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FACULTY OF LAW

Beaverbrook House
Saint John, New Brunswick

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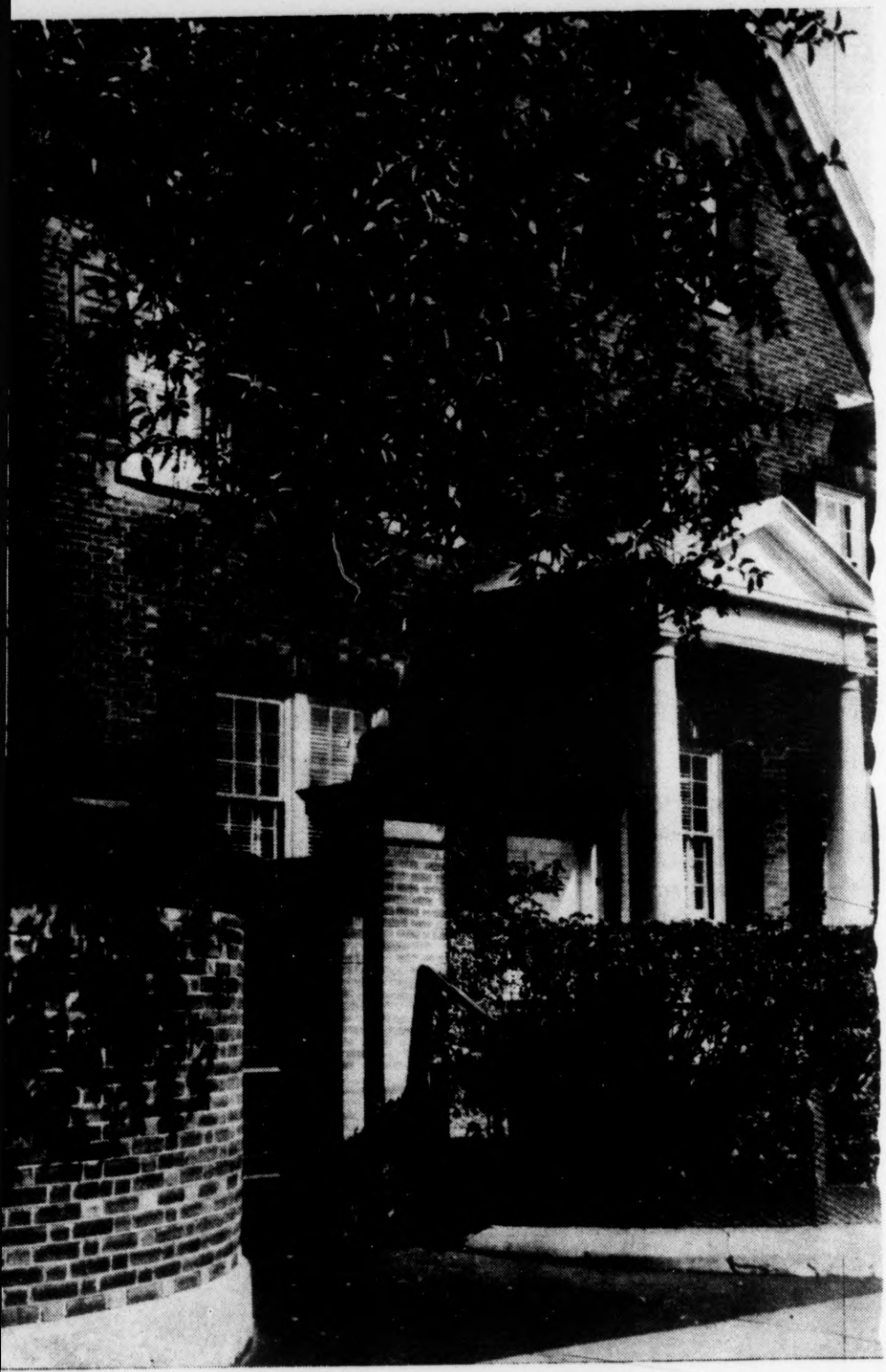

BEAVERBROOK HOUSE

BEAVERBROOK HOUSE

FORMAL OPENING

Legal education and the law profession reached another progressive milestone in New Brunswick when Beaverbrook House, the new home of the University of New Brunswick's Law Faculty, was formally opened by the building's donor, Right Honourable William Maxwell Aitken, First Baron Beaverbrook, on October 16, 1954. This achievement was due to the generosity of that famed son of New Brunswick who was himself a student in the law school in its formative years, and who sees as essential today the need for a sound educational foundation on which to build our juridical system.

The colonial style building, at the corner of Carleton and Coburg streets in Saint John, contains class rooms, offices, a seminar room, and large common rooms, completely and handsomely furnished, in addition to a 9,000 volume library, all of which constitute excellent facilities for the teaching of law. In the words of the University President, Dr. Colin B. MacKay, "The University of New Brunswick has in Saint John truly magnificent quarters for its faculty of law; a building equipped in the manner to make it the envy of all who see it".

Lord Beaverbrook, in dedicating the building, told the distinguished audience that every lawyer should give time and labour to the cause of good government. "Justice", he said, "depends upon the sound administration of public affairs." "It is my hope", he continued, "that the students of this house will be encouraged to take a constant and intense interest in the affairs and concerns of the governments at Fredericton and Ottawa. May this home of learning be dedicated to denouncing any form of intolerance and oppression, and uphold to everyone, equally and alike, the right to enjoy liberty and justice".

President Mackay, in the course of his remarks referred to the significance of Lord Beaverbrook's benefactions to the University and to the people of New Brunswick. He expressed the hope that the Law Faculty would continue to attract "many of the best young minds in the province and beyond"; fittingly, he referred to the increasing number of students entering law from the predominantly French-speaking sections of the province and to the co-mingling of the two cultural groups of the province within the Faculty.

In the distinguished audience were the Honourable Patrick Kerwin, Chief Justice of the Supreme Court of Canada; Premier Hugh John Fleming, cabinet ministers, and members of the New Brunswick legislature; the Chief Justice of New Brunswick, the Honourable C. D. Richards; representatives of Maritime universities; men of outstanding achievement in law and industry who later received honorary degrees; representatives of the armed services; and members of the legal pro-

fession. Lord Beaverbrook expressed sorrow at the inability of Mr. Justice W. H. Harrison, Dean of the Law Faculty, to be present and paid tribute to the "invaluable leadership that he has given the school".

Following the ceremony, the University's fall convocation was held at the Kent Theatre at which, in addition to degrees in course, eight honorary doctorates were conferred:

Doctor of Laws:

The Honourable Patrick Kerwin,	Chief Justice of Canada
The Honourable W. J. West, Q.C.,	Attorney General of New Brunswick
D. Park Jamieson, Q.C.,	President of the Canadian Bar Association
Gordon F. Nicholson, Q.C.,	President of the Barristers' Society of New Brunswick
K. C. Irving,	New Brunswick Industrialist

Doctor of Civil Law:

Professor Elliott E. Cheatham,	Charles Evans Hughes Professor of Law, Columbia University School of Law
Dean F. C. Cronkite, Q.C.,	College of Law, University of Saskatchewan
Dean George F. Curtis, Q.C.,	Faculty of Law of the University of British Columbia

The memorable day was concluded with a dinner in honour of Lord Beaverbrook tendered by the Council of the Barristers' Society of New Brunswick.

—Maurice J. Gautreau.

CONVOCATION ADDRESS

THE HONOURABLE PATRICK KERWIN
Chief Justice of Canada

The occasion is memorable, not merely for this graceful gesture on the part of this University [referring to the honorary degrees conferred] which is a reason personal to ourselves, but because, due to the generosity of your honorary Chancellor, Lord Beaverbrook, and by him, there has been this day dedicated to the service of the legal profession, and therefore to the service of the public, a new building fully equipped for the teaching of law. While primarily intended for the use of residents of New Brunswick, advantage will be taken of its facilities by others from various parts of Canada and from foreign shores. Those facilities include, it is needless to emphasize, not merely the physical structure, its embellishment and the fixtures and the books but also the members of the Faculty of Law of the University.

The teaching of law had its genesis in remote antiquity but throughout the centuries has developed in different countries in numberless ways. Here, as in the other common law provinces, you operate under a system different from one which has as its foundation, a code. The two great systems of law in Canada have different origins but, as has been many times pointed out by Chief Justice Rinfret, the aim of each is to do justice between man and man and between the individual on the one hand, and the community, whether it be a municipality, a province, or Canada, on the other. To those who have been nurtured in the former, the Common Law of England, as varied by applicable statutory enactments, is the rule to which they are accustomed and it is that law which, save for an excursion into comparative law, it will be the privilege and the function of the members of the Faculty of Law of this University to instill into the minds of its students.

I assume that not everyone in this gathering is trained in the profession or expects to follow that branch of learning but every individual must be affected by the law at one time or another. One may not be concerned in a cause célèbre, but, being a gregarious animal, man is bound to feel its impact in his daily life, — or perhaps his heir or beneficiary after he has departed this planet. It is, therefore, of the greatest importance that the law should be known to those who, by virtue of the training offered them, will be expected to be able to advise competently all who may consult them.

Contrary to the opinion of Mr. Bumble, the law is not "a ass, a idiot" and however imperfect it may appear to a disappointed litigant, its object is to regulate the transactions of, and the relationships among, various members of the human race. It is now a truism in all democracies that the rule of law is necessary for the well-being of their civilizations, but it is not necessary on the present occasion to enlarge upon the reason for this. It suffices to note that its bulwark is a free

and independent judiciary which in England commenced in the reign of William the Third, with the Act of 1700, whereby it was enacted that Judges' commissions should run **"quam diu bene gesserint** (instead of **durante bene placito**) and their salaries ascertained and established, but that upon the address of both Houses of Parliament it might be lawful to remove them. So far as the Judges of the Superior Courts of the provinces in this country are concerned, a similar enactment is to be found in Section 99 of The British North America Act and as to the judges of courts set up by the Parliament of Canada, by provisions in the relevant statutes. Without presumption but with humility, one holder of judicial office, on behalf of all, ventures to affirm that the people of Canada have confidence in the ability, integrity and impartiality of the members of their judiciary.

However, the courts must rely upon the assistance and co-operation of the Bar, not merely in carrying out their obligation to apply the rule of law without fear or favour and under all circumstances, but also in ensuring the preservation of that function. The task allotted to each is not for the glory of the members of either but as a means of furthering the cause of democracy and keeping alive what Bliss Carman described as:—

"That master cry, 'If freedom die,
Ye will have lived in vain' ".

Freedom of thought and of action does not come from the recitation of decided cases or the statement of principles enunciated in them, although each of these is necessary. The pupil must be taught not merely what the professor knows but he must be trained to think for himself so that he will appreciate the reason for a rule and apply it to circumstances as they arise. Then will he be able to distinguish those cases where the principle is inapplicable from those in which it will be proper to extend or amplify it. Nowhere is the general point put more clearly or expressively than by Cardinal Newman when, in his Sixth Discourse on University Teaching, he takes for granted "that the true and adequate end of intellectual training and of a University is not Learning or Acquirement, but rather is Thought or Reason exercised upon Knowledge". At the same time there must not be overlooked the practical object of sending forth into a world men and women who will be able to advise others, draw pleadings, and argue in court. Into the current discussion as to the mode of attaining this desideratum I do not enter since the body having the responsibility of instruction must, after surveying the field, come to a conclusion as to what it considers best in the interests of the public which is really the test of the best interests of the neophytes.

Thus the responsibilities resting upon any Faculty of Law are onerous. In the past they have been met fully and with accomplishment at the University of New Brunswick and it is the firm conviction of all that in the future its Faculty will follow a noble tradition.

But if the teacher be important, as he is, the student body must be prepared to take full advantage of the opportunities afforded it. George Sharswood, in his Memoir of William Blackstone, justly points out that "the profession (of the law), like all others, demands of those who would succeed in it an earnest and entire devotion". In what other manner may a pupil justify the years he spends at such an institution as this? In some cases there have been sacrifices by parents and relatives. In every instance the student owes it to himself to utilize to the utmost the possibilities before him so that in time he may come to the Delectable Mountains; and there is an obligation to his future clients that no lack of preparation on his part may embroil them in needless litigation. This is not to say that all may bear the palm, but if each carries in his mind the words of another gifted son of this province his work will not have been in vain. In truth, anyone connected with the law must continue to pursue a studious course and therefore it is not only to graduates of the Law School of the University of New Brunswick past, present and future, including today's recipients of your favour, but to each and all that these lines by Sir Charles G. D. Roberts are applicable:—

Consider not my little worth,—
The mean achievement, scamped in act,
The high resolve and low result,
The dream that durst not face the fact.

But count the reach of my desire.
Let this be something in Thy sight;—
I have not, in the slothful dark,
Forgot the Vision and the Height.

EXPLANATIONS BY AN ACCUSED: TRUTH V. REASONABLENESS.

The question whether a Court in a Criminal Prosecution should consider the truth of an explanation given by an accused, or merely whether the explanation is reasonable, has given rise to irreconcilable statements by Canadian Judges, resulting in a series of conflicting decisions.

In endeavouring to trace the history of this problem in Canada, the case of **R. v. Searle,**[1] may be taken as the starting point. This was a decision of the Alberta Appeal Court, delivered by Harvey, C.J.A. on an appeal from a conviction on a charge of receiving stolen goods. After referring to **R. v. Schama,** where Lord Reading, C.J. said:[2]

> But if an explanation is given which may be true it is for the Jury to say on the whole of the evidence whether the accused is guilty or not; that is to say, if the jury think the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal . . . .

The Alberta Court concluded:

> It appears from these authorities that it is the reasonableness of the explanation rather than the tribunal's belief in its truth that should guide. . . . .
>
> In the present case if the magistrate thought it was sufficient that he should disbelieve the story told he was wrong in his law.

This conclusion, it is submitted, is erroneous: it is not founded on sound reason or principle, but rather on a misunderstanding of the meaning of the words of Lord Reading. If the explanation of the accused is not believed then there is no explanation to consider. If on the other hand the Court or Jury is unable to decide whether or not to believe the accused, then it must direct its mind in accordance with the rule enunciated in the **Schama** case namely whether the explanation might reasonably be true.

The principle in the **Schama** case was affirmed by the Supreme Court of Canada in **Richler v. R.**[3] Duff, C.J.C., citing with approval the words stated by Lord Reading, concluded:

> The question, therefore, to which it was the duty of the learned trial Judge to apply his mind, was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reasonably be true. . . . .

Nowhere in the judgment was there a suggestion that if the Trial Judge did not believe the explanation given that he must consider whether it might reasonably be true. Rather Duff, C.J.C., affirmed the principle that if the trial Judge is uncertain of its truth, then he must direct his mind to the further question whether it might reasonably be true.

1. 51 C.C.C. 128
2. 11 C.A.R. 45
3. [1939] 4 D.L.R. 281

Unfortunately the British Columbia Appeal Court, in **R. v. Davis**[4], like the Alberta Court in **R. v. Searle**, did not appreciate the real principle contained in the **Schama Case**, and approved in the **Richler** case. In fact Sloan, J. A., in his Judgment, shows that he did not appreciate the effect of the **Schama** case by his words "The learned Chief Justice then reproduces the somewhat involved language of Lord Reading in **Schama's** case".

When the British Columbia Court of Appeal again considered the same question in the case of **R. v. Nelson,**[5] some seven years later, it disregarded the situation when the Judge absolutely disbelieved the explanation of an accused, and agreed with the **Richler** Case that in cases where the Judge was in doubt, the proper test was, "not whether he was convinced that the explanation given was true explanation, but whether the explanation might reasonably be true."

The problem was again considered by the Supreme Court of Canada in the case of **Ungaro v. R.**[6] This was an appeal from a conviction for receiving stolen goods. The trial Judge stated the explanation given by the accused was "fantastic", but did not state whether he disbelieved him. The Supreme Court ruled that he had not directed himself properly, namely, whether the explanation might reasonably be true. This direction, of course, as explained by Rinfret, C.J.C., arises only in a case where the Judge has not decided that he disbelieves the accused. The learned Chief Justice stated:

> I do not understand Chief Justice Duff's statement in *Richler v. The King* as meaning that if the trial judge does not believe the accused it is, nevertheless, his duty to apply his mind to a consideration as to whether the explanation given by the accused might reasonably be true. If the trial judge does not believe the accused the result is that no explanation at all is left.

However, in the judgment of Estey, J, with whom Kerwin, J (now C.J.C.), concurred, there is an unfortunate passage in which the words used seem to lead to a confusion of meaning. Estey, J, stated:[7]

> On the assumption that he is, in the latter referring to the explanation as to the source of the goods, it is clear the learned judge is directing his mind to whether the explanation is a reasonable one. He therefore falls into the same error that those who consider the truth, the reasonableness or the probability of the explanation rather than direct their attention to whether that explanation as made by the accused, having regard to all the circumstances, might reasonably be true and therefore set up in the mind of the judge reasonable doubt to which the accused is entitled to the benefit.

The passage has been urged by some Counsel to mean that the Judge must not determine whether he believes the accused or not, even though he believes that the story of the accused is purly fictitious and false. It is argued that if the story **might** reasonably have been true, under the circumstances, the accused must be taken to have rebutted

4. [1941] 1 D.L.R. 557
5. 93 C.C.C. 344
6. [1950] S.C.R. 430
7. Ibid., p. 437

any presumption of guilt. It is submitted, however, that this is not the proper meaning of the statement and that, considering the judgment as a whole, Estey, J., went no further than the conclusions of Chief Justice Rinfret.

In 1951 in the British Columbia case of **R. v. Schlosser**[8] O'Halloran, J.A., and Bird, J.A., both held that the truth of an explanation was not the criterion. O'Halloran, J.A., cited **R. v. Schama, Richler v. R.** and **Ungaro v. R.**, as authorities for the proposition and continued:

> That it was not enough for them to disbelieve that explanation of possession of the stolen bill, but that even if they did not believe it, yet in order to convict they must find the explanation was not a reasonable one in the circumstances.

Bird, J.A., also purporting to follow the **Richler** and **Ungaro** cases, stated:

> in my view, with great respect, an essential factor was omitted in this direction, in that the jury were not told that in their consideration of the appellant's explanation, even though they did not believe his account of possession of the stolen bill, nevertheless they must determine whether that explanation might reasonably be true.

Surely such a direction is improper. If such were the state of the law, a jury and judge would be precluded from administering true justice. An accused, although committing perjury, would be entitled to be acquitted if he were intelligent or smart enough to concoct a plausible story or explanation. Such cannot be the meaning of the **Richler** and **Ungaro** cases.

It is refreshing to refer to a decision of the English Court of Criminal Appeal in the case of **R. v. Aves.**[9] Lord Goddard, C.J., in delivering judgment in an appeal against a conviction for receiving, stated:

> Where the only evidence is that an accused person is in possession of property recently stolen, a jury may infer guilty knowledge, (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue. If, however, the explanation offered is one which leaves the jury in doubt whether he knew the property was stolen, they should be told that the case has not been proved.

This statement, it is submitted, concisely and correctly defines the law. To the same effect is a judgment of the Quebec Court of Appeal in **Kushner v. R.**[10] The Court not only purported to follow the principles laid down by the Supreme Court of Canada in the **Richler** and **Ungaro** cases, but it is submitted for the first time, properly interpreted, and applied those principles. Pratte, J., in delivering a judgment similar in reasoning to that of Barclay J. and Missonette J., stated the whole situation as follows:[11]

> If, then, an accused found in possession of goods recently stolen gives an explanation which the judge or the jurors are not certain is true, but which suffices to raise in them a reasonable doubt about his

8. 13 C.R.C. 433
9. [1950] 2 All E.R. 330
10. 14 C.R.C. 30
11. Ibid., p. 47.

> knowledge, that is sufficient to destroy the presumption that arises from the possession, and it will be necessary to seek proof of his knowledge elsewhere.
>
> If the accused does not attempt to justify his possession or if he gives an explanation that is found to be false, the presumption will continue and will be sufficient to bring about his conviction, because, then, it will be reasonable to presume that the accused was knowingly in possession of stolen goods.
>
> An affirmation may well appear false to one but true to a second and doubtful to a third; but it is impossible for it to appear to an individual as false and doubtful at the same time; the certainty of the falsity excludes the possibility of the truth. Hence it follows that if the accused's explanation is found to be false by the judge, there is no reason why the latter should ask himself whether it would not be reasonable to believe this explanation.

The **Kushner** case states concisely and brings out the basic reasoning which was, or should have been applied, in the various judgments, commencing with the **Schama** case. If this reasoning is followed in other cases in which a presumption arises, requiring an explanation by the accused, the work of the Courts will be greatly facilitated and the confusion of conflicting decisions ended. For too long in this area of the law little caution has been taken against the danger of abstracting statements found in reported decisions, without considering the case as a whole, and without considering the basic reasoning and principles behind the statement.

—Eric L. Teed,
Saint John, N. B.

PANEL DISCUSSION ON MOTOR VEHICLE ACCIDENT LITIGATION

University of New Brunswick Faculty of Law, March 28, 1955.

Chairman: Professor William F. Ryan.

Panel: J. Paul Barry, Q.C., E. Neil McKelvey, Donald M. Gillis, Henry E. Ryan.

Chairman: This panel discussion is being sponsored by the Saint John Law Society, the Legal Education Section of the Canadian Bar Association and Continuing Legal Education Committee of the New Brunswick Barristers' Society.

We have as members of the panel J. Paul Barry, Q.C., Mr. Neil McKelvey, Mr. Donald Gillis and Mr. Henry Ryan. All have had experience in motor vehicle accident litigation, and I am sure we will profit from their experience.

Question 1

How do you go about collecting and organizing evidence in an automobile accident case?

Answered by Mr. Barry

There are different ideas on this. From an insurance standpoint, we get reports from insurance adjusters, which are more often than not inaccurate. I might illustrate what I mean. You get a report from a witness, gathered by an adjuster, who isn't trained, generally speaking, in taking a statement for use in court. You also find, I think, when acting for a plaintiff that the plaintiff wants to tell you everything in his favour. He wants to meet all of the arguments that he expects and convince you, no matter what you hear from other sources, that what he has said overcomes those arguments. The insurance adjuster gathers evidence from the standpoint that the company he represents is not liable. Now, neither the plaintiff, if you are acting for him, nor the insurance adjuster, if you are acting for the insurance company, has to present the case in court. That is the greatest problem that I find in beginning to get a picture of the case. The facts are presented to you by your client from his own standpoint without any appreciation of the other person's and the insurance adjuster is interested in getting a statement, which he presents also to the company, to support his recommendation that you deny liability.

You must see your witnesses. You must examine your witnesses in the same manner that you would examine witnesses for the opposite side. I think that you have to cross-examine the witnesses in your own office, at the same time explaining to them why you are doing it because they may resent it. Until you convince your own client, be he plaintiff or defendant, of the problem that he is up against, he will have no appre-

ciation of anything except his own viewpoint, and anybody who has been in an accident, almost without exception, maintains he is not to blame.

You must of course see the police report, if there is a police report, and there is today in nearly every accident case. The police report is usually objective.

You should visit the scene of the accident. It is no use, of course, for you to take the measurements and to see how far the visibility extends or where the buildings are. Your witnesses and your client must do that.

You have to have a plan of the scene of the accident because judges will ask for it: a plan of the area with the measurements, the width of the street, the height of the curb, the width of the sidewalk, the position of the buildings on the different corners concerned—most accidents occur at intersections—and the width of the shoulder. Are we to deal with injuries or damages in a motor vehicle accident case?

Chairman: I think you could mention that matter.

Mr. Barry: If it is with respect to a vehicle, our experience generally is that solicitors agree on the amount. If it is not agreed on, and in my experience in ninety-five percent of cases it is, you must call the mechanic or the service foreman of the garage who either estimated the repairs or did the repairs to establish exactly what the repairs consisted of and the cost and that this is a reasonable estimate and a reasonable repair bill. There is some difficulty encountered because some judges don't want to accept the opinion of car salesmen on depreciation, on what it was worth before and after the accident.

Mr. McKelvey: I have one thought that arises out of what Mr. Barry said about insurance adjusters. A solicitor who is acting for an insurance company has a great advantage over one who is not in that he does have adjusters who can produce the witnesses for him. You at least know who your witnesses are. On the other hand, if you are approached cold by a client, he wants you to do everything. He hasn't got anybody to gather the evidence. To my mind, the lawyer has not only to interview the witnesses but find out who the witnesses are. That means in a great many cases you have to visit the scene of the accident and find some housewife who happened to be looking out the window at the time it happened. If you don't do that you will find that the insurance adjuster has done it on the other side and will produce the witnesses that you wanted, or should have seen, if they are against you, so that you could avoid the litigation altogether.

Question 2

Smith, the owner, lends his car to Jones. Jones collides with Black's car which was borrowed and is being driven by White. Both cars are damaged and White is injured. If Smith sues White alone what should Black do? If Smith sues Black alone, what should White do? If Smith sues both Black and White what should each of them do?

Answered by Mr. Gillis

There are four people involved: two owners, and two drivers. When you consider this question with two owners and two drivers, there are three thoughts you should keep in mind; first, the Motor Vehicle Act that makes an owner liable for his driver's negligence. That is something new in the past year or so. Secondly, the Contributory Negligence Act, and, thirdly, what is now known as the Tortfeasors Act. I am assuming in this question there is contributory negligence.

Smith is one owner. He lends his car to Jones. Jones collides with Black's car. If Smith sues White alone what should Black do? Well, if I were Black's solicitor, I would apply to be added to the action as a co-defendant and counter claim. You could apply under Order 16, Rule 11. Then White well might be a joint tortfeasor with Jones, who is the driver of Smith's car; if so he probably should claim contribution or indemnity against Jones; I think it would be a proper case for White to bring Jones, the other driver, in as a third party; so we would add Black as co-defendant and take third party proceedings against Jones. In that way White would claim contribution or indemnity. That is what I would do.

Now, if Smith sues Black, that is one owner against the other, what should we do? White suffered damage. He has got a claim against Jones and against Smith. So the situation would be just reversed. I would suggest joining White as a co-defendant under Order 16, Rule 11. He and Black could counterclaim against Smith.

Now, if Smith sues both Black and White what are each of them to do? Each of them obviously could counterclaim against Smith because Smith is liable under the Motor Vehicle Act, and they could add our friend Jones, the driver, by counterclaim. But in that case I would still consider third party proceedings because they might want to claim contribution or indemnity from Jones. As I say, that would be my solution. It may not be the only one, but I can see nothing wrong with it.

Chairman: If Smith sues both Black and White do you think that Black, who is the owner of the car, could take third party proceedings against White?

Mr. Gillis: Well, he could. If it is a question of insurance he wouldn't, I wouldn't think. It would depend a good deal on the financial worth of our friends Smith and Jones. Black could take third party proceedings against White.

Chairman: Suppose Smith got a judgment against Black, and Black was required to pay the judgment?

Mr. Gillis: Yes, I think probably you should take third party proceedings and in that case obviously you wouldn't need an order, you would just issue your third party notice, under Order 16A, Rule 12. One co-defendant against another co-defendant.

Chairman: Do you think that Black and White are joint tortfeasors?

Mr. Gillis: I wouldn't say Black and White. We were talking about Jones and White.

Chairman: Might not Black take third party proceedings against White? You said, "Yes".

Mr. Gillis: Yes. It would be possible.

Mr. Barry: That is before he is joined as a co-defendant?

Mr. Gillis: No. He is a co-defendant.

Chairman: Would it be on the basis that they are joint tortfeasors? I am wondering if Black would have a claim against White on the ground that Black and White are joint tortfeasors?

Mr. Gillis: Why do you say Black and White are joint tortfeasors? The Motor Vehicle Act doesn't make them joint tortfeasors.

Mr. McKelvey: I think it is covered by the Tortfeasors Act. A tortfeasor liable in respect of that damage may recover against another tortfeasor, whether as a joint tortfeasor or otherwise.

Mr. Gillis: I would say Black is not a tortfeasor.

Chairman: Would you say Black is a tortfeasor only if there is a vicarious relationship?

Mr. Gillis: Yes.

Mr. Barry: There is some confirmation of what Prof. Ryan suggests: where the statute makes a person liable for his driver without a vicarious relationship by implication he is in the same position as a joint tortfeasor. We know that the owner of a car today is responsible for the act of the driver to whom he has no vicarious relationship. That being so and bearing in mind what Mr. McKelvey read from the Tortfeasors Act, if he is liable he is almost in the same position as a tortfeasor; in almost the same position as a master. The situation does exist in some other provinces and there is authority for what Prof. Ryan has suggested.

Mr. McKelvey: In other words he is sort of a statutory tortfeasor.

Mr. Barry: He is made statutorily liable.

I think, Mr. Chairman, that there are a lot of problems in question two.

Chairman: Would you suggest another approach?

Mr. Barry: If you could present to me one aspect, I would rather answer that.

Chairman: Let me put the first question: if Smith sues White alone what should Black do? As I understand Mr. Gillis he says that Black should apply to be added as a co-defendant. Would you agree with that approach?

Mr. Barry: If I were acting for Black I would issue a writ for Black against Jones and Smith.

Mr. Gillis: Then you have two actions.

Mr. Barry: But White is the only defendant of the other action.

Mr. Gillis: You have got two actions.

Mr. Barry: I appreciate that.

Mr. Gillis: You are disregarding the other action.

Mr. Barry: What should Black do? Sue Smith and Jones.

Mr. Gillis: What if you were acting both for White and Black?

Mr. Barry: I don't think I could act for both of them.

Chairman: Isn't there a possible conflict of interest?

Mr. Gillis: Not if Black is insured.

Mr. Barry: I don't think I could act for them even if they were both insured.

Mr. Gillis: How could there be a conflict?

Chairman: Black's car is driven by White; there is a relationship of bailment and there could be a conflict.

Mr. McKelvey: There could be a subrogation claim against the driver.

Mr. Barry: Let us take an actual case. All three of the panel are aware of this. The owner of a car loaned it to a friend of his and it was in a collision with another car driven by another person to whom that car was loaned. The owner, who was home in his bed, finds out in the morning that his car has been wrecked and he sues the driver and owner of the other vehicle. The driver of the other vehicle issues a third party notice against the driver of the car owned by the man who was home in bed. That vehicle is insured, so the driver is in effect being sued indirectly in a chain of relationship by the owner of the car he was driving. If a judgment goes against him, since he is an insured under the owner's policy, the owner of the car who started the action is going to recover part of the damage from the insurance company who insures him; so I give it as an illustration of how a conflict of interest could arise between Black and White.

The Chairman: There is an interesting House of Lords case on that type of situation, **Digby v. General Accident, [1942] 2 All E.R. 319.**

Question 3

Do you think that photographs taken after an accident are useful in establishing causation? How are such photographs put in evidence?

Answered by Mr. McKelvey

This one has the advantage of being a bit simpler than the last. I think what you mean here is in establishing liability. The answer to the question has to be yes, photographs are useful. But it has to be qualified because in many cases photographs are misleading. There are four factors that have to be borne in mind when dealing with

photographs. The first one is that when the photographs are taken they have to be taken with a view to their being used in evidence. Perhaps I can illustrate. A commercial photographer arriving on the scene of an accident will probably take a picture of the vehicles. If there is a body lying in the middle of the road he will take a picture of the body. But the lawyer is interested in such things as skidmarks or where are the cars in relation to the curb, things like that. You look at the thing from an entirely different angle. There was one case I remember, an intersection collision, and a photographer was on the scene within minutes. He didn't show any pictures at all of where the vehicles were. One was a fire engine and the other was a bus. He didn't bother looking at them, but he did go up the street and took pictures of the skidmarks made by one of the vehicles approaching the intersection. He knew what was necessary in evidence and these pictures were very useful.

The second factor is—show the vehicles, if possible, or landmarks if the vehicles are still at the scene, and if the question is where did the accident occur, you can sometimes get it from the position of the vehicles. If you have any landmarks and you have a picture showing that the left front wheel of the car is on the shoulder of the road or up on the curb or something like that, then it is very easy to reconstruct what happened. Another example of the same thing are skidmarks, if they are still on the road, or if the vehicle collided with anything you can show how it collided, for example, if he went through a guard rail.

The third factor is that they are useful to show the nature of the highway or the place where the accident happened. I remember a case where we were told that the accident occurred on an upgrade. There was some dispute as to whether there was any visibility. We argued that it was a straight hill with a knoll at the top and that the accident happened half-way up the hill. Pictures taken several months later showed that that hill was straight.

The fourth factor I think is important is to realize that pictures can be misleading. A local solicitor told me once that one of the factors involved in an action was whether the road was rough or smooth. Well, a photograph was taken from an angle quite close to the ground so that all the pebbles looked like rocks; looking at that picture the road looked very rough. You can do funny things with pictures. You can make pebbles look like rocks and by means of different types of lenses you can distort what you see. A picture, to be of any use at all, must be a straight lens so that a witness should be able to say that that is an exact photographic reproduction of what is there. If the opposing lawyer is the one who is putting pictures in evidence you should be very careful to make the photographer explain just how he took those pictures.

I think we might mention something about motion pictures. Our courts now will accept motion pictures. My view there is, motion pictures are no good in evidence unless the motion is important. There is no point in taking a motion picture of a road with no motion going

on. If motion or the way cars turn a certain corner is a factor, moving pictures can show it, but if on the other hand you are just taking a picture on a road or street there is no point in having a motion picture.

How do you put them in evidence? Well, that should be done by the photographer who can swear that that is what he saw when he took it and that it is a photographic reproduction of what he did see and he can also explain how he took it and what kind of lenses he used. If you haven't got the photographer than you can always do it by someone who was present when it was taken. He can't say that he took the picture or that is the picture he took but he can say that is what he saw when he was standing there. I think I have seen it done that way and our courts will accept it, but it is much better to have the photographer there.

Mr. Gillis: Must you have the photographer or someone who was there when the picture was taken in order to put it in evidence?

Mr. Barry: Anyone who can swear that the picture is a true representation of the scene.

Mr. McKelvey: I think you will agree that it is better to have the photographer there.

Mr. Barry: If he swears that it represents the scene, you take it for granted that it isn't distorted.

Mr. McKelvey: You run the risk of cross-examination on how accurate it is.

Mr. Gillis: If you get it into evidence who cares? There is another thing that occurred to me that I find useful in these photographs. I always like to have a picture of the automobile that was involved in the accident.

The Chairman: Have there been any expressions of judicial opinion on the weight to be given photographic evidence?

Mr. McKelvey: There is a recent Nova Scotia case in which Mr. Justice MacDonald went into it. He was talking about plans mainly but I think he mentioned photographs, too; he said they were very useful.

Mr. Gillis: Why shouldn't it be weighed the same as any other evidence?

Mr. Ryan: Because it can be very misleading.

Mr. Gillis: Any witness might lie, too, on the witness stand.

Mr. Ryan: You have him there and he is subject to cross-examination.

Mr. McKelvey: I think it is true they must be dealt with like any other evidence.

Mr. Gillis: I feel photographs can be conclusive in some respects. If it is a question of **which side of the road a motorist** was driving, if you have a picture of the skid marks on the left hand side, that is it.

Mr. McKelvey: You can, as I said, distort pictures. In many ways pictures can show what you want them to show and you have to be careful particularly if you are opposing, to cut down their usefulness.

Mr. Barry: But you have to answer the question, "Are photographs after the accident useful?" Yes, they are.

Question 4

(a) To be contributorily negligent must the plaintiff be guilty of breach of a duty of care owed by him to the defendant?

(b) "When a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe to a motorist who is going at an excessive speed any duty to avoid being run down." Denning, L.J., in **Davies v. Swan Motor Co. Ltd.,** [1949] 1 All E.R. 620 at 631. Do you agree?

The Chairman: I think the ordinary rule is that negligence consists of a breach of duty of care which one person owes to another person. If there is to be contributory negligence, must the plaintiff be guilty of a breach of duty of care to the defendant?

Answered by Mr. Ryan

Contributory negligence is raised in I would say at least ninety per cent of the automobile cases. There is a case that I would refer to and I think it probably answers the question without leaving very much doubt. It is **Nance v. British Columbia Electric Railway Co., Ltd.,** [1951] 2 All E.R. 448. That was in the Privy Council, by the way. The headnote states, and I think it is quite concise that:

> When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear that in cases relating to running-down accidents such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and other controlling a moving vehicle.

Chairman: That headnote answers the second part of the question as well as the first.

Mr. Ryan: I was just going to cover the quotation in part (b) of the question by reading in part the judgment of Viscount Simon. In the **Nance** case, Viscount Simon says after quoting Lord Justice Denning's proposition, "when a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care, and if a sentence of the judgment of Denning, L.J., in the **Davies** case . . . is to be interpreted in a contrary sense, their Lordships cannot agree with it." I think that answers the question.

The Chairman: You would say, then, in answer to the first part of the question that a plaintiff can be contributorily negligent by being careless for his own safety.

Mr. Barry: But isn't that a duty he also owes to the motor vehicle driver? The duty might be in one sense to take care for his own safety, but it is also a duty he owes to the public using the highway. It becomes a duty to the motor vehicle driver and he is expected to observe it.

Question 5

When a motorist is charged with having "care and control" while intoxicated what is the effect on a claim by him under a motor vehicle liability policy of (a) a conviction or (b) a plea of guilty?

Answered by Mr. Barry:

I think in either case he has got two and a half strikes on him. If he drives the car and it can be established that he was unable to drive it properly because of intoxication he has breached the statutory condition. It may be argued that this is splitting hairs, that he pleaded guilty because he didn't want to bother with the publicity and it was cheaper to do that than hire a lawyer and so on, but once he breaks the statutory condition he can expect no protection from the policy. The third party is entitled to recover under the policy up to standard limits only if the insured cannot pay and has no assets with which to pay the third party.

Mr. Gillis: I am fully in accord.

Mr. McKelvey: I agree with what you say, he has two and a half strikes against him because his insurer won't do anything to help defend the case if there has been a conviction or plea of guilty, but supposing it is a question of a court deciding whether there has been a breach of the conditions; now is a civil court entitled to take into consideration what a criminal court has done?

Mr. Gillis: You don't expect to get a sympathetic hearing in a civil case if you say, "My client wasn't intoxicated", and the judge says to you, "If he wasn't guilty, why did he plead guilty?"

Mr. McKelvey: I still say as a matter of law it has to be proven all over again in a civil court.

Mr. Barry: But as a matter of practice you have had it.

The Chairman: Is the conviction admissable in evidence in the civil case?

Mr. Gillis: On cross-examination I think it is. You can ask him and if he won't admit it you can prove it.

Mr. Barry: In the Canada Evidence Act it is almost the same. Confront him with the proposition; if you get a denial get a certificate.

Mr. McKelvey: But a plea of guilty wouldn't carry the same weight.

The Chairman: A plea of guilty may be an admission.

Mr. McKelvey: Is it an admission if you plead guilty to save the expense of time and publicity caused by a protracted case?

Mr. Gillis: An innocent man wouldn't plead guilty.

Mr. Barry: The court has got to assume that you know the full significance of the plea.

The Chairman: What is the effect of putting the question to the plaintiff, "Were you convicted of the crime of having care and control, etc.," and he says, "Yes"; now what does that go to? Does it just go to his credibility or is it admission as tending to prove one of the issues in the case?

Mr. Barry: If it is a plaintiff suing an insurance company, it is going to prove one of the issues in the case, a breach of the statutory condition on the ground that at the time of the accident for which he is claiming indemnity he was intoxicated so that he was unable to control the vehicle.

Mr. McKelvey: Suppose the conviction has been one of driving while impaired. The degree of intoxication that you have to prove in the Insurance Act is somewhat greater than on a charge of impairment. A conviction on an impairment charge would only apply to impairment of faculties, but not necessarily to the impairment of faculties to the extent that you have to prove under the Insurance Act.

Mr. Barry: You get into the criminal aspect of it. There is sometimes no relationship between the intoxication and the accident but if you are operating a car while unable properly to control it and the accident results in a civil action **prima facie** that is one of the causes.

Mr. McKelvey: Couldn't you be found guilty of care and control while intoxicated on a set of facts which would not involve a violation of that particular statutory condition of the insurance policy?

Mr. Barry: And an accident had occurred? It might be theoretically possible. It may be theoretically possible that the person who was convicted of care and control did not contribute to the accident at all, but I don't think that it would justify them in claiming indemnity from the insurance company because once they drive the car unable properly to control it they breach the contract.

The Chairman: Can't you be guilty under the Criminal Code without being impaired to such an extent that you are incapable of proper control?

Mr. Barry: Theoretically, yes.

The Chairman: Once you admit the possibility the issues are not the same.

Mr. Barry: You can conceive of situations where they are not necessarily the same. I can conceive of a person being guilty of either and not being responsible for the accident but I think, though, that if they are guilty of having care and control that in practical consequence they cannot succeed.

The Chairman: Why should a conviction by a judge or jury in a criminal case have weight in a civil case? The judge in the civil case must come to his own conclusion; why should he pay any attention or why should he be permitted to pay any attention to the verdict in the criminal court?

Comment from Audience: When you get a case decided you have got to accept it.

The Chairman: Not unless you have the same parties and issues or the judgment is **in rem.** The parties and issues are not the same in the criminal and civil cases.

Mr. Barry: I think the question is academic. Take an actual case. The plaintiff is confronted with the question, was he convicted of care and control as charged at the particular time and arrested at the scene of that accident, and he says yes.

The Chairman: That involves a statement that a criminal court came to the conclusion that he was guilty on the criminal charge.

Mr. Barry: You would have to ask, "How much did you have to drink?" You have to prove it again. You have answers, combined with his admission that he was convicted by a criminal court.

Question from Audience: Does he have to testify?

Mr. McKelvey: No.

Mr. Gillis: How is he going to succeed if he doesn't? How is he going to prove ownership of this vehicle?

Mr. McKelvey: I think the law is on Prof. Ryan's side.

Question 6.

Do you think that "reaction time tables" are useful? How should they be used? Do you ever consider calling expert witnesses on "reaction time"?

Answered by Mr. Gillis:

I am glad you said, "Do you think?" Personally, I don't, but I will say this: they are used. I have argued that they should not be but I am told that they are useful as a guide.

How should they be used? I don't know that that is too much of a problem. In one case a witness was asked, if going ten miles per hour in what distance could he stop his car. He said, "In six inches."

Do you ever consider calling expert witnesses on reaction time? I do and I think it would be very useful; unfortunately, around here we don't have such expert witnesses to call. They should be automotive engineers. If you look at the decision of the Supreme Court of Canada in **Adam v. Campbell,** [1950] 3 D.L.R. 449, Mr. Justice Cartwright goes into the question. That accident happened in Ontario and in that case they did call expert witnesses. The expert witnesses testified that at a certain speed the distance it would take that driver to stop was so much. That is exactly what we use in these reaction tables and they proved it there by an automotive engineer. But when the question was put to the expert witness, "What would be the reaction time for the emergency?" he said, "I don't know. I didn't test it but I think it would take longer." In that case Mr. Justice Cartwright said that was inadmissible because his evidence was not based on any test. It is my opinion on this case that the reaction time should be proved by an expert witness. I would like some day to call an expert witness on it.

Mr. Barry: I don't think myself that the tables are useful except sometimes to say that a witness is not telling the truth. It just shows that what he says cannot reasonably happen.

Mr. McKelvey: Does it actually impeach his truthfulness? He says, "It takes me three feet to stop going ten miles per hour," but he is not an automotive engineer. You produce a reaction table saying it takes twenty feet, but what does that prove?

Mr. Gillis: It shows he is exaggerating or a poor judge of distance.

Question 7.

As a matter of trial strategy, do you think it good tactics to plead contributory negligence if you are satisfied that the other party was solely to blame?

Answered by Mr. McKelvey:

What I think the question is directed at is this: if you are acting for one driver and you think the other man is definitely to blame 100%, should you admit the possibility that your man might have been partly to blame. I think that is what it means. It seems to me that you should in the case of pleadings. Supposing you are acting for the plaintiff and you think the defendant is 100% to blame. I don't think in your pleading you need to admit that your client might have been partly to blame. You state that the defendant was 100% to blame. You could rectify it in your reply. If you are acting for a defendant in your defence you have to admit your partial responsibility because you don't get the opportunity to rectify that in your reply. If you are just defending the claim you have to say in your counterclaim that the defendant was not to blame, the plaintiff was to blame 100%, or that the plaintiff was partly to blame. The answer to the question is that you have to do it in your

pleadings: if you are the plaintiff you can do it in your reply, if you are a defendant you don't get the second chance, you have to do it in the one chance that you have, the defence.

As a matter of trial strategy during the course of the trial there is a lot of room for doubt here whether you should argue that the other man is 100% to blame or whether you should admit that your own man might be partly to blame. My view is that you should mention the fact that if you are wrong in saying that the other party is 100% to blame that he was certainly parly to blame to the tune of 50%, 60%, 95% or whatever. If you argue before a judge the proposition that the other man was 100% to blame you give the judge the chance to say he agrees with you or he doesn't agree with you. If he doesn't agree with you there is the possibility that he may say he wasn't to blame at all. You should argue strenuously your own viewpoint that the other man was 100% to blame but add as an afterthought that if he wasn't 100% he was at least partly to blame. I don't feel you weaken your main argument and you give the judge the opportunity if he doesn't agree with you 100% perhaps he will pick 75% or 85% or something down the line until he finds something in your favour. Make sure you mention it in order to give the judge a chance to work his way down the line.

Mr. Barry: I don't agree at all. I wouldn't plead it if I thought the other party was solely to blame. I don't think it is good tactics to plead it, nor, if you have a good case, even to mention it. I suppose Mr. Gillis can give you the figures more accurately than I, but 85% of the cases are decided on contributory negligence. How does a court say 60, 40, 80, 20? They do, but I don't know how they do it. Mr. Gillis has had more experience with contributory negligence than I. You may plead it if you like.

Mr. McKelvey: You certainly have to allege that the other party was negligent. You don't have to mention contributory.

Mr. Gillis: In this case I agree with Mr. Barry. If you have a good case I wouldn't give anything away. I would avoid contributory negligence. In a weak case you well might plead contributory negligence.

Question 8.

Must "**res ipsa loquitur**" be specially pleaded? Would you agree that the doctrine is no more than "a rule of evidence, of which the essence is that an event which in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence"? Give some examples of situations in automobile accident cases that would give rise to a plea of **res ipsa loquitur.**

Answered by Mr. Ryan:

In my opinion it does not have to be specifically pleaded.

Mr. Barry: You don't have to plead it, but if you do not argue it you may be precluded from arguing it on appeal.

Mr. McKelvey: I have seen it pleaded in a good many cases.

Mr. Barry: It doesn't have to be. The word is "must."

Mr. Ryan: There is authority that it need not be pleaded in **Hanson v. Weinmaster,** [1951] O.W.N. 868.

I agree with the quotation. I might just refer to an authority, **Barkway v. South Wales Transport,** [1950] 1 All E.R. 392.

As an example, take a child walking along the street and a car comes up on the sidewalk and strikes him.

It would be a case of **res ipsa loquitur.** I would say if you were properly parked with your car on King St. in the day time and somebody comes along and runs into you, that would be an example. There are numerous cases where it would apply.

Mr. McKelvey: Is it possible to have **res ipsa loquitur** where you have two moving vehicles?

Mr. Ryan: I would say there is a possibility.

Mr. McKelvey: I can't see how there could be if there are two moving vehicles.

Mr. Gillis: What if one vehicle was on his own side of the road driving along, minding his own business, and another car comes around the curve on the wrong side going ninety-five miles an hour and the driver is intoxicated?

Mr. McKelvey: I don't see how it could possibly apply where you have two moving vehicles.

Mr. Gillis: Why don't you say it would not be so apt to apply?

Mr. Barry: I can see under the rule in the **London and St. Katherine Docks** case that if there are two controls the rule cannot apply.

Mr. Gillis: That is true. I don't think it happens too frequently.

Question 9.

Does the plea of "inevitable accident" involve more or less than a straight denial of negligence? If more, why use it?

Answered by Mr. Barry:

It involves more and the only reason I can think of to use it is to bring it to the attention of the Court.

Mr. Gillis: Why take that on yourself?

Mr. Barry: Only from a psychological standpoint if you have evidence to justify it.

Mr. Gillis: It is not necessary to plead it.

Mr. Barry: If you have the kind of a case to establish it I think it is more satisfactory to be able to prove a positive thing if you can than just to disprove an allegation. I have never used it because I have never been in a position to establish an inevitable accident.

Question 10.

Do you think **Bird v. Armstrong,** 27 M.P.R. 54, in effect abolishes the "last clear chance" doctrine in New Brunswick?

Answered by Mr. Gillis:

If you would ask me to state the answer with either "Yes" or "No", I would say, "Yes, it does". I am not convinced that that was a proper decision. What happened in that case was this:— the trial judge found both the defendant and the plaintiff guilty of negligence, the defendants negligent in that they left some unlighted piles of gravel on the road at night and the plaintiff in driving too fast. The trial judge said, "I believe that if he had been travelling at a reasonable rate of speed he could have avoided the accident." It strikes me that was the last clear chance but the Court of Appeal didn't see it that way. They said it was a case of contributory negligence. There still is, I think, in our law room for that doctrine and you will see in a recent case, the **Malenfant** case, decided a few weeks ago that Mr. Justice Kellock puts that proposition right back. He says, "If one person is negligent but the other person could have avoided it"—so there you are. As I say, our Court of Appeal seem to say there is no such thing as last clear chance any more, but I still feel that there will be a case that will go to the Appeal Court and the doctrine will come back. I think there is still a place in our law for it, but don't use the words "last clear chance".

The Chairman: If there is a doctrine of last clear chance would it apply only in a situation where the plaintiff was aware of the situation of danger created by the defendant or should it be extended to a case where the plaintiff ought reasonably to have been aware?

Mr. Gillis: Ought reasonably to have been aware according to the **Sigurdson** case.

Question 11.

Is violation of a section of the Motor Vehicle Act ever conclusive or **prima facie** evidence of negligence?

Answered by Mr. McKelvey:

The courts seem to hold that it is prima facie evidence of negligence. It must of course be a section of the Motor Vehicle Act pertaining to the rules of the road or the manner in which traffic is regulated on the highway—keeping to the right and driving around the middle point of an intersection for example. Two cases **LeBlanc v. S.M.T.** [1949] 23 M.P.R. 145, in our courts and **Kirby v. Kalyniak,** [1948] S.C.R. 544, in the Supreme Court of Canada hold that it is **prima facie** evidence of negligence. There may be some cases that say it is not evidence at all but I think the better view is it is **prima facie** evidence of negligence because when you are driving a vehicle on the highway you yourself are bound to obey the rules of the road and the other people are too; they owe a duty to you and you to them to abide by these rules. It is possible to conceive of cases in which it would be practically conclusive; for

example, driving around a blind curve on the left hand side of the road is a violation of the Motor Vehicle Act. If a collision results on the other end of the curve I think that is conclusive evidence of negligence. On the other hand merely on a stragiht stretch to travel on the left hand side of a road which happens to have a double white line on it, if the stretch is straight, is not necessarily conclusive. It may be **prima facie** but that's all.

Question 12.

Do you think that to violate statutory condition 2 (2) of a motor vehicle policy the owner who permits an intoxicated person or one who is unauthorized or unqualified to drive must know of the condition of that person when the permission is given.

Mr. Barry. Yes.

Mr. Gillis. Not necessarily; not when it is given. If he has reason to believe that that person might well become intoxicated it might have effect.

Mr. McKelvey: Knew or should have known, don't you think?

The Chairman: I think there is a recent decision in Saskatchewan in which it was held that knowledge is necessary.

Question 13.

A, the owner and driver of a car, collides with and causes $2,000 in damages to B's car. The insurer, liable for only $1,000, believes that A is wholly to blame and would like to settle for $2,000 to avoid costs. A, however, refuses to settle and insists that the insurer should defend. What should the insurer do?

Answered by Mr. Gillis:

What is the obligation of the insurer? My feeling is this. An insurer is legally bound under the contract of insurance to defend. There is no way out. They are going to incur costs and they can do whatever is possible to keep the costs down; they can make admissions. They are justified in doing that. If A is being obstreperous and insists on a defence, they must defend but can make such admissions as they deem advisable to keep the costs down.

The Chairman: Without necessarily disagreeing, may I raise a question on what Mr. Gillis has said. As I understand it, his answer was predicated on the assumption that under the insurance contract the insurance company is bound to defend. True there is the covenant in the contract that the insurance company undertakes to defend, but there is another covenant to the effect that the insurance company may settle on such terms as it deems expedient. If it thinks that certain terms are expedient, is it under an obligation to go on and perform its other promise to defend? Could it say, "I have the contractual right to settle. I advise settlement on these terms." If the insured refuses to put up the extra $1,000 then, of course, there can't be a settlement, but could it be argued that the insurance company performed its obligation under the contract by tendering performance of its promise to settle on such terms as it thinks expedient, provided, of course, that ultimately a court will find that an insurance company acted reasonably and in good faith?

Mr. Barry: There is some authority to that effect but apparently the court seemed to feel in a recent case that the obligation to defend is just as important as to settle on terms that it thinks fit and if the insured wants to be defended, his company has that obligation.

Mr. McKelvey: The agreement to settle can't permit the insurance company to settle for any figure it sees fit. If you have an insurance company whose coverage is only $1,000 and you have a claim that ought to be settled for $10,000, that covenant does not give the insurance company the right to settle for $10,000 of which the company pays only $1,000. They can't settle for $1,000 because the other party won't accept it.

Mr. Barry: They can either settle or defend. They can't do partly one and partly the other.

Mr. McKelvey: Could it be that the settlement clause applies only where the policy limit exceeds the claim?

The Chairman: The terms of the contract are "settle on such terms as it deems expedient."

Mr. McKelvey: But you have to restrict that. The insured doesn't agree that he will contribute the difference between the coverage and the settlement. There is nothing like that in the policy.

The Chairman: Yes, I see the force of that. If the proposed settlement exceeds the policy limit the insurer is not in a position to tender performance.

Question from Audience: Couldn't they defend the action and settle as soon as they get started?

Mr. Gillis: You could make a **bona fide** admission of liability to keep the costs down.

Mr. Barry: I would hesitate to do it if the insured said, "No."

Question 14.

A car owned and being driven by Mr. Smith and in which Mrs. Smith is a passenger collides with a car driven by Jones. Mrs. Smith was personally injured. Smith was grossly negligent and was two-thirds to blame; Jones who was also negligent was one-third at fault. Mrs. Smith sues Jones, and proves damages of $1,500. How much will she recover from Jones?

Answered by Mr. McKelvey:

I assume that she brings action against Jones and the judge in that action sets the liability of 2/3 Smith and 1/3 Jones. She can only recover 1/3 from Jones and the reason is that the Contributory Negligence Act, s. 3, says so.

The Chairman: I want to thank the panel for their very fine job. I think we have all profited from the discussion.

SOME PHASES OF LEGAL EDUCATION IN NEW BRUNSWICK*

I

Your invitation to be present this afternoon, at this meeting of the Junior Bar of the Province in convention assembled, is greatly appreciated. Your Chairman prescribed an address on Legal Education in New Brunswick. That is a challenging task. For the course of development is of absorbing interest; and the record of development is not as yet collected together.[1]

What is legal education? Various endeavours have been made to define the substance and to formulate objectives:[2] none transcends in simplicity the requisites inherent in the Canons of Ethics of the profession:[3]

> The lawyer is more than a mere citizen. He is a minister of justice, an officer of the Courts, his client's advocate, and a member of an ancient, honourable and learned profession.
>
> In these several capacities it is his duty to promote the interests of the State, serve the cause of justice, maintain the authority and dignity of the Courts, be faithful to his clients, candid and courteous in his intercourse with his fellows and true to himself.

Legal education, so conceived, is in its initial stages a preparation for a professional life of duty, of competence and of responsibility; the process afterwards remains unremitting.

Three general observations pertain to New Brunswick: first, there has been a general absence of that debate over legal education which elsewhere has engendered controversies of such regrettable proportions; second, the record of development is fairly continuous after 1823 and (comparatively speaking) good; third, legal education in New Brunswick entered a distinctly new phase in 1950. In that year the existing state in England was described as "one of complacent apathy":[4] in New Brunswick, the Barristers' Society revised to a fundamental extent the requirements for and conditions of admission to the profession; and there began that interest in legal education on the part of Lord Beaverbrook which has come to mean so very much.

* The text of an address delivered, in abbreviated form, on April 16th, 1955, to a convention of the Junior Barristers of New Brunswick at Fredericton.

1. The one extant study is the valuable article by Judge H. O. McInerney, Professor Emeritus of the University of New Brunswick Law Faculty: **Notes on Law School History** (1948), 1 [No. 2] U.N.B. Law School Journal 14.
2. For the most recent Canadian studies see: Cohen, The Condition of Legal Education in Canada (1950), 28 Can. Bar Rev. 267; Williams, Legal Education in Manitoba: 1913-1950 (1950), 28 Can. Bar Rev. 758, 880; Rand, Legal Education in Canada (1954), 32 Can. Bar Rev. 387; Cohen, Objectives and Methods of Legal Education: An Outline (1954), 32 Can. Bar Rev. 762. For a suggestion of the extensive critical literature, see the references in Cohen. The Condition of Legal Education in Canada, **supra**, footnotes 1 and 2, and also A Symposium on Legal Education in Canada (1950), 28 Can. Bar Rev. 117-196.
3. From the Canons of Legal Ethics approved by the Canadian Bar Association and adopted by the Barristers' Society of New Brunswick.
4. Gower, English Legal Training: A Critical Survey (1950), 13 Mod. L. Rev. 137, at p. 137.

II

The Evolution of Control

1. Judicial Control. From the establishment of the province in 1784 until 1903, a comparatively long period, formal control over legal education in the province existed in the Judges of the Supreme Court. The field was neither pre-empted to the profession nor explicitly mentioned in the legislation incorporating the Barristers' Society in 1846 for the purpose "of securing to the Province and the Profession a learned and honorable body";[5] all regulations of the Society were subject to the sanction of the Judges of the Court or any three of them.[6] In sanctioning the first rules of the Society in 1847, "touching the examinations of persons as Students at Law and Attorneys", the Judges added to their order the proviso that nothing therein contained should "extend or be construed to impair or interfere with the general superintending power and authority of this Court over all or any of the matters aforesaid".[7] On two subsequent occasions at least,[8] before their immediate surveillance ceased with the Barristers' Society Act of 1903,[9] the Judges withheld sanction from changes proposed in the rules by the Society.

2. Legislative Control. For a comparatively long period, from 1863 until 1903, the control both of the Court and of the Society was circumscribed by direct legislative prescription over important aspects of legal education. Commencing in 1863 the Legislature defined the terms of study:[10] in 1867, the fees to be paid on admission as a student or as an attorney were prescribed as well as the interval of time before an attorney might be called to the bar;[11] in 1870, the conditions were regulated on which a student might receive remuneration for his services or engage in employment or business without being refused admission as an Attorney.[12] The Legislature in 1893 relaxed, though slightly, a measure of its direct control;[13] finally, all such measures were

5. 9 Vict. c. 48, s. 1 (An Act to Incorporate the Barristers' Society of New Brunswick); 3 Local and Pr. Stats. 522.

6. **Ibid.**, s. 3. See also (1893) 56 Vict. c. 37, s. 4 and (1902) 2 Edw. VII, c. 21, secs. 1 - 3, which continued the principle of judicial sanction.

7. R. Mich. 1847, r. 1; Earle, General Rules and Orders of the Supreme Court, (1881), pp. 115-117.

8. See Earle, **op. cit.**, at pp. 154-156, 198-199, and 200d.

9. An Act Respecting The Barristers' Society, and Barristers, Attorneys, and Students-at-Law, C.S.N.B. 1903, c. 68. Pursuant to section 13 the Society was empowered with great particularity to regulate legal education in its several respects; by section 24 all regulations made by the Society were to be published in the Royal Gazette.

10. 26 Vict. c. 23 (An Act relating to the admission of Attorneys of the Supreme Court); and see, **infra**, Part IV, s. 2.

11. 30 Vict. c. 7 (An Act in addition to and in amendment of the Act twenty sixth Victoria, chapter 23, intituled An Act relating to the admission of Attorneys of the Supreme Court); and see, **infra**, Part IV, s. 2.

12. 33 Vict. c. 26 (An Act further relating to the admission of Attorneys of the Supreme Court); and see, **infra**, Part IV, s. 5.

13. 56 Vict. c. 37 (An Act in addition to and in amendment of Chapter 33 of the Consolidated Statutes, 'Admission of Attorneys'). The Barristers' Society, in place of the previous maximum fee of Five Dollars, was empowered to require from any person desiring admission as a student at Law a sum not exceeding Ten dollars, and from any person on his admission as an Attorney a sum not exceeding Fifteen dollars. The Society was also empowered to institute a system of multiple examinations. See also 2 Edw. VII, c. 21 and **infra**, Part IV, s. 3.

repealed in 1903, with corresponding power being vested in the Barristers' Society.[14]

3. King's College Law School. For a period of thirty years, from 1901 until 1931, King's College Law School and its successor the University of New Brunswick Law Faculty occupied an entirely anomolous position with control over the admission of their graduates vested in a unique body. In 1901 the Attorney General for the time being, the President of the Barristers' Society for the time being and one other member, to be designated from time to time by the Council of the Society, were made[15] (as they remain of the University of New Brunswick Law Faculty)[16] ex-officio members of the Board of Examiners of King's College Law School; and it was provided:[17]

> From and after the passing of this Act any student-at-law making application for admission as an Attorney of the Supreme Court of this Province, on presentation of a Diploma from the said University of King's College conferring on him the Degree of Bachelor of Civil Law, and a certificate signed by the Dean of the said School of Law and counter-signed by the Attorney-General, or the President of the said Barrister's Society, of his having there satisfactorily passed the examination prescribed by said Faculty and Board of Examiners, and recommending him for admission as an attorney of said Supreme Court, and on said student conforming with the requisites of the bylaws of the Barristers' Society in all other respects, shall be entitled to be admitted as such Attorney without undergoing or passing any other examination.

That legislation was enacted, according to a contemporary account given by a purely impartial observer (a founder of the school), in recognition of the "practical results" obtained by the College;[18] it was in any event enacted with the unanimous approval of the Council of the Barristers' Society.[19]

The enactment, though not conceived for broader purposes, did more than exempt graduates of the College from bar examinations: its effect was to vest in the College a substantial measure of independence from the Society and of control over admission to the profession. For a time the right accorded was jealously guarded: in 1922 the College successfully opposed a bill which would have authorized the Society to examine graduates in practice and procedure;[20] a year later a committee

14. **Supra**, footnote 9.
15. 1 Edw. VII, c. 17, s. 1 (An Act relating to the admission of Attorneys), as am.; C.S. N.B. 1903, c. 68, s. 14.
16. 21 Geo. V, c. 50, s. 10. (The Barristers' Society Act, 193[illegible], consolidation 1952). The section is not presently invoked.
17. 1 Edw. VII, c. 17, s. 2. In the C.S.N.B., 1903, c. 68, s. 15 the words "at Saint John" were added after the words "School of Law" and the words "of such School" after the words "board of examiners". By (1902) 2 Edw. VII, c. 21, s. 4 graduates of other law schools were to be exempt from the system of intermediate bar examinations therein envisaged; by C.S.N.B., 1903, c. 68, s. 13 (6) the Society was empowered, with respect to such students, to accept, in lieu of any examination prescribed by the Society, the degree of any university subject to such conditions as the Society might prescribe.
18. Letter from Mr. Justice Hanington to the Editor of The Globe, Saint John, appended to the Minutes of King's College Law School for 1908-1909.
19. Synoptic Report of Proceedings of the Legislative Assembly of New Brunswick, 1901, p. 138.
20. Minutes of King's College Law School for March 20, 1922, and for May 8, 1922.

of the Faculty was appointed to prepare a bill to secure to the University of New Brunswick Law Faculty, the successor institution, the "same powers and privileges" that King's College Law School had enjoyed;[21] those powers were obtained in 1924.[22] With the revision of the Barristers' Society Act in 1931, and without dissent from the University, control over the conditions of admission of graduates of the University Law Faculty was vested (as earlier it had been over other students-at-law) exclusively in the Barristers' Society.[23] Graduates have been admitted since that date without further examination pursuant to regulation of the Society.[24]

4. Professional Control.[25] The principal organizational units of the profession now concerned with legal education in New Brunswick are three in number:

1. The Barristers' Society with its Council, subject to control by the Society as a whole, empowered from time to time to make regulations respecting "the qualifications, course and manner of study and examinations of students-at-law and the requirements preliminary to their admission as barristers and solicitors and for regulating their admission and enrolment as barristers and solicitors."[26]

2. The Canadian Bar Association, founded in 1914 as a national association of individual Canadian barristers "to advance the science of Jurisprudence, promote the administration of Justice, and uniformity of Legislation throughout Canada."

3. The Conference of Governing Bodies of the Legal Profession in Canada, consisting of representatives of each of the provincial Law Societies and of the Board of Notaries of Quebec, founded in 1929 "for the consideration of matters of common interest to the Governing Bodies of the Profession and the making of recommendations in respect thereof".

Both the Conference and the Canadian Bar Association have a purely persuasive effect upon the course of developments; both operate by the crystallization of professional opinion. But their work has been, and is, or the utmost importance. The Legal Education Committee of the Canadian Bar Association has had great influence on legal education through its adoption some years ago of recommended standards of admission[27] and a uniform Curriculum;[28] this is still the initial stage of its influence on the development of continuing legal education. The recent work of the Conference of the Governing Bodies in formulating Uniform Conditions as to the Transfer of Barristers and students-at-law from province to province is familiar to all and it is, on the basis of any evaluation, a major accomplishment.

21. Minutes of the University of New Brunswick Law Faculty for October 5, 1923.
22. 14 Geo. V, c. 20 (An Act to amend Chapter 68 of the Consolidated Statutes, 1903, respecting the Barristers' Society and Barristers, Attorneys and Students-at-Law).
23. See 21 Geo. V, c. 50.
24. Ibid under Reg. 36. (consolidation 1952).
25. The section is based in part on MacDonald, The Professional Aspects of Legal Education (1950), 28 Can. Bar Rev. 160, pp. 162-163 and 165.
26. 21 Geo. V, c. 50, s. 11 (4) (consolidation 1952).
27. See, infra, Part IV, s. 1.
28. See, infra, Part IV, s. 4.

Of the three bodies the Barristers' Society is at the apex of professional control. As in the past, the Society is concerned with legal education chiefly in three aspects: (1) the general education which must precede law studies; (2) the professional education which a candidate must have as exemplified by the passing of bar examinations or of an approved law school course; and (3) the practical office training which a candidate must have obtained concurrently with, or subsequent to, his professional education.

III

Organized Instruction

1. The Background: In the record of the arrangements developed in New Brunswick for training in the law, there is some criticism[29] and an occasional note of approval.[30] The record, however, is one (as intimated earlier) of fairly continuous development after 1823, when the Judges first regulated the period of study and apprenticeship. It is one of comparatively early provision for organized instruction, though such instruction was not made an indispensable prerequisite to admission until 1950.

Pertinent to the record it should be said[31] that in the England of 1784, when the province was established, the ancient system of instruction carried out by the Inns of Court and Chancery had all but ceased; that instruction in the common law had not been established in the Universities as a vital discipline. In 1846 it could be observed by a Select Committee that "no legal education worthy of the name of a public nature" existed; to the enduring envy of Professors and students alike, the Downing Professor of Law at Cambridge could report that he never lectured at all.

The Select Committee of that year (for a Royal Commission was appointed in 1854 and a further committee under Lord Atkin in 1932) expressed the opinion,[32] though it now seems erroneous, that legal education was better provided for on this continent: in fact, though the first professorship of Law in America was established in 1773, the professor at once abandoned his chair;[33] the Harvard Law School, the first to be established in 1817, was not a vital institution until after the 1840's.[34] In Canada the record of organized instruction does not go back beyond 1848.[35] But there was on this continent one difference:

29. See, e.g., Report of the Legal Education (Committee) Section, 6 Proceedings of the Canadian Bar Association (1921); Ibid, 7 Proceedings (1922); Cohen, The Condition of Legal Education in Canada (1950), 28 Can. Bar Rev. 267.
30. See the reference to the Carnegie Foundation Report in McInerney, **op. cit.**, p. 16.
31. Based on Gower, **op. cit.**
32. Ibid.
33. At Columbia (then King's) College; Calendar, School of Law, Columbia University.
34. From 1839 to 1870 the period of study necessary to obtain a degree was one and one-half years or three terms with the lectures for each course given only in alternate years. In 1870 the course prescribed for the degree was lengthened to two years with the subjects being given each year. The present three year course dates from 1877: Calendar of the Harvard Law School. See also Stone, Some Phases of American Legal Education (1923), 1 Can. Bar Rev. 646.
35. The Centennary of the Faculty of Law of McGill University was celebrated in 1948: Cohen, The Condition of Legal Education in Canada (1950), 28 Can. Bar Rev. 267, at p. 269 footnote 6.

the development of legal education was not to be inhibited by the historic reasons[36] which in England had led to the separation of the Universities and the profession. In Canada, aside from one instance, the university law schools were to develop with the active support of the profession,[37] generally in the absence of organized instruction offered by the bar and even as a substitute for it.[38]

2. King's College Law School. King's College Law School was established in New Brunswick in 1892 with the full support of the Judges and of leading members of the profession.[39] It was established in the absence of organized instruction offered by the bar and within fifteen years of the adoption of the three year law course at the Harvard Law School;[40] it was founded contemporaneously with the schools of law at Osgoode Hall,[41] Dalhousie University [42] and at the University of Toronto.[43] In the eventual history of the School, it is of interest that the founders, before completing arrangements for its establishment as a part of King's College, endeavoured to secure its organization in association with the University of New Brunswick.[44] In the original draft of the bill, which resulted in the act of 1901 conferring the special privileges of admission on graduates of King's College, there was by way of anticipation a proviso to confer similar privileges on graduates of the University of New Brunswick should it at any time establish a law school.[45] In due course the University was to undertake instruction in law and the present Dean of the Faculty, the Honourable Mr. Justice W. H. Harrison, on behalf of the Senate of the University, was in 1912 to propose to the College that arrangement,[46] which has since subsisted, under which first year law studies may be completed at Fredericton[47] and students admitted to the second year in the University Faculty at Saint John.

36. See the account given by Blackstone, Commentaries on the Law of England, Section 1, of the Study of the Law (Sharswood ed.); see also, **supra**, footnote 34, Stone.

37. See, e.g., the reference to the discussions between the Benchers of Alberta and the University of Alberta in Report of the Legal Education (Committee). Section, 6 Proceedings of the Canadian Bar Association (1921), p. 241; see also, **infra**, footnote 38.

38. For an early account of the interest of the Law Society of British Columbia, which at the time conducted law schools at Vancouver and Victoria, in the establishment of a Faculty of Law at the University of British Columbia, see MacRae, Legal Education in Canada, Report of a Canadian Bar Association Committee (1923), 1 Can. Bar Rev. 671 at 682 and 683.

39. See McInerney, **op. cit.**, p. 14.

40. **Supra**, footnote 34.

41. Established in 1873, abolished in 1878, re-established in 1881, and re-organized in 1889 with a full time principal: Handbook of the Osgoode Hall Law School.

42. Established in 1883: Calendar, Dalhousie University.

43. Established in 1887: Calendar, School of Law, University of Toronto.

44. **Supra**, footnote 39.

45. **Supra**, footnote 19.

46. Minutes, King's College Law School for May 6, 1912. The arrangement was accepted by King's College and, in accordance with the special act of 1901 governing admission of graduates to the bar, by the Attorney-General and the President of the Barristers' Society: Minutes for May 6, 1912 and November 10, 1913.

47. Lectures were commenced in the fall term: Minutes, King's College Law School for November 8, 1912.

3. University of New Brunswick Law Faculty.[48] In 1923, following the destruction by fire of the parent institution at Windsor (Nova Scotia) and in view of a proposed amalgamation of King's College with Dalhousie University, the President of King's College placed before the Law School, as an alternative to closing, two attractive proposals: one of continuing the School on an independent basis in New Brunswick; the other, of continuing it as a school of the proposed new University in which event King's College Law School and Dalhousie Law School (for the names were to be retained) were to be sister schools under the one central administration. The proposals were not satisfactory to the Law School: by following any one of them it was felt that "the benefit of the advantageous New Brunswick Legislation now applicable to the Law School" would be lost. Following a series of negotiations with the University of New Brunswick, King's College Law School was succeeded by the Faculty of Law of the University of New Brunswick. The arrangements between the University and its new Faculty were not precisely defined until the general revision of the University of New Brunswick Act in 1952.[49] But the cycle of events had been completed with the provincial university assuming its responsibility to the provincial bar.

IV

Aspects of Legal Education

1. Pre-legal Education. It was in 1843 that the first academic prerequisites to admission as a student-at-law were laid down by the Judges in an order requiring an applicant to be examined, as the Judges might direct, before "such and so many barristers" as the Court might appoint in such of the "several branches of education" as the applicant should intimate instruction had been received as indicated in his petition.[50] Failure by self-selection was the principle invoked. In their first rule, sanctioned by the Judges, touching the subject in 1847, the Barristers' Society defined the disciplines requiring an applicant to be "fully and strictly examined in the English and Latin languages, mathematics, geography and history," by the benchers, or any three of them.[51] That rule did not produce satisfaction: prescribed disciplines were dropped in 1867 and the examination was to be again in such of the branches of learning indicated in the petition as "two members of the Council (one being an examiner)" might determine, subject to the approval of a Judge who was to certify accordingly.[52] In 1881 the Court approved a rule withdrawing judicial certification of the subject matter of the examination and exempting, in the first such rule of the Society, the graduates of any chartered college from examination.[53]

48. See McInerney, **op. cit.**, pp. 15-16 and Minutes of King's College Law School for January 22, April 30, August 13 and 23, 1923.
49. See 1 Eliz. II, c. 14.
50. See R. Trin. 1843, r. 1; Earle, **op cit.**, pp. 106-107.
51. See R. Mich. 1847, r. 1; By-law 1; Earle, **op. cit.**, p. 116.
52. See R. Hil. 1867, r. 2; By-law 19; Earle, **op. cit.**; p. 155.
53. See R. East. 1881, By-law 19; Earle, **op. cit.**, p. 200c. See also the by-law of Mich. T. 1880 which was not sanctioned by the Court: Earle, **op. cit.**, pp. 198 and 200 d.

For all that the prerequisites to legal studies, except for graduates of colleges, remained at a low level in New Brunswick for a considerable period. In 1923 the Legal Education Committee of the Canadian Bar Association was to report that the "examination for applicants for admission as students at law appears to cover even less ground than is required for junior matriculation into the universities."[54] On successive occasions[55] subsequent to 1922, when the Legal Education Committee of the Canadian Bar Association adopted a recommended standard equivalent at least to that of second year Arts,[56] the Law School recommended its adoption to the Society; in due course, the prerequisites became (and in effect for the University Law Faculty) those incorporated in the regulations of the Barristers' Society prior to the 1950 revision:[57]

> s. 41. Any person who has passed the matriculation or other examinations entitling him to be entered as a regular student in the arts faculty of the University of New Brunswick or any other university approved of by the council and who has attended as an enrolled student and has passed the examinations permitting him to enter the third year of the arts faculty at such university, or any person who holds a grammar school license granted by the Board of Education of New Brunswick, may be admitted as a student-at-law without being required to pass any further examination in academic subjects.
>
> s. 42. Applicants for admission as students-at-law, except as provided by section 41, shall be required to pass examinations in subjects equivalent to the final examinations of the first and second years in the faculty of arts of the University of New Brunswick, and the syllabus of subjects for such examinations shall be as made by the council from time to time.

The actual questions, where examinations were required under regulation 42, were to be prepared by "some suitable person", (defined as being a professor in the University of New Brunswick or one holding a license of the grammar school class from the Board of Education of New Brunswick), subject to the approval of the examiners of the Society.[58]

In 1950 the regulations of the Barristers' Society were revised to require as at present:[59]

> 33. The educational requirements for admission as a student-at-law shall be:
>
> (a) Graduation from the faculties of arts or science or such other faculty as the Council may from time to time approve, of any university in the Maritime Provinces or any other university approved by the Council from time to time.
>
> (b) Completion of three years of studies leading to graduation from the faculties of arts or science of any of said universities where such university will grant to the student-at-law a degree in such faculty upon completion of the first-year at an approved law school in which the student-at-law certifies that he proposes to enroll.

54. MacRae, **op. cit.**, p. 672.
55. Minutes, King's College Law School for May 29, 1922; Minutes of University of New Brunswick Law Faculty for October 5, 1923; January 31, 1924; see also June 2, 1924.
56. Report of the Legal Education (committee) Section, 7 Proceedings of the Canadian Bar Association (1922), p. 264. In 1919 the Committee recommended a standard at least equivalent to that attained at the end of the first year of the course leading to the degree of B.A. at an approved university: 4 Proceedings, p. 18.
57. Pursuant to 21 Geo. V, 1931, c. 50 (consolidation 1938).
58. Ibid., Reg. 38.
59. Pursuant to 21 Geo. V. 1931, c. 50, and applicable to students-at-law applying for admission as such on and after September 1, 1951 (consolidation 1952).

Coincident with that revision, corresponding changes were made in the requisites for admission to the University law degree.[60]

In accordance with Regulation 33 (b), the internal regulations of the University were further altered to enable a student in the University to enter the Faculty of Law as a candidate for the degree on completion of the required three years of pre-legal training.[61] Recently, an arrangement was announced to extend within the University Law Faculty the same right of admission to students of Mount Allison University.[62] Every hope is expressed that similar arrangements will be concluded with other universities: the arrangement is that the university of origin of the student grant to him a degree in his appropriate faculty upon completion of his first year in the University Law Faculty.

The prerequisites to legal studies in New Brunswick are now among the very highest in Canada: the very minimum period is three years of undergraduate work and, in the absence of an arrangement such as described, for the majority of students, four years. There is no want of evidence that great and successful lawyers have been nurtured by self-discipline without the benefit of prescribed pre-legal training; there is even the evidence of Mr. Nelligan that in New Brunswick, Nova Scotia, Ontario and Alberta, the man without a general university training had in the period of his survey an income considerably higher than the man who had three or four years.[63] Common agreement dictates, however, that some standard, even if arbitrary, is desirable and necessary. Recently, Mr. Justice Rand added his weight to the four year standard observing that "with a heightening of the value placed on education, in its true sense, commensurate with the increasing stature of the Canadian people in general responsibility it should not be long before such a preliminary training is made the condition of legal study throughout the dominion".[64] Whatever the prerequisites to legal studies may be, the qualities sought in the prospective law student attract universal approval: habits of intellectual discipline, persuasive expression, and honest thinking. For these qualities are indispensable to the lawyer and the foundation of his calling.

2. The Period of Study. In the terms of study for attorneys, as originally laid down by the Judges in 1823, the distinction appeared between college graduates and non-graduates but not (for it was too early) between graduates in Arts and in Law: the term uniformly prescribed for a student was "four years, if he be a graduate of any college, or if not such a graduate, . . . the term of five years".[65] In 1858 the privilege accorded graduates was confined to "graduates of some University situate within the British dominions".[66] That restriction was removed by the Legislature in 1863 and the terms of study were reduced to

60. See the Calendar of the University of New Brunswick Faculty of Law 1950-1951.
61. Calendar of the University of New Brunswick 1955-1956, p. 196. Effective September 1, 1954.
62. Effective September 1, 1955.
63. Nelligan, Income of Lawyers, One of a series of reports prepared for the Survey of the Legal Profession in Canada (1951), 29 Can. Bar Rev. 34, at p. 44.
64. Rand, **opt. cit.**, p. 397.
65. R. Hil. 1823, r. 1; Earle, **op. cit.**, p. 25.
66. R. Hil. 1858; Earle, **op. cit.**, p. 142.

three and four years respectively.[67] From the case of **ex Parte Travis** it is evident that the terms were rigidly applied: on an application to show cause why a mandamus should not issue to compel the Barristers' Society to examine Mr. Travis, a student-at-law, who had interrupted his studies in the province to attend the Harvard Law School and to graduate with the LL.B. degree, Chief Justice Ritchie, for the Court, held that no student could claim to have his time of study reduced unless, during the whole of his period of study, he was a graduate of some legally authorized University or College.[68]

The sequel to the **Travis** case was an enactment in 1867 which not only resolved the special difficulty there presented but also distinguished between graduates in Arts and in Law. It provided (and retroactively as well) that the term of study was to "be reduced to three years" for any student "who shall have taken the degree of Bachelor of Laws at Harvard University, Massachusetts, or any legally authorized University or College in Great Britain, the United States or the British Colonies, at any time prior to his application for admission as an attorney".[69] Every junior barrister will recognize the cardinal error made. In amendment to the Act in 1868, the Legislature was to confess that it had "casually omitted" reference therein to "that part of Great Britain and Ireland called 'Ireland' "; it was to extend with great particularity "all the rights, privileges and immunities" granted by the "act" to students at law in the Province "who shall take or have taken the Degree of Bachelor of Laws in Trinity College, Dublin, or in any lawfully authorized University or College in that part of Great Britain and Ireland called 'Ireland' ".[70] So the terms of study—as such—were to remain,[71] though the legal basis for their existence was to change, until 1950 when the four year term disappeared consequent on institutional training becoming the sole basis for the admission of a student-at-law.[72]

The three year term is (and it has been for quite some time) the accepted term for legal studies in Canada. Three quarters of all lawyers have had three years legal education; some few have had four years; only one in twenty-five has had more than four years.[73] When translated into academic terms the period is gravely short for the job to be done: equal in New Brunswick only to the minimum prescribed for pre-legal studies and for most students actually less than that period. But it is certain that the brink of saturation has nearly been reached for legal and pre-legal studies combined: in point of time alone (and other factors would have to be considered to form an opinion in terms of preparation) the present minimum elapsed time before a student trained in the province may be called to the bar is about equal to the period which obtained between 1823 and 1863, before the terms of study

67. 26 Vict. c. 23, s. 1.
68. (1897), 12 N.B.R. (1 Hannay) 30.
69. 30 Vict. c. 7, s. 1.
70. 31 Vict. c. 3.
71. See as consolidated in C.S., 1877, c. 33, Secs. 1-3.
72. Effective as to students-at-law applying for admission as such on and after September 1, 1951.
73. Nelligan, **op. cit.**, pp. 42-43.

were reduced—for there was an interval of two years before an attorney might be called to the bar;[74] it is longer than any intervening period subsequent to that date.

3. Admission by Examination. It was in 1837 in New Brunswick, just one year after the first examinations for solicitors were introduced in England,[75] that the Judges ordered that thereafter no person should be sworn as an attorney without the production of a certificate, "testifying his fitness and capacity to act as an attorney", signed by examiners.[76] The principle of admission by examination (or by approved law school examination) has remained since that date with the provision for the multiple system of examinations, as it obtained for non-law school candidates under the rules of the Barristers' Society before 1950, being first introduced in 1893 by legislative enactment following representations made by the Council of the Society.[77] Under existing regulations, a student-at-law, other than a graduate of the University Law Faculty, must hold a degree in law from a school approved by the Council and is required to undergo an oral examination in practice and procedure and a written examination on certain prescribed statutes.[78]

In the development of the examination system itself it may be of interest to observe that under the order of 1837 the examiners were to be the Judges of the Court, together with four barristers, or any two of them, whereof a judge was to be one;[79] in 1847 the examiners became the benchers of the Society or any three of them;[80] in 1867 the examination results were to be approved by a Judge;[81] in 1881 control reverted to the Society.[82] It was in 1867 that the Society made its first provision for a regularly constituted Board of Examiners enjoining them to prepare, previous to each term, "reasonable and appropriate questions . . . for the examination of such candidates as may offer" and to "attend their examinations".[83] The Board system for bar examinations has since prevailed though, under the regulations adopted by the Society in 1950, the examinations are now conducted by the University Law Faculty with the examiners, in practice, appointed annually by the Council of the Society and reporting to it.[84]

74. As determined by R. Hil. 1823 r. 2; Earle, **op. cit.**, 26. By R. Mich. 1835, r. 13 the interval was reduced to one year for any attorney, who, on his being admitted an attorney, was a graduate of any college; Earle, p. 62. By 30 Vict. c. 7, s. 2, continued C.S., 1877, c. 33, s. 7, the period was made one year for any attorney. Pursuant to present regulations, a student-at-law is admitted and sworn as a Solicitor and Barrister: 21 Geo. V, c. 50, Reg. 40 (consolidation 1952).
75. Introduced in 1836 and made a statutory requirement in 1843: Gower, **op. cit.**, p. 140.
76. See R. Mich. 1837 r. 1; Earle, **op. cit.**, p. 82.
77. See 56 Vict. c. 37, secs. 3-4. Because of the insufficiency of the fees provided for under the Act, the system was not implemented until after 1902: see the preamble to (1902), 2 Edw. VII, c. 21 and secs. 1-4 for the changes made; see also, **supra**, footnote 13.
78. See Regs. 36 and 37 pursuant to 21 Geo. V, c. 50. (consolidation 1952).
79. **Supra**, footnote 76.
80. See R. Mich. 1847, r. 1; By-law 3; Earle, **op cit.**, p. 116.
81. See R. Hil. 1867, r. 2; By-law 21; Earle, **op. cit.**, p. 156.
82. See R. East. 1881; By-law 21; Earle, **op. cit.**, 200 c-d.
83. To be appointed annually and of the degree of Barristers-at-law and being members of the Council. See R. Hil. 1867, r. 2; By-law 18; Earle, **op. cit.**, p. 155.
84. But see Reg. 38 pursuant to 21 Geo. V, c. 50 (consolidation 1952).

There is in the New Brunswick record, partly because of the absence of organized instruction in the period, nothing comparable to the provision which subsisted in England between 1844 and 1872 when admission to the bar could be obtained either on the basis of attendance at lectures or by submitting to examination: students, of course, chose lectures; the two who had the temerity to present themselves for examination as well were ploughed ignominiously, but were able, notwithstanding, to establish their right to be called.[85] There was in New Brunswick, however, under the rules of 1837 a right, in a candidate dissatisfied with the examiners, to petition the Court for admission[86] and, subsequent to 1847, the candidate could petition the whole body of the benchers.[87] Under the rules of 1867, when the examinations became again the subject of approval by a judge, the student lost his right to appear before the Society, the Judges refusing to sanction a proviso which would have continued it.[88] So far as is known that right was never regained. Subsequently, detailed provision was to be made for supplemental examinations.[89]

Nothing appears in the formal record to show the conditions attending the early examinations until 1867 when the regulations of the Society were to provide: to the questions prepared by the examiners, the student or students[90]—

> shall put the answers to such questions in writing, and during such examination shall not be permitted to refer to any book, or person or other source of information, to assist him in such answers, and shall write the same in a legible hand, in the presence of one of the said Council or the Secretary of the said Society, which written answers shall be submitted to the aforesaid two members of Council for their opinion upon the same, who, after examination, shall submit them for the approval of one of the Judges, such answers to be so submitted and decided on without the said members or Judge knowing the name of the respective parties who gave in the same, such answers being designated by letters or numbers only; and if such Student shall be deemed qualified, he shall receive a first, second or third class certificate, according to the merits of his written answers.

Though the illegible hand was then as now a source of trouble, it may be doubted that it was the reason for the amendment of 1881 to the regulations which provided that the examination might be either "by written questions or orally, or both, at the discretion of the examiners."[91] Without, one ventures to believe, too long an interval, the method of written examination was again adopted for bar examinations except for the oral in practice and procedure.

85. Examinations were introduced by the Inns of Court in 1844 with the requirements becoming uniform in 1852 when the forerunner of the Council of Legal Education was established: see Gower, **op. cit.**, pp. 140-141.

86. R. Mich. 1837, r. 3; Earle, **op. cit.**, p. 82.

87. R. Mich. 1847, r. 1; By-law 4; Earle, **op. cit.**, p. 116.

88. See Earle, **op. cit.**, p. 156.

89. In the University Law Faculty a student who has failed at the regular examinations in not more than two subjects, provided he has made an average of at least 50 per cent on the work of the year, may be granted supplemental examinations in the subject or subjects in which he has failed; a student who has been granted a supplemental in any subject may write it only once: Calendar of the University of New Brunswick, 1955-1956, pp. 197-198.

90. R. Hil. 1867, r. 2; By-law 21; Earle, **op. cit.**, p. 156.

91. See R. East. 1881; By-law 21; Earle, **op cit.**, p. 200c.

4. Curriculum. In their rules of 1847, sanctioned by the Judges, the Barristers' Society would appear to have laid down the first curriculum of studies in the province, prescribing examination "in the elementary principles of the law of real and personal property, forms of action, pleading, evidence, and practice".[92] The last general curriculum of the Society, as it stood unrevised for some years in 1950, extended to:[93] Real Property, Contracts, Torts, Crimes, Sales, Personal Property, Pleading and Practice, Equity, Constitutional Law, Evidence, Personal Property II, Equity II (Trusts), Partnership and Corporations, Criminal Law, Conflict of Laws, Procedure, and Statutes. The present curriculum of the University Law Faculty, revised in 1950, and there were frequent revisions in the years intervening from 1892, extends to:[94] Torts, Property(Real and Personal), Contracts (including Sales), Criminal Law, Judicial and Legislative Method, Trusts, Constitutional and Administrative Law, Property II (Landlord & Tenant), Wills and Intestacy, Agency and Partnership, Commercial Law (Insurance and Bills and Notes), Corporations, Practice, Taxation, Equity, Evidence, Mortgages and Suretyship, Labour Law, Domestic Relations, Conflict of Laws, Jurisprudence, and Creditor's Rights. Apart from contemporary additions, the curriculum of the University Law Faculty corresponds to and is based (as was that of the Barristers' Society) on the curriculum recommended in 1920 by the Legal Education Committee of the Canadian Bar Association[95] and uniformly followed in the common law schools.

The curriculum of the University Law Faculty is directed, as it must in any rational sense be so directed, primarily to the local bar. All of the subjects prescribed by the Barristers' Society for students entering under the former system of admission for non-law school candidates are offered; and considerably greater emphasis is given to certain fields, e.g. to legislation and to property and security transactions. Both are mentioned because legislation is now a principal springboard for legal action and, as a recent survey[96] would suggest, close to 50% of the gross income of law firms, for Canada as a whole, is derived from conveyancing and estate transactions (30% and 20% respectively), followed by corporation practice 18%, litigation (excluding divorce) 11%, and domestic relations 5%. That survey, based on 1948 returns, was related approximately to the conditions of practice in New Brunswick;[97] it also revealed that about 17% only of the New Brunswick profession devoted more than half of their time to one field of law and that the practice was for the profession as a whole varied.[98]

In the extended description given of New Brunswick curricula, there is some indication of the recurring problem of change. Degrees

92. **Supra**, footnote 80.
93. See Regs. 49-51 pursuant to 21 Geo. V, c.50 (consolidation 1938).
94. Calendar University of New Brunswick 1955-1956, pp. 198-203.
95. See Report of the Legal Education (Committee) Section, 5 Proceedings of the Canadian Bar Association (1920), pp. 250-257.
96. Nelligan, **op. cit.**, pp. 47-49.
97. The percentage response to the Income Questionnaire was for New Brunswick 62% and for Canada as a whole 55%: Nelligan, **op. cit.**, Table I, p. 50.
98. See **Ibid**: Table V, p. 51. Placed at 30% for Canada as a whole.

of emphasis shift and labels change; the bed-rock fact of present curriculum here, as elsewhere in Canada, is in the hard core of the now traditional branches of the law. Even the so-called public law subjects have their traditional roots: administrative law, for example, is very largely a consideration of legal rules once described as "Crown Practice". In the perspective of time the changes made have been more dramatic. For within the space comprised by legal education in this province, the course of the law has altered profoundly, the scope of required knowledge expanded, and the forums for practice varied and multiplied. In his penetrating analysis of the role of "The Lawyer in an Expanding Canadian Economy", Mr. John A. MacAulay, Q.C., in his Presidential Address to the Canadian Bar Association in 1954,[99] was to suggest that even in the short period since 1939 "the complexion of legal requirement" has changed materially with new legal fields "little explored and vaguely known" opening up; certainly, as he was to suggest, there is today—and it impinges on curriculum development—an increasing diversification of the lawyer's activities in private practice, in business and industry, and in the public service.

There is one problem (and it has ever been present) of legal education in a sense related to curriculum. It is to inculcate into the student a realistic appreciation of the correspondence between his law school training and the dynamics of practice and to impart to him an appreciable degree of competence in the basic skills and mechanics of practice. Such a formulation is preferred to the more familiar coin of distinction between "theoretical" and "practical training". For that distinction, and it was taken even in Blackstone's time,[100] is now perfectly discredited in any reasoned approach to legal education. The concern, both of the University Law Faculty and of the Barristers' Society, must be that a student be trained to the degrees of competence reasonably to be expected, within the time available for preparation, both for his immediate present as well as for his (experienced) future.

Related to matters of curriculum and instruction, there has been for some years past in the University Law Faculty a program of required participation in Moot Courts. In the present year, at the invitation of the Chairman of the Legal Aid Committee of the St. John Law Society, students in the second and third years sat with panels of the Committee and there have been suggestions that this participation might be continued and extended. One of the most valuable of the additional training media is the **Law School Journal.** Though a difficult undertaking for a small school, the Journal is now in its eighth volume. It does afford an outlet for and some stimulus to student writing.

5. Apprenticeship and Office Training. With respect to apprenticeship, the foundation of the ancient system of admission to the profession, there is much in the record to indicate the early nature and effectiveness of the system in New Brunswick. Before 1823, or so it

99. (1954), 32 Can. Bar Rev. 703-712.
100. Supra, footnote 30.

would appear, students might practice in a variety of courts and train in offices other than of barristers; for in that year the Judges ordered that thereafter training must be taken in the office of a barrister and that no student was to be permitted to practice "in the name of any attorney, or otherwise, in any inferior Court of Common Pleas in this Province".[101] By the simple expedient of engaging students in the offices of the barristers, the attorneys were able to circumvent the order before the door was closed by further order in 1840 that "henceforth no attorney of this Court do employ any student in the office of a barrister of this Court, as his agent in any suit or matter pending in this Court, or in the transaction of any business before a judge, or in the office either of the clerk of the Crown or the clerk of the pleas".[102] In a separate rule in 1840 the Judges intimated that they would "in future expect" in matters of chamber practice that, where the parties did not appear in person, they be attended by a barrister or attorney; or, where that could not be conveniently done, the student employed by a barrister to attend "be of competent experience, skill and knowledge of the business entrusted to him."[103]

The next stage of development followed almost immediately on the revision by the Legislature of the terms of study. In 1867 the Judges sanctioned rule 24 of the Barristers' Society:[104]

> 24. And whereas it is highly necessary, as well for the interest of every person entering upon the study of Law, as for "securing to the Province and the Profession a learned and honorable body," especially in the late curtailed period of study, that Students of the law, during their Studentship, should confine themselves exclusively to the study of their profession, and not receive any emolument or reward for their services, or engage in any other profession, business or employment: No Student, therefore, shall receive any salary or remuneration whatever for his services from the Barrister with whom he studies, nor from any other person, nor shall he be allowed to practice or try causes in any Court, on pain of being refused admission.

It was a stage of short duration for the Legislature intervened in 1870 to provide:[105]

> 1. No Student at Law shall be refused admission as an Attorney for or by reason of his having received any salary or remuneration during the term of his study, or for or by reason of his having practised or tried causes in any Court, or for or by reason of his having engaged in any other business or employment; provided always, however, that no such Student shall during the term of his study engage in any other business or employment, or receive any salary or remuneration from any person whatever, or practice or try causes in any Court, without the knowledge or consent of the Barrister with whom he may be studying at the time.

101. See R. Hil. 1823, rr. 6 and 8.; Earle, **op. cit.**, p. 26.
102. See R. Trin. 1840, r. 5; Earle, **op. cit.**, p. 98. The rule did not extend to prevent the employment by a barrister, himself the agent of any attorney, of any student in his office in the professional business of such attorney.
103. See R. Trin. 1840, r. 6; Earle, **op. cit.**, p. 98.
104. R. Hill. 1867, r. 2; By-law 24; Earle, **op. cit.**, 156-157.
105. 33 Vict. c. 26, ss. 1 and 2; C.S. 1877, c. 33, ss. 4 and 5.

> 2. If such Student do or shall engage in any other business or employment, or receive any salary or remuneration, or practice or try causes in any Court, without the knowledge or consent of the Barrister as aforesaid, he may be refused admission as an Attorney.

The Society, the record reveals, entertained at one point the possibility of subjecting the requisite approval to be given a student to "the approval in writing of three members of the Council";[106] eventually in 1881 the Society settled for a provision requiring the barrister with whom the student articled to certify that the particulars of the employment or occupation and salary had been with his "express knowledge and consent".[107]

That Legislation was repealed in 1903, but it is a conservative statement to suggest that its effect was lasting until 1950. In the regulations of the Society subsisting immediately before that date the familiar provision was:[108]

> 61. In case a student-at-law during his term of study has been engaged in any other occupation or employment he shall state in his petition for admission what the occupation or employment was and how long he was engaged in it, and his petition shall be accompanied by a certificate from the barrister with whom he has studied, distinctly verifying the statement and declaring that the student had engaged and continued in such occupation and employment during the time stated and received the salary or remuneration therefor with his knowledge and consent.

In 1950 the requirement became:[109]

> 35 (c) Each student-at-law shall serve not less than six months in the office of the barrister with whom he is articled, or in case of transfer of articles such service shall aggregate not less than six months in the offices of the several barristers with whom such student-at-law has been articled and prior to admission of a student-at-law as a solicitor and barrister . . . .

Office training is now for all a matter to be experienced rather than a mere formality to apprenticeship before admission. The period prescribed is reasonably brief: Mr. Justice Rand has suggested a one year period after graduation with required office attendance between school years.[110] Such a requirement would preclude many an aspirant to the profession; but the proposal is symptomatic of current interest in apprenticeship. That interest in Quebec province recently led to a fourth year being added to the three years of academic instruction. As carried out at McGill University, students during the fourth year are placed in offices in Montreal and attend part of their time to office work and for part of the time attend special courses given by members of the profession but organized within the University.[111] That scheme may have its own bundle of disadvantages.[112] It is perhaps too early

106. See Earle, **op. cit.**, pp. 199 and 200 d.
107. See R. East, 1881; Earle, **op. cit.**, p. 200 d.
108. Pursuant to 21 Geo. V, c. 50 (consolidation 1938).
109. **Ibid.** (consolidation 1952). Effective as to students-at-law applying for admission as such on and after September 1, 1951.
110. Rand, **op. cit.**, p. 418.
111. See Meredith, A Four-year Law Course of Theoretical and Practical Instruction (1953), 31 Can. Bar Rev. 878.
112. See e.g., Rand, **op. cit.**, p. 408.

to evaluate the New Brunswick scheme. As yet, there has been no perceptible difficulty in finding office space; there is some indication that the training experienced is not as varied as might be desired.

V

The Benefactions of Lord Beaverbrook

No account can now be given of legal education in New Brunswick apart from the benefactions of Lord Beaverbrook, student of King's College Law School and Honorary Chancellor of the University of New Brunswick. By a single decision, as it were, of interest in 1950 Lord Beaverbrook was to rescue in a short while the University Law Faculty from the Provincial Building in Saint John and to establish it in 1953 in Beaverbrook House with a library of its own. In that single act it may be that Lord Beaverbrook preserved to New Brunswick the very existence of organized legal instruction: for the Law Faculty could not have continued indefinitely in any comparative sense without facilities of its own and a physical existence.

The full impact of Lord Beaverbrook on legal education in New Brunswick cannot be assessed in the present: much more is involved than the physical existence of Beaverbrook House with its library; there is the very provision in this province of facilities for instruction in the law comparable to any in Canada at the undergraduate level. But there is more. Under the terms of the Lord Beaverbrook Overseas Scholarships, established in 1947,[113] eleven graduates of the University Law Faculty have so far proceeded to post graduate studies in England.[114] In relation to the total number of graduates, the ratio is possibly the highest in Canada. Beginning this September, Lord Beaverbrook has established on an experimental basis a series of five entrance scholarships to the Faculty each of a value of $600 and tenable for three years. That benefaction is without example in the field of legal education in Canada.

VI

The University Law Faculty and the Bar

The relationship between the University Law Faculty and the bar of New Brunswick has been intimate since 1892: both in the recognition accorded[115] to graduates in their admission to the bar without further examination, and in the service rendered by members of the profession, both in the early days and in the present, on the instructional staff. That service remains vital: not in any sheer economic sense, but because it is a sound precept that the law student, whatever may be his ultimate vocation, should from the initial stages of his study be brought into close contact with the profession itself.

113. See Calendar, University of New Brunswick 1955-1956, pp. 50-51.
114. See (1954), 7 U.N.B. Law Journal, p. 31.
115. Since 1901.

Presently, the Barristers' Society also maintains two annual scholarships in the Faculty, contributes toward the publication costs of the **Law School Journal**, and has centred within the Faculty its arrangements for the examination of candidates for admission who are not graduates of the Faculty. For its part, the University has assumed the financial burden, increasingly greater than when the first modest provision was made in 1923, of providing the basis for organized legal instruction within the province.

In this phase of legal education in the province the relationship between the University Law Faculty and the bar has changed or, more precisely, has deepened in significance consequent on the changes made in the requirements for admission by the Barristers' Society in 1950 and as a consequence of the benefactions of Lord Beaverbrook. The University Law Faculty is the primary training source of candidates for admission to the New Brunswick bar and is able fully to discharge its responsibility.

VII

Mr. Chairman, the title of my address did not require more than a report to you on the present state of legal education in New Brunswick and the course of past development. No prophesies were required. Yet there is one to be made.

If past events and the relationship between students going into higher studies and into law mean anything, it is that within a short time, placed at ten years by competent observers, the number of students in Canadian law schools will more than double present enrolment. There is no doubt that New Brunswick will be a participant in that trend: our arrangements can be matched to the task.

—G. A. McAllister,

University of New Brunswick Law Faculty.

Case and Comment

DEGLMAN v. GUARANTY TRUST CO. OF CANADA AND CONSTANTINEAU.[1]

Contracts — Restitution — Unjust Enrichment — Recovery for Services Performed under Unenforceable Oral Contract

In the Deglman case, the Supreme Court had to decide whether to recognize a doctrine of unjust enrichment in Canada. The facts briefly stated were these: The deceased, the aunt of the respondent, was alleged to have agreed that if the respondent would be good to her and do such services for her as she might from time to time request during her life-time she would make adequate provision for him in her will, and in particular that she would leave to him certain premises in the city of Ottawa. The alleged performance consisted of taking his aunt in her own or in his automobile on trips to Montreal and elsewhere, and on other pleasure drives, of doing odd jobs about two houses owned by the aunt including the one which was to pass to the respondent on her death, and of various services such as errands for her personal needs.

One question was whether the acts done constituted part performance of an oral contract relating to land so as to take the case out of section 4 of the Ontario Statute of Frauds.[2] Both the trial judge and the Court of Appeal held that they did, but were reversed on this point by the Supreme Court. However, this note is not concerned with the doctrine of part performance, but with unjust enrichment or restitution.

The respondent could not recover on the express oral contract because of the Statute of Frauds. The Supreme Court was also of the opinion that logically he should not be permitted to recover on an inconsistent implied contract,[3] and disagreed with the rationale of **Scott v. Pattison**[4] where the plaintiff served the defendant under a contract for service not to be performed within one year, but was held entitled, notwithstanding the Statute of Frauds, to sue on an implied contract to pay him according to his deserts. The soundness of the principle of this decision had previously been doubted.

The only remaining basis for granting the plaintiff a remedy was an obligation imposed directly by law on the administrator of the de-

1. [1954] 3 D.L.R. 785.
2. R.S.O., 1950, c. 371.
3. In **Cutter v. Powell**, 101 ER 573, Lord Kenyon said: "That where the parties have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom of law"; and in **Britain v. Rossiter**, 11 Q.B.D. 123, Brett L.J. said at p. 127: "It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract which is still subsisting; all that can be said is that no one can be charged upon the original contract because it is not in writing."
4. [1923] 2 K.B. 723.

ceased to prevent unjust enrichment. In England there is division of opinion on the availability of such a remedy.

Some English judges have supported the view of Lord Mansfield in **Moses v. Macferlan**[5] where his lordship based the action for money had and received on natural justice.[6] Thus in **Brook's Wharf** and **Bull Wharf Ltd. v. Goodman Bros.,**[7] A had been compelled to pay to B money which C was legally bound to pay B, and A claimed repayment from C. This had long been a well-recognized quasi-contractual obligation and Lord Wright, M.R., based it on the 'unjust benefit' which would accrue to C if he did not repay, and denied that the duty is founded on an implied contract.[8] Again in the **Fibrosa case,**[9] Lord Wright thought that "any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit." In his lordship's opinion, the basis of quasi-contractual liability was not to be found in contract or in tort but within a third category of the common law.[10]

In **Nelson v. Larholt,**[11] Denning J. (as he then was) supported Lord Mansfield's view in somewhat the same language as Lord Wright.[12] His Lordship's opinion was that the principle of unjust enrichment had been evolved by the courts of law and equity side by side. "In equity," he said, "it took the form of an action to follow money impressed with an express trust or with a constructive trust owing to a fiduciary relationship. In law it took the form of an action for money had and received or damages for conversion of a cheque."[13] He went on to say, "It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effects." And in **Reading v. Att. Gen.,**[14] where a soldier derived benefit from wearing his uniform to assist another in illegal activity, he was held answerable to the Crown for the money he received for this service. At the trial Denning J. said that "the master's claim in these cases does not rest in contract or in tort, but in the third category known as restitution."[15] Again in **Larner v. London County**

5. 97 E.R. 681
6. "If the defendant be under an obligation from the ties of natural justice, to refund; the law implies a debt and gives this action (**sc. indebitatus assumpsit**) founded in the equity of the plaintiff's case, as it were, upon a contract (**quasi ex contractu** as the Roman law expresses it) . . . 'In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money'." **Ibid,** p. 681.
7. [1937] 1 K.B. 534.
8. "These statements of the principle do not put the obligation on any ground of implied contract or of constructive or notional contract. The obligation is imposed by the Court simply under the circumstances of the case and on what the Court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law apart from any consent or intention of the parties or any privity of contract." **Ibid,** p. 545.
9. [1943] A.C. 32.
10. "Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution." **Ibid,** p. 61.
11. [1948] 1 K.B. 339.
12. **Ibid,** p. 343: "The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."
13. **Ibid,** p. 343.
14. [1948] 2 K.B. 268.
15. **Ibid,** p. 275.

Council,[16] where the council owing to a mistake of fact paid one of the men more than he was entitled to under the promise, Lord Justice Denning recognized that there was no contractual claim, but thought that the Council should be entitled to recover and that the plaintiff was 'bound' to repay the excess. This was termed by Cheshire and Fifoot, "an attempt to introduce a hybrid obligation, half-way between law and morality."[17]

The Sale of Goods Act[18] has provided that where the claim is for necessaries supplied to an infant, lunuatic or drunkard he must pay a reasonable price. Cotton L.J. said in **Re Rhodes**[19] that the term implied contract was an unfortunate expression in cases under this section[20]. The term implied contract, he said had been used to denote "not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it has a contractual origin." To the same effect, Fletcher Moulton L.J. in **Nash v. Inman,** a case relating to infants, said that "an infant, like a lunuatic, is incapable of making a contract of purchase . . . The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises **'re'** and not **'consensu'**."[21]

Lord Sumner on the other hand regarded implied contract as the true basis of quasi-contract. In **Sinclair v. Brougham**[22] he denied the existence of a principle of unjust enrichment. "There is now no ground left", he said,[23] "for suggesting as a recognizable 'equity' the right to recover money **in personam** merely because it would be the right and fair thing that it should be refunded to the payer."[24] Lord Russell in the **Fibrosa** case was also of opinion that the notion of implied contract as the basis of quasi-contract was firmly embedded in the law of England and was not to be replaced by a more flexible doctrine of unjust enrichment. His lordship said, that "in Scotland the consequence of frustration is not that loss lies where it falls. The Scots law derives from the Roman

16. [1949] 1 All E.R. 964.
17. Law of Contracts (3rd ed.) at p. 526.
18. R.S.N.B., 1952, c. 199, s3. (1): "Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property; provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor."
19. [1890] 44 Ch. D. 94.
20. **Ibid,** p. 105: "It is asked, can there be an implied contract by a person who cannot himself contract in express terms? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessaries."
21. [1908] 2 K.B. 1, at p. 8.
22. [1914] A.C. 398.
23. **Ibid,** p. 456.
24. Lord Wright pointed out in the **Fibrosa** case at page 64 that Lord Sumner's observations in **Sinclair v. Brougham** were **obiter dicta** and added: "Serious legal writers have seemed to say that these words of the great judge in **Sinclair v. Brougham** closed the door to any theory of unjust enrichment in English law. I do not understand why or how. It would indeed be a **'reductio ad absurdum"** of the doctrine of precedents. In fact, the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect, instrument to prevent unjust enrichment, aided by the various methods of technical equity, which are also available as they were found to be in **Sinclair v. Brougham."**

law a different view, founded on the doctrine of **'restitutio'**, which has no place in English law."[25]

When the **Reading** case was appealed to the House of Lords,[26] Lord Porter disagreed with Denning J. on unjust enrichment. "The exact status of the law of unjust enrichment is not assured," he said, "it holds a predominant place in the law of Scotland and I think in the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated."[27]

It seems then that the implied contract theory is still prevalent in England,[28] subject to strong adverse **dicta.** However in the **Deglman** case the Supreme Court of Canada, recognizing that recovery on an implied contract was not possible, imposed on the defendant a direct legal obligation not sounding in contract but in restitution. Rand J. said:

> There remains the question of recovery for the services rendered on a *quantum meruit.* On the findings of both Courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promisor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given. This matter is elaborated exhaustively in the *Restatement of the Law of Contract* issued by the American Law Institute and Professor Williston's monumental work on *Contracts,* 1936, vol. 2, s. 536 deals with the same topic. On the principles there laid down the respondent is entitled to recover for his services and outlays what the deceased would have had to pay for them on a purely business basis to any other person in the position of the respondent.[29]

Cartwright J. shared this opinion:

> I agree with the conclusion of my brother Rand that the respondent is entitled to recover the value of these services from the respondent administrator. This right appears to me to be based, not on the contract, but on an obligation imposed by law.[30]

He also said:

> In the case at bar, all the acts for which the respondent asks to be paid under his alternative claim were clearly done in performance of the existing but unenforceable contract with the deceased that she would devise 548 Besserer St. to him, and to infer from them a fresh contract to pay the value on the services in money would be, in the words of Brett L. J. in *Britain v. Rossiter* (1879) 11 Q.B.D. 123, to draw an inference contrary to the fact.[31]

25. [1943] A.C. 32, at p. 55.
26. [1951] A.C. 507.
27. **Ibid,** p. 513.
28. **In Re Diplock's Estate, Diplock V. Wintle,** [1948] Ch. 465, at p. 480, the Court of Appeal regarded it as clearly established that the right to recover money paid under a mistake of fact is founded on an implied promise to pay.
29. [1954] 3 D.L.R. 788.
30. **Ibid,** p. 794.
31. **Ibid,** p. 795.

Canadian Courts may now be at liberty to provide remedies in cases where actions in tort, contract, or trust would not be available. The **Deglman** case demonstrates a category of claims, the essential principle of which is that the defendant should not be unjustly enriched at the expense of the plaintiff. The test of the recovery is not the loss to the plaintiff, but the gain to the defendant, though in general the loss fixes a limit. The essence of the remedy in other words is not compensation to the plaintiff, but the restitution by the defendant of what would be, if not restored, an unjust enrichment. Since the obligation is one for the refund of enrichment as distinguished from damages, the obligation ceases where the enrichment ceases.

—Joseph Bérubé, I Law, U.N.B.

PROVINCIAL BANK OF CANADA V. WETMORE[1]

Capias Practice

This decision affords an opportunity to examine the practice on issuance of a writ of **capias** and more particularly the requirements of the affidavit in support of an application for an order to hold to bail. The judgment turns on the lack of validity of the affidavit and the main concern here shall be with that.

The facts of this case are simple. Application was made for an order to be at liberty to issue a **capias** against the defendant. The affidavit in support of the application was made by the assistant manager of the plaintiff bank. The order was granted and a **capias** issued. The defendant was arrested and later released on bail bond. The defendant then made application to have the proceedings set aside because of certain irregularities.

The statutory authorization for **capias** proceedings is found in s. 1 (2) of the Arrest and Examinations Act[2] as follows:

> Any person, not having privilege, may be arrested and held to bail, or committed to prison on *mesne* process, under the following circumstances:
>
> Where in an action brought or to be brought in any court having jurisdiction, a person by affidavit of himself or some other person shows to the satisfaction of the judge or other official hereinafter mentioned, that he has a cause of action against another person to an amount exceeding twenty dollars, and also shows such facts and circumstances as satisfy the judge, or other official, that there is good cause for believing that the person against whom the application is made is about to quit the province, the judge or other official may order that the person against whom the application is made shall be arrested, in which event a writ of *capias* may be issued to arrest such person in such manner as has heretofore been the practice.

The following objections were made to the affidavit:

(1) The affidavit did not state the amount of the alleged cause of action.

1. Saint John County Court, Keirstead, Co. Ct. J., [1954] 3 D.L.R. 70; 35 M.P.R. 107.
2. R.S.N.B. 1952, C. 10.

(2) The allegation that the defendant was about to quit the Province was not based on personal knowledge but on information and belief and as such failed to show sufficient grounds for such belief.

(3) There was no statement to the effect that the deponent believed that the defendant was about to quit the Province.

The subject matter of the suit apparently was a promissory note and as such contained both principal and interest. The affidavit here, it seems, failed to state the total amount but did set forth such facts—principal, interest rate, date from which interest to run—so that the total amount could be easily determined. **Id certum est quod certum reddi potest.** The first objection therefore failed.

When the information that the defendant is about to quit the Province is not based on personal knowledge but rather on hearsay evidence, sufficient particulars must be shown so that perjury can be assigned to the statement should it be false. The Rules of Court require that grounds of belief be given when hearsay evidence is permitted. "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted."[3] The reason for permitting hearsay has been given by Parke, B.:

> We think evidence of this nature is a sufficient foundation for orders like the present, and it is every day's practice to make them on such evidence. In many cases it might be difficult, if not impossible, to procure better, and if we were to establish such a rule with respect to these affidavits we should render the statute a dead letter. There is, however, this limitation to hearsay evidence, that no Judge ought to make an order of this description merely upon the plaintiff's swearing that he is informed and believes that the defendant is about to leave the country; the plaintiff should be required to state in his affidavit the name of the person giving him that information.[4]

Failure to name the informants in the affidavit thus permitted the learned trial Judge to allow the second objection.

The deponent after stating that to his information the defendant will quit the Province went on to say: "I do verily believe by reason of the premises that the said intended defendant will quit and leave this Province." The objection to this was sustained because the affidavit did not state the defendant "is about to quit the Province" but only that the defendant "will quit and leave the Province." Presumably there was a lack of immediacy in the form used. The defendant could leave in a week or ten years hence. Because of this the objection would appear to be well taken.

The affidavit being found wanting, the whole proceedings were set aside. An application was made to submit supplemental affidavits but this was denied on the ground that the proceedings having been completed their validity or invalidity must be judged as from the time

3. 0.38, r. 3.
4. **Gibbons v. Spalding** [1843] 11 M. & W. 173, pp. 174-5.

action was taken upon them. This holding can be founded on the statement in The Practice of the Court of King's Bench and Common Pleas, in Personal Actions and Ejectment, 8th ed. by William Tidd, that:

> . . . . [W]here the affidavit is a mere nullity, as being made by a person convicted of felony, or does not contain any positive oath, or cause of action, the court will not receive a *supplemental* affidavit . . .[5]

A number of other objections were made to both the order to hold to bail and the writ. However they did not enter into the judgment.

The judgment points up that failure to adhere strictly to the requirements of practice may—and indeed in this case, does—defeat the immediate object of the proceedings. The function of the writ of **capias** is to take security from a defendant about to quit the Province. Such a defendant is placed in a disadvantageous position as compared to the ordinary defendant with his ability to delay and frustrate the plaintiff contingent upon the giving of security. A plaintiff who by want of form has a **capias** proceeding set aside stands to be put to great inconvenience and may well lose the amount in issue.

—J. W. McManus, II Law, U.N.B.

5. Pp. 191-2. See also **Whitehead v. Bennett** [1846] 6 L.T.O.S. 313, where the defect in the original affidavit could not be remedied by a supplemental affidavit.

SAVAGE v. WILBY AND WILBY AND DELONG[1]

Landlord and Tenant — Master and Servant — Negligence — Vicarious Liability of Tenant for Negligence of Independent Contractor — Common Means Employed by Contractor — Tenant Without Knowledge of Risk Involved.

In this case the Supreme Court of Canada was again confronted with the exceptions to the general, and well established, rule of law that a principal is never liable for the negligence of an independent contractor. These exceptions, briefly summarized, fall into two broad classes: first, where the principal is under an absolute or strict liability; and second, where the undertaking instigated by the principal is, in itself, inherently dangerous; and in these instances a stringent duty to take care, or to see that due and proper care is taken, is placed upon the principal, and if, under these conditions, injury should occur to another through the negligence of an independent contractor, then the principal becomes vicariously liable.

With regard to this non-delegatable liability Salmond has stated[2] that:

1. [1953] 4 D.L.R. 326.
2. Salmond on Torts (11th ed.) p. 133.

> the tendency of legal development is in the direction of extending rather than restricting this liability

and Friedmann has advanced this idea further with his proposition[3] that:

> the traditional distinction between an employer's liability for the acts of his servants and for those of his independent contractor, has no longer any real meaning.

From the reasons given for the decision in the case under discussion it may well be concluded that the Supreme Court of Canada is adhering to this modern legal trend.

The appellant Savage was lessee of a ground floor in the City of Fredericton owned by the respondent Wilby. The premises were to be used as a restaurant, and in the course of redecorating the appellant hired the respondent DeLong, a painter contractor. DeLong, in undertaking the removal of paint, at first used a remover of brand name CCO-10 which was noninflammable, but, when the odour from this remover was found to be nauseating to his employees, he later changed to a highly inflammable liquid remover known as Taxite. During the use of the Taxite a fire occurred causing serious damage to the premises, and resulting in an action by Wilby against both DeLong and Savage. At the original hearing in the New Brunswick Supreme Court, Queens Bench Division, Bridges J. found the contractor guilty of negligence, and, the actual cause of the fire being undetermined, applied the doctrine of **res ipsa loquitur;** but he excluded the appellant Savage from liability on the ground that it was beyond his knowledge to realize the danger involved. On appeal, before the New Brunswick Court of Appeal, the liability of the respondent DeLong for negligence was affirmed, and the appellant Savage was also held liable on the finding that there was a dangerous undertaking which a reasonable man might expect to cause damage to others if due and proper care was not taken. Hughes J., in his dissenting judgment as to the liability of Savage, held that the dangerous nature of Taxite paint remover was not of common knowledge and therefore should not have been ordinarily known to a reasonable man, and also that the substitution of the highly inflammable Taxite liquid, for the noninflammable CCO-10, was done without the knowledge of the appellant Savage. On appeal to the Supreme Court of Canada it was held, affirming the Appeal Court of New Brunswick, that the appellant's actual knowledge of the probable danger was immaterial, as the dangerous nature of Taxite was such as should have been known by him as a reasonable man, and that he was therefore under a duty to see that due precautions were taken, and that the damage resulted from the lack of such precautions.

In coming to this decision it was necessary for the Supreme Court to recognize and to answer three questions: viz.— What is a dangerous or hazardous undertaking? What are the boundaries confining what a

3. 1 Modern Law Review, p. 54.

reasonable man must be expected to foresee? What is required to discharge the taking of "due and reasonable precautions"?

In relation to the first question the Court made reference to the cases of **Grote v. Chester Holyhead Railway**[4], and **St. John v. Donald**[5], and, on the basis of the two cases held, in the words of Rand J.[6]:

> . . . difficulties may arise in determining when the circumstances present the degree of danger attracting the rule, but . . . here . . . the excess of risk was present.

In the **Grote** case the undertaking was the building of a railway bridge, which must be properly done or be a hazard to the public as passengers; in the **St. John** case the undertaking was the handling of explosives; in both, the dangerous and hazardous aspects of the undertaking were clearly within the conception of what was intended to be an undertaking inherently dangerous in itself. In his decision in the **St. John** case, Anglin J., in discussing hazardous undertakings, said in part[7]:

> . . . of a nature likely to involve injurious consequences to others . . .

Is paint remover capable of being so classed? In its highly inflammable nature there is the possibility of accident and injury, but its common and every day use would seem to remove any expected possibility into the realm of remote probability. Indeed, a number of painting contractors called as witnesses testified to the fact that they had used Taxite, or removers akin to it, on many hundreds of occasions without mishap, and further, that the probability of such, or any, mishap had never primarily occupied their concern. Considering that, in the case of **Fosbroke-Hobbes v. Airwork Limited,** in 1936[8], the courts were reluctant to place air travel within the scope of a hazardous undertaking, it can only be concluded that by placing paint remover within this scope the Supreme Court has taken a step in the direction of widening the limits intended a dangerous undertaking, to include, not only such as are inherently dangerous in themselves, but those to which even the improbable aspect of injurious consequences attach.

Turning to the second question the Court's answer is found in the words of Cartwright J.[9]:

> In my opinion a reasonable man in the position of the appellant ought to have forseen the danger which the work would create.

Here the Court relied on the decision in **Dalton v. Angus**[10], which concerned the lateral support of an adjoining building. On the same point the New Brunswick Court of Appeal considered the decision in the case of **Brooke v. Bool**[11], where a joint tortfeasor had searched for a gas leak with the aid of a match. In both cases the possible danger

4. [1848] 2 Ex. 251; 154 E.R. 485.
5. [1926] 2 D.L.R. 185.
6. [1954] 3 D.L.R. 206.
7. [1926] 2 D.L.R. 191.
8. [1936] 53 T.L.R. 254.
9. [1954] 3 D.L.R. 210.
10. [1881] 6 A.C. 740.
11. [1928] 2 K.B. 578.

from the act done was clearly of the type which a reasonable man might be expected to recognize. Were the circumstances in the instant case similar?

Undoubtedly, the appellant Savage should have known of the highly inflammable nature of the substance in use, in view of the fact that nearly all such removing or cleaning products are of that nature. Hughes J., however, in his dissenting judgment in the New Brunswick Court of Appeal, was of the opinion that, in the absence of knowledge that the highly inflammable Taxite had been substituted in the course of the undertaking for a noninflammable remover, no danger existed which should have been foreseen by the appellant. But, it is submitted, the true question for determination was whether the appellant, as a reasonable man, could have been expected to foresee that the acts of the contractor would be performed in such a manner as to invoke the known possibility of danger. Should he, having hired an experienced contractor, been expected to foresee that the contractor would act in a manner encouraging mishap? Even with the knowledge of the possibility of danger, would it not be unreasonable to hold him foreseeable of such acts, in a legal sense, unless he also possessed the competency to understand the intricacies of the work itself, and to recognize that it was being performed in an undesirable and danger provoking manner? In the result this decision would appear to have widened the duty of the principal to inquire and, correspondingly, to have extended the range of foreseeability in law.

To the third question, whether Savage had exercised due and reasonable care in the presence of the foreseeable danger, the Court answered in the negative, as there was nothing in the record to suggest that he gave any directions to the contractor, or took any steps whatsoever, in regard to the performance of the undertaking. But the question remains basic: What precautions would have relieved Savage of liability? The idea that there really is any such relief has often been questioned, but it would appear from the statement of Cockburn J. that:[12]

> When work is likely to cause damage to another . . . [There is] a duty to take all reasonable precautions against such danger.

that such relief is in fact possible; to the same effect are the observations of Winfield:[13]

> The defendent is answerable not only for his own wrongdoing . . . but also for the fault of an independent contractor. The duty is thus pitched higher than in negligence, but lower than that in *Rylands v. Fletcher,* for he is not liable if he has taken reasonable care.

Accepting that the appellant could thus have escaped liability, it becomes necessary to consider the acts on his part sufficient to afford him this relief. It is apparent that a mere warning to the workers to take every reasonable precaution and to accomplish the undertaking in the safest possible manner remains far from adequate, because, for all such

12. **Bower v. Peate** -- [876] 1 Q.B. 326.
13. Winfield on Torts, (5th ed.) p. 598.

pleadings, he has no guarantee that they will proceed accordingly. Once again the matter of knowledge becomes important: the principal's must equal that of the contractor, if he is competently to determine when the undertaking is in fact being carried out in the proper and most desirable manner. The possession and application of such knowledge, it is submitted, elevates the principal to a position where he is affecting, if not in fact directing, the actual mode of work; thereby is erased the sole distinguishing factor essential to the principal-independent contractor relationship.

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REFORM OF THE STATUTE OF FRAUDS IN ENGLAND.

Last June seventh the Law Reform (Enforcement of Contracts) Act, 1954, came into force in England and Wales; and in the following month judgment was delivered[1] in what may prove to be the last of a countless number of cases in which the Statute of Frauds has been pleaded as a defence.

The legislation, which amended section 4 of the Statute of Frauds[2] and repealed section 4 of the Sale of Goods Act,[3] has met with almost universal approval—most people considering it long overdue. It has been suggested that no one is sorry to see the end of the Statute of Frauds except perhaps a few law teachers, who have lost a perennially fertile field for lecture and examination! The Act, in the form of a private bill, gave effect to the First Report of the Law Reform Committee[4] presented to Parliament in April, 1953. This committee in effect agreed substantially with the recommendations of the Law Revision Committee[5] with regard to these matters, and endorsed the reasoning of that earlier group.

The Act repealed the whole of section 4 of the Statute of Frauds except the clause relating to guarantees ("any special promise to answer for the debt, default or miscarriage of another person"). The clause relating to land and interests therein had been repealed before and replaced by section 40 of the Law of Property Act, 1925.

The Law Revision Committee, after careful consideration, had recommended the reform

1. **Craxfords (Ramsgate) Ltd. v. Williams and Steer Manufacturing Co., Ltd.**, [1954], 1 W.L.R. 1130.
2. In New Brunswick, the corresponding sections to those repealed are subsections (a), (c) and (e) of section 1, Chapter 218, R.S.N.B., 1952.
3. In New Brunswick, section 5, Chapter 199, R.S.N.B., 1952.
4. Law Reform Committee, First Report, 1953, Cmd. 8809.
5. Law Revision Committee, Sixth Interim Report, 1937, Cmd. 5449.

> on the grounds that [the sections] had outlived the conditions which generated and, in some degree, justified them; that they operated in an illogical and often one-sided and haphazard fashion over a field arbitrarily chosen; and that on the whole they promote rather than restrain dishonesty.[6]

The Statute of Frauds had been passed mainly to prevent perjury in times when parties to an action could not themselves give evidence. There is no need to discuss in detail the evils of the Statute, nor the reasons given for the recommendations. They have been the object of considerable comment; and the reasons will be found in the report of the Law Revision Committee.[7] The same reasoning is applicable to Canada.

The earlier committee—the Law Revision Committee—had, in its recommendations, included the repeal of the clause referring to guarantees. A majority, however, had expressed the view that contracts of guarantee should be void unless in writing. The Law Reform Committee in its report took the middle course and suggested that the law in this respect should remain unchanged. As a result, the legislation did not repeal that clause and contracts of guarantee remain unenforceable unless evidenced by writing[8]. There is still considerable difference of opinion on this point, and there are indications that the committee members were not unanimous in wishing that the clause remain untouched. Dr. Goodhart, a member of both committees, has intimated[9] that it was feared that insistence on inclusion of guarantees in the repeal might well have lost the whole measure. The matter was, then, dropped for the time being in order that the other reforms might be effected. Although this difference of opinion exists with respect to guarantees, as opposed to the apparent unanimity with regard to the other proposals, it seems relatively safe to say that the weight of opinion still favours repeal of this last vestige of the Statute.

The reasons given by the committee for retaining the requirement of writing in guarantees are weak. They point out the distinction that guarantees are a type of contract which most people know quite definitely must be in writing, but fail to deal adequately with the hazy dichotomy between guarantees and indemnities. Surely there is no real difference in principle between these two contracts, and it seems evident that it arose as a result of an ingenious judicial play on words directed at circumventing the Statute of Frauds and thereby alleviating the injustices assumed to be caused by it. It is submitted that the reasons for repealing the other clauses apply with equal force to contracts of guar-

6. Law Reform Committee Report, **op. cit.**, p. 3, para. "2".
7. Reprinted in (1937), 15 C.B.R. 585.
8. The fact that the Statute of Frauds did not operate to avoid a contract (i.e. affected procedural rather than substantive rights) is illustrated by **Craxfords** case (above). In that case pleadings were filed months before the new Act came into force, and the Statute of Frauds was pleaded as a defence. Pilcher, J., noted that the new Act referred to all contracts, whether made before or after it, and ruled out the Statute of Frauds as a defence. Inherent in the judgment was the conclusion that the Statute of Frauds affected only procedural rights, for otherwise no rights would have existed upon which an adjudication could be made.
9. Dr. Goodhart, (1954), 70 Law Quarterly Review 441; see also Mr. Gunfield, (1954), 17 Modern Law Review 451.

antee, and it is unfortunate that the rather artificial distinction between guarantee and indemnity has been retained.

In its report, The Law Reform Committee mentioned that enquiries were made into the position in the other common law countries and it was found that no attempt has been made to change the law with respect to the matters under discussion. The committee did not feel this to be of any weight in deciding on the desirability of the proposed legislation. On the contrary, the belief was stated that the other common law countries might well be prepared to follow the lead of England in the matter.

It is to be hoped that New Brunswick, and indeed all the Canadian legislatures, take this suggestion; and I would urge that in doing so they adopt the 1937 committee's recommendations: i.e., extinguish the necessity for writing in contracts of guarantee, as well as in the other classes, save of course those relating to land.

A more general need, emphasized by this particular activity in legal reform, is some permanent machinery for ensuring that reforms are effected. In the debate on the Law Reform Bill in the House of Commons, Mr. G. R. Mitchison commented on the fact that it was a private member's bill and pointed out that, since there is no great public pressure brought to bear on such matters, the government neglects them.

> The machinery for putting into effect recommendations for law reform is lamentably lacking . . . There ought to be careful consideration of the means by which we can get this kind of thing put through less accidentally and more quickly.[10]

Thus the inadequate provision for implementation of committee recommendations is deplored in England. But in New Brunswick there is not even a committee to which references may be made to consider "proper changes of a non-controversial and non-party character recommending themselves to the legal profession as a whole and in the interests of those who have to make use of the law . . . in the ordinary course of their lives and business."[11] True, there is a periodic revision of the Statute law, and the Barristers' Society often makes recommendations for desirable reforms. Something more is needed, however, to keep the law abreast of modern conditions. How often is a judge heard to make a decision which even he himself believes contrary to justice? It is for the judge to determine and apply the law; for the legislature to change it if need be. It would be of great benefit if the legislature's function of keeping the law up to date were bolstered by the introduction of a whereby this duty could be discharged without impinging too greatly on the members' already overcrowded schedule. Judges should not be forced to achieve justice by resorting to artificial and far-fetched distinctions. They themselves are the first to deplore "judge-made-law" of that kind.

10. Mr. G. R. Mitchison, M.P., **Parliamentary Debates (Hansard)**, 12 February 1954, Vol. 523, p. 1573.
11. **Ibid.**

What is needed is a permanent and effective system whereby the law may be kept under constant review; a body to study aspects of the law and make recommendations when changes are considered necessary; and most important of all, a system which will ensure prompt and effective machinery for translating such recommendations into law.

New Brunswick has in the past shown a commendable willingness to implement reforms in the law when such are brought to attention. An example is the manner in which the legislature became the first in Canada to adopt the new Wills Act proposed by the Conference of Commissioners on Uniformity of Legislation in Canada. It is to be hoped that this progressive spirit will continue and that the legislature in future will take advantage of the work of such bodies as the Law Reform Committee. In particular, it should repeal s. 1 (a), (b), (c), (e) and s. 2 of the Statute of Frauds and s. 5 of the Sale of Goods Act.

—T. B. Drummie,
Lord Beaverbrook Overseas Scholar,
London School of Economcs.

IVEAGH V. INLAND REVENUE COMMISSIONERS *

Conflict of Laws — Voluntary Settlement of Intagible Movables — Proper Law of the Settlement — Imputed Intention of the Parties — Relevant Considerations

By a voluntary settlement dated July 1, 1907, when the territory of the Republic of Ireland formed part of the United Kingdom, certain shares, bearer bonds and other securities were settled on E.G. for life with a power of appointment in favour of his wife and children. The settlement contained a very wide investment clause, including expressly investment in land in England, but there was no express power to invest in freehold land in Ireland. The settlement was drafted and prepared by solicitors in England and at all material times the shares and other indicia of title were kept in a bank in England, although there was power under the settlement to keep the securities in Ireland. At the date of the settlement the domicile of all the parties to it was Ireland. It was executed in England. The tenant for life had married in 1903, and by appointments made in 1946 and 1948 he surrendered his life interest in part of the settled property in favour of his daughters. On a question as to whether estate duty was exigible on £75,000 ordinary shares in an English company, Arthur Guinness, Son & Co. Ltd., registered on the register kept in Dublin by the company and locally situate there,[1] on the death of the tenant for life in 1949, it was held,

* [1954] Ch. 364.

1. Shares in a company are situate at the place where they can be transferred, which is normally the registered office. See **Dicey's Conflict of Laws**, 6th Ed., 1949, p. 306. **Land, Trusts in the Conflict of Laws**, 1940, holds the view that "for purposes of determining the law governing trusts of intangible personal property the element of location of the trust property should be used in the sense of the place where the securities are physicaily kept." (p. 21). He states that this is the view the American courts have taken. (p. 88). Cf. **Treasurer of Ontario v. Blonde et al.** [1946] 4 D.L.R. 785; [1947] A.C. 24 (J.C.P.C.) Falconbridge, **Conflict of Law**, 2nd. Ed., 1954, at p. 500 says in reference to the **situs** of shares: ". . . it is not certain to what extent the tests adopted for the purposes of taxation are identical with the tests that should be adopted for the purpose of the conflict of laws . . ."

by Upjohn J., that for the purposes of estate duty the settlement was governed by its proper law which was the law of the Republic of Ireland.[2]

In determining the proper law, the learned judge considered the domicile of the settlor, the beneficiaries and the trustees, the form and contents of the settlement, the place where the settlement was drafted and executed, in what country the trust was managed, the nature and **situs** of the trust property and the physical location of the share certificates and other indicia of title, and the scope of the investment clause.[3]

One of the significant features of this judgment is the holding by the court that the law which governs the "rights and liabilities" under a voluntary settlement is the law by reference to which the settlement was made: the proper law. This conclusion was reached by encompassing the voluntary settlement within the principle applied to a marriage settlement in **Duke of Marlborough v. A.-G. (No. 1)**,[4] and applying the theory of the intention of the parties—prevalent in the field of pure contractual obligations—to the determination of the proper law of a trust **inter vivos** of intangible movables where foreign elements are involved, for estate duty purposes. In his discussion of the development of the intent theory in arriving at the law governing a contract, Prof. Nussbaum makes this observation:

> Recently the theory which makes the applicable law dependent upon the intent of the parties — we shall briefly term it the 'intent theory' — has even been carried over to trusts.[5]

The view of this eminent jurist is indicative of the trend of the courts in some American states. We shall seek to determine here if **Re Iveagh** represents the first application of the doctrine of the proper law to **inter vivos** trusts of intangible movables by an English court.

A preliminary point peculiar to this case should at the outset be made. When parties contract with a definite proper law in view, even though that law must be discovered for and attributed to them by the court, it is the law of that country at the time a feature of the contract calls for adjudication, e.g., when a breach occurs, and not the law at the time the contract is entered into that must be applied.[6] However, it is when the contract is made that the selection of the proper law takes place, or is deemed to take place. When the settlement in the instant case was executed in 1907, England and Ireland were under one system of law—that of the United Kingdom. Now, since the parties made no express choice of law to govern the trust on the execution of it, one cannot ascribe to them a choice of English

2. [1954] Ch. 364; [1954] 2 W.L.R. 494; [1954] 1 All E. R. 609.
3. In the United States, where there has been a steadier development of this aspect of the conflict of laws, additional elements have been the forum of the action and the implied intention of the settlor. See Swabenland, **"The Conflict of Laws in the Administration of Express Trusts of Personal Property"**, [1936], 45 Yale L.J. 438 at pp. 442-3.
4. [1945] Ch. 78; [1945] 1 All E. R. 165 (C.A.), which, in turn, derived its rule from conflictual rules respecting contracts.
5. Nussbaum, **Principles of Private International Law**, 1943, p. 159. In a footnote to this statement the author states that there was not, as of then, any discussion of this topic, although there had been decided cases in the U. S.
6. We are not here concerned with the situation where the parties incorporate into a contract particular provisions of a given system of law which remains unaffected by any relevant change in that law once the contract has been entered into. See Cheshire, **Private International Law**, 4th Ed., 1952, pp. 209-10.

or Irish law at that time. Indeed, the question would have no significance.[7] As Upjohn J. remarked:

> It is in a sense a hypothetical question because in 1907 . . . it was all one country, and the question whether the law of Ireland or the law of England governed was not a real question.[8]

But, with the political separation of the two countries the possibility of the present conflict arose and crystallized in the instant case. Thus, the intention of the parties, if one was to be ascertained, must be entirely artificial, and the selection of the proper law totally dependent on other considerations albeit cloaked in the terms of the parties' intention.[9]

A discussion of this topic is hampered because authorities on private international law (and judges, too) do not seem to have separated it from marriage settlements or the sale of chattels or the assignment of choses in action. As one writer said:

> Yet for the purposes of the conflict of laws one can not comfortably identify the typical *inter vivos* trust transaction either with the transmission of an estate upon death or marriage or with the sale or incumbrance of chattels.[10]

Within the framework of the trust concept itself clarity will be encouraged by adopting the following classification, gathered from writers on this matter:[11]

Between (1) a) the **creation** of the trust:

(i) capacity of the parties to the trust.
(ii) formal validity of the trust.
(iii) essential validity of the trust.

b) the **administration** of the trust.
c) **construction** of the trust instrument.
d) **jurisdiction** of the court to determine the above matters.

7. Moreover, the parties could not be heard to say in court (as they did in **The Assunzione** [1954] 2 W.L.R. 234; [1954] 1 All E.R. 278, C.A.) that they held diametrically opposed views as to which law they intended to govern their contract, although, as Singleton L.J. pointed out, nothing could be gained by demonstrating this fact since "that would have meant that there would have been no contract."

8. **Iveagh v. Inland Revenue Commissioners** [1954] 1 All E.R. 609 at p. 614.

9. Had the settlement contained a clause stating that the law of the United Kingdom should govern the validity and administration of the settlement, even more formidable difficulties would have arisen. How could that intention **per se** be effectuated? Moreover, would the express use of the phrase "English law" have necessarily meant the law of England as distinguished from the law of the U.K.?

10. Cavers, "Trusts Inter Vivos and Conflict of Laws", [1930], 44 Harv. L. Rev. 161 at p. 188. This article investigated the problem of the law which determined the validity of an **inter vivos** trust of movables and set aside that of administration. Lathem in "The Creation and Administration of a Trust in the Conflict of Laws," [1953], 6 Current Legal Problems, p. 176, says: "But although books on the Conflict of Laws devote a chapter to contract, and one to tort, I know of none with a systematic chapter on trusts."
Halsbury, 3rd Ed., vol. 7, p. 76 discusses **Re Iveagh** under the heading Settlements and Assignments, making no distinction between an ordinary trust and a marriage settlement.

11. Land, **op. cit.**, pp. 1-2; Beale, "Living Trusts of Movables in the Conflict of Laws", [1932], 45 Harv. L. Rev. 969; Cavers, **loc. cit.**, **passim**; Swabenland, **loc cit.**; Hoar, "Some Aspects of Trusts in the Conflict of Laws", [1948], 26 Can. Bar Rev. 1415.

Between (2) taxation of trust property, including inheritance, property, gift and income tax.
Between (3) a) testamentary trusts and
b) **inter vivos** trusts.
Between (4) a) trusts of immovables and
b) trusts of tangible movables and intangibles.

Since the distinctions in these various groups are of different orders, it is evident that there are numerous potential combinations of them; e.g., the court might be concerned with the administration of a trust **inter vivos** of intangible movables or a problem of taxation respecting a testamentary trust of movables. Unfortunately, the above classification has not been recognized by English courts. However, it would appear that matters of succession duty[12] have been treated under administration.[13] Lord Greene M.R. in **Duke of Marlborough v. A.-G. (No. 1)** said:

> The next case is *Attorney-General v. Jewish Colonization Association*.[14] There a domiciled Austrian assigned property to an English company by deed under which the settlor was to receive the income during his life and after his death the company was to apply the property for the benefit of Russian Jews. The settlement was written in the English language and was in English form. The company was one which apart from formal matters conducted its business from its principal office in Paris. At the death of the donor when duty was claimed the greater part of the investments were foreign investments and only a small proportion were British. Speaking of this case in *Attorney-General v. Belilios*[15] Sargant L.J. points out that it would not have been necessary for the court 'to apply foreign law *for the purposes of administration* . . .[16]

English decisions are scanty and relate in the main to marriage settlements,[17] and "they strongly point to the conclusion that the courts are inclined to emphasize the contractual aspect of trust transfers in preference to assimilating them to property transfers."[18] An early case considering an **inter vivos** trust of intangible movables, which was not cited in **Re Iveagh**, is **A.-G. v. Felce** [19] where a Frenchman created a trust in 1880. The trust **res** — various foreign stocks and

12. Succession duty was abolished in England by the Finance Act, 1949, s. 27 (1) and (2).
13. Croucher, "Trusts of Moveables in Private International Law", [1940], 4 Modern L. Rev. 111 and cases therein discussed. Upjohn J. in **Re Iveagh** considers the question as one affecting the "rights and liabilities of the parties", a phrase which could embrace validity as well as administration. Cf. Schmitthoff, **English Conflict of Laws**, 3rd Ed., 1954, p. 218, where the author cites **Re Iveagh** in support of the statement that "as far as the creation [i.e., the validity] of the trust is concerned, there can be little doubt that that act is governed by the law intended by the settlor and the other parties to the trust."
14. [1900] 2 QB 556 [Ridley & Darling JJ.]; [1901] 1 K.B. 123 (C.A.)
15. [1928] 1 K.B. 798 at p. 820 (C.A.)
16. [1945] Ch. 78 at p. 86 (C.A.) This case **itself** involved a determination whether succession duty was exigible on certain trust funds settled under a marriage settlement. Cf. Lathem, **Op cit.**, p. 183, where the view is taken that these succession duty cases purported to find the law governing the **creation** of the trust.
17. Croucher, **loc. cit.**, emphasizes that the English cases he examines relate to marriage settlements, and that the principles of them might not necessarily apply to ordinary trusts.
18. [1950], 3 International L. Q. at p. 89. The writer of this note states that the only relevant English decision is **Re Pilkington's Will Trusts** [1937] 3 All E. R. 213 [Farwell J.]. He discusses an Australian case which considered the law applying to the validity of an **inter vivos trust.**
19. [1894], 10 T.L.R. 337 (Q.B. Div., Mathew & Cave JJ. Westlake, **Private International Law**, 7th Ed., 1925, appears to be the only recent conflicts text to cite this case.

securities—was placed in the hands of an English trustee domiciled in England. All the stocks and securities, which were payable to bearer, were deposited by the trustee in an English bank (and thus situate in England) and the trustee made a declaration of trust in accordance with the settlor's direction, for the benefit of certain persons, who were all Frenchmen domiciled in France, but were not his lineal issue. On the death of the trustee, the defendant and another were his executors. The settlor died in 1891 and the Commissioner of Inland Revenue claimed stamp and estate duty (which was paid) and also succession duty on the capital value of the trust funds (less the account duty) passing on the settlor's death and derived from him as predecessor, under the declaration of trust, to the persons mentioned as beneficiaries. The executors refused to pay the succession duty.

The Crown argued that the declaration of trust was executed in England, that the trustee was and continued to be domiciled in England and the executors were domiciled in England, and that the securities were situate in England. The Crown stressed the point that the trust was created in order to obtain the protection and benefit of English law and was thus an "English trust". Dicey Q.C. (for the executors), contended that the court must consider whether under all the circumstances the fund and the objects of the trust were foreign or English. The court held that the trust was English and consequently succession duty was payable. In so doing, it followed **Wallace v. A.-G.**,[20] **A.-G. v. Campbell** [21] and **In re Cigala's Trusts.**[22] Mr. Justice Cave said:

> The disposer of the funds in the present case has expressly created an English trust to secure it according to English law, on account of the apprehensions he entertained as to the state of affairs in France.[23]

The court used no phraseology reminiscent of "proper law" but instead spoke of an "English trust". Nevertheless, although the report of this case is short and the judgments evidently oral, it is submitted that the leading factor which brought the court to an application of English law as governing the trust was the intention of the settlor as expressed in his desire to obtain the protection of English law. It will be observed that the court rejected the very element which weighed most heavily with Upjohn J. in **Re Iveagh,** namely, the domicile of the settlor and the beneficiaries. In both cases the law applied was that of the **situs** of the trust property, but in the **Felce** case, whether the court regarded the various other factors which established a connection with England as relevant considerations does not appear from the judgments.

In the **Re Iveagh** situation the subjective theory of intention breaks down, whether it is attempted to imply or to impute that intention. It was impossible for the parties on making the settlement to choose between English and Irish law since they formed one system. The theory might be supported by adopting Schmitthoff's view that:

20. [1865], L.R. 1 Ch. Ap. 1.
21. [1872], L.R. 5 H.L. 524.
22. [1878], 7 ch. D. 351 (Jessel M.R.)
23. [1894], 10 T.L.R. 337 at p. 338.

> . . . the search for the presumed intention of the parties becomes, in fact, the attribution of a fictitious intention to them and the courts insert in the contract a provision which the parties, 'as just and reasonable people' would probably have inserted if their attention had been directed to contigencies which escaped their notice.[24]

In the present case this would involve inserting in the settlement by the court a provision that if at any time after it was executed, the law of England and Ireland were to differ, then Irish law would govern the trust. Certainly, in **Re Iveagh** there was no real basis for the discussion of intention, be it that of the parties or that of the settlor only. This is not to say that intention should never be the means of ascertaining the law governing an **inter vivos** trust; but, it is submitted, the intention should be limited to that of the settlor, although one of the matters in discerning this intention could be the domicile of the beneficiaries.[25] In this respect there would be a departure from the intention theory in contract.

If this case is looked upon as supporting the objective theory of intention—the law of that country governs with which the contract has the most real or substantial connection—it must be remembered that this connection is not a matter of quantity, for in **Re Iveagh**, a majority of factors connected the settlement with England.[26]

Succession duty was attracted in England[27] if the successor becomes entitled to the property by English law, and that is so when "the property is found to be legally vested in a person subject to the jurisdiction of the British courts, and the title to the beneficial interest in the property is regulated and capable of being enforced by the laws of this country . . ."[28] In Canada, payment of succession duty on a movable depends on its **situs**, since under the B.N.A. Act, provincial authority to levy tax is confined to taxation "within the province".[29] **Situs**, then, is all-important, possibly to the exclusion of all other elements, even where the movable is held in trust. An instructive case is **Attorney-General for Ontario v. Fasken et al.**[30] where F set up a trust of a chose in action in these circumstances: while domiciled and resident in Ontario, he advanced money to a Texas company

24. Schmitthoff, **Op cit.**, p. 105. See also **The Assunzione** [1954] 1 All E. R. 278; [1954] 2 W.L.R. 234 (C.A.) and note in 1954, 17 Modern L. Rev. at p. 255. It seems obvious that it is reasonability in the judge's conception. The learned judge in **Re Iveagh** [1954] 1 All E. R at p 616) said: "the decisive matter here, **in my judgment**, is that this is a settlement to benefit a family in Ireland . . ." See in this regard **George C. Anspach Co. Ltd. v. C.N.R.** [1950] 3 D.L.R. 26 (Ont. H. C. Wilson J.).

25. This test would lose significance when the beneficiaries did not have a common domicile.

26. Numerical preponderance of factual connections has been suggested to be of importance in deciding the court which has **jurisdiction** to pass on questions of administration of the trust. Swabenland, **Op. cit.**, at pp. 438-9.

27. See Footnote 12, **supra.**

28. Halsbury, Laws of England, 2nd Ed , Vol. 13, p. 357 **et seq**, where an alternative test is suggested in the settlor's intention. See **Attorney-General v. Jewish Colonization Association** [1901] 1 K.B. 123 per Collins L.J. at p. 136, 137. Also, Halsbury, **Op. cit**, s. 396: "Where a person, whether domiciled in this country or abroad by an **inter vivos** disposition, creates an English or Scottish settlement of personal property, whether locally situate in this country or abroad, succession duty is chargeable upon the death of a life tenant under the settlement, even though the property may then be locally situate abroad." The question, of course, is, How is the court to determine that the settlement is English so that it is governed by English law.

29. B.N.A. Act, 1867, s. 92 (2).

30. [1935] O.R. 288, [1935] 3 D.L.R. 100 (Ont. C.A.).

with head office and only place of business in that state. Later, F procured from the company a written acknowledgement of the debt in favour of three nominees, who, by a declaration of trust prepared in Ontario, became trustees of the chose for beneficiaries outside Ontario. F died domiciled in Ontario and the Ontario government claimed payment of succession duty on the debt owing by that company. The court held that, **by the law of Texas,** the debt had a **situs** in Texas and was not subject to duty in Ontario.

Counsel for the Attorney-General stressed the presence of a trust with so many factors connecting it with Ontario and relied on many of the cases cited above. The view of the court on the importance of their being a trust is epitomized in a statement in counsel for the defendant's argument:

> As to the contention that the settlement was an Ontario settlement, the form and language and manner of execution of the declaration have nothing to do with the situs of the property.[31]

It is submitted that **Re Iveagh** lays down a rule which extends beyond the matter of estate duty and includes the administration[32] (and possibly the validity) of a trust **inter vivos** of movables. There is a Canadian case concerning the administration of a testamentary trust which, as a result, should be noted, namely, **In re Nanton Estate.**[33] In this case a Manitoba court applied the **lex situs,** which was also the **lex fori,** as the law controlling what was without a doubt a question of administration. In so doing, the court adopted a statement by Dean Falconbridge:

> It would seem that whatever be the nature of the trust *res* and whatever be the law governing the creation of the trust, the law governing the administration should, as a general rule, be the *lex rei sitae*, including whatever effect *that law* gives to the expressed or implied intention of the testator.[34]

Since the author sets out a simple rule for the administration of an **inter vivos** trust,[35] it is quite possible that a Canadian judge might prefer this view to that in **Re Iveagh.** Perhaps the only appreciable differences between the two are that the English case speaks of "the intention of the parties" while the Canadian decision touches only that of the settlor, and secondly, (and this may be the more divergent element), the Manitoba case would have us discover the settlor's intention by the **lex rei sitae** while in **Re Iveagh** the parties' intention was ascertained by application of the **lex fori.**

—Franklin O. Leger,
Lord Beaverbrook Overseas Scholar,
London School of Economcs.

31. **Ibid., at p. 290.**
32. Or **other** matters of administration, if the exigibility of duty be looked upon as arising under the law governing the administration of the **inter vivos** trust.
33. [1948], 56 Man. R. 71; [1948] 2 W.W.R. 113 (Williams C.J.K.B.) followed in **In re Oldfield Estate (No. 2);** [1949], 57 Man. R. 193 (Williams C.J.K.B.).
34. Falconbridge, **Op cit.,** 1947, p. 560; 2nd Ed., 1954, p. 639. The validity of a testamentary trust is, in general, governed by the law of the testator's domicile at his death.
35. **Ibid.,** p. 640.

Practice Notes

1. TAXATION OF COSTS

Under the rules of Court, a Plaintiff who is a necessary witness, may be allowed the reasonable and necessary expenses incurred by him in attending the trial of an action. **Fox v. Toronto & Nipissing Railway Co.**, 7 PR, and cases cited therein, **Widdifield on Costs** followed. **Routtu v. Routtu.** Saint John County Court,

Ritchie, McKelvey & MacKay, Plaintiff's Solicitors.

2. NOLLE PROSEQUI

A **nolle prosequi** cannot be entered by the Attorney General after a verdict has been delivered in a Criminal Case.

Commonwealth v. Tulk, 20 Pick 356 (Mass). disapproved.

Regina v. Swanton, per Keirstead Co. C. J.

3. CONDITIONS FOR SUMMARY APPEAL

Section 750 (c) of the Criminal Code provides, where the appeal is from a conviction or order whereby a penalty or sum of money is adjudged to be paid, the appellant shall deposit with the Justice making the conviction or order an amount sufficient to cover the amount so adjudged to be paid together with such further amount as such Justice deems sufficient to cover the cost of the appeal. Held, where the fine was paid but the Justice refused to set a sum for costs, the appellant had done all within its power to comply with the section and was entitled to proceed with his appeal.

Regina v. Boone, per Keirstead, Co. C. J.

4. SHERIFF'S FEES ON SERVICE

When a number of papers are served on a number of Defendants only one fee is allowed. Entry fee and return fee is allowed for each document. In this action a writ of Summons, an injunction order, a notice of motion, a notice of appointment and Ten affidavits were served on each of 22 Defendants. The Sheriff submitted a bill of $333.50 for these services. It was based on entry 20c, service 50c, return 30c for each of 14 papers on each of the 22 defendants, plus mileage.

On taxation it was held that there was only one entry and one return of each document, and the Sheriff was entitled to only one of such fees for each document. A fee for service was allowed only with respect to each independent paper. These were the Writ, the Notice

of Motion and the injunction. The affidavits were to be considered as part of the Injunction Order. Accordingly the Sheriff's Bill was reduced from $333.50 to $59.80.

Lawson Motors Limited v. Automotive Lodge No. 1700 et al.
14 April—53, per Registrar Supreme Court.
Ritchie, McKelvey & Mackay, Plaintiff's Solicitor.
Teed & Teed, Defendant's Solicitor.
No one for the High Sheriff of Saint John.

5. EXTENSION OF TIME TO APPEAL

An application to enlarge time for giving notice of appeal should not be made **ex parte** but on Notice of Motion or by Summons. Judgment was delivered dismissing the plaintiff's action without costs. After the expiration of the time allowed for the service of a notice of appeal, as provided in Order 58, rule 3, the plaintiff made an **ex parte** application and was granted an order extending the time for serving the Notice of Appeal. On receipt of this order the defendant made application to set the order aside on the ground that an application to extend the time for service of a notice of appeal cannot be made **ex parte.** It was argued for the Defendant that once the time for appeal as of right, has expired the successful party has a vested right in the judgment, and should not be deprived of that right without being given an opportunity of showing cause why an application for extension of time for appeal should be refused. Order 52 rule 3; **Jackson v. McLellan,** 19 N.B.R., 494. **In Re Lawrence** L.R. 4 Ch. D. 139; **Commercial Bank of N.B. v. Price,** N.B.R. 97 and **Saint John-Quebec Ry. Co. v. Fraser** 43 N.B.R. 188 cited.

The order for extending time for service of the Notice of appeal was set aside.

Selby v. Selby. Per Richards, C.J. Jan. 1955.
J. F. H. Teed, For Defendant (Respondent)
R. V. Limerick, For Plaintiff, (Appellant)

6. WHAT IS NECESSARY FOR BRIEF FEE

It was held that under the County Court Scale of costs to entitle a party to a fee for brief on law under item 8, the solicitor should at least prepare some form of written memorandum on points of law, prior to judgment being rendered.

It was not necessary that the memorandum be extensive or served on the opposite party. However, in order to justify the fee there should be some written paper which could be used, on the application or trial. **Bustard v. Durley** per Keirstead, Co. Ct. J.

Teed & Teed, for Plaintiff
Gibbon & Harrigan for Defendant.

7. TAXATION OF COSTS ON DIFFERENT SCALES.

The Plaintiff succeeded on his claim for $87.00, and succeeded against the Defendant's counter-claim for $387.00, in an action in tort.

On taxation it was held that the plaintiff's costs of his claim be allowed on the 1st. scale, that the plaintiff costs of opposing the counter-claim be allowed on the third scale and that items which were common to both defence and counter-claim should be divided where possible and such parts allowed on the appropriate scale.
Bustard v. Durley, per Keirstead, Co. Ct. J.
Teed & Teed, for Plaintiff
Gibbon & Harrigan for Defendant.

8. WHEN WRIT MAY BE FILED NUNC PRO TUNC.

Under Order 60, Rule 2, if a writ is not filed within thirty days of service double filing fees must be paid, unless an order is obtained dispensing with double payment. When the plaintiff by affidavit, showed the defendant, after being served with the writ, had arranged for payments on account, and later made default, permission was granted to file the writ without paying double fees.

John F. Rooney v. C. W. Myles, per Keirstead, Co. Ct. J.
H. E. Ryan, Plaintiff's Solicitor.

9. LEAVE TO SERVE WRIT OUTSIDE PROVINCE

Under Order 11, Rule 1 (g), application was made for leave to issue a Writ outside the jurisdiction of the Province. The Plaintiff showed (a) facts from which it appeared there was a good cause of action for debt, (b) the opinion of counsel that there was a good cause of action on the facts stated, (c) facts which indicated that there would be assets in New Brunswick which might be used to satisfy any judgment recovered against the intended defendant, (d) that the intended Defendant was a British subject, (e) that the intended Defendant was believed to be in Manitoba. Upon these facts the application for leave to issue a writ for service in Manitoba was granted. Costs of the application were ordered costs in the cause.

Regal Craft Company v. Albert Hall, per Keirstead Co. Ct. J.
Ritchie, McKelvy & Mackay, Plaintiff's Solicitor.

Eric L. Teed,
Saint John, N. B.

SOME STATISTICS
OF THE BAR
OF NEW BRUNSWICK

EXPERIENCE OF BARRISTERS BY YEAR OF ADMISSION TO THE BAR

County	Before 1904	1904-13	1914-23	1924-33	1934-43	1944-53	Total
Albert	—	—	1	—	—	—	1
Carleton	—	—	2	2	1	3	8
Charlotte	—	—	2	3	1	—	6
Gloucester *	1	—	1	1	2	7	12
Kent	—	—	1	2	—	1	4
Kings	—	—	—	2	4	1	7
Madawaska	—	1	1	2	4	7	15
Northumberland	1	—	3	2	2	3	11
Queens	—	—	—	—	—	1	1
Restigouche	—	—	1	3	3	6	13
Saint John	2	6	10	6	17	33	74
Sunbury	—	—	—	1	—	—	1
Westmorland	1	3	7	4	11	23	49
Victoria	—	—	1	1	2	4	8
York	1	1	5	6	7	14	34
Total	6	11	34	36	54	103	244

* One Gloucester County Barrister has year of admission omitted.
Source: Canada Law List 1954.

SIZE OF FIRM BY BARRISTERS

	Practicing alone	2-member firms	3-member firms	4-member firms	5-member firms	Total
Saint John *	42	14	6	12	—	74
Moncton	21	18	3	—	—	42
Fredericton	11	8	6	4	5	34
Other communities	76	16	3	—	—	95
Total	150	56	18	16	5	245

* Including Lancaster.
Source: Canada Law List 1954.

POPULATION DENSITY TO NUMBER OF BARRISTERS BY COUNTIES

County	Number of Barristers *	Population **	Number of Persons Per Barrister (in thousands)
Albert	1	9,910	9.91
Carleton	8	22,269	2.78
Charlotte	6	25,136	4.19
Gloucester	13	57,489	4.42
Kent	4	26,767	6.69
Kings	7	22,467	3.21
Madawaska	15	34,329	2.89
Northumberland	11	42,994	3.91
Queens	1	13,206	13.21
Restigouche	13	36,212	2.79
Saint John	74	74,497	1.01
Sunbury	1	9,322	9.32
Westmorland	49	80,012	1.63
Victoria	8	18,541	2.32
York	34	42,546	1.26
Total	245	515,697	2.10

* Canada Law List 1954.
** 1951 Census.