effective for all purposes as an adoption made under the provisions of the Child Welfare Ordinance, N.W.T. "The Eskimos, and particularly those in outlying settlements and distant camps," he said in his judgment:

> are clinging to their culture and way of life which they have found to be good. These people are in process of cultural change and have a right to retain whatever they like of their culture until they are prepared of their own free will to accept a new culture. In particular, although there may be some strange features in Eskimo adoption custom which the experts cannot understand or appreciate, it is good and has stood the test of many centuries and these people should not be forced to abandon it and it should be recognized by the court.[13]

In these four cases, dealing with different aspects of the legal position of the Eskimos, there is evident a very real desire on the part of the presiding judge to make an active sense of justice the handmaiden of the law.

ROY ST. GEORGE STUBBS*

THE CONSTITUTIONAL VALIDITY OF THE TIME SALE AGREEMENT ACT

The Time Sale Agreement Act,[1] recently passed by the Manitoba Legislature, but not yet proclaimed, has given rise to considerable controversy, especially among Manitoba merchants. One question which has yet received little consideration is the constitutional validity of this Act.

The preamble to the Act indicates its purpose. It states:

> Whereas it is desirable that a person purchasing goods on an instalment payment plan should, at the time of entering into an agreement for the purchase thereof, be fully informed as to the amount of interest that he is required to pay on any unpaid balance of purchase price and the true rate thereof, and also as to all other amounts added to and included in the purchase price, or payable in addition to the purchase price;

The Act applies to conditional sale and hire purchase agreements[2] (included in the term "time sale agreement") in retail sales for an amount of one hundred dollars or more,[3] and requires all such agreements to be "evidenced" in writing, to be signed by the purchaser and to contain a description of the goods sufficient to identify them.[4]

In addition, such agreements are required[5] to state, *inter alia*: the regular cash selling price; the full selling price charged to the buyer, including a separate item showing the amount for the finance charges; the amount charged for insurance, if any, and the nature of the coverage provided; any other amount, including interest, charged to the buyer for the privilege of purchasing under a time sale agreement, and showing whether it is

13. P. 101.

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1. S.M. 1962, c. 76.
2. Section 2.
3. Section 5.
4. Section 3 (1).
5. Section 3.

included or is in addition to the actual purchase price; the rate of interest charged, and the basis upon which it is calculated; any additional charge for delivery and installation; the amount of liquidated damages in case of default; the amount of the initial payment and the value of the trade-in, if any; and the amount and due date of each instalment. Curiously, the Act does not require the seller to deliver to the buyer a copy of this memorandum.

Failure to comply with the Act renders the seller liable to a fine, on summary conviction, of not more than five hundred dollars and, in default of payment, to imprisonment for a term not exceeding six months. In addition, although this is not explicitly dealt with in the Act, it is likely that a time sale agreement not complying with the Act would be unenforceable on the part of the seller.[6]

The subject of "interest" is reserved exclusively for the jurisdiction of the federal Parliament by section 91 (19) of the British North America Act.[7] This subsection has received little attention from the courts, but the scope of the term "interest" can be derived from a few *dicta*. The federal power is certainly not confined to prohibiting usury. It is unlikely that "interest" will be given less than its ordinary meaning by the courts. In *Credit Foncier* v. *Ross*,[8] a decision of the Alberta Court of Appeal, Harvey, C. J., stated:

> Counsel for the Attorney-General contended before us, as he did at the trial, that the word "interest" in heading 19 of Section 91 could not have been intended to mean the whole field of interest but only such matters as usury which had been theretofore the subject of legislation in England or at the most the determination of what would be legal and what illegal interest . . . there appears no justification for considering that "interest" was not intended to mean "interest". It is a perfectly simple word with a well recognized meaning without ambiguity. It is defined in the New Oxford Dictionary as meaning "money paid for the use of money or for the forebearance of a debt according to a fixed ratio."

That the federal power is not restricted to regulation of interest "rates" in private contracts was indicated by the Judicial Committee of the Privy Council in *The Saskatchewan Farm Security Act Case*. Viscount Simon, speaking for the Board stated:

> It is, therefore, clear that a provincial statute which varies the stipulation in a contract as to the rate of interest to be exacted would not be consonant with the existence and exercise of the exclusive Dominion power to legislate in respect of interest. The Dominion power would likewise be invaded if the provincial enactment was directed to postponing the contractual date for the payment of interest *without altering the rate*, for this would equally be legislating in respect of interest.[9]

Similarly, I submit that an enactment requiring the disclosure of interest charges in a specified manner and form is legislation in respect of interest, even though there is no attempt to alter interest rates.

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6. See for example, *Ferguson* v. *Norman* (1838) 5 Bing. N.C. 76, *Bensley* v. *Bignold* (1822) 5 B. & Ald. 335, and *Cundell* v. *Dawson* (1847) 4 C.B. 376.
7. (1867) 30 Vict. c. 3.
8. (1937) 2 W.W.R. 353, at p. 363. See also *Re Unconscionable Transactions Relief Act* (1962) O.R. 1103.
9. *Attorney-General for Saskatchewan* v. *Attorney-General for Canada* (1949) A.C. 110, at p. 124. The italics are mine.

Furthermore, "interest" is not an overlapping field. A province is excluded from dealing with interest whether or not there is federal legislation on the subject. In *Credit Foncier* v. *Ross*, Harvey, C. J. stated:

> While agreeing with the views of the learned trial Judge it appears to me that whether the provisions of the Act conflict with any Dominion legislation respecting interest is really not material because there is no common field in which the double aspect rule can apply. The Act is as already indicated, essentially, not merely incidentally, legislation on the subject of interest, a field in which the legislature has no right to enter whether the Dominion parliament has or has not.[10]

Only if the provincial legislation deals "in pith and substance" with some other subject within provincial jurisdiction can it validly deal incidentally with interest. Thus in *Ladore* v. *Bennett*[11] the Judicial Committee of the Privy Council considered the validity of certain Ontario legislation which effected the amalgamation of four insolvent municipalities, and which provided, *inter alia*, that existing debentures were to be replaced by new debentures at a lower rate of interest. This legislation was attacked on the ground that it trenched on the exclusive federal jurisdiction regarding "interest". However, Lord Atkin, in delivering the judgment of the Board, held that the legislation in pith and substance dealt with the provincial subject of "municipal institutions", and that the provisions relating to interest were only incidental to the exercise of that valid provincial power.

In order to support the Time Sale Agreement Act it would be necessary to establish that the Act deals with interest only incidentally. It might be argued for example that the Act in pith and substance deals with the "sale of goods", a subject which falls under the provincial jurisdiction to legislate with respect to "property and civil rights in the province", and that the provisions dealing with the disclosure of interest are only incidental to this subject.

The Act does operate in a "sale of goods" context, but that is not sufficient to give it constitutional validity. The mere fact that the Act deals with interest arising in a particular type of contract rather than with interest generally does not of itself justify the Act.[12] The crucial question is whether the Act is concerned in essence with "interest", or merely deals with it in an incidental manner.

The preamble[13] clearly indicates that the legislation was passed to require a full disclosure of interest charges. Although the Act requires the disclosure of other charges, the preamble refers specifically only to interest, and the bulk of the requirements of the Act are directed to a full disclosure of interest. It would, therefore, be fair to conclude that the main emphasis of the Act is upon the full disclosure of interest. In any

10. (1937) 2 W.W.R. at p. 364. See also *Case* v. *Godin* (1914) 24 M.R. 788.
11. (1939) A.C. 468. See also *Day* v. *City of Victoria* (1938) 3 W.W.R. 161.
12. See for example *The Saskatchewan Farm Security Act Case*, *supra*, note 9.
13. *Supra*, p. 94.

event, the requirement of a full disclosure of interest is not subordinate to some other purpose within provincial jurisdiction, as was the case in *Ladore* v. *Bennett*,[14] but was enacted in and for itself.

The Act, therefore, in pith and substance deals with interest, and is to that extent invalid. It is likely that the whole Act would fall, since the other provisions are inextricably tied up with the interest provisions and are, therefore, not severable.

The Attorney-General of Manitoba is reported in a recent newspaper article to have stated that the object of the legislature in passing the Act was to eliminate the small minority of cases in which consumers are being victimized, and not to make life difficult for reputable companies offering credit facilities. Laudable as this object is, the remedy is clearly one for the federal Parliament.[15]

MARK SCHULMAN*

PARADISE REGAINED: THE DECLINE AND FALL OF THE SECONDARY INTENTION THEORY IN DETERMINING CAPITAL GAINS

Capital gains cases are legion, and trying to derive general principles from cases decided on unique facts is a task fraught with danger. It has often been stated that a case, being authority only for what it actually decides, cannot be quoted for a proposition that may seem to follow logically from it.[1] The cases on capital gains, in particular, constitute "a confused and heterogeneous mass of jurisprudence . . ."[2]

Nevertheless, certain principles have emerged over the years from cases where the courts have been faced with determining whether a profit is taxable income or a tax-free capital gain. The problem, briefly put, is to decide if the profit has been received by the taxpayer from the operation of a business, or from "an adventure or concern in the nature of trade"[3], in which event the gain is considered to be taxable income.[4] On the other hand, if the gain is in the nature of an enhancement or appreciation of value arising from the realization of a security or investment, it will be, in general, a tax-free capital gain.

In determining whether the taxpayer has been engaged in an adventure or concern in the nature of trade, the court will try to decide if the asset, the realization of which resulted in the profit, was acquired initially as an

14. *Supra*, note 11.
15. Since this note was written the government has announced its intention to make certain changes in the Act. It is doubtful, however, whether they will affect the problem discussed herein.
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1. See *Ouinn* v. *Leathem* (1901) A.C. 495, at p. 506.
2. Note by H. H. Stikeman to *Smith* v. *M.N.R.* (1960) C.T.C. 392.
3. Income Tax Act, R.S.C. 1952, c. 148, s. 139(1)(e).
4. Income Tax Act, ss. 3 and 4.