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HIS WORSHIP THE MAYOR

AND

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OF THE

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THE JOINT MID-WINTER MEETING OF THE ATLANTIC SECTIONS OF THE CANADIAN BAR ASSOCIATION

Following last year's successful mid-winter meeting of the New Brunswick members of the Canadian Bar Association, it was decided to hold a similar meeting this year and to invite members of the Association from the other Atlantic provinces. The meeting took place at the Admiral Beatty Hotel and the University of New Brunswick Law School in Saint John on March twenty-second and twenty-third, 1957, under the general chairmanship of the New Brunswick Vice-President of the Association, D. Gordon Willet, Q.C. The organizing committee consisted of E. Neil McKelvey, Dean William F. Ryan, George J. Bigham, Douglas G. Rouse, Thomas L. McGloan and Eric L. Teed. A varied ladies programme was organized by Mrs. D. M. Gillis, Mrs. D. G. Willet, Miss M. L. Lynch, Mrs. H. E. Ryan and Mrs. E. N. McKelvey. There was a large representation of the Bar of New Brunswick and several members of the Bars of Nova Scotia and Prince Edward Island including the Vice-President of the Association for each of those provinces, Donald McInnes, Q.C., and M. A. Farmer, Q.C., respectively.

The meeting began at 2 p.m. Friday, the twenty-second, with the first of four papers in a symposium on selected legal topics conducted by the Legal Education and Training sub-section of the Canadian Bar Association, the Faculty of Law of the University of New Brunswick and the Faculty of Law of Dalhousie University. Wallace D. Macaulay, Lecturer in Agency at the University of New Brunswick Law School, delivered this paper. It is entitled "Vicarious Liability of a Master for the Torts of His Servants" and is reproduced elsewhere in this issue.

This was followed immediately by sub-section meetings on the Administration of Criminal Justice chaired by Henry E. Ryan and the Administration of Civil Justice presided over by John P. Palmer. At the first of these meetings, there were discussions of proposed amendments to the Criminal Code prohibiting publication of statements made by an accused before trial and to the Poor Prisoners Defence Act providing for fees for counsel for indigents charged with criminal offences triable at County and Supreme Courts. At the second meeting, several matters relating to the Supreme Court of Canada were discussed, namely, the advisability of increasing the number of judges and having the Court sit in two divisions; restrictions on rights of appeal; and the adequacy of the tariff of costs in the Court and of current practice respecting security for costs. In addition, consideration was given to draft amendments to the Garnishee Act providing for standing garnishee orders of future wages.

The meeting continued that evening when the second paper of the Symposium was delivered by G. V. La Forest of the Faculty of Law of the University of New Brunswick. The paper, "The Rights of Landowners in New Brunswick respecting Water in Streams on or adjoining their Land", is also substantially reproduced in this Journal.

Later in the evening, a meeting of the Insurance Law sub-section was held under the chairmanship of Donald M. Gillis. The first matter discussed was automobile insurance coverage and the Unsatisfied Judgment Fund as a source of compensation for damages occasioned by motor vehicles. A panel of several lawyers then considered practical problems in Insurance Law. Finally a discussion was had on recent changes in insurance coverage.

The evening concluded with a reception sponsored by the barristers of Fredericton and Moncton.

Saturday morning, meetings of the Commercial Law and Labour Relations sub-sections took place. At the former, a discussion was held, under the chairmanship of J. Edward Murphy, Q.C., on desirable provisions in the proposed new New Brunswick Companies Act. Lester G. Hoar presided over the Labour Relations meeting. At the meeting E. Neil McKelvey gave a talk on the rights and remedies of parties to collective agreements with reference to enforcement and prosecutions. The talk is reproduced elsewhere in this Journal. Mr. Hoar then spoke on the extent that an employer may communicate with his employees during the period of organization before certification of a trade union. The activities of this sub-section concluded with a discussion of proposed amendments to the Labour Relations Act.

A short informal talk on the value of studying international law was then given by Maxwell A. Cohen of the Faculty of Law of McGill University. Following this, Dean W. F. Ryan of the Faculty of Law of the University of New Brunswick delivered the third paper of the Symposium on "The Rights of a Defaulting Buyer under a Contract of Sale". The paper is not available for publication at this time.

Following a pleasant luncheon at the University of New Brunswick Law School, the meeting resumed with the final paper of the Symposium by R. Graham Murray of the Faculty of Law of Dalhousie University. The paper, "The Law of Evidence; a Fresh Approach", was distributed in mimeographed form at the meeting. It is not available for publication at this time.

The final sub-section meetings were on Taxation and Civil Liberties. At the former, a panel discussion on practical problems arising in the valuation of estates for succession duty purposes was held. The principal speaker on this topic was L. H. Meier, Manager of the Central Trust Company of Canada at Saint John. M. Gerald Teed, Q.C., then gave the highlights of the amendments to the Income Tax Act proposed by the Canadian Bar Association and the Canadian Institute of Chartered Accountants. The meeting was chaired by David M. Dickson. At the Civil Liberties sub-section meeting, presided over by William A. Gibbon, practice respecting prerogative writs and bailable proceedings was discussed as well as provisions of the Provincial Hospitals Act relating to the liberty of the subject.

At the business meeting chaired by D. Gordon Willet, Q.C., several resolutions were passed among which was one to hold a similar meeting next year. A reception sponsored by the Saint John Law Society followed. The meeting concluded with a dinner at the Admiral Beatty Hotel .presided over by Mr. Willet. The guest speaker, Maxwell A Cohen of the Faculty of Law of McGill University, delivered an illuminating address on "The Legal Issues that Divide Canada and the United States." The speaker was introduced by Dean William F. Ryan and was thanked by David M. Dickson.

THE VICARIOUS LIABILITY OF A MASTER FOR THE TORTS OF HIS SERVANT

It is a well-established doctrine that, under certain conditions, a master is liable for the injuries which his servant causes to third parties. The basis of this doctrine has yet to be satisfactorily explained. One of the earliest suggestions as to its basis was that of Holt, C. J., when he stated about 1700:

> for seeing somebody must be the loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger.[1]

During the past two and a half centuries many other eminent jurists and text-book writers have expressed their opinions on why liability should settle upon one who has personally committed no wrong: some have suggested that he who sets a force into motion for his benefit and under his control should be responsible for its actions and results; many have felt that there should be a remedy against one who is in a position to pay for the damages suffered — and up until recent times, that person has usually been the master rather than the servant; still others have attempted to find a logical basis for the doctrine rather than suggesting social or economic reasons why it should exist, but with little success.[2]

Recently Denning, L. J., proposed that what has always been regarded as vicarious liability is actually personal liability to see that care is exercised by one's servant; that a negligent act or omission by a servant amounts to personal default in the master himself.[3] His Lordship stated:

> The reason for the master's liability is not the mere economic reason that the employer usually has money and the servant has not. It is the sound moral reason that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done. A master who sends a lorry out on the road with his servant in charge is morally responsible for seeing that the lorry does not run down people on the pavement.... It is his lorry, and it is engaged on his business. He takes the benefit of the work when it is carefully done, and he must take the liability when it is negligently done. He is himself under a duty to see that care is exercised in the driving of the lorry on his business. If the driver is negligent there is a breach of duty, not only by the driver himself, but also by the master.[4]

His Lordship apparently bases his reasoning upon a literal application of the maxim *qui facit per alium facit per se:* he who acts through another, acts through himself. In fact, in a later case,[5] he quotes this maxim and states that an employer is made liable, not so much for the employee's fault, but rather for his own fault committed through the employee.[6] The House of Lords, however, has expressly rejected his Lordship's submission. In disposing of it Lord Reid stated:

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(1) **Hern v. Nichols**, 1 Salk. 289; 91 E.R. 256.
(2) See Laski; "The Basis of Vicarious Liability", 26 Yale L.J. 105.
(3) **Broom v. Morgan** [1953] 1 All E.R. 849.
(4) **Ibid**, at pp. 853-854.
(5) **Jones v. Staveley Iron & Chemical Co., Ltd.** [1955] 1 All E.R. 6.
(6) **Ibid.**, at p. 8.

> It is a rule of law that an employer, though quilty of no fault of himself, is liable for damage done by the fault or negligence of his servant acting in the course of his employment. The maxims respondeat superior and qui facit per alium facit per se are often used, but I do not think that they add anything or that they lead to any different results. The former merely states the rule badly in two words, and the latter merely gives a fictional explanation of it.[7]

So while many jurists and text-book writers continue to search for the basis of the doctrine of vicarious liability, and others have long abandoned any hope of finding the font from which it has sprung, it cannot be denied that the rule is universally accepted and applied.

A master will be vicariously liable if his servant is acting within the scope or course of his employment when the act or omission, which is complained of, occurs. If a servant is doing something "on a frolic of his own", his master will not be liable as the servant has exceeded the bounds of his employment;[8] under such circumstances the servant occupies the position of a stranger in relation to his master. The determination of whether an act or omission is within the scope of a servant's employment is always a question of fact which will turn on the particular circumstances of each case.

There is no doubt that a master is responsible for those acts which he has expressly authorized his servant to do and that are tortious in themselves or will necessarily result in a tort when carried out.[9] Difficulty in determining liability arises when the servant performs an authorized act in a negligent or unauthorized manner, or commits an act which is either unauthorized, prohibited or maybe even criminal. In such cases the master, in attempting to avoid vicarious liability, usually alleges that the servant has removed himself from the scope of his employment by his actions.

The master may argue that it is never within the scope of his servant's employment to do an act in a negligent manner. In a sense, the act complained of has not been authorized. However, if the servant is acting within the scope of his employment when he committed the act complained of, he is merely doing something in a careless and negligent manner which he was employed to do carefully.

For example, in *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*[10] the board had in its employ a gasoline truck driver. While delivering gasoline into the tanks of a gasoline station from his truck, he lighted a cigarette and carelessly threw away the lighted match which resulted in a fire and considerable damage. One of the questions was whether the driver's negligence was within the course of his employment. Lord Wright stated in the House of Lords:

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(7) **Staveley Iron & Chemical Co., Ltd. v. Jones, [1956] 1 All E.R. 403 at p. 409.**

(8) **Battistoni v Thomas and Thomas [1932] S.C.R. 144; Hoar v. Wallace et al [1938] O.R. 666.**

(9) **See Hals. (2nd) Vol. 22 at pp. 221 et seq.**

(10) **[1942] 1 All E.R. 491.**

> The act of a workman in lighting his pipe or cigarette is an act done for his own comfort and convenience and at least, generally speaking, not for his employer's benefit. That last condition however, is no longer essential to fix liability on the employer. *(Lloyd v. Grace, Smith & Co.)*. Nor is such an act *prima facie* negligent. It is in itself both innocent and harmless. The negligence is to be found by considering the time when and the circumstances in which the match is struck and thrown down. The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to require either argument or authority.[11]

The act of a servant that is complained of may have been performed in an unauthorized manner, but that in itself will not remove it from the scope of his employment as was evidenced in a recent Nova Scotia case.[12] In that case it was part of an usher's duties to see that no disturbance occurred in the theatre and that no one talked or placed their feet upon the seats. H. was a patron and upon his making a disturbance, the usher requested him to leave. An exchange of words took place and the usher struck H. believing that the latter was about to hit him. The court found that unnecessary violence had been used and held the theatre owners vicariously liable even though they had not authorized the use of such violence; the usher was performing his duties of keeping order in the theatre but he was doing it in an unauthorized manner.[13]

It is not unusual for an employee to be informed by his employers at the time he is hired that he is not to do certain things while purporting to carry out his duties — or he may receive notice of such instructions from time to time while he is within their employ. A disregard of such prohibitions will not of itself remove the servant from the sphere of his employment if it only affects the manner or mode of performing his authorized duty.

For example, notice the case of *C.P.R. v Lockhart*[14] where the railway company issued instructions that its employees were not to drive their own cars in connection with company business unless they carried insurance against public liability and property damage risks. S. was employed by the company as a carpenter and general handyman and had full knowledge of this prohibition. In the course of his employment he prepared a key for a locker in the company's North Station at Toronto. Upon being instructed to proceed to the North Station for the purpose of testing the key, he took his own car, which was uninsured, although there were other means of transportation available. On the way he negligently injured the infant respondent who commenced an action against him and the company. The trial judge dismissed the action against the

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(11) **Ibid., at p. 497.**

(12) **Hyslop & Hyslop v. M. E. Walker Ltd. [1956] 1 D.L.R. (2d) 777.**

(13) **Cf. Griggs v. Southside Hotel Ltd. and German [1947] 4 D.L.R. 49; also note Percy v Corporation of City of Glasgow [1922] 2 A.C. 299.**

(14) **[1942] 3 D.L.R. 530.**

company upon the ground that the driving of a privately owned and uninsured car was not an act falling within the class of acts which S. was authorized to perform. Eventually the case was considered by the Judicial Committee of the Privy Council. It was of the opinion, in view of the fact that S. was required to travel between stations in the course of his employment, that the means of transportation used was clearly incidental to the execution of that which he was authorized and employed to do; the prohibition merely limited the means by which he was to execute the work he was employed to do. A breach of that prohibition was not sufficient to remove S. from the course of his employment. The company was vicariously liable to the injured infant.

If a master could hide behind a prohibition all he would have to do to be immune from vicarious liability would be to instruct his servant never to commit a tortious act. However, as Mr. Justice Willes once commented on such prohibitions:

> In my opinion those instructions are immaterial. If disobeyed, the law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability.[15]

It was not until after the turn of the last century that any question appears to have been raised as to whether a servant's act should be for the benefit of his master to be within the scope of employment. Indeed, cases up to that time seem to imply that an act was, of necessity, for the benefit of a master to be within the scope of his servant's employment. However, in 1912 the House of Lords found itself squarely faced with the problem in *Lloyd v. Grace, Smith & Co.*[16]

In that case Mrs. Lloyd owned a cottage and held a mortgage on other property. She desired to find a more profitable investment and approached the defendant firm with that thought in mind. She was interviewed by one S., the defendant's managing clerk, who conducted all the conveyancing business of the firm, and believing him to be a partner of the firm, placed the matter in his hands. By divers fraudulent means he had the cottage conveyed and the mortgage assigned to him, both of which he turned into cash and used for his own ends. The sole partner of the defendant firm contended that S. was not acting within the scope of his employment because his actions were solely for his own benefit and not that of his employer. Their Lordships expressly rejected this defence, stating that it was a tortious act wilfully committed by S. in conducting the business which he had a right to conduct honestly on behalf of his employer. The fact that the benefit derived from the clerk's actions accrued to the clerk alone did not of itself take the fraud out of his scope of employment.

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(15) **Limpus v. London General Omnibus Company** (1862), 1 H. & C. 526 at p. 539; 158 E.R. 993 at p. 998.

(16) [1912] A.C. 716.

The *Lloyd* case also illustrates the point that the wilful commission of a crime during the course of employment will not of itself remove a servant from his sphere of employment or relieve his master from the vicarious liability arising as a result of that crime.[17] In a later case the English Court of Appeal found that the owner of a private detective agency was vicariously liable for personal injuries suffered by a lady when an operator from the agency blackmailed her in attempting to force her co-operation in securing certain information desired by the owner of the agency.[18]

The problem sometimes arises as to whose servant a man was at the time he committed a tortious act. Such a situation can occur when a general employer gratuitiously lends or hires out one of his employees to another party to perform certain tasks for that party. If such an employee negligently injures X. in performing those tasks, to whom, besides the employee, can X. look for damages? Is the situation clarified by the general employer contracting with the sub-hirer, at the time of the lending or hiring out, that the servant shall be the servant of the latter while working for him? The determination of this problem is of the utmost importance from the injured party's point of view: he could join both as party defendants but, of course, he does not want to incur needless costs which he would have to pay by bringing an action against the person who is not vicariously liable.

In *Mersey Docks and Harbour Board v Coggins & Griffiths (Liverpool) Ltd. and McFarlane.*[19] the Board hired out to the respondent stevedoring company a crane, together with its driver, one Newall, for the purpose of loading a ship lying in Liverpool harbour. In the contract of hire it was provided that the driver would be the servant of the stevedoring company. While loading the ship Newall negligently ran into and injured one McFarlane, who sued Newall and the Board for damages. The Board brought an action to have the judgment against it discharged and to have substituted for it a judgment in favour of McFarlane for the same amount against the stevedoring company, claiming that Newall was, at the time of the accident, the servant or employee of that company.

In determining whether the Board or the Company were Newall's masters at the time the accident occurred, their Lordships stated that the test was: who had the *right to control* and direct how Newall was to carry out his work and operate his crane, as distinct from who had the right to directly benefit from his services? Applying this test, their Lordships found that the Board alone had the right to control Newall and direct the manner in which he worked. As Lord MacMillan stated:

> The stevedores were entitled to tell him where to go, what parcels to lift, and where to take them, i.e., they could direct him as to what they wanted him to do, but they had no authority to tell him how he was

(17) Also note **Barwick v. English Joint Stock Bank**, (1867) L.R. 2 Ex. 259.
(18) **Janvier v. Sweeney and another** [1919] 2 K. B. 316.
(19) [1946] 2 All E.R. 345.

> to handle the crane in doing his work. In driving the crane, which was the board's property confided to his charge, he was acting as the servant of the board, not as the servant of the stevedores. It was not in consequence of any order of the stevedores that he negligently ran down the plaintiff. It was in consequence of his negligence in driving the crane, that is to say, in performing the work which he was employed by the board to do.[20]

Viscount Simon pointed out, however, that the stevedoring company could have been liable if they had interfered and given directions to Newall as to how to drive the crane and he had complied with the resulting injury to McFarlane. In such a case the company would have been liable as joint tort feasors.[21]

In presenting the case the Board's counsel placed considerable reliance upon the clause in the hiring agreement to the effect that Newall was to be considered the servant of the stevedoring company. Their Lordships pointed out, however, that such a clause was not in itself sufficient to make Newall a servant of the stevedoring company. Before this could happen Newall would have to consent to the exchange: he could not become the servant of another against his will as the relationship of master and servant is a contractual one. Of course, his consent could be either expressed or implied, but as their Lordships pointed out, there is never a presumption that a change of employers has taken place. The burden is upon the person who claims that such a change has been effected, and it is a much heavier burden than merely showing that the benefit of a servant's services has been transferred.[22]

Although the type of clause just mentioned is insufficient in itself to bring about an exchange of employers, it is sometimes useful in determining whether the contracting parties intended that the general employer should be indemnified by the particular for the tortious acts of the former's servant when performing services for the latter. Of course, the prudent general employer will have an indemnification clause expressly inserted in the contract of letting or hiring so as to avoid any doubt as to what was intended—but again this will not affect the right of injured third parties to sue the general employer if he has the right to control at the time the injury occurs.

As we have noted, a master is vicariously liable for the negligent acts of his servant when they occur within the scope of the servant's employment whether they are authorized or not. However, if the servant is not liable for the act complained of, the master can have no vicarious liability, regardless of what his personal liability may be. The one exception to this general rule is when the servant causes personal injuries to his or her wife or husband, as the case may be.

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(20) **Ibid**, at p. 349.

(21) **Ibid**, at p. 349.

(22) Also note **Quarman v. Burnett and another** [1840] 6 M. & W. 499; 151 E.R. 509; **Bain v. Central Vermont Railway Company** [1921] 2 A.C. 412; **Century Insurance Company v. Northern Ireland Road Transport Board**, [1942] A.C. 509; **Chowdhary and another v. Gillot and others** [1947] 2 All E.R. 541.

At Common Law and under the Married Woman's Property Act of the Province of New Brunswick,[23] neither a husband nor a wife can sue the other for personal injuries. However, this immunity is personal to the spouse alone and does not extend to their respective employers if the injury occurs negligently during the course of employment.

In *Broom v. Morgan*[24] Mr. and Mrs. B. were employed by the defendant to run a public house. While Mr. B. was carrying bottles of beer from the cellar to the bar on the floor above, he negligently left a trap door open behind the bar without warning Mrs. B. or taking any steps to protect the opening. Mrs. B. failed to notice the opening and fell through, suffering personal injuries. Mrs. B. brought an action against the defendant, who raised the defence that in view of the fact that she could not sue her husband for his negligent act, she in turn could not bring an action against his employer for vicarious liability. The Court of Appeal upheld the trial judge's decision that the defendant employer was liable to Mrs. B. for injuries sustained, notwithstanding the legal immunity of Mr. B. from action at the suit of his wife. As Denning, L. J. stated:

> His (the husband's) immunity is a mere rule of procedure and not a rule of substantive law. It is an immunity from suit and not an immunity from duty or liability. He is liable to his wife, although his liability is not enforceable by action, and, as he is liable, so also is his employer, but with the difference that the employer's liability is enforceable by action.[25]

The case of *Broom v. Morgan* could have had its sequel if Mr. B. had been a person of substance. It appears, however, that the employer considered Mr. B. unworthy of a suit in order to regain the monies which had to be paid to Mrs. B. for the injuries caused her by the negligence of Mr. B. Although the average employee may not realize it, one of the implied terms of the contract of employment with his employer is, if it is not expressly stated otherwise, that the employee shall perform his duties with proper care and skill.[26] Therefore, if an employee negligently performs his duties and injures a third party, the master may sue the employee for breach of contract to regain any damages which he (the master) has had to pay upon his vicarious liability to the injured party. Although the sanction of dismissal is usually invoked, an action for damages at the suit of the master has always been available, but it appears to have rarely, if ever, been used. However, I submit that we will see a change in this situation now that the pendulum of improved economic conditions is rapidly swinging in favour of the working class. In the future our Mrs. B. will hesitate to sue her employer for personal injuries caused by the negligence of her husband for fear that the employer will in turn bring an action against Mr. B. and the family circle will be no better off financially.

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(23) R.S.N.B. 1952, c. 140, s. 56 (2).

(24) [1953] 1 All E.R. 849.

(25) Ibid, at p. 855.

(26) Harmer v. Cornelius (1858) 5 C.B.(N.S.) 236 at p. 246; 141 E.R. 94; Lister v. Romford Ice & Cold Storage Co. Ltd., [1957] 1 All E. R. 125.

In the recent English case of *Lister v. Romford Ice & Cold Storage Co. Ltd.*,[27] the pendulum had apparently swung sufficiently far enough to encourage an action for breach of the implied term to take care in the contract of employment. The appellant, L., and his father were employed by the respondent company as lorry driver and helper respectively. In the course of his employment, L. negligently ran into and injured his father, who obtained judgment for damages against the company for his son's negligence. The company's insurers paid the judgment and then, being subrogated to the company's rights and with a view to regain the amount they had to pay to L.'s father, brought an action in the name of the company against L. for breach of the implied contractual duty to drive with care. The insurance company was successful in obtaining judgment against L. in the amount of £1600 and costs, which was upheld on appeal by both the Court of Appeal and the House of Lords, although both Courts were divided.

This case is a practical illustration of the liability of a servant for failure to perform his duties with proper care and skill. However, there were other facts and findings equally interesting and important.

The respondent company was insured in respect of any liability which might be incurred by or arising out of the use of their vehicles upon the road. Such insurance was compulsory by statute before the company could lawfully operate any vehicles upon the highway.[28] There was also a form of endorsement upon the policy which provided that the indemnity given by the policy would be extended to any person in the employ of the company while driving a vehicle on the company's orders and for company's purposes; in other words, while acting within the scope of their employment.

L. contended that the endorsement protected him against the company's claim for indemnity. The House of Lords, however, brushed this contention aside by stating that the endorsement only covered third party claims and it was not that type of an action that faced L. in this case, but rather a claim for breach of a contractual duty. It is difficult to understand why this contention was dismissed in such a summary manner, as there appears to be sufficient grounds for considering the submission that L's liability actually arose out of the use of a motor vehicle: if he had not been driving the vehicle this action would never have arisen. An action for breach of contract merely served as the medium of attacking L; L's liability arose out of the negligent operation of one of the company's vehicles. However, such suggestions were disposed of without consideration.

Two further defences, among others, raised by L's counsel were considered to some extent by their Lordships, and one, in particular, caused divided opinion.

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(27) [1957] 1 All E.R. 125.

(28) Road Traffic Act, 1930, s. 35 (1).

Firstly, counsel contended that an implied term in the contract of service was that the respondent company would indemnify L. against all claims and proceedings brought against him for any act done by him in the course of his employment. This contention is all-embracing; whatever the degree of negligence and whether wilfully done or not, L claimed that he should go free and the respondent company should bear the burden. This contention was rightly rejected upon the ground that it would not be consistent with the duty of a driver to take reasonable care in driving his employer's vehicle.

Secondly, counsel contended that an implied term in the contract of service was that L. would receive the benefit of any contract of insurance effected by the respondent company covering their liability in respect of the action brought by L's father.

Viscount Simon confused the issue by only considering an amendment of this plea made by L's counsel. This amendment was to the effect that L. was entitled to be indemnified not only if the respondent company were in fact insured or required by law to be insured, but also if they ought, as reasonable and prudent employers, to have been insured against the risk in question. His Lordship dismissed the whole matter by declaring that the alleged implied term was not precise enough, that it was impossible to show when such a term was first supposed to have come into existence in the Common Law, that it was impossible to know where to draw the line (i.e., did it just apply to truck drivers or would it extend to other types of employees?), and that it would conflict with the employee's obligation to take care: none of which reasons, I submit, is very forceful.

Both Lord Morton and Lord Tucker felt that the implied term as originally stated was unnecessary to give the transaction such efficacy as both parties must have intended that it should have at the time the employee entered into his employer's service. Their Lordships also stated that such a term was unacceptable as it would deprive the insurers of their right of subrogation upon payment of any claims against the insured. However, they appear to have overlooked the fact that there is no rule of law preventing the insured from fettering away his rights to third parties; as Lord Somerville pointed out, the insurer only succeeds to those rights which the insured possessed at the time the cause of action arose.[29]

Lord Radcliffe and Lord Somervell were of opinion that such an implied term (whereby the appellant was to have the benefit of the employer's insurance) existed and would have allowed the appeal.

Lord Radcliffe based his opinion upon the fact that the employer was compelled by statute to carry insurance coverage against third party claims; without such coverage it was illegal to place vehicles upon the highway. His Lordship stated that in his view it was the employer's duty

(29) [1957] 1 All E.R. 125 at p. 147.

to procure the insurance, and it followed as a result that both he and his employees would impliedly agree that the coverage should be for the benefit of the latter as well as the employer himself.

Lord Somervell came to his conclusion independently of the statutory obligation. He stated:—

> When a man is engaged as a chaffeur or a lorry driver, the question whether his resources are at risk, should he cause damage through his negligence, is as important to him as it is to an owner driver. Nothing was said in this case and I dare say nothing is usually said. If, when such a contract was being negotiated, the question has been raised, it is obvious, I think, that the appellant would have stipulated for the usual cover that an owner driver provides for himself. If nothing is said, it is, in my opinion, for the employer to see that the driver's resources are protected by insurance. It is inconsistent with such an obligation that the employer should seek by action to make the driver personally liable, as in the present case.[30]

As a result of the decision in the *Lister* case, an almost intolerable situation has now developed in England under circumstances where employers and employees are covered by insurance policies similar to the one under consideration in that case. As Lord Radcliffe stated:

> The situation is this. If an accident takes place through negligence, the person injured can sue either employer or employee or both of them. If he sues the employee, alone, the latter calls on the insurance company for the cover which the employer has brought him; the insurance company has to provide the fund of damage required; neither the wages nor the savings of the employee can be touched to reimburse the insurers for the risk that they have underwritten. But if the injured person takes a different course, one which neither employer, employee nor insurance company can control, and sues the employer either alone or jointly with the employee, the position of the employee is, apparently, very much worse and the position of the insurance company, apparently, much better. For now the latter can indemnify itself for the money it finds by getting it back from the employee in the employer's name and the former, instead of getting the benefit of the insurance which his employer was to provide, is in the end of the one who foots the bill.[31]

If the injured party and the employee were husband and wife, a dilemma would really exist. The only course of action available would be against the employer, but he in turn, or his insurers by subrogation, might well bring an action against the negligent husband and take out of the same sugar bowl on the top shelf via the husband what has already been placed there via the wife.

If the employee is to be protected from suits at the instance of his employer, he will either have to carry his own personal insurance policy against such a possibility or else have an express term in the contract of employment covering such an eventuality. It is submitted that as soon as the various trade unions in England realize the significance of the

(30) **Ibid**, at p. 146.
(31) **Ibid**, at p. 141.

Lister decision, provisions will commence to appear in future collective agreements designed to protect union members from the possible effect of what is felt to be a serious error on the part of the House of Lords.

In the Province of New Brunswick the Insurance Act provides that an owner's policy shall insure, inter alia, a person who is driving any automobile with the owner's consent against liability imposed by law "arising from the ownership, use or operation" of such automobile.[32] The effect of this provision does not appear to be too unlike the endorsement in the *Lister* case. However, it is to be hoped that the Bench of this province will disregard the *Lister* case and not be influenced by it if similar circumstances are presented wherein an employee, while acting within the scope of his employment, causes injury to a third party through the use or operation of his employer's vehicle.

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(32) R.S.N.B. 1952, c. 113, s. 202 (1).

RIGHTS OF LANDOWNERS IN NEW BRUNSWICK RESPECTING WATER IN STREAMS ON OR ADJOINING THEIR LANDS

Even a cursory examination of Canadian cases dealing with the rights of a landowner respecting water on his land reveals that the divergencies between our law and English law are so substantial that English authorities may, on certain aspects of the subject, be misleading. Not only are our statutes on the matter quite different from the English, but one cannot feel too certain to what extent the Common Law of England will be followed. Our Canadian courts have felt far freer in modifying the Common Law on this subject than perhaps any other branch of the law. And that is only natural. The physical characteristics of our rivers and lakes are vastly different from those of England. To apply to inland seas like the Great Lakes rules developed in connection with even the largest British lakes would be unthinkable. And the same applies to mighty rivers like the St. Lawrence. England is, after all, part of a small island; Canada is half a continent.

Further, the economic needs of a young developing country are entirely different from those of a land that has known good means of communication since Roman times. Our rivers and lakes were often virtually the only mode of transport for our pioneering forefathers. These were facts our courts could not well ignore in determining whether English law was applicable to our situation and conditions.

In their search for solutions, our judges directed their gaze to the experience of other countries, and as is often the case with us, it was the experience of our American cousins that, next to the English, made the greatest impact on our law. Our courts, especially the Supreme Court of Canada, have also been greatly influenced by the French law of Quebec. In cases of doubt, then, American and Quebec cases may well be of equal persuasive authority with English law.

For these reasons, it may be useful to examine, in outline, the rights of a landowner respecting water in streams on or adjoining his land by reference to New Brunswick cases and statutes. This is not intended to be an exhaustive study, but rather a preliminary orientation.

I will first deal with riparian rights.

Riparian Rights

The owner of land adjoining a river or other stream has certain rights respecting the water therein, whether or not he owns the bed.[1] These rights arise by virtue of his ownership of the bank,[2] and from the Latin word for bank, *ripa*, they derive their name of riparian rights. The owner is similarly referred to as a riparian owner.

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(1) **Byron v Simpson (1878) 17 N.B.R. 697; Attrill v Platt (1883) 10 S.C.R. 425; Municipality of Queen's County v Cooper 1946 S.C.R. 584.**

(2) **Ibid.**

The riparian rights may be classified under the following heads:

(1) the right of access to the water;

(2) rights relating to the manner in which the water reaches and leaves a riparian owner's land; and

(3) rights relating to the use of the water.

Of these, the most basic is the right of access; for without it a riparian owner could not enjoy the others. He may therefore maintain an action or obtain an injunction against anyone,[3] even the owner of the bed,[4] who interferes with this right.

Coming to the second head, a riparian owner is, first of all, entitled to have the water flow down the stream to his land along its regular channel. This is a proprietary right; anyone who diverts the water from its regular course may, therefore, be restrained from doing so without proof of damage, actual or apprehended.[5] Similarly, a riparian owner has the converse right of having the water flow from his land without obstruction.[6] If, therefore, a riparian owner obstructs the flow of the water by means of a dam or boom or otherwise and causes the water to back up on an upper riparian owner's land, the latter is entitled to an action. Indeed, apart altogether from riparian rights, there is the general rule of *Rylands v Fletcher* that anyone who collects anything on his land that is likely to cause damage if it escapes is absolutely liable for any damage caused by its escape, unless the escape resulted from an Act of God or the action of a third person.[7]

Not only has a riparian owner the right to have the water flow in its regular channel, he is also entitled to have it flow in the manner in which it has been accustomed to flow,[8] substantially undiminished in quantity[9] and without appreciable change in quality.[10] But in order to obtain an injunction restraining an interference with the water, otherwise than by diverting it from its course, the riparian owner must prove damages, or at least a reasonable apprehension of injury. What amounts to a reasonable apprehension of injury can be demonstrated by the case of *City of Saint John v Barker*,[11] where the City prayed for an injunction to restrain an upper riparian owner from allowing outhouses to drain into Loch Lomond which flows into a river on the banks of which the City owned land. The amount of offensive matter introduced into the stream was too small to do any harm, but Barker, J., held

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(3) **Byron v Simpson (1878) 17 N.B.R. 697; Irving Oil Company Limited v Rover Shipping Co. (1935) 36 M.P.R. 180.**

(4) **See Merritt v The City of Toronto (1913) 48 S.C.R. 1.**

(5) **Saunders v William Richards Company, Limited (1901) 2 N.B. Eq. 303.**

(6) **Smith v Scott and Crandall (1840) 3 N.B.R. 1; Lawlor v Potter (1869) 12 N.B.R. 328.**

(7) **Wade et al v Nashwaak Pulp & Paper Company, Limited (1918) 46 N.B.R. 11.**

(8) **Saunders v William Richards Company, Limited (1901) 2 N.B. Eq. 303; Brown v Bathurst Electric & Water Power Company, Limited (1907) 3 N.B. Eq. 543.**

(9) **Keith v Corey (1877) 17 N.B.R. 400.**

(10) **The City of Saint John v Barker (1906) 3 N.B. Eq. 358.**

(11) **Ibid.**

that if all upper riparian owners did the same, the Lake (from which, incidentally, the City obtained its water supply) would become polluted, and he granted the injunction.

Even if a riparian owner suffers injury from an interference with the flow of the water — other than a diversion from its normal channel —, he has no remedy against an upper riparian owner who can show that the injury resulted from a reasonable use of the water in connection with the upper riparian land. A riparian owner does not own the water in a running stream,[12] but he may use it for ordinary purposes connected with the riparian land, such as the supplying of water to persons and animals thereon. And if, in making such use of it, he completely exhausts the supply, he is not liable to an action by a person living further down the stream.[13]

In addition, a riparian owner has the right to take water for extraordinary purposes.[14] What amounts to an extraordinary purpose depends upon the general conditions in the area and the uses to which the stream has previously been put. A common example in this province is the use of water for working a mill. Unlike an owner who uses the water for ordinary purposes, a person who uses it for an extraordinary purpose must restore it to the stream substantially undiminished in quantity and quality.[15] But the use of water for extraordinary purposes will frequently interfere with the manner in which it reaches land lower down the stream. If, for example, he dams the water, its flow will be interrupted from time to time. For injury caused in this manner he is not liable if, having regard to all the circumstances, he has acted reasonably.[16] Whether a person has acted reasonably is always a difficult question, but it is particularly so in this connection. For this and other reasons, it is usual to obtain statutory powers whenever it is desired to undertake works of considerable magnitude, as for example, hydro-electric development, on a river.

The mere fact that a person has for many years been using the water to run a mill (or for some other extraordinary purpose) does not preclude an upper riparian owner from himself using the water for extraordinary purposes and thereby interfering with the running of the mill so long as he acts reasonably. Long user can only mature into an easement if the person against whom the easement is claimed could have complained of the use.[17]

Finally, a riparian owner has no right whatever to take water for purposes unconnected with the riparian land.[18] Thus a city or town

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(12) **Keith v Corey** (1877) 17 N.B.R. 400.

(13) **Ibid**; **Brown v Bathurst Electric Water Power Company, Limited** (1907) 3 N.B. Eq 543.

(14) **Ibid.**

(15) **Ibid.**

(16) **Ibid.**

(17) **Ibid**; see also **McLean v Davis** (1865) 11 N.B.R. 266; **Lawlor v Potter** (1860) 12 N.B.R. 328.

(18) **The City of Saint John v Barker** (1906) 3 N.B. Eq. 358.

is not justified in extracting water from a stream to supply its waterworks system simply because it owns riparian land. Statutory power must be obtained for the purpose.

Ownership of the Bed

Riparian rights, we saw, arise by virtue of the ownership of the bank of a stream, but it is evident that a riparian owner can make more effective use of these rights, particularly for extraordinary purposes, if he owns the bed of the stream. A man who wishes to use water to operate a mill needs must construct a dam, but if the bed of the stream belongs to another, he cannot do so without committing a trespass. More important, if he erects any fixture in the stream, it becomes the property of the owner of the bed.[19]

The owner of the bed of a stream is, in general, entitled to use it in the same manner as any other landowner. This is subject, however, to the riparian rights of other landowners along the stream and to certain public rights that will be discussed later. Further, under the Waters Storage Act, no dam, boom or other work impounding or holding back water is to be constructed until approved by the Lieutenant Governor in Council.[20] The Act does not, however, apply to driving dams on brooks and small streams, nor to reservoirs for the supply of water to cities, towns or municipalities.[21]

In addition to the ordinary rights of other landowners, the grant of the bed of a stream ordinarily carries with it the exclusive right to fish in the waters flowing over it,[22] unless the stream at the point in question is tidal or, possibly, navigable.[23] The right to fish may be expressly excluded from the grant of a stream and its bed and exist as a *profit à prendre* called a several fishery, if vested in one person, and a common of piscary or common fishery if vested in several persons.

Frequently in a grant of land adjoining a stream, or through which a stream flows, no specific mention is made of the bed. For this reason the law has devised a group of *prima facie* rules to determine whether the bed is included in the grant. It must be emphasized that these are rules of construction that may be overridden by express terms or by clear implication.[24]

The rule to be applied depends on the nature of the stream. If it is tidal at the point in question, a grant of land adjoining the stream extends only to the high water mark, or more accurately, to the medium

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(19) **Quiddy River Boom Co. v Davidson** (1886) 25 N.B.R. 580.

(20) R.S.N.B. 1952, c. 248, s. 1.

(21) **Ibid**, s.5.

(22) **The Queen v Robertson** (1882) 6 S.C.R. 52; **In re Provincial Fisheries** (1895) 26 S.C.R. 444; some early New Brunswick cases assert that the right of fishing is a riparian right; see, for example, **Byron v Stimpson** (1878) 17 N.B.R. 697, but these cases would now clearly not be followed on this point.

(23) **In re Provincial Fisheries** (1895) 26 S.C.R. 444; see below under public rights.

(24) **Saunders v William Richards Company, Limited** (1901) 2 N.B. Eq. 303 (fresh water); **Quiddy River Boom Co. v Davidson** (1886) 25 N.B.R. 580 (tidal).

high tide line between the spring and neap tides.[25] Unless expressly granted,[26] the shore[27] and bed[28] remain vested in the Crown—in the Crown in right of the Dominion in a public harbour,[29] and in all other cases, in right of the province.[30]

If the stream is navigable, though not tidal, there are *dicta* in the *Reference re Provincial Fisheries* (1885) asserting that the rule is similar to that relating to tidal waters.[31] It was there said that *prima facie* a riparian owner owns only to the bank of the stream. If the statement is correct,[32] it constitutes a local variation of the Common Law.

As regards non-navigable fresh water rivers, our courts have followed the English Common Law. The owner of land through which the stream flows owns the bed of the stream unless it has been expressly reserved, and if the stream forms the boundary between lands owned by different persons, each proprietor *prima facie* owns the bed of the river *ad medium filum aquae* — to the centre thread of the stream.[33]

Public Rights

Reference has been made to public rights in a stream. These must now receive attention in so far as they affect landowners along a stream.

First, of the right of navigation. In England the public has a natural right to navigate in tidal navigable water, but though non-tidal streams may be *de facto* navigable the public may not navigate there, except by statute or custom or unless the stream has been dedicated as a highway.[34] Judges frequently speak as if this were the rule here also,[35] but there are weighty *dicta* in the Supreme Court of Canada asserting that if waters are *de facto* navigable, the public right of navigation exists there.[36] That is, I understand, the law of Ontario and Quebec and

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(25) **Lee v Arthurs et al** (1919) 46 N.B.R. 185 and 482; **Lee v Logan** (1919) 40 N.B.R. 502, **Turnbull v Saunders** (1921) 48 N.B.R. 502.

(26) **Brown v Reed et al** (1874) 15 N.B.R. 206; **Magee v City of Saint John** (1883) 23 N.B.R. 275; **Quiddy River Boom Co. v Davidson** (1886) 25 N.B.R. 580; **Saint John Harbour Commissioners and Attorney General of Canada v Eastern Coal Docks, Limited** (1935) 8 M.P.R. 499.

(27) **The Queen v Taylor** (1862) 10 N.B.R. 242.

(28) **In re Provincial Fisheries** (1895) 26 S.C.R. 444.

(29) S. 108, Schedule 3, British North America Act, 1867; **Holman v Green** (1881) 6 S.C.R. 707.

(30) S. 109, British North America Act, 1867. **In re Provincial Fisheries** (1895) 26 S.C.R. 444; for pre Confederation cases, see **Doe dem Fry v Hill** (1853) 7 N.B.R. 587; **The Queen v Taylor** (1862) 10 N.B.R. 242.

(31) **In re Provincial Fisheries** (1895) 26 S.C.R. 444.

(32) The judges based their finding on Ontario cases which were based on old French law. They did, however, indicate that this was the Common Law of Canada. It should be noted that the statement appears in a reference, not a case.

(33) **Byron v Stimpson** (1878) 17 N.B.R. 697; **The Queen v Robertson** (1882) 6 S.C.R. 52; **Saunders v William Richards Company, Limited** (1901) 2 N.B. Eq. 303; **Watson v Patterson** (1903) 2 N.B. Eq. 488; **Roy v Fraser** (1903), 36 N.B.R. 113.

(34) See **Byron v Stimpson** (1878) 17 N.B.R. 697.

(35) See, for example **Queddy River Boom Company, Limited v Davidson** (1883) 10 S.C.R. 222.

(36) **The Queen v Robertson** (1882) 6 S.C.R. 52; **In re Provincial Fisheries** (1895) 26 S.C.R. 444.

the continental part of Canada, at least where the stream is naturally navigable; the English rule seems clearly inappicable to their state and conditions.[37] But our maritime situation is not unlike that existing in England, and the statement should not, therefore, be accepted too readily. Whatever test is adopted a stream may well be navigable by the public for part of its course, and not for its whole length, and it is sufficient to give the right if it is a navigable at high tide.[38]

The public right of navigation is a paramount right, that is, whenever it conflicts with the rights of the owner of the bed or a riparian owner, it will prevail.[39] Thus even the owner of the bed is not entitled to erect anything thereon that interferes with navigation, notwithstanding that the structure erected is of greater public benefit.[40] The right is similar to the public right of passing and repassing on a highway without interference from the owner of the land forming the highway.[41] Permission to build in navigable waters may, however, be obtained by application to the Governor General in Council under the Navigable Waters Protection Act.[42] It should be noticed in passing, however that such permission does not authorize any interference with the private rights of others. It does not, for instance, authorize a person to build on another's land or to interfere with the right of access of a riparian owner.[43]

Somewhat similar to the right of navigation is the public right to float logs and other property on navigable and floatable streams. A floatable stream is one that is not navigable in the strict sense but is navigable by canoes and other small craft and is capable of floating logs and other property.[44] It is sufficient to give the public right if the capacity to float only exists at times of freshet.[45] The right to float also includes the right to go on riparian land when necessary to remove logs that have been cast on the shore.[46]

This right to float, if it exists in England at all, has not been developed there because, whenever it is necessary to establish such a right, reliance is had upon the better recognized devices of custom and dedication.[47] Since this country was settled long after the beginning of legal memory in 1189, it is impossible to establish a customary right here. As

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(37) **In re Provincial Fisheries** (1895) 26 S.C.R. 52 and the cases therein cited; the court appears to have relied heavily on the fact that French Law was once applicable to the rivers of which it spoke.

(38) **The Queen v Robertson** (1882) 6 S.C.R. 52.

(39) **Brown v Reed et al** (1874) 15 N.B.R. 206; **Queddy River Boom Company, Limited v Davidson** (1883) 10 S.C.R. 222; **Saint John Harbour Commissioners and Attorney General of Canada v Eastern Coal Docks, Limited** (1935) 8 M.P.R. 499.

(40) **Ibid.**

(41) **Byron v Stimpson** (1878) 17 N.B.R. 697.

(42) R.S.C. 1952, c. 193.

(43) **Irving Oil Company, Limited v Rover Shipping Company** (1935) 36 M.P.R. 180.

(44) **The Queen v Robertson** (1882) 6 S.C.R. 52; **Roy v Fraser** (1903) 36 N.B.R. 113; **Watson v Patterson** (1903) 2 N.B. Eq. 488; **Bathurst Lumber Company v Harris** (1919) 46 N.B.R. 411.

(45) **Esson v M'Master** (1842) 3 N.B.R. 501.

(46) **Quiddy River Boom Company, Limited v Davidson** (1886) 25 N.B.R. 580.

(47) **Caldwell v McLaren** (1884) 9 A.C. 392.

to dedication, many of our rivers were used to transport property long before there were owners who could dedicate them. Yet in a young country like ours, the right to float logs and timber on streams is an economic necessity, and the courts have met the challenge by developing a variation from the English Common Law.[48]

Unlike the right of navigation, the right to float is not paramount; it does not prevail over the rights of the owners of the bed and bank but is concurrent with them.[49] One who floats logs or other property down a stream must do so in a reasonable manner,[50] interfering as little as possible with the rights of landowners along the stream, and if he injures the property of a landowner the onus is on him to show that his conduct was reasonable. This is evidenced by *Roy v Fraser* where the defendant was held liable for damage resulting to the plaintiff's dam from the driving of logs.[51] Had the defendant been exercising the right of navigation, he would not have been liable.

Riparian owners must on their part exercise their rights reasonably, so as to hinder as little as possible persons floating logs on the stream. Thus if a person builds a dam, he is under a Common Law duty to provide sluiceways or other reasonable means to allow logs and timber to pass.[52] In New Brunswick the Dams and Sluiceways Act provides a procedure whereby a person wishing to drive logs may compel a dam owner to make sluiceways to permit him to do so.[53] The statute was mentioned in *Roy v Fraser* but it is not clear from that case whether the statutory remedy is in addition to, or in derogation of, the Common Law remedy.

Finally, the public has the right to fish in all tidal waters up to the point where the tide ebbs and flows.[54] The grant of land over which tidal water flows does not automatically carry with it the exclusive right to fish in that water, as it does in the case of fresh water.[55] Indeed, in England, the Crown since Magna Charta has no power apart from stat-

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(48) The early cases on the subject purported to follow English Law, but they clearly do not accord with modern English Law: see **Esson v M'Master** (1842) 3 N.B.R. 501; **Rowe v Titus** (1849) 6 N.B.R. 327.

(49) **Roy v Fraser** (1903) 36 N.B.R. 113; **Watson v Patterson** (1903) 2 N.B. Eq. 488; **Bathurst Lumber Company v Harris** (1919) 46 N.B.R. 411.

(50) In **Bathurst Lumber Company v Harris** (1919) 46 N.B.R. 411, at pp. 442-3, Grimmer J., giving the judgment of the Supreme Court of New Brunswick had this to say about reasonableness: "The degree of care, skill and diligence required of the log owners depends largely on the circumstances surrounding each case, and the rule applicable to riparian proprietary interests and log owners is equally applicable to cases of owners of legally constructed bridges crossing the river for public or private use or convenience. What might rightly constitute reasonable and proper skill and diligence in one case might quite easily assume and become negligence in another. If from the conformation of the land the river runs through narrow places and gorges where jams may easily form even under ordinary conditions....a greater deal of care, diligence and skill is required by the log owner....than in and along the broader and more open reaches of the river." See also Barker, J., in **Watson v Patterson** (1903) 2 N.B. Eq. 488 at pp. 491-2 citing from **Davis v Winslow** 51 Me. 291.

(51) **Roy v Fraser** (1903) 36 N.B.R. 113.

(52) **Ibid.**

(53) R.S.N.B., 1952, c. 56.

(54) **Steadman v Robertson et al; Hanson v Robertson et al;** (1879) 18 N.B.R. 580; **Nash v Newton** (1891) 30 N.B.R. 610; **In re Provincial Fisheries** (1895) 26 S.C.R. 444.

(55) **Ibid.**

ute to grant a several fishery in tidal waters either to the person who owns the land beneath or to anyone else. This has been said to apply to New Brunswick,[56] but the point has been doubted in the Supreme Court of Canada.[57] However that may be, unless the right to fish is expressly granted to the owner of the bed, he cannot interfere with the public fishing there.[58]

Section 60, Crown Lands Act

An important qualification to the law as above stated must be made in regard to much of the land originally granted from the Crown since 1884. The qualification arises out of section 60 of the Crown Lands Act[59] and its predecessors. The section now provides that all Crown grants issued after the passing of the Act shall be subject to a reserve in full ownership by the Crown of a strip of land three chains (198 feet) in depth from each bank of any river or lake in the province.

The history of the section is both interesting and instructive. Shortly after Confederation the federal and provincial governments began a protracted dispute respecting legislative jurisdiction over, and the proprietary rights to the inland fisheries. The province was desirous of retaining as much control over the fisheries as it could because of their economic importance to the province. The new Parliament at Ottawa, on its part, was very jealous of its legislative jurisdiction, so shortly before vested in the various provinces. By 1884, it had become clear that while the Federal Parliament had legislative authority over all fisheries, the proprietary interest in the inland fisheries not previously granted was vested in the province.[60] Now by virtue of section 92 (5) of the British North America Act, 1867, the province may legislate respecting the management of provincial public lands, which, of course, includes fisheries.[61] By retaining the ownership of the fisheries, the province could ensure itself some measure of jurisdiction over them as well as revenue derived from leasing the fisheries.[62]

Accordingly, in 1884 a section was passed providing that in all future Crown grants there should be reserved a strip of land four rods (66 feet) in width adjacent certain rivers therein named and such other

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(56) **Wood v Esson** (1883) 9 S.C.R. 239; **Nash v Newton** (1891) 30 N.B.R. 610; the statements are obiter. In **Attorney for British Columbia v Attorney General for Canada** [1914] A.C. 153 the restriction in Magna Charta was said to apply to British Columbia; the statement is not binding since it appears in a reference.

(57) **In re Provincial Fisheries** (1895) 26 S.C.R. 444.

(58) In **In re-Provincial Fisheries** (1895) 26 S.C.R. 444 it was asserted that the public may also fish in navigable non-tidal waters, but the contrary was put forward in **Attorney General for British Columbia v Attorney General for Canada** [1914] A.C. 153. Since both statements are in references, neither is binding.

(59) R.S.N.B., 1952, c. 53.

(60) See, for example, **The Queen v Robertson** (1882) 6 S.C.R. 52.

(61) **Attorney General for Canada v Attorney General for Ontario, Quebec and Nova Scotia** [1898] A.C. 700.

(62) The reason for passing the section may be seen in the Synoptic Report of the Proceedings of the House of Assembly for 1884. The practice of leasing the fisheries was provided for in 1884 also; see 47 Vict., c. 1.

rivers, lakes and streams as might be declared by proclamation, together with the riparian ownership of the streams.[63] The section, however, gave the owners or occupiers of any land abutting the strips a right of way to and from the streams. The streams mentioned in the section are well known fishing rivers in the northern part of the province, for example, the Tobique, the Restigouche, the North West Miramichi.[64]

The section was modified in 1887 to provide that grants of islands in rivers could be made without the reservation, provided such grants expressly reserved the fishing privileges contigous to the islands,[65] and in 1890 it was again amended to provide that grants might be made without the reservation if application had been made therefor before the passing of the section in 1884.[66]

Following these amendments the provision remained substantially unchanged,[67] and no further streams or lakes appear to have been added to the list[68] in the section until 1927. In the revised statutes of that year, the provision was re-enacted as section 62 of the Crown Lands Act,[69], but the following important modifications were made:

(a) the strip was reserved from all rivers, lakes and streams;[70]

(b) the breadth of the strip was increased from four rods (66 feet) to three chains (198 feet);

(c) no right of way was preserved for the owner or occupier of land adjoining the strip; and

(d) the Minister of Lands and Mines was empowered to reduce the breadth of the strip or dispose of it altogether in sales of islands, lands of small extent and, more important, whenever he considered it in the public interest.

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(63) 47 Vict., c. VII, s. 4.

(64) The rivers listed are: Nepisguit River; Jacquet River; Upsalquitch River; Quatawamkedgwick River; Restigouche River; Charloe River; Patapedia River; Middle River: Little River; Tattagouche River; Big Tracadie River; Tabcintac River; Dungarvon River; Renous River; North West Miramichi River and branches; Kouchibouguac River; Kouchibougacis River; Richibucto River; Green River and branches; Tobique River and branches.

(65) 50 Vict. c VII, s. 2.

(66) 53 Vict. c. XVII.

(67) It was re-enacted by C.S.N.B. 1903, c. 27, s. 4.

(68) The Department of Lands and Mines has informed me that it has never found any proclamation adding to the list in the original section. However, it became the departmental policy sometime between 1884 and 1920 to reserve a strip on lots fronting on the Southwest Miramichi, but the Department has found no proclamation making the policy mandatory.

(69) R.S.N.B. 1927, c. 30.

(70) The section speaks only of rivers and lakes, but s. 8(42) of the Interpretation Act. c. 1, R.S.N.B. 1927, provides that "'River' may mean creek, stream, or brook". It is suggested that it would probably have that meaning in this case. Many of the doubts that might be had about the section are settled by the practice of making the reservation expressly in each grant.

Section 60 of the Crown Lands Act of 1952,[71] though differing markedly in phraseology, in effect reproduces the 1927 section, except that

(a) whenever the strip is reduced or disposed of in the case of an island in a river, the grant must expressly reserve to the Crown all fishing privileges contiguous to the island,[72] and

(b) a right of way to and from the stream is given to owners of land abutting on the strip.[73]

Since the Minister of Lands and Mines has had the power since 1927 to grant all or any part of the reservation provided by the section whenever he considers it in the public interest, it is evident that he could entirely change the effect of the section. The Department advises me, however, that the power is very rarely exercised.

It is now possible to summarize the effect of the section upon water rights since its original enactment. Apart from a few exceptional cases, no grant made between 1884 and 1927 of land adjoining the northern New Brunswick rivers set forth in the original section has given any of the valuable water rights arising out of the ownership of the bank and bed of a stream. Since 1927 the same may be said of any grant of land adjoining any lake or stream in the province.

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(71) R.S.N.B. 1952, c. 53. The section speaks only of rivers and lakes but s. 38(41) of the Interpretation Act, R.S.N.B. 1952. c. 114 defines river as including creek, stream and brook. It is open to question whether the word "lake" includes a pond. The section also fails to make specific mention of the bed. It might possibly be doubted whether the bed would be excepted in certain cases under the statutory reservation. However, the practice is to expressly reserve the beds of streams and lakes as well as the adjoining strip in each grant.

(72) The Legislature may have intended that the fisheries be reserved in all cases, but the section is clumsily worded and it seems doubtful that it is necessary to reserve the fisheries except in the case of small islands. The Department of Lands and Mines has advised me that the fisheries are invariably reserved.

(73) It is usual to reserve the strip expressly, and in the grants I have seen no reference is made to the right of way. It is doubtful if the right of way exists in such cases.

THE ENFORCEMENT OF COLLECTIVE AGREEMENTS

It is a tribute to Canadian employers and trade unions that there are only a handful of reported Canadian cases dealing in any way with problems of enforcement of collective agreements. Apparently even the least congenial of unions and employers regard it their duty to comply with the terms of a collective agreement, at least after bona fide disputes as to the meaning of the agreement have been settled by arbitration or otherwise.

Although the decision as to what action to take to enforce a collective agreement may not frequently arise in practice, it is an ever present problem and can become important at any time if one's opponent is particularly recalcitrant. While not intended to be an exhaustive treatment of the subject, it is hoped this paper may help to point the way for the busy practitioner faced with an enforcement problem.

LEGAL STATUS OF COLLECTIVE AGREEMENTS

Consideration of the legal status of a collective agreement, as will be seen, has become academic as a result of recent legislative developments (except in Ontario) but a brief statement is not out of order as a prelude to the understanding of the main problem.

At Common Law, in Canada at least, a collective agreement was regarded as merely a statement of working conditions not forming part of the individual's contract of employment.[1] The employee, unless he actually was a signatory to a collective agreement, was thus left with no remedy against an employer who breached the agreement[2] unless he could establish that the union entered into the agreement as his duly authorized agent.[3] The only effective remedy for a breach of a collective agreement was stated by the Judicial Committee of the Privy Council to be economic action in the form of a strike by the union or a lock-out by the employer.[4]

The unenforceability of collective agreements, as between employer and employee, did not prohibit actions between the employer and the union itself if they were actually parties to the contract. The lack of legal validity vis-a-vis an employee resulted solely from the fact that the employee was not a party to the agreement. The only problem in an employer - union case was the question whether the union had status to sue and be sued.

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(1) **Young v C.N.R.** [1931] 1 D.L.R. 645 (P.C.); **Aris v Toronto, Hamilton & Buffalo R. Co.** [1933] 1 D.L.R. 634 (Ont.); **Wright et al v Calgary Herald** [1938] 1 D.L.R. 111 (Alta. A.D.).

(2) **Ziger v Shiffer & Hillman Co. Ltd.** [1933] 2 D.L.R. 691 (Ont. C.A.).

(3) **Ibid**, per Logie, J., trial judge, at p. 695.

(4) Lord Russell of Killowen in **Young v C.N.R.** [1931] 1 D.L.R. 645 at p. 650.

ENFORCEMENT BY ECONOMIC ACTION

The case in which the Judicial Committee decreed that economic action was the sole means of enforcing a collective agreement was decided before the advent of statutory provisions, which are now common to most labour relations legislation, that no strike or lock-out can be declared during the currency of a collective agreement.[5] With the advent of this legislation, the remedy of enforcing a collective agreement by economic action disappeared. Economic action can now be used only as a means of forcing the opposite party to enter into a collective agreement in favourable terms.

ENFORCEMENT BY ARBITRATION OR COURT ACTION?

Most labour relations legislation now requires that all collective agreements contain a provision for final settlement of disputes and that parties to the agreement must comply with that provision and give effect thereto.

In New Brunswick, section 18 of the Labour Relations Act[6] reads:

> 18. (1) Every collective agreement entered into after the commencement of this Act shall contain a provision for final settlement, without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.
>
> (2) Where a collective agreement, whether entered into before or after the commencement of this Act, does not contain a provision as required by this section, the Board shall, upon application of either party to the agreement, by order prescribe a provision for such purpose and a provision so prescribed shall be deemed to be a term of the collective agreement and binding on the parties to and all persons bound by the agreement and all persons on whose behalf the agreement was entered into.
>
> (3) Every party to and every person bound by the agreement and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement and give effect thereto.

The difficulties existing at Common Law as to whether a collective agreement is binding upon the individual employee have been overcome by legislation, such as section 17 of the New Brunswick Act, which provides that a collective agreement is, subject to and for the purpose of the Act, binding upon the union and all the employees in the unit as well as the employer.[7] This section is sufficient to give efficacy to the provisions of section 18.

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(5) New Brunswick Labour Relations Act, R.S.N.B. 1952, c. 124, s. 21; Nova Scotia Trade Union Act, R.S.N.S. 1954, c. 295, s. 22. The Prince Edward Island Trade Union Act prohibits strikes and lock-outs until disputes are arbitrated, but does not specifically forbid such action during the curency of an agreement; see R.S.P.E.I. 1951, c. 164, s. 13(1). The text of this paper, in general, refers to the New Brunswick Act; references will also be made in the footnotes to the Nova Scotia and Prince Edward Island legislation.

(6) R.S.N.B. 1952, c. 124; s. 19, R.S.N.S. 1954, c. 295 is identical; there is no similar provision in the P.E.I. Act.

(7) R.S.N.B. 1952, c. 124; s. 18(1), R.S.N.S. 1954, c. 295 is identical; there is no similar provision in P.E.I.

The words of section 18 appear to be sufficiently directive that any person, either employer, employee or union, seeking to enforce the terms of a collective agreement must do so through the means for final settlement provided in the agreement or prescribed by the Labour Relations Board. In a recent Ontario case this result is strongly indicated.[8] An employer who was dissatisfied with the finding of an arbitration board applied to the court by way of certiorari to quash the award on the ground that the arbitration board had exceeded its jurisdiction, but certiorari could only lie if the board was a "statutory tribunal." It was held that the provisions of the Labour Relations Act compelling the parties to arbitrate their dispute was sufficient statutory authority to render the board, in effect, a statutory tribunal and that certiorari was applicable. The effect of this decision, for present purposes, is that section 18 is an absolute statutory direction which the parties must obey. The same compulsion was indicated recently by the Supreme Court of British Columbia,[9] where it was stated that if the employees concerned had any dispute with their employer, it was their duty to resolve it in accordance with the arbitration clause of the collective argeement.

Section 18 calls for a provision for "final settlement of all differences between the parties. . . .concerning its meaning or violation." It is difficult to see what dispute could arise respecting a collective agreement that would not come within these words. They are broad enough to include any type of dispute that could otherwise be raised in the form of a legal action if the difficulties mentioned above respecting the bringing of action did not exist.

It is a rule of statutory construction applicable in considering whether a statutory procedure abolishes previously existing actions to ask: Is the substituted procedure a complete one, and have the parties the same rights to be heard as they formerly possessed?.[10] Section 18 not only gives the parties the same rights as they had before, but appears to enlarge them in that the previously existing common law disabilities have been taken away. Section 18 is phrased in clear and unmistakeable terms.

It seems to follow that any possibility of court action to enforce a collective agreement either between the actual signatories to the agreement (the union and the employer) or by or against any employee has been taken away by statute and that enforcement must be accomplished through the procedure established pursuant to the statute.[11]

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(8) **Re Arbitration of International Union of Mine, Metal and Smelter Workers, re International Nickel** (1956) 1 CCH Canadian Labour Law Reporter (hereinafter cited as C.L.L.R.) 15,063 (Ont. C.A.).

(9) **Dawson, Wade & Co. Ltd. et al v Tunnel and Rockworkers Union of Canada et al** [1956] 5 D.L.R. (2nd) 663.

(10) Hals (2nd), Vol. 31, p. 503.

(11) In Ontario s. 3(3) of The Rights of Labour Act, R.S.O. 1950, c. 341, provides: "A collective bargaining agreement shall not be the subject of any action in any court unless it may be the subject of such action irrespective of any of the provisions of this act or of The Labour Relations Act", so that whatever actions existed at Common Law appear to still exist in that province. In a paper presented at the Canadian Bar Association annual meeting in 1956, Prof. J. McL. Hendry expressed the view that collective agreements could still be enforced by court action.

A recent decision of Clyne, J. in the British Columbia Supreme Court,[12] however, casts doubt on the validity of this conclusion. A company became involved in a jurisdictional dispute between the union with which it had a collective agreement and another union which contended certain work should be done by its members rather than those of the first union. The company ordered the first union and its men to do the work as it was included in the work defined in the collective agreement. The union refused and also declined to follow the grievance procedure of the agreement. The company brought an action against its own union for an injunction and a declaration to compel the union and its members to do the work covered in the agreement, and against the second union to restrain it from inducing a breach of contract by the first union. Notwithstanding that the statute contained provisions identical with subsections (1) and (2) of section 18, the court held the first union had breached the collective agreement and gave judgment for the company. The decision makes no reference to these statutory provisions. The only distinguishing feature of this case is that the statute did not contain the provisions of subsection (3) of section 18 which direct the parties to abide by the result of an arbitration clause. On the other hand the statute did contain a section, as does the Nova Scotia Act, requiring all parties concerned to do everything they are required to do by the provisions of the collective agreement.

With respect, it is difficult to see why the parties to this case should not have been compelled to arbitrate their difference in accordance with the clear language of the statute. It is submitted that, inasmuch as the decision does not refer to the arbitration sections of the statute, this case does not weaken the foregoing thesis that the clear language of the statute must be obeyed and that the jurisdiction of the courts is ousted.

The last mentioned case brings up a subsidiary problem: what means of enforcement can be adopted if the alleged offender fails to appoint an arbitrator as required by the arbitration clause? The answer seems to be that the arbitration clause should spell out a method for completing the arbitration in the event of a refusal to appoint and that, if the clause does not so provide, the complaining party would have a right to apply under the Arbitration Act to complete the arbitration in the way in which that Act provides.

Section 18, however, does not affect the special terms of any individual contract of employment that may exist separate from a collective agreement. For example, a man might be employed for a fixed term of one year in a classification covered by a collective agreement, the terms of his employment to be as set out in the agreement. Assuming the collective agreement contains no terms restricting the employer's right to discharge employees, the employee would have an action against the employer for damages for wrongful dismissal prior to the end of the one year period. This would not be a difference concerning the meaning or

(12) **G. H. Wheaton Ltd. v Local 1598, United Brotherhood of Carpenters & Joiners of America et al** [1957] 6 D.L.R. (2nd) 500.

violation of the collective agreement but a dispute arising out of the separate agreement of service. There is nothing in the Act precluding action in the courts on this type of claim.

ENFORCEMENT OF ARBITRATION AWARD

Once having taken the dispute to an arbitration board and the board having rendered its final award, the next hurdle is the problem of how to enforce the award should the losing party fail to voluntarily comply with it.

There seems to be two avenues open, first, by signing judgment under the Arbitration Act; secondly, by a prosecution for a breach of the Labour Relations Act.

1. Enforcement under Arbitration Act

Section 3 of the New Brunswick Arbitration Act[13] states that the Act applies to every arbitration under any Act as if the arbitration were pursuant to a submission. In view of the Ontario decision that a labour arbitration board is, by virtue of the Labour Relations Act, a statutory tribunal for purposes of certiorari, it seems apparent that it must be an arbitration "under" an Act within the meaning of section 3 of the Arbitration Act. The effect is the same as if the Labour Relations Act itself contained the required arbitration submission applicable to all collective agreements.

It seems also clear that a labour arbitration comes within the Arbitration Act apart from the effect of the Labour Relations Act. The relevant sections of the Arbitration Act refer to a "submission", and a submission is defined as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." In the definition of "submission" there is no reference to an arbitration agreement existing by virtue of an Act of the Legislature and it is therefore indicated that the Arbitration Act applies to all arbitration submissions regardless of their source.[14]

The enforcement section of the Arbitration Act is section 18 which provides:

> An award on a submission may, by leave of the Court, be entered as a judgment of the Court and may, with taxed costs, be enforced in the same manner as a judgment or order to the same effect.[15]

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(13) R.S.N.B. 1952, c. 9. The Arbitration Act of Nova Scotia, R.S.N.S. 1954, c. 13 does not contain similar provisions and, therefore, this paragraph does not apply to that province. S. 3, R.S.P.E.I. 1951, c. 12 is identical to s. 3 of the N.B. Act; see also s 19 of the P.E.I. Trade Union Act as enacted by s. 1 of c. 3 of the Statutes of P.E.I. 1953 (2nd Sess.).

(14) R.S.N.B. 1952, c. 9, s. 1(g); R.S.N.S. 1954, c. 13, s. 1(d) and R.S.P.E.I 1951, c. 12, s 1 are similar in terms.

(15) R.S.N.B. 1952, c. 9; R.S.N.S. 1954 c. 13, s. 14 and R.S.P.E.I. 1951, c. 12, s. 13 are substantially to the same effect.

It is therefore open to a party seeking to enforce an award of a labour arbitration board to have the award entered as a judgment of the court. This makes it possible to enforce the award through any of the ordinary means of enforcing court judgments—executions, examinations proceedings, etc. It also means that failure to abide by the directions of an award so entered will be a contempt of court, punishable by imprisonment or sequestration.

The peculiar problems of enforcing a judgment against a union deserve special treatment. The Common Law difficulties arising from the status of unions as mere unincorporated associations have, in the past, created enforcement problems. These obstacles are dealt with in the judgment of Ritchie, J., in the recent Saint John I.L.A. dispute,[16] the decision of the Manitoba Court of Appeal in the famous *Tunney* case,[17] (both of which judgments are under appeal and therefore subject to being overruled) and many recent decisions holding that a certified union is a legal entity with power to sue and be sued.[18] In the *I.L.A.* and *Tunney* cases the court directed judgment against the union and held that the union's funds could be levied on to satisfy the judgment. If these judgments stand, the same relief should be available to satisfy a monetary claim arising out of an arbitration award entered as a judgment, and it should not be carrying the analogy too far to apply sequestration against a union for failure to comply with a non-monetary order.

If the *I.L.A.* and *Tunney* cases are overruled on the point now discussed, employees seeking to obtain payment of monetary awards out of union funds must resort to the rules of law under which judgments against trustees may be satisfied out of trust funds held by them. This is only possible when union officers who are trustees of union funds can be made parties to the proceedings. This procedure is fraught with difficulties which are purposely passed over in this paper.

2. Enforcement by Prosecution

Section 18 (3) of the Labour Relations Act provides that every party to and every person bound by a collective agreement, or on whose behalf it was entered into, must comply with the provision for final settlement and give effect thereto. Under this section the parties to a labour arbitration are bound by statute to carry the award into effect. Section 40 makes it an offence for a person to do anything prohibited by the Act or to refuse to do anything required by the Act, and provides pen-

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(16) **Carlin & Cusack v Galbraith et al**——January, 1957 (unreported).

(17) **Tunney v Orchard et al** [1955] 3 D.L.R. 15.

(18) **Ibid**, per Tritschler, J., at p. 47 et seq. **Hollywood Theatres v Tunney** [1940] 1 D.L.R. 452; **Re Patterson & Nanaimo, etc.** [1947] 4 D.L.R. 159; **Medalta Potteries v Lomgridge** [1947] 2 W.W.R. 856; **Peerless Laundry etc. Union** (1952) 1 C.L.L.R. 15,041; **Re Medjucks Furniture** (1957) 1 C.L.L.R. 16,062 (N.B.L.R.B.); in **Christie Woodworking v National Union of Woodworkers** (1956—unreported), Bridges, J. ordered an injunction and declared against a certified union itself. In a paper presented at the Canadian Bar Association Annual Meeting in 1955, R. V. Hicks, Q.C. and W. S. Whittaker of the Ontario Bar, concluded that unions could not sue or be sued in Ontario. It is submitted that the above authorities are preponderant and that in the other Common Law provinces the status of a union to sue and be sued must be regarded as settled.

alties for a breach.[19] Thus, either independently of, or concurrently with, the enforcement procedures outlined above, the party in whose favour the award is made may prosecute the offending party for a breach of the Labour Relations Act.

Damages

If a breach of a collective agreement can now only be enforced by arbitration and not by court action, the question would arise: "What about damages?" Although damages against the offending party are not generally regarded as necessary or desirable in many labour relations disputes, there will certainly arise cases in which damages are appropriate. For example, if an employee is discharged contrary to the terms of the wage agreement, he would have redress under the arbitration procedure required by the Act, but if the collective agreement does not specifically provide for ordering the offending employer to compensate the employee for lost wages due to an improper dismissal, surely the employee should not be without a remedy for damages. Conversely if an employee breaches a collective agreement and damages result to the employer, the employer should have the right to recover damages from the offending employee, or if the union is at fault, from the union. The awarding of damages appears, therefore a void left by the taking away of court action.

The obvious solution, of course, is for the collective agreement itself to provide for payment of some damages, and to provide that the arbitration board may determine them. Labour practitioners should endeavour to see that collective agreements provide for this contingency. If the agreement provides for payment of lost wages to an employee improperly dismissed, no damages problem arises. The difficulty is the practical impossibility of providing in a collective agreement for all eventualities which might give rise to a proper claim for damages.

Another solution seems to be possible from the words of section 18 providing for "final settlement. . .of all differences". If a difference arises in such circumstances that it is proper that the offending party should pay damages to the innocent party, it would appear that no settlement can be "final" until the amount of such damages has been determined and awarded. For example, where an employee is improperly discharged and has lost several weeks wages before the arbitration board finds the dismissal was improper, the difference has not been finally settled as far as the employee is concerned until he is compensated for his lost wages. Thus, if the agreement is silent as to the award of damages by an arbitration board, it would appear to be open to the aggrieved party to apply to the Labour Relations Board under subsection (2) for an order prescribing a provision for "final settlement". The board would have power, under the subsection to prescribe a method for determining and awarding the damages properly due.

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(19) R.S.N.B. 1952, c. 124; s. 42, R.S.N.S. 1954, c. 295, is identical; for P.E.I. see s. 25(2) Trade Union Act as enacted by c. 3 of the statutes of that province for 1953 (2nd Sess.).

It should be pointed out in passing that the damages awarded would only be those which a court could award for a breach of contract. No claim for exemplary or punitive damages could be entertained since those types of damages are peculiar to tort and alien to contract.

ENFORCEMENT BY IMMEDIATE PROSECUTION

A few words should be said about immediate prosecution as a method of enforcing a collective agreement.

There is no section in the New Brunswick Labour Relations Act making it an offence for any person to violate the terms of a collective agreement (other than section 18(3) referred to above). Direct prosecution, therefore, is impossible unless of course an unfair labour practice is involved. Prosecution as a method of enforcement can only be employed to enforce an arbitration award as outlined above. It makes little difference, however, whether a prosecution is started immediately or after an arbitration because in most prosecutions the question would be raised whether the alleged offender had in fact violated the Labour Relations Act, and this dispute would have to be resolved by arbitration in any event.

The situation seems to be different in Nova Scotia. Section 18(2) of the Trade Unions Act of that province requires every person bound by a collective agreement to do everything he is required to do and refrain from doing anything he is required to refrain from doing by the provisions of the collective agreement. Penalties are provided, as in the New Brunswick Act, for a violation of the Act. For what it is worth, therefore, an immediate prosecution for a violation of a collective agreement can be taken in Nova Scotia without resorting to arbitration, provided, of course, there is no difference or dispute as to whether the collective agreement has been violated, which must, by statute, be referred to an arbitration board.

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LE PREMIER JUGE ACADIEN AU NOUVEAU-BRUNSWICK

Sir Pierre Amand Landry, avocat, député, ministre, juge, chevalier, a su ainsi gravir tous les degrés de l'échelle sociale. Plusieurs pages de notre histoire en témoignent éloquemment. Tous ces titres attachés à son nom demeurent toutefois impuissants à exprimer toute la grandeur de cette admirable carrière.

Fils d'Amand Landry et de Pélagie Caissie, tous deux de vieille descendance acadienne, Pierre Amand Landry naquît à Memramcook le 1 mai, 1846. Il était le quatrième de neuf enfants. Son père n'eut pas l'avantage d'une instruction supérieure parce qu'alors, il n'y avait aucune maison d'études françaises au N.B. Il s'instruisit lui-même pendant ses heures de loisir et obtint un brevet d'instituteur. Il enseigna pendant quelques années et à l'automne de 1846, il fut élu député libéral de Westmorland. L'honneur lui revient d'avoir été le premier député acadien à franchir l'enceinte de la Chambre d'Assemblée du N.B., où il siéga durant vingt-quatre années.

Après avoir fréquenté le Collège St. Joseph, Pierre Amand Landry se livra à l'enseignement. Très jeune encore, il embrassa la carrière légale et fit ses études sous la direction de Sir Albert J. Smith à Dorchester. Ce dernier était, à cette epoque, très bien connu dans le monde politique. Il avait été, en 1865, premier ministre de la province. L'année suivante, son gouvernement avait dû résigner à cause de sa forte opposition à la Confédération.

En 1870, à la suite de trois années de travail ardu, Pierre Landry fut admis au barreau de la province. Il décida alors de s'établir à Dorchester. En 1872, il épousa Mlle. Bridget McCarthy de Frédéricton dont il eut onze enfants.

Doué d'une intelligence brillante et toujours soucieux de l'intérêt de ses clients, le jeune avocat ne tarda pas à se créer une pratique très considérable. Son nom est intimement lié à plusieurs causes importantes de l'époque. La plus célèbre survint lors du triste évènement des émeûtes de Caraquet en 1874. A cette date, une agitation malencontreuse avait bouleversé et divisé les esprits au sujet des lois scolaires de 1871 si âprement discutées. Cette division entre les gens de la province souleva de graves conflits à deux endroits particuliers, à St. Jean et à Caraquet.

L'histoire nous révèle que les troubles de Caraquet furent le résultat d'un jeu de circonstances en elles-mêmes inoffensives. Les Acadiens de la région étaient déterminés à réclamer certains droits scolaires et pour cette raison, ils se réunissaient occasionnellement. A cause d'une exagération du projet en question, les miliciens de Chatham furent appelés à Caraquet. Comme résultat, deux hommes furent tués et une vingtaine d'Acadiens arrêtés. Les esprits se tournèrent alors vers cet avocat sérieux et compétent, Maître Landry. Ces infortunés avaient enfin trouvé un homme à qui confier leurs litiges. Mais vu l'insuffisance de son expérience, limitée à quelque quatre années de pratique, il crut bon de

s'assurer les services d'un avocat de haute réputation. Il devint ainsi, dans cette cause, l'associé de Samuel R. Thomson.

Monsieur Landry pratiqua le droit de 1870 à 1890. Pendant ces vingt années, son intérêt principal demeura dans le domaine juridique. Cependant, les qualités de son esprit ne l'obligèrent pas à restreindre ses activités. En sa première année de pratique, il inaugura sa prodigieuse carrière politique.

En effet, Amand Landry, le père de Pierre Amand, se faisait vieux et décida de résigner son mandat. Aussi, il nous est permis de croire que Sir Albert Smith, qui enseignait à Pierre Landry son noble métier, était aux élections de 1870 assez impopulaire parmi un grand nombre d'électeurs. Ceux-ci jetèrent alors les yeux sur le jeune avocat et l'invitèrent à briguer les suffrages populaires. Un scrutin favorable renversa les rôles et ce fut au tour de l'élève de donner la leçon au maître; Pierre Landry sortit victorieux et représenta les intérêts conservateurs à l'Assemblée Législative jusqu'en 1874.

A cette date, l'agitation au sujet des lois scolaires de 1871 persistait presque dans toute la province. Monsieur Landry fut battu aux élections de 1874 avec quelques amis qui partageaient ses vues sur cette question. Par ailleurs les élections de 1878 prouvèrent que cette réaction n'avait été qu'éphémère. Ce jour marqua l'un de ses plus grands triomphes électoraux.

En cette même année, il entra dans le gouvernement-Fraser en qualité de commissaire-en-chef des travaux publics, poste qu'il occupa jusqu'à la reconstitution du gouvernement sous la direction de l'Honorable Daniel L. Hannington. Ses collègues lui confierent alors l'important ministère de secrétaire-provincial où il exerça son talent remarquable d'administrateur jusqu'au démembrement du gouvernement en 1883.

Pendant cette période, un incident assez amusant devait donner libre cours au verbiage politique. L'ancien parlement situé à Frédéricton fut détruit par le feu. Depuis plusieurs années, la population de St. Jean enviait jalousement l'importance de Frédéricton de même que ses édifices parlementaires. Le désastre du parlement et d'autres circonstances favorables se prêterent généreusement aux convoitises des rivaux politiques.

En effet, le premier ministre et le commissaire-en-chef n'étaient pas de Frédéricton. Par contre, ils avaient épousé des jeunes filles de cette ville. De leur côté, les hommes politiques de St. Jean ne pouvaient pas ignorer cette occasion unique d'affirmer leur propos. Aussitôt, ils réclamèrent hautement par tout moyen honorable la construction du parlement à St. Jean. Tous leurs effort furent vains car les ruines fumaient encore que le ministre Landry avait jeté les plans d'un nouvel édifice à Frédéricton.

La défaite fut désastreuse. Les vaincus de St. Jean découvrirent pourtant l'énigme du mystère. L'indifférence des ministres avait été compensée par les intérêts de leurs épouses pour leur ville natale. Ils louèrent alors ironiquement une administration aussi efficace que celle des femmes dans les ministères de leurs maris.

N'importe les raisons qui influencèrent cette décision, le parlement actuel, construit sous sa direction, demeure un monument mémorable à Sir Pierre Amand Landry.

En 1883, Monsieur Landry fut invité à succéder au député fédéral de Kent. Après des luttes acharnées, il fut élu et représenta ce comté à la Chambre des Communes jusqu'en 1890.

Cette année là, malgré sa santé compromise par un travail excessif, il accepta la fonction de Juge de la Cour des comtés de Westmorland et de Kent offerte par Sir John A. Macdonald. Ce fut le début d'une glorieuse carrière de juge qui devait être couronnée par son élévation à la Cour Suprême du Nouveau-Brunswick. Plus tard, en 1913, il fut promu Juge en Chef de la Cour du Banc du Roi.

Une activité aussi ardente dans le domaine juridique et politique peut nous laisser croire que Pierre Amand Landry n'aurait pas eu le temps de s'occuper des nombreux problèmes de son peuple. Au contraire, jamais aucun homme s'est autant consacré à la prospérité de notre nation, au maintien de la justice et au règne de l'harmonie parmi les sujets de cette province.

A plusieurs reprises, Monsieur Landry a joué un rôle de premier ordre dans multiples aspects de notre vie sociale. Deux fois, en 1874 et en 1880, il fut l'un des déléguées acadiens du Nouveau-Brunswick aux conventions nationales de Montréal et de Québec. Plus tard, il présida les trois premières conventions françaises de cette province.

A la tribune parlementaire, il sut par son éloquence gagner le respect même de ses adversaires.

En jetant un coup d'oeil fortuit sur l'époque où vécut Sir Pierre Amand Landry, on remarque que la population du N.B. était composée de peuples très différents quant à leur histoire, à leur culture et à leurs croyances. Ces diversités causèrent de sérieuses difficultes de comprehension et d'entraide entre ces peuples. A cause de cette situation, la voie suivi par Maitre Landry constitue la plus grande marque de sa compétence. Il a su le premier de sa race démontrer ses talents dans les divers postes de confiance qu'll occupa.

Dans le domaine juridique, il fut le premier Acadien à devenir avocat, et par la suite, le premier à être élevé aux fonctions de Juge de la Cour de comté, Juge de la Cour Suprême du N. B., et enfin, Juge en-Chef de la Cour du Banc du Roi. En politique, il fut le premier Acadien à être nommé préfet de comté, le premier à occuper un ministère à la chambre d'Assemblée du N.B., finalement, le premier à devenir secrétaire-trésorier de la province.

Le Souverain d'Angleterre, George V, a lui-même honoré Pierre Amand Landry en le créant Chevalier, le premier et seul Acadien à obtenir ce titre. Il lui conféra cet honneur en 1915 à peine un an avant sa mort qui survint le 28 juillet, 1916. Ce fut le juste couronnement de cette éblouissante carrière.

Joseph Daigle, II Droit, U.N.B.

Case and Comment

INCOME TAX — PURCHASE AND RESALE BY COMPANY OFFICER IN PRIVATE CAPACITY — WHETHER "AN ADVENTURE OR CONCERN IN THE NATURE OF TRADE"

Minister of National Revenue v. Taylor[1] a decision of the Exchequer Court, clarifies the meaning of "an adventure or concern in the nature of trade" in the definition of "business" in s. 139 (1) (e) of the Income Tax Act.[2] Actually the case arose under s. 127 (1) (e) of the 1948 Act,[3] but the sections are identical.

The case illustrates the narrowing scope of the tax exempt capital gain transaction. It enunciates positive and negative rules by which to determine whether a transaction is of a capital nature or is a "trading adventure" productive of taxable income.

The respondent, Taylor, was the president and general manager of the Canada Metal Company, Ltd., a wholly owned subsidiary of an American parent, engaged in Canada in fabricating non-ferrous metal products including lead. Because of the parent's policy of refusing to allow its Canadian subsidiary to keep more than a thirty day supply of lead on hand the subsidiary suffered from shortages from time to time. In 1949, when foreign lead prices were sharply reduced, the subsidiary requested permission of the parent to import a three month supply of lead, but was refused. Respondent was given permission, however, to buy the lead as an individual. Accordingly he bought 1,500 tons which he later resold to the company at a large profit, lead prices having increased. Respondent was assessed on this profit. The Income Tax Appeal Board allowed his appeal;[4] the Minister appealed to the Exchequer Court.

Although the respondent testified that it was not his intention to resell the lead at a profit, but rather to guarantee his company a supply, the Exchequer Court applied an objective standard, and held that absence of intention to sell at a profit was not an answer. The transaction was "an adventure or concern in the nature of trade." "The considerations prompting the transaction may be of such a business nature as to invest it with the character of an adventure in the nature of trade even without any intention of making a profit on the sale of the purchased commodity."[5]

Two helpful positive criteria were laid down by which the commercial character of a doubtful case may be established: (1) if a person deals with a commodity bought by him in a manner similar to that of a dealer

(1) [1956] C.T.C. 189 (Ex.).
(2) R.S.C. 1952, c. 148.
(3) The Income Tax Act, 11-12 Geo. 6, c. 52.
(4) Taylor v. Minister of National Revenue, [1953] 9 Tax A.B.C. 358.
(5) [1956] C.T.C. 189, at p. 212.

in the commodity, such dealing is a trading adventure; (2) the "nature and quantity" of the commodity may be such as to make a transaction in it inherently commercial, and to exclude the possibility of its being merely the realization of a capital investment. In this case the respondent's conduct in buying and selling the lead at a profit through the same channels and in the same manner as conventional lead dealers satisfied the first test, and 1,500 tons of lead, requiring more than twenty freight cars to transport them, satisfied the second.

To be taxable the transaction itself need not be part of a going business or trade: isolation is not decisive. In a Scottish case Lord President Clyde said: "A single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made in the waters of trade."[6] That nothing has been done by the purchaser to make the article saleable before resale does not deprive its subsequent sale of a trading character. In *C.I.R. v. Fraser*,[7] a woodcutter bought a consignment of whisky which he later sold in three lots at a profit. He did not blend or advertise the whisky: it merely passed through his hands. Yet, the transfer was commercial and therefore taxable. Similarly lack of a business organization to market the article is not decisive. Again, dissimilarity of the activity from the trader's usual business is not crucial: a purchase and resale outside the taxpayer's usual line of business may well be taxable.

Since in the present case, the respondent's reasons "were business reasons of a trading nature,"[8] and the adventure a speculative one, lack of intention to make a profit, lack of processing of the product and the isolated nature of the transaction were not enough to deprive it of its trading character. The speculation was commercial and its profit taxable.

Howard McConnell, II Law U.N.B.

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(6) **The Balgownie Land Trust, Ltd. v. C.I.R., [1929] 14 T.C. 684, at p. 691.**
(7) **[1942] 24 T.C. 498.**
(8) **[1956] C.T.C. 189, at p. 215.**

INSURANCE — FORFEITURE — ELECTION TO DEFEND — NON-WAIVER AGREEMENT — JOINDER AS THIRD PARTY.

The plaintiff, an insurer, issued a policy indemnifying the defendant against liability arising by law while operating a motor vehicle. The defendant ran down one, Kane, while driving in the State of Washington, U.S.A. The defendant informed the plaintiff of the accident including the fact that he had been drinking before the accident. Kane commenced an action in Washington. The plaintiff obtained a non-waiver agreement from the defendant and undertook the defence of the Kane action. Then the plaintiff commenced an action in B.C. claiming a declaration that the defendant by drunkenness forfeited his rights under the policy. *Held*, for the defendant. *Federal Insurance Co. v. Matthews*, [1956] 3 D.L.R. (2d) 322 (B.C.).

The relevant terms of the B.C. Insurance Act are similar to those of the N.B. Act. However, since the action brought by Kane was in the U.S.A., the insurer could not invoke the sections of the B.C. Statute corresponding to s. 211(9) of the N. B. Act: under this section an insurer denying liability to the insured has the right to apply to be added as a third party in the injured person's action against the insured, and to contest the liability of the insured to the plaintiff.

This case was decided on the ground that to permit the insurer to defend the Kane action and deny liability under the policy would be to permit it to take a position in which its interest during the Kane action might be contrary to that of the insured. In effect, having elected to defend, the insurer was a fiduciary; as such its duty was to serve its principal single-mindedly.

However, the insurer obtained a non-waiver agreement from the insured and maintained that this preserved the right to repudiate liability while still continuing the defence. In interpreting this agreement, the Court held it was essential to consider the intention of the parties, and the insured's intention could not have been that contended for by the insurer. Cline J. said:

> In my view the non-waiver agreement was designed to prevent the defendant (Matthews) from successfully alleging that the plaintiff (insurer) had waived the breach during its investigations and up to the time when it reached its decisions to repudiate. To suggest that its operation continued after repudiation would place a construction upon the agreement which would be manifestly unfair to the defendant.[1]

In defending the Kane action, it would be the duty of the insurer in the insured's interest to proceed in good faith and argue that the insured was not intoxicated; while at the same time, it would be in the insurer's own interest in regard to the insured's potential claim against it under the policy to show he was drunk. This appeared to be the point on which the case turned. But one might argue that the insurer could have denied liability and defended the Kane action without any real clash of interests. The actions would be completely separate. The insurer could maintain the insured was sober, and that the cause of the accident was Kane's negligence. If Kane recovered judgment, this in itself would be some indication of forfeiture by the insured. Even if the insured was liable on negligence alone, the insurer would then be in no worse position to deny liability than when first informed of the accident.

If the Kane action had been brought in B.C., the insurer would not have faced the problem of election. By virtue of s. 183 of the B.C. Insurance Act, the insurer could have denied liability, and applied to be joined as a third party to contest the action. In N.B. today, where an action is brought against an insured for damages arising from operation of an automobile, the insurer, unless it denies liability, must defend the action.[2] If liability is denied, the insurer may be joined as a third party

(1) [1956] 3 D.L.R. (2d) 322, at p. 343.
(2) R.S.N.B. 1952, c. 113, s. 204.

and contest the liability of the insured to the same extent as if a defendant in the action.[3] But if no ground for denying liability is disclosed until after an appearance has been entered, or during the trial, how must the insurer proceed: deny liability immediately or, under the circumstances, continue the defense without prejudicing the right to deny liability?

In *England v. Dominion of Canada Gen. Ins. Co.*,[4] insurers, with knowledge of circumstances relieving them from liability, undertook and continued the defence of an action against the insured. In a subsequent action against them, they were held to have admitted liability under the policy and could not, therefore, repudiate liability. If the insurers intended to rely on such circumstances to relieve them from liability, it was their duty to abandon the defense as soon as these circumstances came to their knowledge. However, in *Stenhouse v. General Casualty Ins. Co.*,[5] after the insurer's counsel had addressed the jury, he learned for the first time that the insured had given a chattel mortgage of the insured car which, if given before the accident and during the currency of the policy, would have avoided the policy. Pending ascertainment of the date of the mortgage, counsel agreed to continue the defense. It was held that, in the dilemma in which counsel found himself, it was competent for him to make an arrangement whereby the trial could proceed to its conclusion preserving the rights of the insured and the insurer pending the insurer's decision. On learning the date of the mortgage and that it constituted a breach, the insurer did nothing further. It was held also that *England v. Dom. of Can. Ins. Co.*, was not authority for the proposition that to preserve its rights an insurer must completely withdraw from the trial as soon as it suspects a breach by the insured of a policy condition. In *Marshall v. Adamson*,[6] it was held that an insurer, in continuing defence after grounds for repudiation have arisen during the course of an action but pending investigation into the grounds for repudiation, does not waive the right to repudiate.

It seems, therefore, that until an insurer's suspicion of grounds for repudiation becomes knowledge, the insurer may continue the defense without prejudicing its right to repudiate.

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(3) Ibid., s. 211 (9).

(4) [1931] O.R. 264; [1931] 3 D.L.R. 489.

(5) [1934] 3 W.W.R. 564; [1935] 1 D.L.R. 193 (Alta C.A.).

(6) [1936] O.R. 394, rev'd [1937] O.R. 872, rev'd [1938] S.C.R. 482 (sub. nom, **Provident Assur. Co. v. Adamson**).

INTESTATE SUCCESSION — THE RIGHT TO ELECT DOWER — SECTIONS 21, 23 and 32, DEVOLUTION OF ESTATES ACT.

The law of intestate sucession is of such great practical importance that it should be as clear and unambiguous as possible. Unfortunately this cannot be said of the provisions of the New Brunswick Devolution of Estates Act[1] dealing with the rights of a widow whose husband dies intestate. Those provisions are set out in sections 21, 23 and 32 of the Act. Section 21 provides for the succession where the husband leaves a widow and one or more children; if there is only one child, the widow receives one-half of the estate, and if there is more than one child she receives one-third of the estate. Under section 23, when an intestate leaves a widow and no children, she is entitled to his whole estate up to $20,000, and if it exceeds that amount, then to $20,000 and one-half of the residue. So far the law is clear, but difficulty arises in interpreting section 32 of the Act, the relevant portion of which reads as follows:

> 32 .....and no widow shall be entitled to dower in the land of her deceased husband dying intestate, unless she shall elect within six months from the date of his death not to take the benefits to which she would be entitled under section 23 of this Act.

The law is clear where an intestate leaves a widow and no issue. Under section 32 the widow has the choice of taking either the benefits of section 23 or dower. However, the settlement of the estate of an intestate leaving a widow and issue is open to several interpretations.

The first possibility is that the widow of an intestate dying with issue no longer has any right to dower in the deceased's real property, but is only entitled to the benefits under section 21. This means, in other words, that dower in the land of an intestate is abolished absolutely except when he has left no issue and his widow elects not to take her benefits under section 23. While a literal reading of section 32 would give this result, several objections may be raised.

Firstly, the widow of an intestate with no issue, by having a right to take dower, would be in a preferred position to that of a widow with children. There seems no reasonable ground for this distinction, which could be inequitable to the latter. As is well known, dower attaches to all real property in which a man had a legal estate while married, even if he has conveyed it to another (unless the wife was a party to the conveyance). During his married life a man might well have owned real property of greater value than his combined real and personal property at the time of his death. In this case dower might well be of greater value than the benefit the widow would receive under section 21 — particularly if she had more than one child, when she would receive only one-third of the intestate's real and personal property. The effect is that legislation intended to benefit a widow would in fact be to her detriment.

(1.) R.S.N.B. 1952, c. 62. The Act was first passed in 1926 and these three sections are virtually unchanged. Only the provisions for interest in section 23(2) and (3) are new.

It follows from the last objection that the suggested interpretation would also have unexpected effects on the rights of a purchaser who bought land from a seller without obtaining a release from dower. If the seller died intestate leaving a widow and issue, the land in the purchaser's hands would not be subject to dower. Yet if the seller died leaving a widow and no children, the land would be subject to dower if the widow so elected. It seems inconceivable that the legislature ever contemplated so strange a result.

Another possible interpretation of section 32 is that dower in the estate of an intestate is only abolished when an intestate dies leaving a widow and no issue and she fails to elect to take dower. The widow of an intestate with issue would then receive both dower *and* the benefits of section 21, whereas if the intestate left no issue, the widow would only be entitled to dower *or* the benefits under section 23.

A similar result can be arrived at in another way. It might possibly be argued that the widow of an intestate with issue could elect not to take any of the benefits under section 23 (since she could not possibly receive such benefits anyway), and thereby be entitled to dower as well as the benefits under section 21. Both this interpretation and the previous one are subject to the objection that there seems no logical ground on which they can be justified.

Up to now, it has been assumed that the words "no widow shall be entitled to dower in the land of her deceased husband, dying intestate," in section 32 apply to all lands that have at any time been owned by the husband during his married life. It may, however, be argued that those words apply only to land owned by the husband at his death, not lands that have been conveyed to others. However, if that interpretation is adopted, it simply means that the right of election in section 32 is a meaningless procedure, because there could never be a case where dower would be more valuable than the benefits under section 23 plus dower in land conveyed to others. It is, therefore, submitted that this interpretation is incorrect.

The truth of the matter appears to be that the legislature intended that a widow should have the right to elect either dower or the benefits under the Act, whether or not the intestate left issue, but that section 32 incompletely expresses the intention. The courts might conceivably read into section 32 the necessary words, but this could more appropriately be done by the legislature. It should be noted that, under the section in the Ontario statute[2] corresponding to section 32, a widow has a choice between dower and the benefits under the Act, whether the husband leaves issue or not. It is submitted that the New Brunswick Legislature should amend section 32 so as to obtain a similar result.

Lois Holman, I Law, U.N.B.

(2.) R.S.O. 1950, c. 103, s. 8(1).