim. In this situation the accused fares no better in the United States than in Canada. In *Villemaire v. The Queen*²³, "V" was charged separately with the rape of "A" and the rape of "B" on the same day at the same place. On the first charge he was acquitted, and on the second charge he was convicted. At the first trial all elements were admitted except the identification of the accused. The majority of the Quebec Court of Appeal, however, was unable to find that the issue of identity had been found in "V's" favor. Similarly, in the American case

17. *Ibid.*, p. 290.

18. [1963] 1 O.R., at 581.

19. See *R. v. Hrynuk* (1948) 56 M.R. 380, at 386; and *Woolmington v. D.P.P.* [1935] A.C. 462, at 480 and 482.

20. [1963] 2 All E.R. 688.

21. (1947) 332 U.S. 575, at 578.

22. The offence alleged was to defraud the United States by presenting false invoices and making false representations to a ration board to the effect that certain sales of sugar were made to exempt agencies.

23. (1963) 39 C.R. 297.

of *Hoag v. New Jersey*²⁴, "A" was acquitted on three indictments of robbery of three persons on the same occasion. The defence was solely one of alibi. "A" was then indicted for robbery of a fourth man on the same occasion. He was convicted, and the United States Supreme Court was unable to find what issue had been determined in "A's" favor at the first trial. In both of these cases the key factor in the decision was the existence of different victims. It is difficult to see how the fact that there is a different victim complicates the issue when at the first trial it has obviously been found that the accused was not present. The words of Warren, C. J., who dissented in the *Hoag* case, are worth considering:

Of course, such a review of the record cannot say with certainty what was in the mind of each juror But because a court cannot say with certainty what was in the mind of each juror is no reason for declining to examine a record to determine the manifest legal significance of a jury's verdict The guarantee of a constitutional right should not be denied by such an artificial approach.

A fundamental right is protected by our law in the defences of *res judicata* and *autrefois*. The *Wright* and *Villemaire* cases are frightening, because they may indicate a judicial trend to narrow the operation of these defences, thereby encroaching on this fundamental right.

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CRUELTY IN FAMILY LAW

In *Gollins v. Gollins*¹ the House of Lords has attempted to settle the meaning of "cruelty" in that area of English matrimonial law where it is a ground for matrimonial relief. The case is of immediate interest in Manitoba in that this province retains the English concept of cruelty as a ground for judicial separation in the Queen's Bench as well as in proceedings under section 4 of the Wives' and Children's Maintenance Act.²

The leading definition of cruelty was set forth in *Russell v. Russell*³ by Lord Herschell to the effect that the conduct complained of in the application for judicial separation must be such as to cause danger to health (bodily or mental), or a reasonable apprehension thereof. The difficulty in the application of this rule arose by reason of the mental element involved. Did the petitioner have to prove that the respondent intended the harm? Or was it merely necessary to show that he ought reasonably to have foreseen it? Opinion as to what constituted this mental element

24. (1958) 356 U.S. 464.

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1. [1963] 2 All E.R. 966.

2. R.S.M., 1954, c. 294.

3. [1897] A.C. 395, at p. 456.

resolved itself into two distinct, though somewhat overlapping, schools of thought. The first stated that:

. . . where the respondent has no express intention of injuring the petitioner and his conduct is not aimed at the other nor shows an unwarrantable indifference to him or her, there cannot be cruelty, for the presumption of intention cannot be drawn.⁴

The second suggested that:

. . . in order to establish cruelty, it must be shown that the respondent foresaw the consequences of his conduct; if conclusive evidence on this point is not available, the presumption that a person intends the natural and probable consequences of his acts may be invoked and that which cannot be proved may be presumed.⁵

Both schools agreed that "intention" was necessary, but the first stipulated *actual* intention as a pre-requisite, whereas the second recognized *presumed* intention based on reasonable foresight of the consequences.

These divergent views evolved, it has been suggested,⁶ as a result of the reluctance of the courts to define basic principles in relation to cruelty in the matrimonial causes. This reluctance in turn was the consequence of timidity in dealing with any matters concerned with public policy, religion or morality. However, the courts have not been totally blind to such consideration. There has been a real concern to preserve that which is entered into, at least theoretically, as a life-long relationship between the parties. This concern was enunciated by Denning, L. J. (as he then was):

If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled.⁷

It was this desire to preserve the institution of marriage which led to the development of the mental element concept, whether it be expressed as intention or foreseeability.

Now, however, the House of Lords has disapproved the *dictum* of Denning, L.J. in *Kaslefsky v. Kaslefsky* and the cases on which it was based. The Court of Appeal in that case was apparently correct in law, for it was bound by precedent, but incorrect in social justice. The door which Lord Denning feared to open too wide has now been fully opened by the House of Lords, for it has dispensed entirely with the mental element as a condition precedent for a successful application.

Gollins v. Gollins involved parties who were married in 1946. There were two daughters of the marriage, born in 1947 and 1949. The husband had had a farm, but as a result of accumulated debts was forced to sell. He then bought a house on mortgage which he transferred, subject to the

4. P.M. Bromley, *Family Law*, 2nd. ed. at p. 96.

5. John M. Biggs, *Concept of Matrimonial Cruelty*, at p. 98.

6. A. L. Goodheart, "Cruelty, Desertion and Insanity in Matrimonial Law," 79 L.Q.R. 98, at p. 123.

7. *Kaslefsky v. Kaslefsky* [1950] 2 All E.R. 398, at p. 403.

mortgage, to his wife, who had given or lent him considerable sums. The wife ran this house, the matrimonial home, as a guest house in order to maintain the family while the husband did little or nothing to help. He made no effort to obtain gainful employment. His creditors visited the wife to prevail upon her to pay the husband's debts. He refused to assist his wife or to earn money. He was "incorrigibly and inexcusably lazy". The result was that the wife, formerly a normal and active person, began to worry, and eventually was reduced to a physical and mental state whereby she was no longer able to support herself or her children. She then made application for a non-cohabitation order, alleging cruelty. The justices at trial granted the order. On the husband's appeal to the Divisional Court, the justices' decision was reversed. The wife's appeal was allowed by the Court of Appeal, and that judgment was affirmed by the House of Lords.

The House of Lords approached the case in a mood illustrated by the words of Lord Reid:

It appears to me that the time has come to decide whether or not intention really is a necessary element in cruelty.⁸

The question was answered in the negative, and the court held that:

. . . if the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent's mind.⁹

It was further stated¹⁰ that the test to be applied in any particular case is a subjective test, in which should be considered the particular individuals concerned and the particular circumstances. If, as the result of such test, it appears that the petitioner must have a remedy, then it will be immaterial whether there was either intentional conduct aimed at the petitioner or reasonable foresight of the consequences. In short, the state of the actor's mind need not be considered.

The case of *Gollins v. Gollins* indicates a liberalizing of English matrimonial law by the judiciary. The concern to clarify areas of matrimonial law plagued with ambiguities, and to adjust family law to meet the needs of the day was again illustrated by *Williams v. Williams*,¹¹ which followed (chronologically) *Gollins v. Gollins*. That case dealt with the question of whether or not on a petition for divorce on the grounds of cruelty, the respondent could validly raise as a defence insanity according to the

8. [1963] 2 All E.R. 966, at p. 973.

9. P. 974.

10. P. 970.

11. [1963] 2 All E.R. 994.

McNaghten rules as applicable to criminal law. The court held that he could not. Lord Reid said:

In my opinion judgment decree should be pronounced against such an abnormal person not because his conduct was aimed at his wife nor because a reasonable man would have realized the position, nor because he must be deemed to have foreseen or intended the harm he did, but simply because the facts are such that, after making all allowances for his disabilities and for the temperaments of both parties, it must be held that the character and gravity of his acts was such as to amount to cruelty.¹²

The significance of the *Gollins* case is twofold. First, in the realm of English matrimonial law, much of the confusion surrounding the application of rules relating to cruelty has been removed. Secondly, and of greater significance to Manitoba law, the House of Lords has indicated that matrimonial law is not static, but must be adjusted to meet the changes and the challenges of an ever-moving society. Although *Gollins v. Gollins* cannot bind our courts, its persuasive *dicta* should be acknowledged and accepted; not because it is a House of Lords decision, nor because it expounds any profound new truths, but because it realistically faces and resolves pressing social problems.

D. K. WILSON*

CONCLUSIVENESS OF TORRENS TITLES

Since Torrens title conveyancing plays such a large role in the practice of the average solicitor in western Canada, the recent case of *Kaup and Kaup v. Imperial Oil Ltd. et al*¹ should be of considerable interest to the profession. The Supreme Court of Canada ruled that a certificate of title issued under Alberta's Land Titles Act² is indefeasible only if it is held by a *bona fide* purchaser for valuable consideration.

The *Kaup* case dealt with a transfer of land wherein all the mines and minerals other than coal were reserved. However, due to an error of the Registrar, this reservation was omitted from the resulting certificate of title. The purchaser subsequently transferred the property to a volunteer, and a new certificate was issued, also without the mineral reservation. Some thirty years later, the Registrar sought to correct all titles involved, and an action was commenced to determine the rightful ownership of all mines and minerals other than coal. It was held by the Supreme Court, *per* Martland, J., that the original transferor had not parted with his mineral interest, and that since there was no subsequent *bona fide* purchaser

12. P. 1004.

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1. [1962] S.C.R. 170; 32 D.L.R. (2d) 112; 37 W.W.R. 193.

2. R.S.A. 1955, c. 170.

for value without notice, the later certificates could be corrected, in order to exclude that interest.

Mr. Harold McKay, Manitoba's Registrar-General, has made the following comment on the *Kaup* case:

This judgment follows very closely the dissenting judgment of Justice Dennistoun and *overrules* the majority decision of the Manitoba Court of Appeal in *McKinnon v. Smith*.³

The *McKinnon* case,⁴ which was not referred to in Mr. Justice Martland's judgment in the *Kaup* case, dealt with the indefeasibility feature of the Manitoba's Torrens title. It involved a transfer by a father to his children, without consideration, of the fee simple interest in land which was in fact his homestead. The action was brought by the transferor's wife, who sought to have the transfer set aside on the ground that it did not contain the required dower consent by the wife. The action was dismissed because a certificate of title had been issued to the children, and the majority of the Manitoba Court of Appeal held that the certificate of title was conclusive in the absence of fraud. It must be acknowledged that the indefeasibility section of the Real Property Act⁵ was not the sole, or even the principal, *ratio* of the majority decision. All four majority judges relied on a section of the Dower Act which expressly provided for conclusiveness of title in cases of that kind. Only two judges, Trueman, J. A., and Prendergast, J. A., relied alternatively on the general indefeasibility provision of the Real Property Act. Nevertheless, as the previously cited article by Manitoba's Registrar-General demonstrates, the case has been regarded for almost forty years as the leading decision on the conclusiveness of a certificate of title issued under the Manitoba Real Property Act.

The *Kaup* and *McKinnon* cases can be distinguished on their facts, since the question of a Registrar's power to correct titles, which was important to the former decision, did not arise in the latter one. However, Mr. Justice Martland's *dicta* regarding the purposes of a Torrens act are in direct conflict with the views of Trueman and Prendergast, J. A. in the *McKinnon* case. But does this mean, as Mr. McKay has suggested, that the Manitoba case must be treated as impliedly overruled? It is respectfully submitted that since each of these decisions deals with the interpretation of a similar but distinct act, the legislation involved must be compared before the *Kaup* case can be assumed to be applicable in Manitoba. It is of course essential that the courts expound a statute, "according to the intent of them that made it."⁶ It is quite conceivable that the two legislatures had a different "intent" when enacting their respective Torrens statutes.

3. (1963) 6 Can. B.J. 336. Italics are mine.

4. [1925] 3 W.W.R. 293; 4 D.L.R. 262; 35 M.R. 207.

5. Now R.S.M. 1954, c. 220, s. 63.

6. *Sussex Peerage Case*. (1844) 11 Cl. & F. 143.

The indefeasibility section of the Manitoba Act, s. 63, reads as follows:

Every certificate of title shall, so long as it remains in force and uncanceled, be conclusive evidence at law and in equity, as against Her Majesty and all persons, that the person named in the certificate is entitled to the land described therein for the estate or interest therein specified, subject, however, to the right of any person to show that the land is subject to any of the exceptions or reservations mentioned in section 62, or to show fraud wherein the registered owner, mortgagee, or encumbrancer has participated or colluded and or against the registered owner, mortgagee, or encumbrancer, but the onus of proving that the certificate is so subject, or of proving fraud, is upon the person who alleges it.

A volunteer is not one of the exceptions under s. 62. However, it is provided in s. 67 that the title of a volunteer *who acquires from a fraudulent transferor* is defeasible. Applying the *expressio unius* principle, it appears that a volunteer to whom a certificate is issued in the absence of fraud acquires an indefeasible title. This was the interpretation adopted by Trueman, J. A. in the *McKinnon* case:

The plaintiff's submission is that this provision is for the benefit of purchasers for value only . . . I may say at once that I find no warrant for this construction of the section. Its terms, read as they must be in their literal sense, being free from ambiguity, make no distinction between purchasers and volunteers, and do include the latter.⁷

Therefore, upon a consideration of s. 63 alone, there can be no doubt that an application of the "Literal Rule" of interpretation leads to but one conclusion: fraud is the only exception to the conclusiveness of title.

Section 65 of the Alberta Land Titles Act is substantially the same as the Manitoba section, except in certain aspects that are not relevant in the present context. But Mr. Justice Martland held in the *Kaup* case that to interpret this section it is necessary to look beyond the words of the section itself:

In my opinion, the conclusiveness of a certificate of title, referred to in s. 44 of the 1906 Act, must be considered in the context of the scheme of the Act as a whole . . .⁸

Looking at the Act as a whole, and at certain sections providing expressly for indefeasibility in the case of a *bona fide* purchaser for value, he concluded that the above section does not concern indefeasibility at all, but does no more than:

. . . state what is a basic principle of the Land Titles Act system that it is only the registration of an instrument under that Act, and not its execution and delivery, which can be effective to convey a legal interest under the statute.⁹

Since Mr. Justice Martland considered that these sections "must be considered in the context of the scheme of the Act as a whole" we will compare the contexts in which they occur in the Alberta and Manitoba Acts. Section 65 of the Alberta Act is contained in a portion of that Act providing for the "registration of instruments". There is, therefore, some

7. [1925] 3 W.W.R., at 306.

8. [1962] S.C.R., at 182. Section 44 of the 1906 act was the equivalent of the present s. 65.

9. *Ibid.*, at 177.

justification for treating it, as Mr. Justice Martland did, as dealing with the effect of registration rather than conclusiveness of title.

Upon a perusal of the Manitoba Act it is evident that s. 63 is one of a series of thirteen sections dealing solely with certificates of title and their effect.¹⁰ There is a *separate series* of sections dealing with the registration of instruments¹¹. In the latter group, which is not relied upon to establish indefeasibility under the Manitoba Act, there is a provision providing for what Mr. Justice Martland accepts as the main effect of the Alberta section: that registration is essential to pass title. Therefore, since it must be assumed that the Manitoba legislature intended s. 63 to have some independent meaning, it must mean something different than its Alberta counterpart.

There should be nothing startling in the assertion that the Alberta and Manitoba Acts may differ on this point. There are other fundamental differences as well. For example, the Manitoba Act establishes the quasi-judicial office of Registrar-General to administer the Act and to hear appeals from the District Registrars. Appeals from the decision of the Registrar-General go directly to the Court of Queen's Bench, and this procedure is also provided in the Act. In Alberta, appeals from the District Registrars are made to the Attorney-General's department. While the latter example has no direct bearing on the question of defeasibility, it does illustrate a fundamental difference in the two approaches to the administration of a Torrens system.

With respect I would submit that, at least in Manitoba, the Real Property Act seeks not only to protect *bona fide* purchasers for value by insisting and providing for registration, but also to provide *evidence* of title. The Manitoba certificate stems not merely from registration of a transfer, but is in effect the *warranty* of the Registrar that the person named therein has a good safe-holding title to the lands and the estate as described in that certificate. Such a warranty is based on the transfer *plus* the Registrar's investigations of such other material as he may require to be filed (such as company charters, provincial licences and registrations, and testamentary documents). Subject only to fraud, a person may thereby rely on the certificate and purchase a *profit à prendre*, such as a mineral lease, without undertaking an historical search. If all the *dicta* of the *Kaup* case were applied, then such persons would have to go behind the title to ascertain the consideration involved.

It is therefore submitted that the *McKinnon* case still presents a valid interpretation of the Real Property Act, and that Manitoba's Torrens title remains indefeasible save only in the case of fraud.

J. C. CRAWFORD*

10. Section 54 to 67 inclusive.

11. Section 68 to 85 inclusive.

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1963 INCOME TAX CHANGES

The Budget Resolutions of June 13, 1963 were startling, and yet expected. Their aims and long range objectives had for some considerable time been espoused by Walter Gordon, newly appointed Minister of Finance, yet the means which the Minister used to achieve his purposes were surprising, in that they seem in some instances diametrically opposite to past policy, and even to the very goals contemplated. Reaction to the Budget ranges from complete accordance in some circles (seemingly concentric ones), to absolute opposition in others. The writer finds himself closer to the latter group than the former.

The Resolutions were intended to serve three primary objectives:¹ encourage Canadian ownership of, or at least greater participation and representation in, domestic enterprises; stimulate secondary industry; end certain anomalies and close certain loopholes in the Income Tax Act.

The first of these objectives, the attempt to encourage Canadian ownership of domestic enterprises, is a laudable objective with which few Canadians will argue. It is the principle underlying the changes in non-resident tax rates. The new provisions are found in clauses 15, 22, 23 and 28 of Bill C-95 which deal respectively with Sections 70 (2), 105D, 106, 110B and 139A of the Act.

Clause 23 of the Bill, Section 106 of the Act, holds the major provisions of the new non-resident tax rates. Basically, it imposes an increase in the rate from 15% to 20% where the corporation does not have the required degree of Canadian ownership and control, and a decrease from 15% to 10% where the corporation does have such a degree of control and ownership.

Clause 28 of the Bill, Section 139A of the Act, defines this required degree of control and ownership. The major requisites are that the corporation be resident in Canada, and that either: (a) at least 25% of the issued voting shares be held by persons resident in Canada, or by one or more corporations controlled in Canada, or by a combination thereof; or (b) the voting shares of the corporation be traded on a prescribed stock exchange in Canada, and no non-resident or person related to him may control more than 75% of the voting shares. It is also necessary that the corporation must have at least 25% of its board consist of resident Canadian directors.

The Canada-United States Reciprocal Tax Convention, which provides that the country of residence will recognize and take into account any taxes levied by the country in which the income is earned, may be seriously affected by the implementation of Clause 23, since, under Article XI (3) of the Convention Canada's action may be construed as a termination of Article XI (1), with the result that the United States rate will become 30%

1. The space available precludes an intensive investigation of all the changes in the Act. In all there were 23 clauses in Bill C-95.

in 1965. This would mean that the standard 30% United States rate would apply to Canadians expecting or in a position to receive interest, dividends, rents, royalties or similar payments from the United States. It may be rather optimistic of Mr. Gordon to hope for favourable re-negotiations of the Convention with the United States in light of the Department of Finance's poor luck in altering our Conventions with Britain and Holland after the December, 1960, abrogation of the lower rates of tax imposed upon dividends payable to residents of those countries. Of course, if a Canadian government were really convinced that Canadian money should stay at home, it might risk subjecting Canadians to the 30% rate. But it is hard to believe that the government is willing to pay so high a price. It is submitted that for the purpose of building Canadian equity ownership incentives to Canadians would be a better policy than penalties on foreign investors.

Another facet of Clause 23, which seems to have escaped the Minister's notice is that he may very well be forcing some major Canadian owned companies to emigrate to the United States in order to avoid paying a high United States tax on the profits received by them from their American subsidiary companies. These companies, seeing the trap which they are being driven toward, have made representations to the Minister, but he has proved unimpressible. The new taxing provisions may hurt any Canadian firm which does a major part of its business through a United States subsidiary more than it will hurt the American companies at which the legislation is directed. The result is that if the United States raises its rate to 20% (which it will probably do, rather than going all the way up to its standard 30% rate), then with normal United States corporate taxes, a Canadian parent desiring to bring all its profits back to Canada might see the subsidiary corporation pay as taxes almost 62% of its profits. One must hope that the Minister will effect some means to stop this sacrifice of the relatively few, but very large, Canadian companies depending on earnings from American operations.

Clause 23 (1) of the Bill, Section 106 (1) (a) of the Act, provides that a 15% tax will be applied to a "management or administration fee or charge" paid to a non-resident person by a resident of Canada. In the House of Commons on July 22, 1963, Mr. Gordon partially explained the term by stating that:

Payments to non-residents will be taxed in circumstances in which the label of management fees is being used as a facade for the withdrawal of profits which should be subject to the full non-resident tax.²

It is submitted that this statement by the Minister does not clarify the vague language of the Act, but only reiterates his objective.

Clause 23 (3) of the Bill, Section 106 (1) (c) of the Act, defines a management or administration fee or charge only in negative terms, and leaves

2. *The Canadian Chartered Accountant*, Volume 83, Number 3, September 1963.

the true meaning of the phrase open to interpretation by the Department, the courts, the profession and the taxpayer. This writer, for one, feels that such a definition is inadequate, and concurs with H. H. Stikeman, Q.C. that:

It would be desirable to have this defined in clear terms, if only to avoid disparity between taxpayers and in order to add certainty to the law.³

Clause 22 of the Bill, Section 105D (1) of the Act, provides for a tax to be payable by a corporation which increases its dividends, during the period June 14, 1963 to December 31, 1964, over a set base amount if that corporation does not have the required degree of Canadian ownership and control. The tax is 5% of the dividends paid in excess of the base amount. This measure was introduced to stop avoidance of the increased taxes arising from Clause 23.

Clause 15 of the Bill, Section 70 (2) of the Act, provides for an increase from 15% to 20% in the rate of tax on non-resident owned investment corporations, after 1964. This seems unreasonable in light of the reduction of tax on dividends paid by Canadian companies to non-resident shareholders (if the company has the prescribed degree of Canadian ownership and control) and in view of the fact that tax rates on interest have not been increased:

In effect, a 5% penalty will be imposed on non-resident owned investment companies which are normally used as depositories of Canadian investment portfolios by non-resident individuals who wish to avoid paying Canadian estate taxes and probating their wills in Canada.⁴

The second prime objective of the Resolutions was the stimulation of secondary industry. One vehicle used was Clause 16 of the Bill, Section 71A of the Act, which provides for a three-year tax holiday for businesses established within 24 months in certain areas designated by the Department of Industry, and meeting certain other requirements. The wording of the legislation is strict, and will not be easily satisfied. The companies applying for this tax holiday must meet such severe tests that many prospective applicants may well be discouraged from trying to come within the ambit of the new sections. For instance, 95% of the machinery and equipment must be new, and must be in the designated area, 95% of the gross revenue must be made up of net sales of goods made or processed in Canada, and, moreover, the rules must be met "throughout" the fiscal year, or else the whole year's exemptions may go out the window. Also, there is the creation of an anomaly in this section, since certain industries are not eligible, but there seems to be no legislation to stop these same firms from incorporating subsidiaries which can make themselves eligible.

3. *Canada Tax Service*, Number 82, October 7, 1963.

4. *McDonald's Current Taxation*, Volume 4, issue 25, June 19, 1963. Page 2.

Because of these and other objections, the following statement of Mr. John McDonald, Q.C., relating to Clause 16 appears justified:

This Section is another example of high-flown oratory at budget time followed by narrow legislation at the working level.⁵

Further, to stimulate secondary industry, the Minister called for new capital cost allowances with regard to certain items meeting particular requirements. Such property may qualify for capital cost allowances at a straight line rate not to exceed 50%, whereas it would otherwise fall within Class 8, under the terms of which such a large capital cost allowance would not be allowed. A similar increase in capital cost allowance is provided for the new businesses to which Clause 16 applies.

The third primary objective of the resolutions was to extinguish certain anomalies and close certain loopholes in the Act.

Clause 6 of the Bill gives rise to change in Section 27 (5) of the Act, which contains business loss carryover provisions. Predictably, the changes further inhibit trading in tax loss companies. The basic difference is that previously the right to carry over business losses could be determined by the change in ownership of the shares of the loss company, whereas now the right is affected by a change in "control" of such loss companies. The new provisions affect only those transactions taking place after June 13, 1963. "Control" has often been variously judicially defined as it relates to particular sections of the Act. The writer would suggest that the Minister has created a new uncertainty in that he has not defined "control" as it will apply in this context. Further, a loophole still exists in that the loss can be deducted from a profitable business even where control changes, so long as the sale occurs in the same taxation year as the loss was incurred. However, the loophole which existed since 1958 of re-classifying the shares and re-activating the loss company is now apparently closed.

Clause 4 of the Bill repeals Section 18 of the Income Tax Act. This Section dealt with lease-option agreements and was primarily intended to stop what the tax authorities considered "artificial" leases accompanied by a \$1.00 option to purchase. The introduction of the now repealed Section 18 proved to have the effect of killing the Phoenix, in that it only lead the practitioner to create new methods of avoiding the section's intent, and thus gave rise to a flood of patently artificial transactions. The repeal of Section 18 is a progressive measure for which the Minister, in this writer's view, ought to be applauded.

Clause 26 contains new provisions relating to dividend strips and associated companies. By adding Section 138A to the Act, Mr. Gordon has re-introduced ministerial discretion into these important areas. In the writer's view, the provisions are regressive, and represent a throwback to the pre-1948 situation, which was hoped to be long dead. It creates

5. *Financial Post*, October 26, 1936, Page 13.

still another situation in which, if the Minister so directs, transactions which do not contravene the exact terms of the Act may, nevertheless, attract tax. Although there are other discretions allowed to the Minister in the Act, those provided for under Section 138A will certainly prove to be of the utmost consequence in future practice. The Minister has created a situation of generalities, and this detracts from the preciseness of the Act. The taxpayer and his advisers can no longer refer to the Act to determine his tax position in this area with certainty. In the first instance, he does not know whether or not his actions will incur tax until after the end of the year when the Minister has exercised his discretion. Secondly, the discretionary element will detract from the uniformity of the Act across the nation, since, in practise, it is not the Minister, but rather the various assessors in the individual provinces who exercise the discretion, and one assessor's view may differ from another's even though the circumstances and facts are identical.

Some time after the original introduction of Clause 26, the Minister introduced Clause 26 (3), which allows an appeal from an assessment under Section 138A to be made to the Tax Appeal Board or Exchequer Court, which may vacate any direction if it finds that none of the purposes was to effect a "surplus strip" or to take advantage of the low corporate tax rate on the first \$35,000 of a company's income. This change mitigates the harshness of the section to some extent, but the discretionary feature remains.

The tenor of tax decisions has indicated that there ought to be a preciseness in all taxing legislation. The introduction of new discretionary tax legislation will not allow the citizen to know in precise terms where and when he may incur tax. There is no doubt that the legislature has the power to pass such discretionary legislation, however, the writer feels that the introduction of Section 128A is a contravention by the legislature of its obligation to comply with the well-founded principle of preciseness in the application of a taxing statute.

Aside from all other aspects of this legislation, it appears that the target at which Section 138A is aimed has been, for the most part, missed. There were previously at least twelve different means of carrying out a dividend strip as was pointed out by H. H. Stikeman, Q.C., in his speech at the 1961 Tax Conference.⁶ It is possible that none of these classical forms will remain, but certainly, with some ingenuity, the extraction of surplus from a company will still be a reality. Moreover, the basing of companies in Bermuda and other tax-haven countries will still remain as an alternative to the domestic dividend strip. The associated corporations legislation, which kills such birds as the corporate partnership, may undoubtedly be overcome by the imaginative taxpayer through the use of devices such as the "leaping discretionary trust", which provide a method of

6. 1961 Tax Conference Report, Canadian Tax Foundation, Page 23.

income sprinkling, and which may be employed in conjunction with a non-corporate entity.

Only the passage of time will affirmatively prove or disprove the means employed by the Minister of Finance. However, at this juncture it would appear that there has been a substantial failure to implement Mr. Gordon's worthy objectives, and more amending legislation appears in the offing.

GERALD W. SCHWARTZ*

LEGISLATORS ON THE BENCH— JUDICIAL TREATMENT OF SECONDARY PICKETING

The problems that Canada experienced on the Great Lakes during the summer of 1963 amplified the murmurings of anti-union sentiment throughout the land. The questioning grew louder: "Are unions too strong?"; "Has the protection unions enjoy under our laws allowed them to escape the control of the law?"; "Is secondary picketing fair? Should it be legal?"

The Ontario courts grappled with these problems in *Hersees of Woodstock v. Goldstein et al.*¹ The case began as a labour dispute between Deacon Brothers Sportswear Ltd., of Belleville, Ontario, and the Almagamated Clothing Workers Union. Hersees was a retailer of clothing manufactured by the Deacon firm, but had no connection with the union, and certainly no dispute with it. In an attempt to force Deacon by indirect pressure to enter a collective agreement with it, the union's representative approached Hersees. The evidence as to what took place at that meeting was contradictory. Hersees claimed that the union threatened to picket their premises unless they cancelled a pending order for clothing from Deacon. The union asserted that its representative simply requested that Hersees protest to Deacon Brothers that its goods were not union made. In all events, Hersees refused to co-operate with the union, and consequently the union picketed its premises in Woodstock. There were seldom more than one or two pickets at a time, and they in no way physically interfered with customers. Their signs stated simply that Deacon Sportswear sold at Hersees was made by non-union labour, and that "to protect your own living standard, look for the union label when you buy."

The trial began as a motion for an interim injunction against this secondary picketing by the union. By consent, it was turned into a motion for final judgment. Apart from nuisance, which both the trial court and Court of Appeal rejected summarily, the plaintiff claimed a conspiracy to bring about breach of contract with the Deacon firm, and in the alternative a conspiracy to injure the plaintiff in his trade through the establishment of the picket line.

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1. (1962) 35 D.L.R. 616; (1963) 38 D.L.R. 449.

The trial judge, McRuer, C.J.H.C., found as a fact that there was no evidence of a contract, or of any effort by the union to break such alleged contract. He also dismissed the claim based on conspiracy to injure, since he felt that the predominant motive of the strikers was their legitimate self-interest, and not the injury of either corporation. He based this decision of the famous *Crofter* case² and the more recent British Columbia judgment of Wilson, J. in *Williams v. Aristocratic Restaurants*.³ He concluded:

The defendants were exercising a common law right to peacefully communicate information by causing a man to carry a placard with a simple statement of fact on it and an implied invitation to those in sympathy with organized labor to buy only goods bearing the union label.⁴

It is interesting to see how Chief Justice McRuer apparently reversed the premise on which he based his earlier decision in *General Dry Batteries v. Brigenshaw*. At that time, he was:

not at all convinced that, in what one may call the guise of advancing their interest in a labour dispute, employees are entitled to bring external pressure to bear on others who are doing business with a particular person for the purpose of injuring the business of their employer so that he may capitulate in the dispute.⁵

It appears that the intervening years have radically changed his attitude. But it is unfortunate that he made no reference to that earlier decision, since other courts have, including the Ontario Court of Appeal in this case.

The three-man Court of Appeal took a very different view, and reversed Chief Justice McRuer. The judgments of Aylesworth, J. A. (with whom McGillivray, J. A. concurred), and MacKay, J. A., reveal a most provocative view of the basic conflict between freedom of speech, as expressed in union picketing, and freedom of trade.

Aylesworth, J. A., agreed with the trial judge to the extent that he was unable to discern a conspiracy to injure the plaintiff in its trade. However, he found as a fact—in direct contradiction of the trial court—that there was a contract between Hersees and Deacon, and that the unionists intended to induce its breach by their picketing. He alluded to the Criminal Code, and found that the actions of the pickets constituted a “watching and besetting” in violation of the Code. Even more interesting was his assertion that secondary picketing, even if carried out peacefully for the mere purpose of communicating information (and thereby protected by the saving clause in the Criminal Code), is illegal *per se*.

2. *Crofter v. Veitch* [1942] A.C. 453.

3. [1950] 4 D.L.R. 548; (1951) S.C.R. 762.

4. (1962) 35 D.L.R. at 619.

5. [1951] 4 D.L.R. 414, at 419.

Following the view of McLennan, J. in *Smith Bros. Construction v. Jones*, that:

The trade union movement has reached the point where workers will not cross a picket line . . . loyalty to this rule should not be abused for a wrongful purpose and where there is no justification.⁶

Aylesworth, J. A., expressed misgivings about the "power and influence of organized labour". Reverting to first principles, he argued that:

The right, if there be such a right, of the respondents to engage in secondary picketing of (Hersees') premises must give way to (Hersees') right to trade; the former, assuming it to be a legal right, is exercised for the benefit of a particular class only, while the latter is a right far more fundamental and of greater importance, in my view, as one which in its exercise affects and is for the benefit of the community at large.⁷

He was unable to find direct precedent for this statement, but felt that a long line of cases, which will be discussed later, showed a trend toward the transcendancy of community benefit over group expression, of freedom of trade over freedom of speech.

MacKay, J. A., supported Aylesworth, J. A., and went further, to find an unlawful conspiracy to injure the plaintiff in his trade as well. He used the same test that McRuer, C.J.H.C., had used at the trial—the *Crofter* test. But he came to the opposite conclusion, since he felt that the predominant motive of the pickets was not to advance their own "legitimate interests", and that even if it were, those interests were outweighed by the interests of the plaintiff. In so holding he relied heavily on the *Nordenfelt v. Maxim Nordenfelt Guns* judgment of Lord Macnaghten:

The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public.⁸

He concluded by finding that the right of the union to advance the interests of the employees of Deacon Bros. in that manner was in direct conflict with the right of Hersees to carry on its business without undue interference, and—the harm to Hersees outweighing the benefit to the strikers—it was unjust.

To understand the thinking of the judges in this case it will be helpful to look at the history of judicial attitudes toward the union and its weapon, the strike.

6. [1955] 4 D.L.R. 255, at 264.

7. [1963] 38 D.L.R., at 454.

8. [1894] A.C. 535, at 565.

English "laissez-faire" condemned any effort to interfere with unfettered free enterprise, even if such organized interference brought better living standards to the working class. America in the dawn of the Twentieth Century used the Fourteenth Amendment ("... no one may be deprived of life, liberty or property without due process of law . . .") to prevent strikes from depriving the capitalist of the fullest use of cheap labour. Judicial opinion favored heavy-handed use of the conspiracy tort to bridle unionism, and the most benevolent treatment strikers could expect was the sort of indifference seen in the *I.L.G.W.U. v. Rother* judgment:

If members of labor unions prefer idleness to employment, that is their affair, and so, as long as they do not attempt to interfere with men who are willing to work or with the business of employers, no one is likely to interfere with them.⁹

But the combination of the humanitarian or progressive movements and the pro-labour influences of the American "New Deal" swung the pendulum in the other direction—perhaps, some would say, too far. The House of Lords consolidated this pro-union trend with its famous trilogy of *Crofter v. Veitch*¹⁰, *Quinn v. Leatham*¹¹, and *Sorrell v. Smith*.¹² Canadian legislators introduced safeguards for unions to keep in step with this reform. Canadian judicial recognition of the legality and desirability of labour organization went as far as sanctioning the strike of the employer directly involved in the dispute. But our courts, with the almost solitary exception of *McRuer, C.J.H.C.*, have balked at the prospect of allowing secondary strikes or picketing against the employer's customers. Judicial disapproval of such activities has been most marked in recent years. Perhaps because of the increasing power of international unions, the motives of unionists have been suspect, and so the test of predominant intention established by the *Crofter* case has proved a very porous shield indeed, so far as secondary boycotts are concerned.

In a 1955 British Columbia case, *Pacific Western Planing Mills v. I.W.A.*, the employees of the plaintiff voted against strike action, but another mill's employees favored striking, and a picket-line was thrown around the plaintiff's mill, which its own employees refused to cross. Coady, J., swept aside the unions' defence:

The purpose here is not to convey information but to induce a breach of contract, nor do I think there is any labour grievance, certainly not in this plant . . . to induce or persuade plaintiff's employees to break their contracts of employment is *per se* an unlawful act, a tortious act.¹³

The *Smith Bros. Construction* case already referred to was decided in the same year, and shows the same judicial impatience with union attempts to style picketing as education of the public, especially secondary picketing.

9. (1923) 34 Que. K.B. 69, at 72.

10. *Supra*, note 2.

11. [1910] A.C. 495.

12. [1925] A.C. 700.

13. [1955] 1 D.L.R. 652, at 655.

The Supreme Court of Canada in 1959 heard an appeal from the British Columbia case of *A. L. Patchett & Sons v. Pacific Great Eastern Railway*.¹⁴ Let it suffice to say that this was a classic instance of secondary picketing, and it is only with the courts' unequivocal *dictum* on that point that we are concerned. On all levels, trial, appeal and Supreme Court, there was outright condemnation of secondary picketing. Sheppard, J. A., in the Court of Appeal, said: "the picketing was illegal as to purpose and method. There was no trade dispute with the plaintiff; the plaintiff's plant was not in the union."¹⁵ In the nation's highest court, the judges took a similar view (the dissents of Locke and Cartwright, J. J. were on another point). Speaking for the majority, Rand, J. said: "there was in fact no labour dispute between I.W.A. and the appellant and the picketing was illegal."¹⁶

Nor were the International Brotherhood of Teamsters immune from the rhetorical lash of the Canadian courts. In *Teamsters v. Therien*¹⁷ a 1960 Supreme Court case, Locke, J., emphasized that "even though the dominating motive in a certain course of action may be for the range of your own business or your own interests, you are not entitled to interfere with another man's method of gaining his living by illegal means!" And, as the Supreme Court said in the *Patchett* case, the secondary picket is illegal *per se*.

In similar vein is the British Columbia Court of Appeal decision in *Pacific Coast Terminals v. International Longshoremen*.¹⁸ There a strike of another employer did not result in picketing of the plaintiff, but the striking union had members employed with the plaintiff, and allowed them to work only if they secured permits from the union's picketing committee. The court saw this as akin to secondary picketing and, *per Coady, J. A.*, declared it: "an unlawful interference with the plaintiff's business and *prima facie* a besetting of the plaintiff's premises and therefore actionable."

In Manitoba, a similar conclusion was reached by Monnin, J. (as he then was) in *Dussesoy Supermarkets Ltd. v. Retail Clerks Union*.¹⁹ Having exhaustively probed the precedents, he concluded that in all these cases:

The court held that the retailer had established a *prima facie* right to the free exercise of its business which the picketing had impaired, and granted an interlocutory injunction . . . in the present state of the law, and in the absence of specific legislation on the subject, I feel that I am amply justified in disposing of the secondary boycott . . . by finding that it was part of the conspiracy to injure plaintiff in his trade.

Mirabile dictu, he also applied the *McRuer General Batteries dictum*.

14. (1959) 17 D.L.R. 449.

15. (1957) 23 W.W.R. 145, at 165.

16. (1959) 17 D.L.R., at 453.

17. [1960] S.C.R. 265, at 280.

18. (1960) 21 D.L.R. 249.

19. (1961) 30 D.L.R. 51.

These are much stronger views than were taken by the Supreme Court back in 1951 in *Williams v. Aristocratic Restaurants*.²⁰ The *Williams* case involved a union, which was bargaining agent for one store of a chain, picketing other stores in the chain for which it was not certified. The majority, *per* Rand, J., regarded it not as "watching and besetting" contrary to the Criminal Code, but merely as "attendance to communicate information." As Rand, J. put it:

... there is a difference between watching and besetting for the purpose of coercing either workmen or employer by presence, demeanour, argumentative and rancorous badgering... and unexpressed, sinister suggestiveness... on the one side; and attending to communicate information for the purpose of persuasion by the force of rational appeal, on the other.²¹

But he cautiously pointed out the special facts of that case:

The fact that two of the restaurants were not within the unit of employees for which the union was authorized to act does not affect the question; the owner's economic strength is derived from his total business; and it is against that that the influence of information is exerted.²²

The *Williams* case was the basis of McRuer, C.J.H.C.'s dismissal of Hersees' claim. Yet it is evident that the two cases can be distinguished on the facts, since in *Williams* there was really only one employer involved. In addition, it would seem that the judgments of the Supreme Court since 1951 that we have already reviewed have taken most of the fangs out of the *Williams* decision.

Having shown the unanimity of judicial thought on secondary boycotts, we can return to the *Hersees* decision, and respectfully submit that both at trial and on appeal they contain the seeds of their own rebuttal.

McRuer, C.J.H.C., found, as have so many courts before him, that Viscount Simon's test in the *Crofter* case gives a judge as much latitude as if there were no test at all, and mere personal opinion had to be his guide. His heavy reliance on the *Williams v. Aristocratic Restaurants* case was ill-advised, since, as already shown it is clearly distinguishable on the facts.

That an appellate tribunal should be most wary of reversing a trial court's finding of fact is an ancient prohibition. Where the appeal court does so, it should only be where the trier of fact at first instance was clearly wrong, or proceeded on a wrong principle. Aylesworth, J. A., indicated the evidence upon which he found as a fact that there was a contract between Hersees and Deacon. But there is no indication in his judgment of any compelling reasons why he should have substituted his view of the facts for the finding of the trial judge. He simply said that he "prefer(s) to accept Hersees' version . . ."²³

Having chosen to embark on his own view of the facts, he might well have proceeded to determine whether there was an actual *breach* of the

20. *Supra*, note 3.

21. *Ibid.*, at 784.

22. *Ibid.*, at 787.

23. (1963) 38 D.L.R., at 452.

contract, and whether damages can be awarded to the party picketed rather than the wholesaler against whom the picketing is directed. These two vital omissions from the judgment are comprehensively discussed in a *Canadian Bar Review* article by Professor H. W. Arthurs.²⁴

The difference in viewpoint between the trial judge, McRuer, C.J.H.C., and the Appeal Court justices seems to be less one of law than one of social premises. Chief Justice McRuer appears to place a higher value on the freedoms of the labour movement than do Aylesworth, J. A., and his brother justices. The great divergence in the conclusions of the two courts springs from the efforts to sculpture the law to fit these particular views of the role and scope of organized labour.

In the dawn of unionism, unions lacked power to oppose management. Pro-labour legislation brought about a balance, so that the rights of both sides were respected. The international union today has acquired such influence and resources that it stands equal in power to the mightiest employers. Its power is such that it can paralyze ventures whose speedy completion is essential to the national interest. The labour problems encountered in connection with the Canadian and American wheat shipments to Russia and the American missile program are two examples. Nevertheless, legislation remains on the books to "protect" organized labour from management.

Judges like Mr. Justice Aylesworth seem to recognize that the thing is again out of balance; that the small business man stands naked in the face of union might. Therefore, following this inarticulate major premise, they attempt to restore the balance by twisting present labour law or taking a view of the facts which will circumvent laws they regard as unsatisfactory. One may sympathize with their motives, but such radical change should be left to the legislators if we are to prevent labour law from becoming a labyrinth beyond the comprehension of the employer, the unionist, or their legal advisors. British Columbia has begun by specifically outlawing the secondary boycott, and Manitoba has declared unions suable legal entities. It is time for other provinces and the federal government to follow suit!

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24. (1963) 41 Can. B. Rev. 573.

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