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CONTENTS

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Editorial

AN ATTACK ON A WINDMILL

"When I consider how my light is spent
Ere half my days in this dark world and wide,
And that one talent which is death to hide
Lodged with me useless, – – – – – –"

Milton-On His Blindness

In the material world in which we struggle one often loses sight of his end and for it substitutes some other thing on which he places false value. If we fall into this error, our aim in life is to all intents and purposes frustrated even though we do not perceive the ensuing result.

A law student when first entering upon the study of law is usually somewhat confused as to the objects of his efforts, and unless he absorbs his knowledge in the proper light he is liable to fall into error. The proper time to impress on the student the duty owed to his fellow citizens, the ethics of his profession, the place which he is to take in society and the manner in which he is to exercise his "one talent" is while he is at law school. At this time he is sheltered from "this dark world and wide" and is more likely to conceive the true conception of his talent, not being at this time subject to the influences of false values to which he might otherwise fall prey without the proper guidance.

Many lawyers place the practice of law second to the acquisition of material wealth. They use their profession primarily to make money and herein lies the confusion of ends. In itself the dollar is not undesirable; on the contrary it is very necessary, but it should not occupy a position prior to the primary object. When this happens, he is failing to fulfill his duty to society. If he practices his profession in the true light, monetary success should necessarily follow.

The true light referred to is that approach to human relations which disregards ulterior motives and gives effect to the great principles on which our law is based. The medical doctor deals with the preservation of health and life and this is his great object; the lawyer deals with the protection of human rights and liberties – indeed a greater object. For this reason the legal profession is the most noble of the professions. As evidenced by history most people would rather lose their lives than their fundamental rights, without which life would not be worth living.

Unfortunately, the general public do not hold this view. They for the most part look on lawyers as parasites on society; a necessary evil in the social set-up. Could the reason for this be the abuses which flow from the confusion of basic aims?

To escape the pitfalls of a materialistic age which tend to obscure the end to be sought by lawyers, and to give to the profession its proper efficacy, the student should be moulded while the clay is supple.

This may be accomplished by a proper stress being placed on these matters firstly by lecturers who often are too engrossed in their particular subject to be able to see the forest for the trees. Again, good example, advice and a genuine interest on the part of the members of the bar will further this object. But ultimately the task is a subjective one to be left to the mind of the student who by the time he reaches law school should be mature enough to approach the matter in a reasonable mode and arrive at the proposed conclusion. However his task does not stop there. He must carry his principles into the world and adhere to them even in the face of opposition which he may not recognize as such at the time.

What use would it be to a contractor to assemble his tools and materials and proceed on his undertaking without the guidance of blueprints? Again what would happen if he erroneously used false plans? In both cases chaos would ensue. So also the law student has to be guided by right principles to ensure a sound and enduring result.

If the student could be impressed by the onus which is placed on him to serve society instead of sapping it, then he would practise his talent in the true light with the resulting benefits to himself, to his profession and to his fellow man.

J. P. F.

"ATTENTION MEMBERS OF THE BAR"

The attention of the members of the profession is drawn to the present endeavour being made by the Faculty of the Law School to supplement the most generous gift of law books of the Chancellor of the University the Right Honourable Lord Beaverbrook.

The Faculty is interested in legal materials of every description: reports, texts, statutes, and legal periodicals.

Please communicate with Professor G. A. McAllister.

c/o Provincial Building, 55 Canterbury Street

Saint John, N. B.

Articles

THE PREAMBLE TO THE BRITISH NORTH AMERICA ACT

In Lord Durham's Report it was urged with great emphasis that there should be a union of the provinces in British America. This Union, Lord Durham stated, "would enable the provinces to co-operate for all common purposes, and above all, it would form a great and powerful people, possessing the means of securing good and responsible government for itself, and which, under the protection of the British Empire, might in some measure, counter balance the preponderant and increasing influence of the United States on the American Continent (1) Lord Durham's recommendations were not original; the idea and the vision came from the economic and political needs of British North America. With the force of necessity behind it, Durham's idea travelled down through the years, through the abortive Union of 1840, to spring into full birth in 1867.

Durham's naked idea was given full clothing through the instrumentality of the British North America Act, 1867. (2) The object and intent of the compromise of 1867 are concisely expressed in the Preamble to that Statute:–

> "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom and Ireland, with a Constitution similar in Principle to that of the United Kingdom:
>
> And, whereas such a Union would conduce to the Welfare of the Provinces and Promote the Interests of the British Empire:
>
> And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:
>
> And whereas it is expedient that Provision be made for the eventual admission into the Union of other Parts of British North America:
>
> Be it therefore enacted – etc. (3)"

In the Aeronautics Case (4) Lord Sankey, L.C. stated that "under our system decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and

(1) **The Durham Report**, 1839. P.P. 116-121. Quoted from Bourinot, J. G.; **Constitutional History of Canada**. P. 40.
(2) 30 & 31 Victoria, C. 3.
(3) 30 Vict., C. 3.
(4) **In re The Regulation and Control of Aeronautics in Canada**, (1932) A. C. 54 at P. 70.

effect may be interpreted." At this point, therefore, the words in the Preamble might be examined both in their natural and inherent sense and also with regard to the meaning given to those words by judicial interpretation.

The "desire" (5) of the provinces to form a Canadian Union had been sufficiently shown in the Quebec Resolutions and in the London Resolutions. It remained for the Imperial Parliament to give legislative expression to this desire. To this end, the constitutions of the provinces were surrendered to the Imperial Parliament for the purpose of being refashioned. (6) In the light of this opinion and because the words "will of the people" are not the same as "desire" of the provinces, the compact theory can find little justification in the Preamble or in the remainder of the statute. In spite of this obvious and generally accepted interpretation, the Judicial Committee has, at various times, gone outside the Act, ignoring the passivity of the word "desire" and referred to the Act as a "contract," "compact," or "treaty" founded upon the will of the provinces to unite as expressed in the Quebec and London resolutions. (7)

The words "federally united into one Dominion" both as they appear in the Preamble and in the general scheme of the British North America Act have been the great questions of constitutional controversy in Canada. The expression "federally united" undoubtedly expresses the intention of the Fathers of Confederation. This intention was set forth by Sir John A. MacDonald in these words:—

> "We have strengthened the general government. We have given the legislature all the great subjects of legislation. We have conferred upon them not only specifically and in detail all the powers which are incident to sovereignty but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures shall be conferred upon the general government and legislature." (8)

Lord Sankey, L.C. gave judicial expression to this intention when he said that the real object of the Act was to give to the central government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all provinces as members of the constituent whole. (9) The basic scheme of federal union as expressed in the Act

(5) That "desire" must, in the final analysis, be sought in the London Resolutions of 1866, where the general principles underlying the union are set out: "A general government charged with matters of common interest to the whole country and local governments for each of the Canadas and for the provinces of Nova Scotia and New Brunswick charged with the control of local matters in their respective sections." cf. **Kennedy, W.P.M.**: Documents of the Canadian Constitution: 1759-1915. P. 611

(6) Viscount Haldane, in **Bonanza Creek Gold Mining Company Ltd. v Rex**, (1916) A. C. 566, at 579.

(7) **Attorney General for Australia v Colonial Sugar Co.**, (1914) A. C. at P. 253; **In re Aeronautics**, (1932) A. C. at P. 70; **Labour Conventions Case**, (1951) A. C. 326; cf. MacDonald, V. C.; **Constitutional Interpretation and Extrinsic Evidence; in 17 Can. Bar Rev. 77**, at 82.

(8) **Confederation Debates**, P. 33; quoted by F. R. Scott, in **The Consequences of Privy Council Decisions**; in 15 Can. Bar Rev. 485, at 488.

(9) **Re Aerial Navigation**, (1932) 1 D. L. R. 58 at 65.

was that "the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs." (10)

These judicial interpretations seem to make the meaning of "federally united" quite clear. However, frequent judicial juggling of sections 91 and 92 has deprived these two simple words of their elementary meaning; the Watson-Haldane school of judicial interpretation has taken the emphasis from the words "federally united" and has placed the accent on "confederation," – a word which is nowhere used in the B.N.A. Act. The process of cutting down the powers of the Dominion was begun as early as 1892. In Maritime Bank of Canada v. New Brunswick Receiver General (11) Lord Watson said:–

> "The object of the B.N.A. Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all the powers, executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of those powers, property and revenues, as are necessary for the performance of its constitutional functions, and that the remainder should be retained by the provinces for the purpose of provincial government."

The idea expressed by Lord Watson that there was to be a federal government in which the provinces, and not the people, were to be represented implies central government by delegation which is not the same as a federation. (12) The plain words "federally united" time after time have either been ignored or twisted so as to give the provinces the pride of place in the Canadian Union.

In an Australian case, (13) Lord Haldane took occasion to destroy the meaning of the words "federally united." He said:

(10) Per Lord Sankey, L. C. in **Edwards v. A. G. for Canada,** (1930) A. C. 124.

(11) (1892) A. C. 437, at 441.

(12) "———Canada is a federation in essence; that is, that the central national government is in no sense a delegaton; that the provincial governments are in no sense 'municipal'; and that national and local governments exercise co-ordinate authority and are severally sovereign within the sphere specifically or generically or by implication consitutionally granted to them. This construction agrees with the Preamble———" Cf. Kennedy, W. P. M.; **The Constitution of Canada.** (Oxford, 1922.) P. 405.

(13) **A.—G. for the Commonwealth of Australia v Colonial Sugar Refining Co., Ltd.,** (1914) A. C. 237, at 252.

"The B.N.A. Act of 1867 commences with a preamble that the then provinces had expressed their desire to be federally united into one Dominion with a Constitution similar in principle to that of the United Kingdom. In a loose sense the word "federal" may be used, as it is there used, to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to an entirely new Constitution even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which those states, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitution. (14) Now, as regards Canada, the second of the resolutions, passed at Quebec in October, 1864, on which the British North America Act was founded, shows that what was in the minds of those who agreed on the resolutions was a general government charged with matters of common interest, and new and merely local Governments for the Provinces. The Provinces were to have fresh and much restricted Constitutions, their Governments being entirely remodelled. This plan was carried out by the Imperial Statute of 1867. By the 91st section a general power was given to the now Parliament of Canada to make laws for the peace, order, and good government of Canada without restriction to specific subjects, and excepting only the subjects specifically and exclusively assigned to the Provincial Legislatures by S. 92. There followed an enumeration of subjects which were to be dealt with by the Dominion Parliament, but this enumeration was not to restrict the generality of the power conferred on it. The Act, therefore, departs widely from the true federal model adopted in the Constitution of the United States, the tenth amendment to which declares that the powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively or to their people. Of the Canadian Constitution the true view appears, therefore, to be that, although it was founded on the Quebec Resolutions and so must be accepted as a treaty of union among the then Provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure, and established new Dominion and Provincial Governments with defined powers and duties both derived from the Act of the Imperial Parliament which was their legal source."

(14) W.P.M. Kennedy states that "it cannot but be a surprise to constitutional students to find a federal constitution defined as one in which the central or national government is a delegation from the constituent states or provinces. Lord Haldane's definition appears to be based on an erroneous view of the essence of a federation and seems to have confused a federation with a confederation." Kennedy, W.P.M.: **The Constitution of Canada** (Oxford, 1922) P. 410.

The Preamble further states that the Constitution of Canada is to be "similar in principle to that of the United Kingdom." (15) Unlike the words "federally united" this phrase has caused little difficulty in judicial interpretation; the meaning of the phrase has been crystal clear to all serious students of the Canadian Constitution. Duff, C.J.C., in the Persons case (16) has given a generally accepted interpretation of the wider meaning of the phrase, viz.;–

> "The object of the Act was to create for British North America, a system of parliamentary government under the British Crown, the executive authority being vested in the Queen of the United Kingdom. While the system was to be a federal or quasi-federal one, the constitution was, nevertheless, to be "similar in principle" to that of the United Kingdom; a canon involving the acceptance of the doctrine of parliamentary supremacy in two senses, first that Parliament and the Legislatures, unlike the legislatures and Congress in the U.S., were, subject to the limitations necessarily imposed by the division of powers between the local and central authorities, to possess within their several spheres, full jurisdiction, free from control by the courts; and second, in the sense of parliamentary control over the executive, or executive responsibility to Parliament. In pursuance of this design, Parliament and the local legislatures were severally invested with legislative jurisdiction over defined subjects which, with limited exceptions, embrace the whole field of legislative authority."

With respect to the phrase a constitution "similar in principle to that of the United Kingdom," Mr. Edward Blake has said, "A single line imported into the system that complex and somewhat indefinite aggregate called the British Constitution." (17) Thus, this line incorporated into the Canadian constitutional system, insofar as they were not at variance with the actual terms of the British North America Acts, all the great landmarks of the British Constitution – Magna Carta, the Petition of Right, the Bill of Rights, the Habeas Corpus Acts, the Act of Settlement as well as the generally recognized constitutional conventions and usages. (18) These constitutional checks operate in Canada to limit the executive authority which is vested

(15) "The object of the B.N.A. Act was" as the preamble of the Act recites, "to unite (the provinces) federally into one Dominion, under the Crown of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom — to sow, in fact, the seed of the parent tree, which, growing up under the protecting shadow of the British Crown until it should attain perfect maturity, would in the progress of time become a nation identical in its features and characteristics with that form from which it had sprung, and to which, in the meantime, should be given the new name of "Dominion," significant of the design conceived, and of the anticipated fortunes of this new creation."
cf. **Gwynne J., in City of Fredericton v. The Queen,** (1879) 3 S.C.R. 505 at 561.

(16) **Reference re Meaning of Word "Persons" in S. 24 of the B.N.A. Act,** (1928) S. C. R. 276 at P. 291.

(17) **St. Catharine's Milling and Lumber Co. v The Queen.** 14 App. Cas. 46.

(18) Kennedy, W.P.M.; **The Constitution of Canada.** (Oxford, 1922) P. 378.

by the B.N.A. Act in the Crown and is exercised, in the federal sphere, by a governor-general, and in the provincial spheres by lieutenant-governors. (19) The Act further provides that the legislative power of the Dominion shall be entrusted to a bi-cameral parliament consisting of a senate and a house of commons. Professor F. R. Scott, a noted authority on constitutional law, has suggested that the single line in the Preamble, referred to above, taken together with other clauses spread throughout the remaining part of the B.N.A. Act contain the elements of a Bill of Rights, however incomplete. (20) Professor Scott claims that Canada has adopted, but in part only, the principle of parliamentary sovereignty. We have, he says, adopted it to this extent, that within the spheres of jurisdiction assigned to them under the B.N.A. Act, and with some important exceptions, our Parliament and provincial legislatures are supreme. However, Professor Scott has pointed out that there is, under the Canadian Constitution, a very important limitation on the power of Parliament. He says:–

> "The B.N.A. Act contains two basic notions which are somewhat contradictory. One is the principle, inherited from the United Kingdom, of the sovereignty of Parliament. – – – In England no court may declare an Act of Parliament **ultra vires**, no matter to what degree it destroys the cherished liberties of the subject, or violates the fundamental rights of man. The King in Parliament is legally supreme, and his laws can never be invalid. It is the exceptions to this rule, however, which are important. For there are some absolute limitations on the principle of parliamentary sovereignty in Canada, and these occur precisely in order to guarantee certain political and minority rights. There is no Bill of Rights in the B.N.A. Act in the sense of a single article or section listing all freedoms which are safeguarded from legislative invasion, but there are a number of specific rules, which no laws, federal or provincial, can repeal."

Professor Scott's contentions would seem to have been supported in at least one case. In protecting the principle of the freedom of the press (21) Duff, C.J.C. said,

(19) Cf. Rex v Hess (No. 2) (1949) 1 W. W. R. 586 at 596, per O'Halloran, J. A. —"———the purported powers in sec. 1025 A (of the Criminal Law) to deny an acquitted person bail, to obstruct and delay his application therefore, and to detain him in custody for an offence of which the court has acquitted him and when there is no offence charged against him are all contrary to the written constitution of the United Kingdom, as reflected in Magna Carta (1215), the Petition of Right (1628), the Bill of Rights (1689) and the Act of Settlement (1701). I conclude further that the opening paragraphs of the preamble to the B.N.A. Act, 1867, which provided for "a constitution similar in principle to that of the United Kingdom," thereby adopted the same constitutional principles, and hence sec. 1025 A is contrary to the Canadian Constitution, and beyond the competence of Parliament or any provincial Legislature to enact so long as our constitution remains in its present form of a constitutional democracy."
(Cf. **Obiter Dicta**, 1947-48)

(20) Cf. Scott, F. R.: **Dominion Jurisdiction over Human Rights and Fundamental Freedom**; in 27 Can. Bar Rev. 497, at 501.

(21) **In Reference re the Alberta Press Bill**, (1938) 2 D. L.R. 81, at P.P. 107-109.

> "Under the constitution established by the B.N.A. Act, legislative powers for Canada are vested in one Parliament consisting of the Sovereign, an upper house styled the Senate and the House of Commons. Without entering into detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body, constituted, that is to say, by members elected by such of the population of the United Provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the Constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter criticism, from attack upon policy and adminstration and defence and counter attack; from the freest and fullest analysis and examination from every point of view of political proposals."

Moreover, the fact that Canada was to have a constitution similar in principle to that of the United Kingdom meant that Canada was to have a flexible constitution; that is, as Mr. Lefroy has said, a constitution "capable of proceeding in a course of natural and spontaneous development." (22) If this was a goal of the B.N.A. Act, it has been missed because Canada's constitution does not possess the flexibility of the constitution of the United Kingdom.

Many diverse meanings can be given to the second clause of the Preamble – "whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire." Only two comments need be made regarding this section. The general line of Privy Council decisions has done everything possible to promote the welfare of the provinces even if, at times, sectional well-being was opposed to the national interest. With respect to the interests of the British Empire no Canadian can be blamed for suspecting that the Judicial Committee, in its approach to the B.N.A. Act, has had an imperialistic bias which was directly opposed to Canadian interests. However this may be, it is presumed, that the paramount interest to be kept in mind in the future in dealing with the B.N.A. Act will be Canadian, inasmuch as appeals to the Privy Council are now abolished. (23) At any rate the retention of the word "British Empire" in the Preamble is obsolete. It is submitted that the replacement of "Commonwealth" for "Empire" would be proper and appropriate especially in view of the words of Lord Jowitt in the Reference re Privy Council Appeals. (24)

(22) **Report to the Senate of Canada, 1939, by W. F. O'Connor at P. 22**
(23) **Reference re Privy Council Appeals, (1947) A. C. 127**
(24) **(1947) A. C. 127.**

In the third section of the Preamble it was stated that "Whereas on the Establishment of the Union by Authority of Parliament it is expedient not only that the Constitution of the Legislative authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared." The words "by authority of Parliament" mean that the B.N.A. Act was, and is, a British statute. Professor W. P. M. Kennedy states that the Privy Council has always considered it as a British statute and has always held that its interpretations must begin from that point of view. (25) The remaining part of this section deals with the establishment of the executive government in Canada and with the division of legislative powers between the Dominion and the provinces. These matters were taken care of in detail in the main body of the Act and will not receive any consideration in this article.

The last section of the Preamble has led to the enlargement of the Dominion of Canada. The power to establish additional provinces in the Dominion and to alter the limits of the provinces, with their consent, and to legislate for any territory not included in the Province, was conferred upon the Parliament of Canada by the B.N.A. Act, 1871. (26) This Act also confirmed other Acts of the Parliament of Canada respecting Rupert's Land and the N.W. Territories and the Province of Manitoba. Rupert's Land and the N.W. Territories became part of Canada pursuant to the Rupert's Land Act, 1868 (Imp.). Manitoba was admitted as a province in 1870, British Columbia in 1871, Prince Edward Island in 1873, Alberta in 1905, Saskatchewan in 1905 and Newfoundland in 1949.

Up to this point the plain words of the Preamble have been considered. This has been done in order to get "back to the constitution." But, it is evident that plain words are not enough, for the Canadian Constitution, regardless of the B.N.A. Act, is what the judges say it is. Thus, at this point, it is proper to consider the various lights in which the courts have looked at the B.N.A. Act and the weight which has been given to the Preamble.

In 1932, the Judicial Committee stated that the B.N.A Act embodied a compromise under which the original provinces agreed to federate and that it was important to keep in mind that the preservation of the right of minorities was a condition upon which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. "The process of interpretation," according to Lord Sankey, "as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of sections 91 and 92 should impose a new and different contract upon the federating bodies." (27) Un-

(25) Kennedy, W. P. M.; **The Constitution of Canada.** P. 405.

(26) 34-35 Vict., c. 28.

(27) **In re Regulation and Control of Aeronautics in Canada,** (1932) A. C. 54.

doubtedly this is a worthy judicial platitude even if the principle is erroneously stated. However, by no stretch of the imagination can it be said that the Judicial Committee have followed this dogma. Indeed, Professor Kennedy has said, with some truth, that "the terms of the Constitution, in their plain meaning, are not extremely difficult of application, and that the complexities which today flow from our constitutional law to the detriment of our national life do not flow from the British North America Act itself but from the interpretations of it. These interpretations cannot be supported on any reasonable grounds. They are simply due to inexplicable misreadings of the Act." (28) The errors of interpretation to which Professor Kennedy refers are too numerous and too widespread to be mentioned here. Not only have there been errors but there has been no stability in the interpretation and exposition of the Act. For a long time the B.N.A. Act was regarded as a mere statute to be treated by the same methods of construction and interpretation as courts of law apply to ordinary statutes. (29) At other times the Act has been treated as a great constitutional charter or has been likened to a "living tree." (30) Sometimes the Act has been given a narrow technical construction while at other times and by other judges a broad liberal interpretation has been chosen. The Privy Council, like a man suffering from insomnia, has tossed and turned from one approach to the other, never certain and rarely true to the intentions of the farmers of the Act. As W. P. M. Kennedy has said:—(31)

> "Our final courts, in ninety-nine cases out of a hundred, interpret our constitution as a statute. Thy have refused, as happened until quite recently in the judicial interpretation of the Australian constitution, to allow the importation of anything not necessarily implicit, to follow American law cases or American precedents, to see in it anything of a contractual nature, or to be guided by its historical origins. They have interpreted it, and given effect to it, according to its own terms, finding the intentions from the words, and upholding it precisely as framed. As a statute, they have applied to it most generally the arbitrary rules of statutory construction, which whatever else, they might have done, have at times robbed it of its historical contents and divorced its meaning from the intentions of those who in truth framed it."

Needless to say the plain meaning of the B.N.A. Act has suffered greatly because of this judicial error and wandering from one interpretation to another. The Preamble, of all of the parts of the Act, has probably suffered more by this Privy Council treatment.

(28) Kennedy, W. P. M.; **The Terms of the B.N.A. Act; In Essays in Canadian History.** Ed. by R. Flenley (Toronto 1939) P. 129.
(29) Cf. Bank of Toronto v Lambe, (1887) 12 App. Cas. at 579.
(30) Cf. **Edwards v A—G. for Canada,** (1930) A. C. 124.
(31) Kennedy, W. P. M.; **Some Aspects of the Theories and Working of Constitutional Law** (New York, 1932)

A noted authority on the interpretation of statutes (32) has said:–

> "A statute is the will of the legislature and the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of them that made it.———The object of all interpretation of a statute is to determine what intention is conveyed, either expressly or impliedly, by the language used———."

It is submitted that the Privy Council has not followed this fundamental rule. The intentions of the Fathers of Confederation have been largely ignored. Moreover, the Privy Council has even tried to strike down words like "federally united" and substitute for this the idea of a confederation or a sort of treaty-union.

"The influence of the preamble," says Story, in his commentary on the Constitution of the United States of America, "has a foundation in the exposition of every code of written law, – upon the universal principle of interpretation, – that the will and intention of the legislature is to be regarded and followed. The preamble is entitled to great consideration. It is, indeed, that introductory statement to which both reason and authority point for ascertaining the intention of the enactment." (33) A review of the great constitutional cases of Canada show that the Preamble to the B.N.A. Act has received little or no consideration. To a great extent it has been ignored. The plain words of the Preamble have not been allowed to exercise "their due force and appropriate meaning." (34) When great constitutional cases came before them the learned judges of the Privy Council preferred to rely on their own political ideas rather than what was contained in the written words of the Preamble.

"The Preamble is properly referred to," says Story in his Commentaries, "when doubts or ambiguities arise upon the words of the enacting part." (35) If this is a sound rule of interpretation it cannot be said that it has been faithfully followed by the Judicial Committee. This was all too clearly shown by Lord Haldane in his decision in Commonwealth of Australia v. Colonial Sugar Refining Co. (36)

Potter has pointed out that "in the history of American jurisprudence and of American fundamental law, there is no single paragraph that possesses more profound significance, in the expression of the object and intent of the instrument and its framers, than that of the preamble to the federal constitution. The highest judicial authority ever accords to it a significance becoming an instrument which was laying the deep foundations of a national government for American empire which should rest on the solid basis of the will of an intelligent

(32) Maxwell, P. B.; **The Interpretation of Statutes.** 9th ed. (London, 1946) at P. 12.
(33) Quoted by Potter, P.; **A General Treatise on Statutes.** P. 107.
(34) See the dissenting judgement of Taschereau in **The Citizens' and the Queen Insurance Cos. v. Parsons** (1880) 4 S.C.R. 215 at 299.
(35) Potter, P.; **A General Treatise on Statutes.** P. 107.
(36) infra. P. 4

and free people;———" (37) Unfortunately, it can be said unequivocably that this principle has not been acted upon by the Judicial Committee in interpreting the B.N.A. Act. In performance the B.N.A. Act has fallen far short of the promise of the Preamble. (38) The Preamble promised a federal union. The Privy Council gave the Canadian people something else. The intentions of the Fathers of Confederation have been overlooked. The consequence of this has been, in many fields of government activity, futility and disillusionment.

(37) Potter. P.; **A General Treatise on Statutes.** P. 266

(38) However. it is too extreme to assert with Mr. Dicey that the Preamble of thhe B.N.A. Act is a notable instance of "official mendacity." (Quoted from Dicey, The Law of the Constitution, 3rd Ed. P. 155. Modified in later editions to "diplomatic inaccuracy".)

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"THE INNKEEPER'S GUEST"

> "The law of England confers exceptional privileges, and imposes exceptional liabilities, upon innkeepers. Those privileges and liabilities attach only in respect of those persons who are in the position of travellers, and come to the inn as travellers in the transitory character of travellers."

So said Lord Justice Lopes some fifty-four years ago in the case of Lamond v Richard (1), and in glancing at this statement one may find little wherewith to dispute it. But just what does the learned lord justice mean by the word "traveller"? In what sense, legally, is a person so regarded, that, in coming to an inn, he may be accorded certain rights because of this special status? What must a person do to constitute himself a traveller? That a person had to come within this category, to recover goods lost while at the inn for example, is clear from very early cases. As far back as 1627, the law regarded this status as a necessary element in an action brought against the innkeeper. (Grimston v an Innkeeper (2).) Indeed, for those who are Latin scholars, or at least authorities, the early writ of action against the keeper of an inn contained the words "Ad hospitandos homines, per partes ubi hujusmodi hospitia existunt, transeuntes, et in eisdem hospitantes," a free translation of which is "for the entertaining of men passing over through places where such entertainments exist, and for men staying in the same places." (Lingley – Smith). Now how did one get to be classed as a traveller to protect himself and his goods while at an inn?

In early times, when litigation concerning landlords and innkeepers was beginning to be reported, it was considered necessary that a person lodge at the inn, or at least rent a room for the night. This rule of thumb test was not only necessary but was considered sufficient to make a man a traveller. It made no difference whether the person was at the beginning, in the middle, or at the end of a journey – he was a traveller if he rented a room for the night. Chief Justice Coke in Warbrooke v Griffin (3), a case heard in 1609, stated one of the first exceptions to the rule when he said that "if a neighbour of the innkeeper came to the innkeeper, he shall not answer for (his) goods, for he is not lodged....." Similarly if the innkeeper should invite someone such as a neighbour to come in for a short stay, the keeper would still not be liable for that person's goods (Calye's Case (4).) The essential element needed to make a person a traveller was the comparatively permanent one of lodging, for at least a night, as opposed to a mere casual visitor.

However, if a traveller stayed for three or more nights, he lost his status of wayfarer and became instead a boarder, with attendant changes in his rights and liabilities. This custom of changing one's category

at the end of three nights' lodging at an inn became unpopular, particularly among the gentlemen of what may be termed the sporting class, who journeyed about viewing horse-races, and, what is more to the point, among lawyers and judges attending the assizes, who had much travelling about from place to place. Often they would stay more than three nights at a particular sitting and yet were loath to relinquish the legal privileges accorded to them as travellers, which they didn't get as boarders – among which was the higher protection of their luggage, etc. Accordingly, the number of nights' lodging one could have and still remain a traveller became indefinite, and as we shall later see, came to depend on the facts of each individual case.

A marked change had taken place in the "lodging test" by the year 1793, for one finds in the case of Bennet v Mellor (5) that it had become generally recognized that it was no longer necessary for a man to be lodged for a night at the inn, or even to rent a room, in order to place himself in the position of traveller. It was sufficient if one stopped in for refreshment, liquid or otherwise, which was offered by the inn. In the Bennett case (supra), plaintiff's servant went to an inn with certain parcels and asked if he might leave them there for a week. Due to lack of room his request was refused; bearing no ill-will however, the servant stopped to partake of refreshment, placing the parcels behind him when doing so. On his departure the parcels were missing. Was the servant in the legal position of traveller so that through his master he might claim protection for the lost parcels? The Court held him so to be, even though he had stopped merely for the space of a few minutes. In the course of his judgment Grose J. remarked that "when the plaintiff's servant was sitting in the inn, with the consent of the innkeeper (for the latter did not object to receive him), he was in the same situation as any other guest, and entitled to the same protection for his goods." This will be seen to be a radical departure from the older test of who a traveller was, when a person came to an inn.

In a later case, that of Orchard v Bush & Co., (1898) (6), counsel in argument said that the guest or traveller might stay only a few minutes at the inn to become such, but that he must be doing some travelling of some sort, even if it be merely a journey from office to home. Indeed, in these more modern days, many rightly look upon such a trip as a full-fledged journey; at any rate, in the Orchard case (supra), the plaintiff was in fact going from his business establishment in Liverpool to his home outside the city. On his way he stopped at the defendant's hotel for supper, where he lost his coat. The plaintiff was considered by the Court to be a wayfarer and consequently protected, with his goods, while in defendant's establishment. Mr. Justice Wills remarked, "It is said that in order to make him a guest he must be a wayfarer and traveller. The facts are that....he was on his way to the station from which he travelled home by railway. Why was he not a wayfarer?"

In Lord Justice Denning's disagreement with this idea of a traveller having to be one who is actually journeying we come to the modern view, in my opinion, of what constitutes a traveller—certainly a much more relaxed view than that seen in Calye's Case and Warbrooke v Griffin (supra). In a very recent case of this year (Williams v Linnett (7),) the learned lord justice says that since there is no practical way for an innkeeper to distinguish among his patrons between those who are travelling and those who are not that he must accept all who come to him as being travellers, whether or not they actually be in the process of journeying. The innkeeper is not likely to know all the local inhabitants who drop in for a short stay, and it is not his right to question those who come as to their comings and goings; hence the keeper of the house is bound perforce to accept one and all as travellers, thereby according them rights that they would not otherwise have. With the few exceptions seen earlier (e.g. a neighbour invited by the innkeeper) this seems to be the modern view, affording, as may readily be seen, a much easier mode of protecting one's self and chattels when going to an inn than formerly.

That a person coming to an inn may cease to be a traveller has been strongly pointed out by two nineteenth century cases. In Thompson v Lacy (8) a person who had lodged for several months at an inn (or what may, I think, be safely regarded as our modern hotel) was held to have been in the position of a traveller, in spite of his protracted stay. However, in the case of Lamond v Richard (supra) a stay of ten months by plaintiff was decided to have changed her status of traveller to that of lodger. The learned judges in that case pointed out that one of the most important factors by which the status may be changed is the length of the stay; every case, though, must depend on its surrounding circumstances to see whether the alteration has taken place.

The latter day use of the word "guest," replacing our older "traveller," has been to my mind a loose one. That it is considered more up-to-date, more dignified, has been seen by the nearly universal use given it on the part of hotel keepers, tourist homes, and places of transient accomodation. Certainly everyone who goes to an inn or hotel isn't a traveller in the strict sense – taking as a very simple example a person who resides at a hotel while his home is being renovated, or who remains at a hotel while searching for a new home. Halsbury seems to treat all so-called guests as travellers, however, pointing out that the primary purpose of people coming to an inn is causa hospitandi – loosely, for the sake of (being) entertained.

Judge Gorham, an Ontario County Court judge stated that "One who goes casually to an inn and eats or drinks *or* sleeps there, is a guest, although not a traveller," (Fraser v McGibbon (9)) meaning that a person need not actually be journeying in order to come under the protection afforded by an innkeeper. However, though it perhaps may be a mere

play on words, I prefer to look upon a guest as being a traveller – i.e. that a guest is automatically a traveller so far as obtaining the latter's rights upon coming to a hotel are concerned. Lord Justice Asquith in Williams v Linnett (supra) seems to me to state the correct view when he says "There are no decisions which say expressly that anyone can be a guest without being a traveller, and (certain) decisions, in my view, tacitly assume a guest to have fulfilled the qualification necessary to his becoming a guest, namely that he should have been a traveller." This statement seems to be in line with the view taken by Denning L. J. when he thought an innkeeper bound to accept all, with a few exceptions, as travellers.

In closing, let us have regard to the definition of a traveller given by Mr. Justice Kennedy–"....any person, who (is) neither an inhabitant of the house nor a private guest of the innkeeper or his family, but who came into the house as a guest to get such accommodation as is afforded, and he was willing to pay for, (is) a traveller." (Thompson v Lacy – supra). In that we have, summed up neatly, what a person must be or do to put himself in that class of persons who may have certain rights accorded to them by law, while at a hotel, which others might not receive. To make a poor witticism, the traveller has come a long way since he first started on his journey towards greater legal protection for himself and his goods. The guest of today owes much to the oldentime traveller who, perhaps unconsciously, has added greatly to his well-being and has altered for the better his status with his host at places of public accommodation.

Bev. Smith – Law II

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(1) **Lamond v. Richard** — 77 L.T.R. — 141.
(2) **Grimston v. an Innkeeper** — 1627 — 124 E.R. — 334.
(3) **Warbrooke v. Griffin** — 1609 — 123 E.R. — 927.
(4) **Calye's Case** — 77 E.R. — 520.
(5) **Bennett v. Mellor** — 1793 — 5 Term Rep. — 273.
(6) **Orchard v. Bush & Co.** — 1898 — 2 Q.B. — 284.
(7) **Williams v. Linnett** — 1951 — 1 A.E.R. — 278.
(8) **Thompson v. Lacy** — 1820 — 106 E.R. — 667.
(9) **Fraser v. McGibbon** — 1907 — 10 O.W.R. — 54.

L'ORIGINE DE LA LOI POSITIVE

En matière de jurisprudence comme en philosophie proprement dite, les théoriciens tant disciples de Thémis que philosophes érudits se disputent fortement l'arène des débats. Cependant malgré quelques variantes, on convient généralement que la jurisprudence soit l'étude des principes premiers de la loi positive humaine. Toutefois dès cette première concession le calme se rompt et les différends s'amorcent à l'endroit du vocable "loi positive."

A l'instar du juriste Austin, d'aucuns soutiennent que la loi positive humaine est une simple ordonnance du souverain au peuple qui lui obéit. Il ressort de cette définition qu'une ordonnance revêt le caractère de loi dès qu'il est possible de l'attribuer au souverain. Ainsi conçue, la loi se résume à l'arbitraire du tout-puissant; c'est la dictée du maître à la masse qui se soumet. Par bonheur, il se trouve des théories plus démocratiques sinon plus réalistes pour expliquer l'origine de la loi positive. Entre autres, mentionnons celle des scolastiques.

Saint Thomas nous dit de la loi humaine qu'elle est "une ordonnance de la raison pratique en vue du bien commun de la société civile, établie et promulguée par celui qui a la garde de cette société." Ainsi, selon le Docteur Angélique il convient d'ajouter une qualification à l'ordonnance du souverain avant de lui reconnaître le titre de loi. N'est loi que ce qui provient de la raison pratique de l'autorité établie.

Puisque nous soutenons le bien-fondé de cette définition, qu'il nous soit permis d'en illustrer quelques aspects par une bien simple allégorie. Reportons-nous à une époque où les rois sont maîtres de la planète. En Utopie le peuple chèrit son souverain qui d'ailleurs se montre excellent administrateur. Mais voici que la guerre vient visiter cette forteresse de bonheur. L'ennemi promène ses armées aux quatre coins du royaume et pour s'assurer la victoire, on effectue le blocus des vivres. Sous la dictée des évenements ainsi qu'à la lumière d'une saine économie, notre Titan déclare qu'il faut éliminer les bouches inutiles si l'on veut épargner les jeunes d'une famine imminente. Les vieillards et les infirmes sont alors les premières victimes de l'édit royal.

A première vue il semble que ce décret renferme les critériums essentiels d'une loi positive humaine. Que le bien commun ait déclenché la volonté royale, il va de soi. Par ailleurs vu la gravité des circonstances les principes économiques

dictaient également en faveur des mesures adoptées. Et pourtant nous ne serions pas prêts à apposer le sceau de loi à cette ordonnance. Car la loi doit son origine à des principes plus universels et moins contestables que des principes économiques.

La loi positive en effet est constituée dans le but de guider les individus: elle prescrit certains actes, elle en défend certains autres. Or l'acte humain ne peut être amoral; il importe donc que la loi se plie aux conceptions éthiques des individus. Mais alors, est-ce à dire qu'il faudra sacrifier l'uniformité de la loi pour concilier les esprits récalcitrants? Du tout: malgré des dissenssions en matrière de conclusions particulières, les hommes se rencontrent tous sur un terrain commun; ce facteur commun c'est la loi naturelle d'où découle et où doit remonter toute loi positive valide.

Puisque nous avons de quoi asseoir notre système légal, nous aurons également de quoi revenir pour vérifier la validité d'une loi humaine. En matière de raison spéculative les conclusions particulières sont contenues en quelque sorte dans des principes universels; de sorte que si l'on veut vérifier la logique de son raisonnement, il doit être possible de remonter ces conclusions à leur source. Il en va de même en matière de raison pratique. La loi humaine qui est une conclusion pratique doit elle aussi être ramenable à ses principes premiers. Il s'ensuit donc qu'une loi est valide dans la mesure où elle ne va pas à l'encontre de la loi naturelle.

Donat J. Lévesque
2 ième année.

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TOWNSEND Dennis A. E.	29 Mecklenburg Street, Apt. 1.	29 Mecklenburg St., Apt. 1, Saint John, N.B.	2-4544

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CANONS OF LEGAL ETHICS

EDITOR'S NOTE—The following is reprinted as a service to the barristers of the province and especially for the benefit of the students, who are about to enter the world of practice.

Approved by the Canadian Bar Association, and adopted by the Barristers' Society of New Brunswick, as a correct, though not exhaustive, statement of some of the ethical principles which should be observed by the members of the legal profession.

It is not possible to frame a set of rules which will particularize all the duties of the lawyer in all the varied relations of his professional life and no attempt has been made to do so.

The following Canons of Ethics should therefore be construed as a general guide and not as a denial of the existence of other duties equally imperative though not specifically mentioned.

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.

1. TO THE STATE

(1) He owes a duty to the state, to maintain its integrity and its laws and not to aid, counsel, or assist any man to act in any way contrary to those laws.

(2) When engaged as a public prosecutor his primary duty is not to convict but to see that justice is done; to that end he should withhold no facts tending to prove either the guilt or innocence of the accused.

(3) He should take upon himself without hesitation and if need be without fee or reward, the cause of any man assigned to him by the Court and exert his best efforts on behalf of the person for whom he has been so assigned counsel.

(4) It is a crime against the State and therefore highly non-professional in a lawyer, to stir up strife or litigation by seeking out defects in titles, claims for personal injury or other causes of action for the purpose of securing or endeavoring to secure a retainer to prosecute a claim therefor, or to pay or reward directly or indirectly any person, for the purpose of procuring him to be retained in his professional capacity.

2. TO THE COURT

(1) His conduct should at all times be characterized by candour and fairness. He should maintain towards the Judges of the Courts a courteous and respectful attitude and insist on similar conduct on the part of his client, at the same time maintaining a self-respecting independence in the discharge of his professional duties to his client.

(2) Judges, not being free to defend themselves, are entitled to receive the support of the Bar against unjust criticism and complaint. Whenever there is proper ground for serious complaint of a judicial officer, it is a right and duty of the lawyer to submit the grievance to the proper authorities.

(3) He should not offer evidence which he knows the Court should not admit. He should not, either in argument to the Court or in address to the jury, assert his personal belief in his client's innocence, or in the justice of his cause, or as to any of the facts involved in the matter under investigation.

(4) He should never seek to privately influence, directly or indirectly, the judges of the Court in his favour, or in that of his client, nor should he attempt to curry favour with juries by fawning, flattery or pretended solicitude for their personal comfort.

3. TO THE CLIENT

(1) He should obtain full knowledge of his client's cause before advising thereon and give a candid opinion of the merits and probable results of pending or contemplated litigation. He should beware of bold and confident assurances to clients especially where the employment may depend on such assurances. He should bear in mind that seldom are all the law and facts on the side of his client and that "audi alteram partem" is a safe rule to follow.

(2) He should at the time of retainer disclose to the client all the circumstances of his relations to the parties and his interest in or connection with the controversy, if any, which might influence the client in selection of counsel. He should avoid representing conflicting interests.

(3) Whenever the controversy will admit of fair adjustment the client should be advised to avoid or to end the litigation.

(4) He should treat adverse witnesses, litigants, and counsel with fairness, refraining from all offensive personalities. He must avoid imparting to professional duties the client's personal feelings and prejudices. At the same time he should discharge his duty to his client with firmness and without fear of judicial disfavour or public unpopularity.

(5) He should endeavour by all fair and honourable means to obtain for his client the benefit of any and every remedy and defence which is authorized by law. He must, however, steadfastly bear in mind that the great trust of the lawyer is to be performed within and not without the bounds of law. The office of the lawyer does not permit, much less does it demand of him, for any client, violation of law or any manner of fraud or chicanery.

(6) It is his right to undertake the defence of a person accused of crime, regardless of his own personal opinion as to the guilt of the accused. Having undertaken such defence, he is bound by all fair and honourable means to present every defence that the law of the land permits to the end that no person may be deprived of life or liberty but by due process of law.

(7) He should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject matter of the litigation being conducted by him. He should act for his client only and having once acted for him he should not act against him in the same matter or in any other matter related thereto, and he should scrupulously guard and not divulge his client's secrets or confidences.

(8) He should report promptly to his client the receipt of any monies or other trust property and avoid the co-mingling with his own, or use of trust money or property.

(9) He is entitled to reasonable compensation for his services but he should avoid charges which either over-estimate or under-value the service rendered. When possible he should adhere to established tariffs. The client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge or even none at all.

(10) He should avoid controversies with clients regarding compensation so far as is compatible with self respect and with the right to receive reasonable recompense for services. He should always bear in mind that the profession is a branch of the administration of justice and not a mere money getting trade.

(11) He should not appear as witness for his own client except as to merely formal matters, such as the attestation or custody of an instrument, or the like, or when it is essential to the ends of justice. If he is a necessary witness with respect to other matters, the conducting of the case should be entrusted to other counsel.

4. TO HIS FELLOW LAWYER

(1) His conduct towards his fellow lawyer should be characterized by courtesy and good faith. Whatever may be the ill feeling existing between clients it should not be allowed to influence counsel in their conduct and demeanour towards each other or towards suitors in the case. All personalities between counsel cause delay and promote unseemly wrangling.

(2) He should endeavour as far as possible to suit the convenience of the opposing counsel when the interests of his client or the cause of justice will not be injured by so doing.

(3) He should give no undertaking he cannot fulfil and he should fulfil every undertaking he gives. He should never in any way communicate upon the subject in controversy, or attempt to negotiate or compromise the matter directly with any party represented by a lawyer, except through such lawyer.

(4) He should avoid all sharp practice and he should take no paltry advantage when his opponent has made a slip or overlooked some technical matter. No client has a right to demand that his counsel shall be illiberal or that he shall do anything repugnant to his own sense of honour and propriety.

5. TO HIMSELF

(1) It is his duty to maintain the honour and integrity of his profession and to expose without fear or favour before the proper tribunals unprofessional or dishonest conduct by any other member of the profession, and to accept without hesitation a retainer against any member of the profession who is alleged to have wronged his client.

(2) It is the duty of every lawyer to guard the Bar against the admission to the profession of any candidate whose moral character or education unfits him for admission thereto.

(3) The publication or circulation of ordinary simple business cards is not per se improper but solicitation of business by circulars or advertisements or by personal communications or interviews not warranted by personal relations, is unprofessional. It is equally unprofessional to seek retainers through agents of any kind. Indirect advertisement for business by furnishing or inspiring newspaper comment concerning causes in which the lawyer has been or is connected, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, and like self-laudations defy the traditions and lower the tone of the lawyer's high calling, should not be tolerated. The best advertisement for a lawyer is the establishment of a well merited reputation for personal capacity and fidelity to trust.

(4) No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client; he has a right to decline employment.

(5) No client is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the State, or disrespect for the judicial office, or the corruption of any persons exercising a public or private trust, or deception or betrayal of the public.

(6) Every lawyer should bear in mind that the oath of office taken on his admission to the Bar is not a mere form but is a solemn undertaking and on his part should be strictly observed.

(7) He should also bear in mind that he can only maintain the high traditions of his profession by being in fact as well as in name a gentleman.

"THE JUDGE" (1975 A.D.)

I have dueled with Legal Furies,
I've converted stubborn juries,
Heard the plaudits of The Mighty,
(Took the handsome fees they paid.)
Now, my judgments they are quoted
Public speeches, gravely noted.
These were only passing triumphs,
Transient memories, that fade.

But the frolic, and the laughter,
(Thor the headache followed after)
And that early morning lecture
(Which I gladly would evade)
Mouthy battles; loud and vi'lent
Classmates voices (some now silent)
These are memories enduring,
These; and Friendships that I made.

Herman Lordly

Case and Comment

DRINKWATER AND ANOTHER v. KIMBER

Husband and wife-Action by husband and wife for injury to wife-Husband's contributory negligence-Liability to contribute towards damages awarded to wife-Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1)

The Courts, have always shown great reluctance to consider an Act of Parliament as altering or modifying a previous enactment, unless it does so in clear words. This is another decision which speaks eloquently in favour of this principle.

The fact situation which gave rise to this action involves no intricacy. Mrs. D. was driving with her husband when their vehicle collided with a car driven by Mr. K. Mr. and Mrs. D. brought this action for injuries suffered by Mrs. D. as a result of the collision: liability for the wife's injury was admitted, but the husband plaintiff was found partly to blame. The defendant's counterclaim raised the issue whether under section 1 (1) of the Contributory Negligence Act (1945) the husband would be liable towards his wife for his proportionate contribution to the injury.

At the very outset of his case, counsel for the defendant was met with strong opposing legislation: the English Tortfeasors Act (sec. 6 ss. 1) recites that "Where damage is suffered by any person as a result of a tort (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been liable in respect of the same damage." As husbands and wives may not sue each other in tort, this Act is ostensibly of no avail to the defendant but may prove fatal to his case.

Despite the clear words of the Tortfeasors Act, counsel for the defendant argued strenuously that sec. 1 (1) of the Contributory Negligence Act had the effect of defeating the tortious immunity which existed between husband and wife. The pertinent section relied upon, provides: "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage." As this section makes no mention of the husband and wife limitation, the defendant contended that the husband plaintiff came within the words "any other person." Hence the husband should be made to compensate the defendant for damages arising out of the injury to the wife since he was partly responsible for it.

Devlin J., rejecting counsel's contentions first directed his attention to the general scope of the Contributory Negligence Act. Having remarked that the "Act is not intended to alter any substantive defence to a cause of action," he continues: "The defendant's construction of subs (1) depends on reading the word "damage" as meaning more than physical damage and as wide enough to include the sort of financial loss which arises when, as the result of a wrongful act, a man has to make a payment to the third party. It might perhaps, be read that way if there were nothing to point to the contrary....but that reading makes subs. 3 at best superflous and at worst contradictory. If contribution between joint tortfeasors is among other cases covered by subs. (1), it is superflous, and, indeed almost incomprehensible, to provide that s. 6 shall apply to persons who would be liable by virtue of sub. s. (1). If however the meaning of "damage" is restricted to physical damage, the two sub-sections fall into place and are complimentary."

If I were to add to that sound expose of statute exegesis it would be to agree with the conclusion of Devlin J. by resorting to different means. Indeed I should prefer to tread a shorter path to reach a similar result.

Without elaborating extensively on the history of the relevant statutes involved in this case, it is possible to restrict their application, thus leaving their content intact and the word "damage" to be defined by a higher authority.

As I propose to discard the Contributory Negligence Act as irrelevant to the issue on the counterclaim, I shall deal with it now. This Act was evolved to meet situations where the cause of damages due to negligence was divisible and attributable to different agents. It apportions damages in terms of causation; but its application is restricted to definite relationships. To claim under the Act, independently of some other enactment, the parties must have been at the same time agents and victims of the negligent act complained of: both must have given and received. If one of those essentials is lacking, the relationship is not established and the Act will not apply unless some other statute grants the privilege.

Let me illustrate what I wish to convey by referring to the case at hand. Here the plaintiff husband and the defendant were found negligent and both partly to blame for the collision. As between themselves, the Act clearly applies; but will it be applicable to all the damages which have issued from the impact?

Glancing back on the facts, we are met with the wife's claim for her injuries. The Court has found no negligence, either personal or imputed on her part. Were it not for the rule that wife and husband may not sue each other in tort, she would have a perfectly good claim against either perpetrator of the negligent act. But even then, she is not precluded from collecting her entire damages. The law on

this subject is thus expressed in The American Restatement Of Torts, No. 883: "Where two persons would otherwise be liable for a harm, one of them is relieved from liability by the fact that the other has an absolute privilege to act or an immunity from liability to the person harmed." At this stage, the defendant admits liability for the wife's claim but counterclaims against the husband for the latter's proportionate contribution to the wife's injuries. As he was responsible for part of the wife's injuries only, he contends that he should be compensated by the husband plaintiff for the other portion of the damages. The fallacy of defendant's argument may easily be detected; he relies primarily and exclusively on the Contributory Negligence Act, while he should first direct his attention to the Tortfeasors Act. Considered in relation to Mrs. D., both drivers were tortfeasors; they were co-tortfeasors. Therefore, the liability issuing from that relationship should be governed primarily by the Tortfeasors Act. This Act provides for compensation between co-tortfeasors; but one may recover from the other only if the party injured could have sued that co-tortfeasor from whom recovery is sought. If the injured party in this case could have sued D. then the Act would apply and the amount of damage recoverable by K. would be defined by the Contributory Negligence Act. But as the facts in the counterclaim preclude us from enquiring beyond the Tortfeasors Act, it is submitted that any discussion of the Contributory Negligence Act was superfluous and irrelevant to the counter-issue.

Donat J. Levesque, 2nd year.

BENNETT, WALDEN & CO. v. WOOD (1950) 2 A.E.R. 134

This is the latest in a series of cases in which the English Court of Appeal has had to interpret real estate agency contracts in order to determine whether the agent has earned his commission.

The plaintiffs, a firm of estate agents, wrote to the defendant: "We thank you for your instructions.... to act as your agents in the sale of (your) property, and beg to confirm that in the event of our securing for you an offer....our commission will be...." The plaintiffs in due course introduced a potential purchaser who offered to purchase "subject to contract," and paid a deposit. The defendant accepted this offer, but did not complete the transaction. The plaintiffs sued for their commission and succeeded at first instance; however this judgment was reversed on appeal.

The plaintiffs based their case on the letter, which, they contended, constituted the terms of the agency, and on what they had in fact done. The case, therefore, turned on the construction of the letter, and, in particular, on the words "securing for you an offer." In interpreting these words, the Court applied the dictum of Lord Russell of Killowen in Luxor (Eastbourne), Ltd. v. Cooper (1941) 1 A. E. R. 47: "It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction of the contract would, in my opinion, require clear and unequivocal language."

The defendant had bound himself to pay a commission on the plaintiffs securing an offer. The plaintiffs had secured an offer "subject to contract." Now, under well established rules, an offer "subject to contract" is very different in effect from a "firm" offer; the former is not susceptible of being transformed into a contract by acceptance; the latter is. The term "offer" in the contract thus was not "clear and unequivocal," and so, in line with Lord Russell's dictum, was interpreted in favour of the defendant as meaning "firm" offer. Therefore the plaintiffs had not done what they had contracted to do; they had not procured an offer. It followed they were not entitled to be paid for their services.

In Luxor Ltd. v. Cooper (supra), Lord Russell also said: "No general rule can be laid down by which the rights of the agent or the liabilities of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of those terms." This is no doubt true, but in the light of the cases of which this case is the most recent, it is clear that the Court of Appeal, recognizing the relative inexperience of the ordinary vendor, and the high degree of skill and wide range of knowledge in these matters of the average broker, have tended to construe real estate agency contracts very strictly as against the agent.

J. Arthur Ryan, III Law U.N.B.

WHITE AND OTHERS V KUZYCH – (1951) 2 ALL. E. R. 435
Trade Union-Domestic tribunal – Adjudication on member's conduct– Provision for appeal to executive of federation–

The Privy Council in June, 1951, considered one of its final judgements respecting Canadian cases in their decision in this case. It deserves strict attention because of its assured future prominence in the field of internal labour relations. The writer however wishes only to comment on certain aspects and certain reasoning in the case itself.

The plaintiff (respondent), a member of a Canadian trade union, was charged before a domestic tribunal set up under the by-laws of the union with conduct unbecoming a member of the union and of committing acts discreditable to it; deemed serious offences by the by-laws. He was found guilty and at a general meeting a resolution was passed expelling him from the union.

Article 26 of the by-laws provided: "If a member has been found guilty..... and feels that the decision is unfair, or the penalty too severe, he may, within sixty days file an appeal in writing with the executive of the Shipyard General Worker's Federation...." Article 22 of the by-laws provided that every member should be deemed to have entered into a contract with the union and at all times to abide by the following oath obligation; "I promise that I will not become a party to any suit at law or in equity against this union or the federation, until I have exhausted all remedies allowed to me by said constitution and by-laws."

After expulsion the plaintiff brought an action in the British Columbia High court for having been invalidly expelled from the union and for a declaration that he was still a member and for consequential relief. Whittaker J. at the trial, held that the plaintiff was entitled to the declaration that he had not been validly expelled from the union and was still a member in good standing and awarded him damages in the amount of five thousand dollars. On appeal the British Columbia Court of Appeal, by a majority affirmed the trial judgement.

On further appeal to the Privy Council, it was held that the conclusion reached at the general meeting to expel the respondent was a "decision" within the meaning of article 26, even though it was tainted by bias or prejudice or arrived at in defiance of natural justice. Accordingly the conclusion reached by the general meeting was subject to an appeal to the federation which the plaintiff was by contract bound to pursue before he issued his writ and therefore he was not entitled to the declaration which he sought.

The case might have been considered from various perspectives but the aspect which intrigued the writer was the basis of the decision of Whittaker J. at the trial and that of O'Halloran J. in the Appeal Court. They based their decisions on the much discussed and equally confused principle of "natural justice." A few words on the origin and significance of the doctrine is necessary.

The theory of natural justice was first propounded by the Greek philosophers Plato and Aristotle. They applied this concept to the legal relationship existing between man, the state and immutable nature. The Greeks traditionally regarded laws as being related to both justice and ethics. From there the theory was adopted in a diluted form by the Romans and such diluted aspects were applied to the Roman Law. Then the principle achieved its zenith in the works of the medieval Scholastics and their theory of rationalism – the principal exponent being Saint Thomas Aquinas who in his Summa Theologica traced the relationship of all forms of law to the Eternal Being.

From that time down to the present day the principle of natural justice has lost much of its former significance; but it must not be forgotten that in a technical sense equity is considered as a portion of the natural law which the common law courts omitted to recognize and it's still administered in its original forms. Moreover in sporadic cases and as the basis of Lord Mansfield's conception of the governing principles in quasi-contract this theory of natural justice is to-day applied in the courts.

Thus, is it not interesting that when in a case of labour relations, judges in two courts based their decisions clearly and boldly on the principle of "natural justice"? Whittaker J. at the trial concluded his judgement with this statement; "It cannot by any stretch of the imagination be said that the trial within the union was one that was free from prejudice and bias....." and the learned judge added, "It is almost inconceivable that so determined an effort should have been made to influence the members against the plaintiff while the charges were pending and before the plaintiff had been tried.....In the light of the facts, I am of the opinion that the purported expulsion of the plaintiff was contrary to natural justice."

In the Court of Appeal O'Halloran J. went even further; "In such circumstances it was obviously impossible for the respondent to receive a fair trial....There could be in that trial committee as constituted no opportunity for judicial consideration of the question on its merits. The verdict for expulsion was inevitably prejudiced and virtually decided before the trial was held..... A man has a right to work at his trade. Moreover, the civil liberties of the subject cannot be decided by a trial committee set up by a labour union. That is the prerogative of the constitutional courts of the country. In my judgement, the question the union trial committee sought to deal with in the circumstances here was beyond the competence of any union to decide."

The Privy Council practically disregarded the principle of natural justice, applying a strict ruling on the union's by-laws. It would have been interesting if the plaintiff had filed an appeal to the federation within the stipulated period contracted for so that the Privy council would have had to face the question squarely.

G. T. CASEY
III Law U.N.B.

BRITISH MOVIETONEWS LTD. v LONDON & DISTRICT CINEMAS LTD.
(1951) 2 ALL E. R. 617

CONTRACT – CONSTRUCTION – FRUSTRATION

Until this case reached the House of Lords the law relating to frustration had reached an advanced stage in its developement. But now it has been set back a good many years. Such a reaction is often seen in the formation of new doctrines and theories. The status quo resists for a time, but finally gives way to new ideas. I would say that this case presents such a bloc in the progress of the law and in time will succumb.

In 1941 the appellant (plaintiff), a distributor of news reels, agreed with the respondent (defendant), an exhibitor, to supply news reels for a period of at least 26 weeks and thereafter either party could terminate the contract on four weeks notice. However in 1943 the rationing of film made it necessary for the parties to enter a supplementary contract under which the original contract was to remain in force until the rationing order was lifted. The order was made under the Emergency Powers (Defence) Act 1939 – This act expired in 1946 and was replaced by the Supplies and Services (Transitional Powers) Act 1945 which act continued the order, rationing film. In 1948 the Respondents gave four weeks notice even though the order was still in existence.–The plaintiff sued to enforce the contract. The defendants countered that they had the right to terminate under the original contract or in the alternative that it was ended by frustration due to the different purpose for which the new act was passed. The plaintiff succeeded at the trial but the Court of Appeal reversed this judgment and thus the plaintiff carried his appeal to the House of Lords, who allowed the appeal.–

The Court of Appeal based their judgment on the fact that notwithstanding the literal words of the contract the parties could not have contemplated the new situation which arose consisting of the different purpose for which the order of 1943 was continued after the expiration of the 1939 act; that therefore the defendant was free to give notice. Denning, L.J. expounded what he thought was a third theory of frustration; namely that in the face of an uncontemplated turn of events which does not amount to a frustrating cause, the court has a qualifying power under which it applies justice and common sense to the words in the new circumstances. This theory he says was stated by Lord Wright in Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corpn. Ltd. (1941) 2 All E.R. 85 and in Denny, Mott & Dickson, Ltd. v. Fraser (James B.) & Co. Ltd. (1944) 1 All E.R. 683, which in turn were based on Bush v. Whitehaven Town & Harbour Trustees (1888) 52 J.P. 392, and Jackson v. Union Marine Insurance Co. Ltd. (1874) L.R. 10 C.P. 125. He continues to say that until recently the theory was applied only in cases where there

was a frustrating event; one which struck at the foundation of the contract. But in the case of Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Works & Public Buildings (1950) 1 All E.R. 208 the Court of Appeal applied the principle to an uncontemplated turn of events where there was no undermining of the foundation of the contract.

However the House of Lords firmly disagreed with the Court of Appeal and Viscount Simon is very explicit in saying that there is no such 3rd theory as put forth by Denning L.J. There are only two theories; the doctrine of the implied term and the doctrine of the disappearance of the foundation of the contract. Both these doctrines he says, are based on a construction of the contract. Turning to this case he says that as a matter of construction the parties are bound by the agreement until the order is revoked.—

The learned Lord then sums up in the following words the law on frustration as it stands to-day:

> "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate.....Yet this does not of itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point — not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation."

Evidently the House of Lords felt that the Court of Appeal was opening a new door and opening it too far and too quickly. As a result, the clock of frustration is set back three or four hours. However I feel that this view will be changed in the not too distant future and that the clock will be re-set and allowed to run its normal course in an ever-changing world of commerce. As Denning L.J. so aptly put it, "qui haeret in litera, haeret in cortice."—"He who clings to the letter clings to the dry and barren shell, and misses the pith and substance of the matter."

John P. Funnell, III Law U.N.B.

KENWARD v. KENWARD: 2 A.E.R. 1950, p. 297

The Second Great War was so extensive and of such intensity that it did not fail to influence our Modern Society in every phase of its existence. The field of Law was no exception to this influence. An interesting example of the War's impact in the field of Conflicts of Law may be found in the case of Kenward v. Kenward (supra). This case dealt with a domiciled British subject, who while in the armed services met a domiciled Russian, the subsequent marriage taking place in Russia. Since the husband could not be re-united with his Russian wife he sought a decree of nullity.

This action was instituted along with three others of similar nature; they all sought decrees of nullity of their Russian marriages with their Russian wives, contending that the marriages were invalid for want of form, or alternatively, were void for want of consent. The wives were not represented by counsel, and as Joseph Jackson pointed out in his article (1951 Modern Law Review Vol. 14 No. 1 p. 84), "Cases of public concern should be dealt with by Acts of Parliament. This would be fairer to the wives, as someone would have argued their case, and the result would have been more conclusive." Of the four cases Kenward v. Kenward was the only one that was definitely dismissed by the Court of first instance.

The principle facts of this case are as follows: Kenward was serving with the Royal Navy at Archangel in 1945. In September of that year he met his wife, Nina Nikolaevna, a Russian girl, who after a short while suggested marriage to which he agreed. After many attempts, Nina finally got an appointment with the local registrar, and through an interpreter the marriage was effected October 16, 1945. Kenward did not remember signing the register (but the Court concluded that he had). His passport was not stamped nor was he asked for a certificate relating to his health and previous marital status. Two days after the marriage the husband was recalled to his ship, and never again saw his wife.

The first ground for the petition of nullity was that the formalities of the lex loci contractus were not adhered to. Hodson J. in the lower Court held that these infractions of form, such as the failing to stamp the appellant's passport, and his not having a certificate stating his previous marital status and the condition of his health as outlined by the Russian code, did not render the marriage invalid. Sir Raymond Evershed M.R. concurred with Hodson J. that the infraction of the form did not go to the root of the contract. The determining factor for Hodson J. was section 2 of the Russian Code 1926, which stated that registration was sufficient proof of a valid marriage, despite the formalities not being complied with, and this marriage had to be tested by Russian Law.

The Master of the Rolls, Lord Evershed, disagreed with Hodson J. on the interpretation of section 2 of the Russian Code. He thought that the registration of the marriage was not indisputable as to its validity. Wolff, the expert witness, had testified that this section would be set aside if the omissions went to the root of the contract. Lord Evershed held this as the main question—to decide the validity of the marriage, did the lack of form in this case go to the root of the contract? From the evidence he contended that it was clear that the Russian officials tried to discourage the Russian girl Nina from her marriage with Kenward, and that it was only after repeated efforts on her part that the officials finally relented. Even so, they did not comply with all the forms. Another unusual fact was that the marriage ceremony was held at night at Archangel.. Joseph Jackson in his article (supra) believes that the Russian officials never intended this to be a valid marriage – that they purposely left out part of the required forms of a valid marriage. These officials more than likely realized that Kenward's ship was sailing the next day.

Lord Evershed looked to the intention of the Soviet authorities and concluded that the subsequent legislation by the Soviet Government in 1947—forbidding Russian spouses to leave Russia and forbidding their foreign spouses coming to Russia to join them – clearly illustrated the intention of the Soviet officials. But what if we look to the intention of the parties themselves? Would this not tend to support the view of a valid marriage?

A point which was stressed more strenuously in the Court of Appeal concerned the invalidity of the marriage on the ground that it was not Christian. Section 9 of the Russian Code stated that it was not necessary for both parties to live to-gether, they could choose their own profession. Living to-gether is not a duty, but is based upon mutual arrangement or agreement of the parties. Nachimson v. Nachimson (1930) p. 217 did not support this view; Lord Evershed held it dealt with the simplicity of dissolution, and not the invalidity of a Russian marriage because of its lack of consortium. English law stresses consortium, but basically a Russian marriage is no different from an English marriage and thus this argument was rejected. Russian marriages are not polygamous and thus do not violate the Christian principal of "the union of one man and woman...."

Lack of Consent was another ground raised to dissolve the marriage. Consent is based upon the personal law of the parties and not the personal law of the place where the marriage is performed; this doctrine was laid down in Apt v. Apt (1947) 2 A.E.R. 677. Evershed M.R. Hodson J. and Bucknill L.J. all agreed that on English law the husband's consent was present.

It was further contended that there was a fundamental mistake which voided the contract. The belief that Russian authorities would continue to allow wives to leave Russia or permit their husbands to

join them was a fundamental belief when the marriage was celebrated. The subsequent Russian legislation removed this contention and the appellant's counsel held that this mistake should void the contract. It was pointed out that this was a subsequent mistake and was not in existence at the time the contract was made. It is a fundamental rule of contracts that a subsequent mistake cannot void a previously made contract. A mistake of law will not void a contract, but a mistake of fact will. This opens up an arbitrary point as it is difficult at times to distinguish law and fact.

The point of Frustration was also raised by the appellant's counsel as a further basis for voiding the marital contract. The contract was void through no fault of either party but as a consequence of subsequent Russian legislation. Lord Evershed who had already concluded the contract invalid on formality did not officially deal with this point, deciding to leave it open for later judicial decisions dealing directly with the point. He did however comment that this was a relatively new doctrine (Taylor v. Caldwell (1863) 3 B & S. 826) and had never been applied to marriage before. Hodson J. in the court of first instance, briefly dealt with this point as it was not raised at the trial (but it was left open in the Court of Appeal). He said the contract of marriage creates a status and the doctrine of frustration has no application.

Perhaps the judgment of Lord Justice Denning is the most interesting in the case. He must be admired for meeting the problem head on rather than evading issues and leaving them for future decisions. Although he uses the term frustration, he doesn't mean to apply it in the strict sense of the doctrine. He assumed that if the marriage was formally valid, then it was voidable by English law by reason of a condition which failed. Frustration implies the contract is voided at the moment the frustrating event occurs and not merely voidable as stated by Denning L.J. Various statutes describe the conditions for a valid marriage and new ideas such as Frustration cannot be applied. The Personal law of other countries may differ, and thus a condition attached to the law of one party may not apply to that of the other. If they have married accepting the particular condition as being fundamental, the marriage is then voidable if this condition is broken. In Re Bethell (1888) Ch. D. 220 supports the view that marriage depends on conditions attached to one party. If a person entering into a foreign marriage voluntarily adheres to its conditions it should be a binding marriage. The present marriage is voidable for failure of a condition that was fundamental and applicable; the belief that they would enjoy subsequent consortium, but Russian legislation thwarted this condition, thus the contract is voidable.

This case has been criticised on the grounds that it is an example of English law-makers bending backwards to stretch the law into giving a just decision. I am of the contrary opinion that this is a strict interpretation of the law. Hodson J. illustrates the attitude adopted by the judiciary in interpreting this case. He had great sympathy for the petitioner. Many lawyers will appreciate his refusal to stretch the law to a point where its extension becomes difficult or impossible to justify on existing provisions and principles. The Court of Appeal however developed the case a little more extensively than the court of first instance. I feel certain that the admirers of Hodson J. will hold equal admiration for the Court of Appeal in the manner in which they arrived at their decision.

Donald J. O'Brien, II Law U.N.B.

News Items

This seems to be a very eventful year as far as the law school is concerned. The new instructional methods inovated last year are now well established and with the promise of new quarters the outlook for the future is indeed bright.

The enrollment is slightly down this year as compared to last. The class of 1951 was one of the most prolific in the school's history. The decline is perhaps due to the sharp reduction in the number of veterans attending the school under the D.V.A. plan.

The Law Ball which was held on the evening of November twenty-third, in the Admiral Beatty Hotel was a great success. A large representation from the bar as well as the majority of the student body made up the bulk of the gay crowd. Mr. John Stark, social chairman of the Law Students Society and his co-workers deserve congratulations for their efforts.

The Debating team under the capable leadership of Mr. Robert Allen is endeavouring to keep the Eaton Trophy (symbolic of Maritime Inter-Collegiate debating supremecy) here at the law school. It was won last year when Mr. Harold Stafford was chairman of the Debating team. Mr. Allen along with Mr. Allen Mitchell started in the right direction by winning the initial debate against King's College in Halifax.

The law students are greatly benefiting in valuable experience from the Moot Courts this year. They are conducted on a high plane with practicing members of the bar acting as judges. Every student acts in these Moot Courts, at least once as a counsel, solicitor or registrar. The sittings are held every Monday evening at 7:30 p.m. in the Chancery Court room. The proceedings are formal with all participants being appropriately robed for the occasion, and putting forth their most Court-like performance.

Mr. George Noble is doing a fine job in co-operating with the faculty in keeping the Moot Courts running smoothly. The Supreme Moot Court of The University of New Brunswick incidently has overruled several Privy Coucil and Supreme Court of Canada decisions.

The Athletic Chairman Mr. T. V. Kelly is initiating a new diversion for the law students this year in the form of Curling. He has had an enthusiastic response from the student body and has obtained regular time on Thursday afternoons at one of the local rinks. Mr. Kelly also hopes to get some of the more energetic types out to play a little hockey after Christmas.

Last year's graduates can certainly point with pride to their class, with no fewer than four of their members being recipients of Beaverbrook Overseas Scholarships. The following is a breakdown of the post graduate activities of last year's class.

John Baxter is with the firm of Fairweather & Hoar in Saint John.
Thomas M. Bell has set up partnership with Rod Logan in the City.
Albert J. Clark is with the Army Ordinance Corps.
Richard Cochrane is in Fredericton with the firm of Winslow, Hughes and Dickson.
Leycester D'Arcy is practising in Saint John.
Charles Dionne is practising in Woodstock.
Margaret Duffie practising with her brother in Grand Falls.
Edward Fanjoy in England on a Beaverbrook Overseas Scholarship.
J. Carlisle Hanson is with the firm of Gilbert & McGloan in Saint John.
James D. Harper is with B. R. Guss in Saint John.
George W. Langen is practising in Plaster Rock.
Rodman E. Logan is in partnership with Thomas Bell in Saint John.
Wallace D. Macaulay in England on a Beaverbrook Overseas Scholarship.
Edward F. McGinley in Paul Barry's office in Saint John.
A. R. McIntyre in Toronto Ontario in the firm of McMaster & McMaster.
John L. McSweeney in the City Clerk's office in Moncton.
Fred Morris at last report was moving to Ontario.
Ervin M. O'Brien has opened his own office in Saint John.
John E. Ryan is in England on a Beaverbrook Overseas Scholarship.
Harold E. Stafford also in England on a Beaverbrook Scholarship.
Vincent J. Whelton has gone west to Edmonton Alberta.

Book Reviews

LABOUR AND THE CONSTITUTION; published by the Fabian Society of New South Wales, September, 1950. 24 pp. one shilling

This little pamphlet provides valuable reading for students of the Canadian Constitution not only because of the similarities between the federal systems of the two dominions but because the Australians have faced-up to the difficult task of modernizing their constitution in a manner befitting a great and mature nation.

Although originally designed to aid the Australian people in their aspiration to greater nationhood, the Australian Constitution has now become, in the view of the Fabian Society of New South Wales, a formidable obstacle to social and economic progress. Constitutional change and improvement is the confessed desire of the publishers of this pamphlet. One presumes that the Fabian Society of New South Wales contains the brains of the New South Wales Labour Party. Therefore, it would not be rash to presume also that the Fabians hope that the Constitution will not act as a red light to block the nationalization policies of the Labour Party. Even though the booklet contains a "left of centre" bias it is on balance, a scholarly contribution to the study of constitutional law.

The crux of the complaint of the Fabians is that "progressive policies," many of them favoured by all political parties, are hampered by constitutional limitations upon the powers of the central government. The Commonwealth, they say, lacks general peacetime powers to foster national economic developement, to regulate wages or profits or prices, to co-ordinate public and private investment for an effective full employment policy, to organize the marketing of primary products, to insure the equitable distribution of goods in short supply, to finance and develop education or health services and so on. These are the very matters which cause our own Dominion-Federal Conferences to dissolve in anger and in crocodile tears.

The authors are very critical of the Privy Council and High Court decisions which have moulded the Australian Constitution. Judicial interpretation, they argue, has been largely involuntary and unconscious and has been, therefore, a "haphazard and unreliable" means of adapting the Constitution to changing circumstances. "At best adaption has lagged decades behind the need for change. Frequently, periods of advance have been followed by periods of retreat, when the High Court has recoiled from the implications of earlier bold decisions." Those who disagree with the decision of the Privy Council in the Snider Case will undoubtedly have a little sympathy for this point of view. However, in spite of this critical analysis the authors conclude that judicial re-interpretation by judges who are impartial, honest and competent, affords one of the best means of revising the constitution.

Undoubtedly this pamphlet contains a certain amount of leftist propaganda designed for Australians. Even so, the twenty-four pages have a high informative value for Canadians. It is refreshing for a democrat to realize that at least in Australia a political party has the courage to remind readers of this pamphlet, i.e., men and women of goodwill of all political parties, that a deadlocked constitution is a negation of democracy.

It is a pity that in Canada our political parties do not publish pamphlets setting forth honestly, fearlessly and intelligently, their views on the serious matters of our time. If such publications were attempted by our major political parties one could be sure that the competition of sound ideas would soon cripple error, falsehood and the theories of constitutional "crackpots."

J. C. Hanson.

* * *

CANADIAN MASTER TAX GUIDE; (7th Ed., September 1951)

published by

C. C. H. Canadian Limited, Toronto – $3.00 – 282 pages and index.

This book begins with the history of The Income Tax Act and proceeds to analyze all of the provisions of the Act in a detailed and comprehensive manner. It answers such questions as––Is a partnership liable for tax? Are race track winnings taxable? What income is taxable and what is not taxable? These and many other difficult problems are solved in this small but thorough book. Moreover, the guide contains many bits and pieces of interesting information such as the following:

> "A taxpayer may be carrying on a business of an illegal nature, bootlegging, and yet be taxable from returns therefrom."
>
> "Where farming is carried on as a hobby, or where it is not the chief source of a taxpayer's income, or where it combined with other sources is not the chief source of income, the taxpayer may deduct one half of any loss on the farming operations, up to a maximum of $5,000 from his income from other sources."

The completed specimen individual income tax return which the guide contains would be very useful in assisting the average farmer or white-collar worker to fill in his own return. Besides containing the essence of income tax law, the manual deals briefly with gift taxes, succession duties and Dominion excise and sales taxes. Unfortunately the guide tells us nothing about the New Brunswick Sales Tax.

The printing is set in large clear type. Speedy reference to any tax problem is simplified by a comprehensive index of 31 pages.

The guide is primarily designed for accountants, lawyers and company officers. However, it is written in such a clear and simple style that it would assist any person of average intelligence and of an industrious nature to pierce, at least, the mystery of his own income tax problems.

By J. Carlisle Hanson

MARRIAGE IN THE COMMONWEALTH

Abstract of Legal Preliminaries to Marriage — in the United Kingdom and the other Countries of the British Commonwealth of Nations, and in the Irish Republic — London: His Majesty's Stationery Office — six Shillings net. 188pp.—

As may be seen by the title this booklet is a collection and summary of the legal preliminaries of marriage as seen in the statutes of the various countries of the Commonwealth.

It treats each country separately and insofar as possible under the same heads, which are nine in number. Firstly it enumerates the statutes and ordinances in force in the particular country — Next it sets out the preliminaries of marriage. Thirdly the minimum ages are set out. Then follow the degrees of relationship under which marriage is prohibited. Residential qualifications is the next head dealt with followed by the consent to be procured by a minor contemplating marriage. The seventh head deals with the persons who may solemnize marriage and the times at which it may be solemnized. The next topic sets out the places where marriages may take place and lastly are set out the fees payable in each country.

The material for the booklet was submitted by the governments of each Country dealt with. It would be useful to any person who wishes to marry within the commonwealth and also to any solicitor or clergyman whose advice is sought in these matters.

John P. Funnell, III Law U.N.B.

SONNET NO. 21

Said detective "Mac" to Professor Willie
The situation is far from silly,
The New Brunswick reports — a rare collection
Is missing one very important selection.

I've searched the library high and low
Wherever could that volume go?
That third year bunch are a motley crew
If I find the culprit I will surely sue.

Line up the students one by one,
Give me rubber hose, club and gun,
I'll find that book come hell or high water
Or else there'll be a terrible slaughter.

The truant work which has strayed so far
Is known as twenty-one N.B.R.

The Court Jester—

UNIVERSITY OF NEW BRUNSWICK

Law Journal

VOL. V, No. 2 April 1952

"THE STUDENT PUBLICATION"

CONTENTS

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CRIMINAL LAW AND PROCEDURE

M. GERALD TEED, B.A., (OXON); Q.C.
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AND

MEMBERS OF THE COMMON COUNCIL

OF THE

CITY OF SAINT JOHN

THE CITY WITH THE ALL-YEAR ROUND PORT

THE FIRST INCORPORATED CITY IN CANADA

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Editorial

Birthday Greetings

This year the "Journal" is celebrating its fifth birthday. The original creators and their successors overcame numerous obstacles to bring it into existence and to keep it in existence. The school is small and the finances limted but the resulting acheivement is large by comparision. The successive editors and their staffs have contributed greatly to its growth and have left the results of their work to be passed on to those who follow. Many of the mechanical difficulties such as printing, circulation and advertising have been smoothed away to some extent. The financial situation has improved. These improvements allow greater stress to be placed on the selection and refinement of the material which goes to make up the "Journal."

However the "Journal" is still a young child and although it has acquired a distinct form in its development, many difficulities remain to be ironed out and much remains to be desired. The object should be to dispose of these difficulties and develop a publication with top qualifications. This can be accomplished only over a period of time as it lacks the touch of the professional periodical. But it can be accomplished!

A semi-professional periodical is envisaged covering the entire province and in due time even the four Maritime provinces. The term "semi-professonal" is used because it is felt that the law school or schools as the case may be, is the best source from which such a publication should emenate. An effort such as the one proposed would be unique in that it could concentrate on matters which are local and which would not otherwise receive notoriety. It would illuminate and profit the bar locally and contribute generally to the profession on a national scale.

These possibilities are presented to show what could be accomplished in the future if the present efforts are channeled in the proper directions. However for the present, endeavours must be confined to the improvement of the existing entity. After acquiring a certain degree of perfection these proposals may then be considered.

To attain this degree of perfection a whole-hearted co-operation of both the students and the members of the bar is required. Contributions from barristers throughout the province would enhance the quality of the material used and add a certain ingredient of maturity which the student is usually unable to acheive. The man in practice has had the opportunity of seeing how the principles and theories with which he became familiar in law school are applied in

the courts, and in everyday experience in his office. He is faced with problems every day; naturally, interest is aroused and he resorts to research to solve them. If he should consider the point to be of wide interest, the next step is to merely concretize his thoughts and efforts onto paper and thus develop his own thinking and skill and at the same time give the benefit of his work to the profession at large. It is not suggested that lawyers devote much time to the writing of articles but it is well known that many interesting points come up for consideration which will particularly intrigue a certain man, and it is this type of topic on which he should write. What practioner has not said to himself, "this is an interesting question, I would like to write something on it?" The trouble is that in the majority of cases he does not carry out his wish.

The student on the other hand should likewise take an active part in the publication of the "Journal." True he is limited by his ignorance but there are fields open to him such as case notes, and narrow points of law, which do not require the concentrated research and know-how of the more experienced writer. Here is his opportunity to develop his skill which will surely be of value to him in whatever field he may later chose to enter. By the time he has reached his graduating year he should be competent enough to attempt a major article.

The profession as a whole has been accused of an inaptitude in the field of writing, preferring to leave the burden to the academic lawyer. If this criticism is justified, steps should be taken to correct the situation, for the practical view of the practioner is important in counter-balancing the detachment of the academic thus giving a more realistic result.

It is hoped that the "Journal" may, on its fifth birthday look forward to a life of growth and development brought about by a close co-operation between barristers and students both showing a genuine interest for its continued well-being.

J. P. F.

The New Home of the Law School

A few of the graduates of the class of 1951 were grouped in the lobby of the Lord Beaverbrook Hotel in Fredericton after the senior class dinner last spring. The topic of their conversation was a natural one, for that dynamic orator, Lord Beaverbrook, had just delivered the address to the graduates. The Beaver was the subject of a comparision with Winston Churchill, another world figure who has made a name for himself in English political life. The comparision was drawn on many aspects of their lives—even the private sides of their characters were included. It was noted that Churchill was not a man to do things in half measures; his speeches during the war were delivered to give the maximum of force and impact; even his trips were made with all the entourage necessary for the fullest comfort. The U.N.B. Chancellor was not to be outdone. The students were given to believe that his adroit handling of aircraft production during Britain's gravest hours was a major factor in the survival of freedom; his trips, especially to New Brunswick, were conducted on a par with any made by the Prime Minister of Great Britain, and these annual vacations usually included a full measure for the University of New Brunswick in the form of a gift for the advancement of education in his native Province.

Numerous are the donations which are forever evidence of Lord Beaverbrook's generosity, usually in the form of buildings 'up the hill.' The Lady Beaverbrook Residence, the Lady Beaverbrook Gymnasium, the Bonar-Law Bennet Library and the Maggie-Jean Chestnut Residence for Women have come in the past along with the valuable Beaverbrook Overseas Scholarships and many priceless books and papers.

One week-end last fall Lord Beaverbrook added another building to the imposing list noted above, which to lawyers and to law students in particular was sweeter than a majority decision. The Chancellor, a former student of the school, purchased the F. P. Starr property in Saint John to house the Faculty of Law—a faculty he says he never would have left if the then Dean had been a little more indulgent. What he proceeded to accomplish after that departure is a glorious chapter in the history of New Brunswick which is still in the writing.

The announcement in the press had its repercussions. Unsuspecting students who, every morning converge on the Provincial Building and climb the three gruelling flights of stairs to pursue the study of law, found themselves the targets of numerous questions as to where the school had been all these years; few people knew that the Law School had its birth in that very building almost ninety years ago.

During the early nineties of the last century the Chief Justice of the Province, Sir John C. Allen joined with others interested in legal education and the group investigated the possibility of forming

a law school in Saint John. The University of New Brunswick was not interested in sponsoring the venture at that time and so the group approached the Governors of King's College, Windsor, N.S. who decided to father the school. This arrangement existed till 1923 when, under the Carnegie Plan, King's College amalgamated with Dalhousie University. King's College Law School then affiliated with the University of New Brunswick as Dalhousie already had its own Faculty of Law. H. O. McInerney, Q.C. present Judge of Probate for Saint John County, became the first professor of law, a position he held until his retirement two years ago.

Lectures have always been given in what is now the Provincial Building. The facilities in the early days were confined to the Equity Court Room on the second floor (in these days it is known as the Chancery Court Room.) Gradually the facilities took their present form; two lecture rooms, a student library and a common room.

The Chancellor's choice for a new building is an unusually magnificent twenty-room structure which, in its forty years existence, has become a dominating landmark in Saint John. Standing at the head of Coburg Street hill it overlooks one of the City's busiest thoroughfares. An observer associates the building as forming one of Saint John's many pleasant sights,—comparable as a view from Charlotte Street, to that of the Old Stone Church viewed from Germain Street, or a view of the waters of the harbor from any of the intersections on Charlotte Street. Although situated centrally, the new school is in a select residential district to which it adds beauty because of its gardens, shade trees, and large expanse of lawns.

The three story structure was built by a prominent Saint John businessman, F. P. Starr, as a colonial mansion. The position of the main entrance at the gable end, looking towards the business section of the city deprived the building of its colonial characteristics. However, this feature will be revived as alternations will provide an entrance on the west side, which actually should be the front of the building.

The edifice is thirty-seven feet wide and seventy-two feet long. The rooms are adequately supplied with natural light and are quite large following the vogue of the time when it was built. The floors are of solid birch and of very fine quality. A beautiful staircase which is both wide and firm, leads from a spacious hall to the upper floors.

When altered the ground floor will be given up to the library; the second floor to three lecture rooms and the top floor to two common rooms and the caretaker's apartment. There will be five offices, one on the first floor and four on the second floor.

The library will advance in quality and quanity in its new surroundings. The added generosity of our Chancellor has increased the total number of volumes to an operative eight thousand, which

have come at an appropriate time. The curriculum has been brought into line with Canadian standards and consequently more books were needed. The new collection consists of law reports, reference works, text-books, legal periodicals, and works of leisure reading.

Beaverbrook, the subject of comparision in that spring meeting of students, who was perhaps the most trusted advisor to that same Churchill in World War II, has made a lasting contribution to legal education in New Brunswick which can only result in time in the development of better Canadians and better world citizens.

T. V. Kelly, U.N.B. Law II

Articles

THE DEVELOPEMENT OF NEW LIABILITY RULES GOVERNING INTERNATIONAL CARRIAGE BY AIR

Introduction

The liability rules governing the international carriage by air of passengers, baggage or goods are, at present, under revision. These rules were established by the Convention for the Unification of Certain Rules Relating to International Transportation by Air, commonly known as the "Warsaw Convention." This Convention was signed at Warsaw on October 12th, 1929, by the representatives of twenty-three (1) countries, and came into force as regards Canada on September 8th, 1947, following the deposit of an instrument of accession (2) by this country with the Polish Government. As the Convention has been ratified, or adhered to, by upwards of forty countries, (3) it governs by far the greater portion of air transportation conducted on an international basis.

There is much international carriage by civil aircraft which originates or ends in Canada and most of this carriage is subject to Warsaw rules. The movement towards the revision of these rules will, therefore, interest those who may be called upon to advise on aviation matters.

Description of the Warsaw Convention

A short description of the main provisions of the Warsaw Convention will give the background against which the new liability rules are being drawn.

The present Convention applies (article 1) to the international carriage of persons, baggage, or goods performed by aircraft for hire or to gratuitous carriage performed by an air transportation enterprise.

As used in the Convention the expression "international carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a trans-shipment, are situated either within the territories of two contracting parties, or within the territory of a single contracting party, if there is an agreed stopping place within a territory subject to the sovereignity, suzerainty, mandate or authority of another State even though that State is not a party to the Convention. (4)

(1) No Canadian representative was present at the Second International Conference on Private Air Law, held at Warsaw in October 1929.

(2) See, for the procedure followed by Canada in acceding to the Convention and in proclaiming the Carriage by Air Act, 1939 of which the text of the Convention constitutes the First Schedule, FitzGerald, **Liability Rules in the International Carriage of Passengers, Luggage or Goods by Aircraft — Warsaw Convention — The Carriage by Air Act, 1939**, (1948), 26 Canadian Bar Review 861-867.

(3) The continent of South America presents a marked exception to the widespread acceptance of the Convention. There, Brazil is the only party.

(4) The two main types of Warsaw carriage would be where the place of departure is in State A and place of destination is in State B, both being parties to the Convention, or where both places are in State A, a party to the Convention, with an agreed intermediate stopping place in State C, even though State C may not be a party to the Convention.

According to the most important provisions (articles 17 and 18), the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident causing the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. Similarly, the carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air. In the latter case, the transportation by air comprises the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

The Convention rules are thus distinguished from the normal rule applied to accidents. The normal rule in many jurisdictions is that the claimant in an aviation case has the burden of proving negligence in the operation of aircraft before the carrier can be held liable for damages. The drafters of the Convention, in 1929, took into account the difficulty which the passenger or shipper would have in establishing the cause of an accident in air transportation and decided to create a presumption of liability against the air carrier on the mere happening of an accident causing damage as above described. This presumption is subject to certain defences allowed the carrier under the Convention. The burden is then on the carrier to show that the injury or death has not been the result of negligence on the part of him or his agents.

The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures (articles 20 (1)). In the carriage of baggage and goods the carrier is not liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage (article 20 (2)). If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability (article 21).

If the Convention gives the passengers and shippers certain definite rights in international air transportation to the disadvantage of the air carrier, it contains a quid pro quo whereby the carrier gets the benefit of a limitation of liability in contrast with the system of unlimited liability to which he might otherwise be subjected in many jurisdictions. (5)

(5) In some jurisdictions the carrier is not permitted to exclude or even limit his liability. Until recently, Canadian air carriers could, by a provision in the contract of carriage, exempt themselves from liability. See, **Ludditt v. Ginger Coote Airways, Ltd.**, (1947) A.C. 233. Now, domestic carriers are not permitted to deny or limit their liability for loss of life or injury to passengers below $20,000 per passenger, while those engaged in international carriage subject to Warsaw rules cannot go below the passenger limit of $8,291 established by the Convention. See Air Transport Board General Order No. 1/51, (1951) Canada Gazette (Part II) 199.

Under the Convention, the liability of the carrier for damages is limited to the following amounts: 125,000 Poincare gold francs (6) ($8,291 U.S.) for each passenger; 250 gold francs ($16.58) per kilogram (2.2 pounds) for checked baggage and goods, unless there is a special declaration of value made by the consignor and an additional sum paid by him if the case so requires; and 5,000 gold francs ($331.67) for objects taken care of by the passenger himself.(article 22).

The carrier is not entitled to avail himself of the provisions of the Convention that exclude or limit his liability if the damage is caused by his wilful misconduct (article 25), or if he fails to comply with certain formalities in relation to traffic documents (articles 3-16).

Any provision in a contract of carriage tending to relieve the carrier of liability or to fix a lower limit than that laid down in the Convention is void (article 23) although the nullity of any such provision does not involve the nullity of the whole contract, which remains subject to the provisions of the Convention.

History of the work on revision

After the Convention had been in operation for a few years it was agreed that, although the general principles were sound, the test court cases in various countries and the actual application of the Convention to air transport brought out a number of obscurities in its wording. The revision of the Convention has been under consideration since 1935, with an interruption of six years (1940-1945) during the recent conflict. At various times the question of revision has been studied by the International Chamber of Commerce, the Comite international technique d'experts juridiques aeriens (7) and the International Air Transport Association. (8) In 1946, the CITEJA, in anticipation of its early dissolution, recommended that further study of the revision should be undertaken by the provisional International Civil Aviation Organization (PICAO) or its sucessor, the International Civil Aviation Organization (ICAO). (9)

In 1947, the newly established Legal Committee of ICAO decided to include the revision of the Warsaw Convention on its work program. In 1948 and 1949, and, again, in 1951 (10), the

(6) This is a standard franc consisting of 65½ milligrams of gold at the standard of fineness nine hundred thousandths.

(7) The CITEJA, as this body was known, functioned from 1926 to 1947 for the purpose of developing conventions on private air law. It was a body of air law experts named by various States. The CITEJA had no power to adopt conventions, but sent its final drafts to International Conferences on Private Air Law.

(8) An association of scheduled international airlines. See, (1951) Volume 8, **Minutes and Documents — ICAO Legal Committee**, 233 for the statement: "IATA....feels that revision of the Warsaw Convention is not at this time advisable."

(9) A specialized agency of the United Nations, established pursuant to the Chicago Convention on International Civil Aviation of 1944 and having its headquarters in Montreal. Fifty-seven states belong to ICAO.

(10) The ICAO Legal Committee suspended its work on the revision of the Warsaw Convention during 1950 and, instead, concentrated its efforts on developing a draft convention on damage caused by foreign aircraft to third parties on the surface. It is expected that this draft will be finalized and opened for signature at a special conference to be held in Rome in September of this year.

Committee made substantial progress on the preparation of principles to be included in the revised Convention. In January of this year a special subcommittee met in Paris and, acting under the instructions of the ICAO Legal Committee, drew up a new draft Convention for the unification of rules relating to the liability of the air carrier in international carriage by air.

New draft convention for the unification of rules relating to the liability of the air carrier in international carriage by air.

In the work of revision by far the most contentious item has been the amount of limits to be included in the new Convention. The replies (11) of States to ICAO questionnaires on this subject have ranged all the way from favouring the retention of the present limits to their increase by 100%. Canada has gone on record as favouring double the present limits in the case of passengers, but states that the present limits for baggage and goods should be retained. Nevertheless, in the interest of unanimity and of obtaining the widest acceptance of the revised Convention as soon as possible, Canada has indicated that she would accept the majority vote on the question of limits. (12)

At its session in Madrid, in September 1951, the ICAO Legal Committee decided to defer any further discussion on the limits until it received from the ICAO Council, necessary information of an economic character. This information will probably be placed before the Committee at its next session in January 1953.

The prime argument given for not distrubing the limit is that to disturb them may reduce the possibility of a widespread acceptance of the revised Convention. Discussions concerning an increase in the limits have tended to raise the following questions to which no universally acceptable answers have as yet been given: Are the present limits in relationship or not with the present purchasing power, cost of living and standard of living? What figure representing the economic value of a human life can be included, with some hope of acceptance, in an international convention, given the fact that national ideas as to the value of a human life vary widely? Would an increase in the limits give rise to a greater number of lawsuits and bring about an increase in court awards?

Although a study of the limits presents many mixed legal-economic problems, the broad background of the Convention is strictly legal and that is the setting into which the new limits will have to be placed. To what extent then, have the revisers changed the purely legal provisions of the Warsaw Convention in preparing the new draft? This may best be shown by taking the latest draft (13) prepared at Paris, and comparing it with the existing Convention. Even this brief comparison will be useful as showing the trends in the development of new liability rules in international carriage by air.

(11) (1951) Volume 8, **Minutes and Documents — ICAO Legal Committee**, 233-234. The questionaires referred to were sent to the States in 1948 and 1949.

(12) **Idem.**

(13) **Report of the Sub-Committee on the Revision of the Warsaw Convention to the Legal Committee, Appendix "A"** — ICAO LC/Working Draft No. 391 30/1.52.

First of all, the scope (14) of the Convention has been enlarged. Carriage can now be "international" even if it takes place between two States one of which is not a party to the Convention. This would increase the amount of international carriage subject to standard international rules. The second (15) type of carriage remains substantially the same as in the present Convention.

The new draft follows the Warsaw Convention in retaining detailed provisions concerning traffic documents (passenger ticket, baggage check, air waybill). However, some important changes in detail have been made.

The Warsaw principle that the carrier must deliver a passenger ticket remains; but the Paris draft modifies that principle in specifying that a separate ticket need not be issued for a child for whom no separate seat is allocated and that members of a family travelling together in the same aircraft may be included in one ticket. (16)

The revisers have had some difficulty in establishing the sanctions to be imposed under the Convention if the ticket is issued without containing the required particulars concerning the place and date of issue; the places of departure and destination; the names and addresses of carriers, and the agreed landing place or places. The Paris draft provides that, if the ticket is issued without these particulars, the carrier will be liable to the passenger for any damage which the latter proves he has sustained by reason of the omission of any one or more of such particulars.

The Warsaw Convention, in dealing with the familiar question of the notice to be given concerning a clause limiting liability, specifies that the ticket must contain a statement "that the transportation is subject to the rules relating to liability established by this Convention." The new draft avoids the vague reference to "rules relating to liability" and requires that the ticket give specific notice of the **limitation** factor. Thus the ticket would have to state "that the carrier's liability may be subject to the limitations established by this Convention." As a corollary to this, if a passenger is carried without the ticket containing such a statement, the carrier will not be entitled to avail himself of those provisions of the Convention that limit his liability unless he proves that the passenger had knowledge that the liability of the carrier might be subject to the limitations established by the Convention.

In the case of the baggage check and air waybill, (17) the number of particulars required has been much reduced.

(14) Warsaw Convention, Article 1; Paris draft, Article 2.

(15) I.e., between points in a Contracting State with an agreed stopping place in another State. C.F. **supra**, Note 4.

(16) Warsaw Convention, Article 3; Paris draft, Article 4.

(17) See for provisions on the baggage check and air waybill: Warsaw Convention, Articles 4-16 and Paris draft, Articles 4-11.

The present sanctions applicable if the carrier fails to issue these documents, or issues them in incomplete form, are rather severe, as the carrier is liable to lose the benefit of the provisions of the Convention excluding or limiting his liability. The Paris draft contains less severe sanctions. Failure to issue the documents or their issuance in incomplete (18) form will render the carrier liable to the passenger or shipper, as the case may be, for the damage which these parties have sustained due to the absence of, or omissions from the documents.

Many countries recognize the negotiability of shipping bills of lading and, on this continent at least, the railway bill of lading (19) is negotiable. Hitherto, air waybills have not been negotiable and, for some time past, there have been discussions as to the advisability and possibility of making these documents negotiable. The new draft Convention provides for the negotiable air waybill, but instead of trying to lay down uniform rules on this matter, it specifies that the negotiability of this document will be governed by the law of the place where the air waybill is issued, except where the consignor and the carrier have agreed that a different law shall be applicable and such agreement is included in the air waybill. Under certain circumstance the national laws relating to shipping bills of lading may be applicable to negotiable air waybills.

As not all air waybills would be negotiable, the draft defines the rights of the consignor and consignee under non-negotiable documents in accordance with the general principles of the Warsaw Convention.

The key provisions of the existing Convention which define the extent of the carrier's liability have not undergone radical changes. Rather, there has been an attempt to clear up certain obscurities in the language. The effect has been to make the provisions somewhat broader in scope. As explained earlier, the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident causing the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The expression "accident" has been replaced by the broader concept of "occurrence," while the vague expression "operations of embarking and disembarking" has been replaced by a provision that the occurence must take place at any time from the moment when the passenger leaves the surface to embark in the aircraft until the moment when he reaches the surface upon leaving the aircraft at any place. (20)

(18) The Paris draft (Article5) lessens the carrier's responsibility for the completion of the air waybill. He is now required to fill out only certain particulars and is not liable for the omission of particulars which, under the new draft, the consignor is required to supply.

(19) E.g., in Canada and the United States; but not in Europe where, although twelve States have signed an agreement for the introduction of a negotiable railway bill of lading, the agreement has not yet come into force.

(20) Warsaw Convention, Article 17; Paris draft, Article 12 (1).

The Warsaw Convention states that the carrier is liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods, but it does not specify what is meant by a delay. In case of passengers the new draft spells out what is meant by a delay when it makes the carrier liable if the passengers do not arrive at their place of destination by the time agreed. (21)

The new draft retains the old defence whereby the carrier can avoid liability if he proves that he and his agents have taken all necessary measures to avoid the damage. But the alternative defence that it was **impossible** for him and his agents to take such measures has been made less rigid, because the carrier might never be able to prove that he had found it impossible to take the measures. Therefore, he would, under the new provisions, only have to prove that it was not practicable for him or his agents to take such measures. (22)

Special defences are now made available in cases of legitimate delay or deviation. It is provided that any delay in the carriage or deviations from the agreed or normal routes, for the purpose of saving life, or for reasons of safety or on account of meteorological conditions, or other reasonable deviation on technical grounds will not constitute a breach of the agreements to carry and the carrier will not incur any liability merely by reason of such delay or deviation. (23)

The object of a novel provision is to prevent employees or carriers from being subjected to suits for unlimited amounts. Otherwise the carriers might indirectly be subjected to unlimited liability by reason of being required by law or agreement to indemnify the employees. (24)

The existing Convention deprives the carrier from availing himself of the provisions of the Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. The expression "wilful misconduct" is the nearest English expression that could be found to render the French expression "dol" found in the French text of the Convention, the French text being the only authentic one. (25) This provision of the Convention has caused serious difficulties. There has been a tendency in the courts of some countries to construe "wilful misconduct" as something less than what is normally understood to constitute "dol." (26) In pre-

(21) Warsaw Convention, Article 19; Paris draft, Article 12 (3).

(22) Warsaw Convention, Article 20 (1); Paris draft, Article 16 (1).

(23) Paris draft, Article 16 (1) (b).

(24) Paris draft, Article 13.

(25) See IV Hackworth, **Digest of International Law** (1942), pp. 372-373, for a note on official correspondence between Ambassador Cudahy, United State Ambassador to Poland and Secretary Hull dated July 31st, 1934 and relating to the translation of "dol" by "wilful misconduct."

(26) Some recent cases involving "wilful misconduct" in relation to the Warsaw Convention are **Ulen v. American Airlines**, (1948) United States Aviation Reports 161; **American Airlines v. Ulen**, (1949) U.S. Av. R. 338; **Lee v. Pan American Airways**, (1950) U.S. Av. R. 290; **Pauwels et al v. Sabena**, (1950) U.S. Av. R. 367 and **Pekelis v. Transcontinental & Western Air Inc.**, (1951) 3 Aviation Law Reporter 17, 440.

paring a new provision, ICAO legal experts have made an effort to find a formula acceptable in English, French and Spanish, since the new Convention will be authentic in the three languages. Those familiar with a fairly lengthy line of decisions on the expression "wilful misconduct" even in non-aviation (27) cases, will appreciate the origin of the new formula. It is now provided that the carrier will not have the benefit of the limits if it is proved that the damage resulted from a breach of duty committed by him, or by a servant or agent of his, acting within the scope of his employment, which breach of duty involves a deliberate act or omission committed either with intent to cause damage or recklessly, not caring whether or not damage was likely to result. (28)

Conclusion

The foregoing presents only some of the principal changes made in the Warsaw Convention. A word of caution is necessary. These changes are not final and there still remains much work on revision to be done. After careful consideration by States and interested international organizations, the Paris draft will be studied by the ICAO Legal Committee at its next session in January 1953.

Meanwhile, at this stage of the work, it may be permissible to draw the tentative conclusion that the architects of the new Convention have recognized the intrinsic worth of the present Convention and that, whenever the new rules governing international carriage by air are finally adopted, they will include the best elements of the present rules.

(27) Some of these cases are **Lewis v. Great Western Railway Company**, (1877) 3 Q.B.D. 195; **Forder v. Great Western Railway Company**, (1905) 2 K.B. 532; **In re City Equitable Fire Insurance Co., Ltd.**, (1925) Ch.D. 407.

(28) Warsaw Convention, Article 25; Paris draft, Article 15 (7).

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EFFECT OF CONCEALMENT OR MISREPRESENTATION IN GUARANTEE INSURANCE

Guarantee insurance is defined as follows:

> "Guarantee insurance" means the undertaking to perform an agreement or contract or to discharge a trust, duty or obligation upon default of the person liable for such performance or discharge or to pay money upon such default or in lieu of such performance or discharge, or where there is loss or damage through such default and includes insurance against loss or liabiliay for loss due to the invalidity of the title to any property or of any instrument or to any defect in such title or instrument, but does not include credit insurance." (1)

This type of insurance is a comparatively modern innovation of insurance law. It seems to include what is known in insurance fields as "surety insurance" as well as "fidelity insurance." As the Insurance Act makes no distinction between Fidelity insurance and Surety insurance, it would appear that the same principles of law on the formation of the insurance contract would be applicable to both.

Guarantee insurance bears a close resemblence to the relationship, between a principal and a surety. One method of distinction between such an insurance contract and that of principal and surety is that an insurer does not undertake to pay the original debt but rather to pay a new debt which arises under the contract of indemnity. The essential distinction however is that the rule of uberrima fides applies to all contracts of insurance whereas the rule may or may not apply in the case of suretyship.

The leading authority on the distinction between an insurance contract and that of suretyship is Seaton v. Burnand (2) which establishes that in contracts of insurance uberrima fides is essential whereas ordinary contracts of guarantee are not amongst those requiring uberrima fides. It can readily be seen that on the formation of a contract of guarantee insurance as indeed in a case of principal and surety three persons are involved or, at least, interested, namely, the insurer and, for the want of better names, the beneficiary and the insured. It is admitted that in other types of insurance, parties other than the insured and insurer have an interest in the contract, mainly by statute, but the general rule is that such interest does not arise until the risk insured against occurs.

Claims under such a policy usually arise when the insured has violated the trust in him reposed by the beneficiary, and the latter claims the amount of the loss from the insurer. As some or all of the three parties take part in the formation of the insurance contract, the following questions may arise:

(1) **The Insurance Act of New Brunswick** 1937, Sec. 2 Sub-Sec. 24
(2) (1899) 1 Q.B. 782 at 792

1. When the insurer expressly questions the beneficiary, what is the effect on the contract of mispresentation by the latter?

2. When the insurer asks no questions of the beneficiary, what is the effect on the contract of concealment by the latter?

3. What is the effect on the contract of misrepresentation of concealment by the insured?

On the first question the authorities are quite clear. This situation could and usually does occur where the insurer has asked for certain information and the beneficiary has misrepresented certain facts to the insurance company. The general rule would appear to be that when the default occurs and there has been misrepresentation on the part of the beneficiary, the insurer can repudiate liability. In reading authorities on this subject care must be taken to ascertain whether the case is that of suretyship or a contract of insurance.

In insurance contracts of this type when an application is made to the insurer, it is the usual custom for the latter to seek from the beneficiary certain information concerning the insured. It is also usually stated that the questions asked of the beneficiary and the answers thereto form the basis of the insurance contract. If the insurer repudiates the contract on the ground of misrepresentation by the beneficiary it must be shown that such misrepresentation was material to the contract. This provision is a statutory one which provides:

> "No contract of insurance shall contain or have endorsed upon it, or be made subject to, any term, condition, stipulation, warranty or proviso to the effect that the contract is to be avoided by reason of any statement in the application therefor, or inducing the insurer to enter into the contract, unless such term, condition, stipulation, warranty or proviso is and is expressed to be limited to cases in which such statement is material to the contract; and no contract shall be avoided by reason of the inaccuracy of any such statement unless it be material to the contract." (3)

A similar provision in the Ontario Insurance Act was before the Supreme Court of Ontario in The Cornwall Township vs. Prudential Assurance Company (4) where an action was brought by the Plaintiff corporation to recover from the Defendent company on a fidelity guarantee policy whereby it agreed to pay or make good any amount not exceeding the sum of $20,000 if a tax collector of the plaintiff should commit larceny, fraud, embezzlement etc. During the time when such policy was in force the tax collector did in fact mis-appropriate

(3) **The Insurance Act of New Brunswick**, 1937 Sec. 87 Sub-Sec. 4
(4) (1947) 3 D.L.R. 189

certain funds to his own use. The Defendents disputed liability on the ground that prior to entering the contract the Plaintiff furnished to the Defendent a written application with certain questions which included:

> "Q. How often is he required to pay over amounts received by him on behalf of the Employer and what are the regulations attaching thereto?
>
> A. Every ten days."

It was alleged by the Defendent that this answer was false in that the tax collector did not pay over the amounts collected by him every ten days and was allowed to retain a substantial balance in his hand from time to time. The Trial Judge held that the answers given were true and that there was no representation and further held that in the event the answers were untrue they were not material to the contract within the meaning of the Insurance Act.

The following cases illustrate the principle that on the formation of a contract of guarantee insurance if the beneficiary has materially misrepresented facts to the insurer, the latter may successfully repudiate liability.

In Grain Claims Bureau vs. Canada Surety Co. (5) the plaintiff was engaged in the business of adjusting grain claims and employed on the staff one by the name of Peters, who applied to the Defendent for a surety bond in the sum of $5,000. As a result the Defenent asked the Plaintiff a number of questions, which included:

> "Q. Is there at present anything due or owing to you by the applicant? If so, what is the amount?
>
> A. No.

The Plaintiff brought this claim on the bond for pecuniary loss which it was alleged to have sustained by reason of acts of larceny or embezzlement on the part of Peters. The Defendent contended that the statement made by the Plaintiffs was untrue and consequently repudiated liability. Trueman, J.A. in allowing the appeal and dismissing the action quoted with approval Viscount Dunedin in Glickman vs. Lancashire & General Ass'c Co. (1927) A.C. 39 as follows:

> "The conclusion to which I have come that the bond is vitiated by fraud antecedent to its execution makes it unnecessary to consider other defences."

In Rural Municipality of Churchbridge v. London Guarantee and Acc. Co. Ltd. (6) the Plaintiff brought action on a guarantee bond issued by the Defendent company to cover loss or embezzlement etc. occasioned by the Secretary-Treasurer of the Plaintiff Municipality

(5) **The Manitoba Court of Appeal, (1928) 1 D.L.R. 677.**
(6) **(1925) 3 D.L.R. 341, The Sackatchewan Court of Appeal**

On August 15th, 1917 a bond for $2,000 on behalf of the secretary treasurer was executed by the defendent company and was renewed up to and including August 14th, 1921. A new bond for $4,000 was given in September 1921 and renewed in September 1922. In 1919 it was found that the secretary-treasurer was short $2,000 and the then reeve of the Plaintiff Municipality gave him two weeks in which to pay up, which he in fact, did. On the application for the new bond the Defendent company asked the reeve (a successor to the reeve previously referred to) for certain information in the form of questions and answers which related to the position of the secretary-treasurer. The list of questions included:

Q. Have you ever had cause to complain of his conduct while employed by you?

A. No.

The court held that the answer given by the reeve of the Municipality was false and the Plaintiff could not recover on the bond which was held void ab initio.

As to the second question, the authorities are to the effect that if the beneficary conceals any material fact from the insurer, even though no questions have been asked or information solicited of the beneficiary, the bonding company may deny liability on that account. Thus in Rural Municipality of Mayfield vs. London & Lancashire Guarantee & Fidelity Company of Canada (7) a County Treasurer applied to the Defendant for a bond in the sum of $3,000 for the purpose of indemnifying the Plaintiff against any loss which it might suffer by reason of any act of embezzlement, misappropriation or other dishonesty committed by the Treasurer. About 12 years before entering the employment of the Plaintiff Municipality the Treasurer had been convicted and sentenced to a term of imprisonment on 31 charges of embezzlement. During the currency of the bond the Treasurer embezzled a sum of money belonging to the Plaintiff; he was discharged from office and later convicted and served a term of imprisonment. The Plaintiff brought this action to recover from the Defendant the amount so embezzled. It was contended by the Defendant that the Plaintiff had knowledge of the fact that the Treasurer's previous record was not free from dishonesty and that it failed to communicate this knowledge to the Defendants. The reeve of the Plaintiff Municipality at the trial stated that he did not report the information concerning the previous acts of dishonesty to the bonding company because the company did not ask him for any information and also because he thought this information was nobody's business but his own; that he did not think there was anything serious and further that the Treasurer had lately been acting honestly and he did not think it would be fair to bring up this old affair against him. The Court held that the Plaintiff could not recover on the bond on account of non-disclosure. Lamond, J.A., at p. 405:

(7) (1927) 1 D.L.R. 463. The Saskatchewan Court of Appeal

> "The enforceability of a bonding contract whereby the beneficiary is insured against loss is founded upon a basis of utmost good faith between the contracting parties. This principle was laid down again lately in this Court in the case of Churchbridge v. London Guarantee & Acc. Co. (1925) 3 D.L.R. 341, at p. 348, 18 S.L.R. 450."

and further at pp. 405 and 406:

> "Several cases were cited to us on behalf of the plaintiffs tending to show a lesser degree of responsibility in the beneficiary of the guarantee. But care should be taken to distinguish between a suretyship in a creditor and debtor transaction and suretyship in a fidelity guarantee."

There still remains to consider the effect of misrepresentation or concealment by the insured upon the insurance contract. This situation usually if not always arises in a case of surety rather than in fidelity insurance. This may be stated thus – Will misrepresentation or concealment by the insured vitiate the contract and render a claim by the beneficiary against the insurer void?

It is stated in Rowlatt on Principal and Surety (8)

> ".....that the surety may have been induced to contract by the fraud of the principal is of course no defence unless the creditor is a party to the fraud."

However, no cases have been found which establish that this rule applies to a contract of Guarantee insurance.

A very similar situation arose under an automobile insurance policy in Bourgeois v. Prudential Assurance Co. Ltd. (9). In that case the New Brunswick Court of Appeal held that where the policy was issued on the basis of misrepresentation by the insured, an injured party had no claim thereunder as against the insurer, the policy being void ab initio. This defence has now been denied the automobile insurer by statute; however, the legal principles contained in the case are still sound, and would form a basis for the proposition that any material misrepresentation by the insured under a contract of guarantee insurance, would abrogate any claim thereunder by the beneficiary, however innocent the latter might be.

(8) 8th Edition
(9) 18 M.P.R. 334

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THE LIABILITY OF A CARRIER BY SEA

At the beginning of the twentieth century the bill of lading had become one of the valuable instruments in commercial circles. Its importance had been created by the custom of the Merchants and statutory enactments which declared that the bill represented title to the property of the goods in transit. Whoever held the bill of lading had the power to demand and the right to receive the goods therein represented, subject to whatever equities may have attached, when the goods reached their destination. The bill of lading was, however, subject to express, implied and statutory conditions. Due to these conditions the holder of the bill of lading would often find that when loss or damange occurred to his cargo the carrier or shipowner had absolute immunity for which he had expressly contracted. The obvious answer was that the holder should have acquainted himself with the provisions in the bill before accepting. However this was not always practical in commercial circles where time was usually pressing and transactions quick. In reality the only answer was legislation which would set out the minimum responsibilities which the shipowner or carrier would not be able to reduce and the maximum exemptions which he could not increase. The major maritime powers eventually drew up a convention containing such conditions with the recommendation that the conditions be legislatively accepted by the powers concerned. These conditions, or rules, were to become known as the Hague Rules, 1921. But to fully appreciate the Rules it is necessary to recognize the liabilities and immunities which a ship owner or carrier possessed prior to the Rules.

In shipping there are two types of carriers: the common (or general) and the private. By the common law the common carrier is the insurer of the goods he carries with the exception that he shall not be liable for loss of or damage to the goods if such is the result of action of the King's enemies, an Act of God due to an inherent vice in the goods themselves (1), or if it is a voluntary sacrifice for the common good of all (2). The common law liabaility of the private carrier is in doubt. There seems to be no authority on the point. Whether the private carrier is only liable for loss or damage due to his negligence is debateable. In a dissenting judgment in Liver Alkali Co. v. Johnson, (3) Brett. J., felt that private carriers were under a liability recognized by the custom of England to carry goods at their absolute liability with the same exceptions applicable to them as to the common carrier. However in Nugent v. Smith (4) Cockburn, C.J., went out of his way in his obiter dictum to disagree with Brett, J., and declared that no such liability attached to a private carrier. But neither view has binding force.

(1) **Coggs v. Bernard** (1703) **92 E.R. 107**
(2) **Payne's Carriage of Goods by Sea**, 4th Ed. p. 77
(3) (1874) L.R. 9 Ex. 338
(4) (1876) 1 C.P.D. 433

The contract for the carriage of goods in the ship is known as the contract of affreightment and may be of two types: charterparty or bill of lading. The charterparty is used where the whole ship is contracted for a specific purpose during a specific term at a fixed rate. The bill of lading is used where the ship is put up as a general ship and cargo will be accepted from those who wish to ship their goods to the ports at which the ship proposes to call.

The average charterer wishes only to charter the cargo space of the vessel: this is a simple charter. The obligation of the shipowner or carrier for goods carried would be set out in the charterparty. However, if the charterer wishes to sublet a portion of the cargo space a bill of lading would be issued setting forth the conditions under which the bill was issued. This bill of lading, as also in the case of the general ship, is evidence of the contract to carry goods safely subject to the conditions set out in the bill; also bailment is thereby acknowledged (5). Transferring the bill of lading for value passes the right to the title (as possessed by the transferor) to the property in the cargo thereby represented and the right to receive delivery of the cargo at the port of discharge. This right remains effective until complete delivery has been made to the perosn holding the bill (6). The transeferor can only pass the rights which he has himself. There must also be the intention to so pass these rights as well as the intention on the part of the transferee to accept them (7). A transfer may be accomplished by delivery, or indorsement and delivery. In Canada the Bills of Lading Act vests the right of action in the transferee as if the "contract contained in the bill of lading had been made with himself" (8).

Three conditions which every shipowner or carrier must observe are implied by common law to exist in every contract for the carriage of goods by sea unless there are express stipulations to the contrary. These conditions are that the ship is seaworthy, that the ship shall commence and carry out the voyage contracted for with reasonable diligence, and that there shall not be unecessary deviations during the voyage (9). If these conditions are not observed and the commercial purpose of the voyage defeated, the shipper can repudiate the contract. If the breach does not defeat the purpose, action for damages can alone arise. Of these conditions mention will be made only of seaworthiness.

The warranty that the ship is seaworthy is absolute. It is not that the shipowner or carrier will do his best to make the ship seaworthy; it is that the ship is reasonably fit in all respects to carry the cargo to its destination safely, bearing in mind the conditions which can be reasonably anticipated on such a voyage. The ship should be in a fit state as to repair, equipment and crew, and in all other respects, to encounter

(5) **Russian Steam Navigation Co. v. Silva, (1863) 13 C.B. (N.S.) 610**
(6) **Barber v. Meyerstein, 39 L.J.C.P. 187**
(7) **Sewell v. Burdick, (1884) 10 App. Cas. 74 (H.L.)**
(8) **R.S.C. 1927, c. 17, S2**
(9) **Scrutton on Charterparties and Bills of Lading, 13th Ed., p. 96**

the ordinary perils of the voyage (10). Therefore a latent defect could be a breach of this warranty although careful inspection could not reveal the defect (11). Carver in his book "Carriage by Sea" considers the problem of seaworthiness:

> ".....the duty to supply a seaworthy ship is not equivalent to a duty to provide one that is perfect, and such as cannot break down except under extraordinary peril. What is meant is that she must have that degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all probable circumstances of it. To that extent.... the shipowner.....undertakes absolutely that she is fit, and ignorance is no excuse. If the defect existed the question to be put is: Would a prudent shipowner have required that it should be made good before sending his ship to sea had he known of it? If he would have, the ship is not seaworthy within the meaning of the undertaking." (12)

Seaworthiness also includes cargo worthiness. The ship must be fit to receive the cargo. Such fitness depends upon the quality and type of cargo and the anticipated duration of the period of carriage. The stowage of the cargo itself, although negligently done, cannot amount to unseaworthiness unless the safety of the ship is thereby endangered (13). If the stowage does not create unseaworthiness it is merely a case of bad stowage and will give rise to damages.

When the ship has left its moorings with no intention of returning it has entered a new stage (14). There is an implied warranty of seaworthiness at the beginning of this new stage. If the ship is unfit to encounter expected perils, although it may have been completely seaworthy whilst it was lying in the loading port taking cargo, the warranty is broken (15). On the completion of one stage the ship must have the degree of fitness which is required for the next stage. The conception of stages is marked by different physical conditions, the exact limits of which are impossible to define. The determination of a stage and the commencement of a new stage will depend upon the circumstances; the location of the ship, nature of the cargo, and the duration of the anticipated voyage. To illustrate: it is not a breach of warranty to start a voyage without enough fuel for the entire trip, but if this is done there must be enough fuel to complete the first stage and for refueling and so on with the different stages. To do otherwise cannot be excepted under any clause of negligence on the part of master or crew in running the ship. If the ship so set out there would be a breach of the warranty of seaworthiness (16). There is, however,

(10) **Dixon v. Sadler** 5 M. & W. 405
(11) **The Glenfruin**, (1885) 10 P. 103
(12) 8th Ed. p. 25
(13) **Kopitoff v. Wilson**, 1876 1 Q.B.D. 377
(14) **Reed v. Page**, (1927) 1 K.B. 743
(15) **Cohn v. Davidson**, 46 L.J.Q.B. 305
(16) **The Vortigen** (1899) P. 140

no warranty that seaworthiness will remain during the stage. If from any cause the ship later becomes unseaworthy resulting in loss or damage to the cargo the shipowner or carrier would be liable only if the cause was one for which he was answerable. If the ship is damaged by perils of the sea, the shipowner or carrier need not repair the ship. But if the ship is not repaired it cannot proceed on the voyage as it is then entering a new phase in an unseaworthy condition (17).

If the implied condition of seaworthiness is broken before the commencement of the performance of the contract, either party to it may declare it void. If, however, the unseaworthiness is discovered after the commencement, the only remedy is damages for actual loss or damage caused by the unseaworthiness. If the damage is caused by anothed peril, which is not associated with the unseaworthiness, the shipowner or carrier may rely on an exception clause for protection, if he can so bring himself within it. He cannot do this if the cargo is damaged in consequence of the unseaworthiness even though the immediate cause thereof may be an expected peril (18).

If a breach of the warranty of seaworthiness is to be relied upon, the plaintiffs must first establish a prima facie case that the ship was unseaworthy at the commencement of a stage. Once this is shown the shipowner or carrier must then prove that in fact the vessel was seaworthy. If the shipowner or carrier does show that the vessel was seaworthy he will then have to show that the damage or loss was caused by one of the excepted perils in order to relieve himself of liability.

From the foregoing it is to be observed that when the common carrier or general ship receives goods to be carried for reward it is implied at common law, in the absence of an express contract, that he shall carry and deliver the goods safely, subject to the four exceptions above mentioned. These are common law exceptions and cannot be relied upon if the shipowner or carrier has not taken reasonable care to avoid the danger (19) or if he has not provided a seaworthy vessel at the commencement of the voyage.

"Excepted perils" have been mentioned above. Since the common law gave certain rights to, and imposed liabilities upon, the shipowner or carrier, he attempted to better his position by stipulations in the contract with the shipper to exempt him from liability. The shipowner or carrier still had to use due diligence in respect of the excepted perils in caring for the safety of the goods carried (20). The excepted peril was relied upon when the shipper proved that his goods had not been delivered or had been delivered damaged. The carrier would attempt to show that the loss or damage was caused by the excepted peril; that the excepted peril was the direct and dominant

(17) **Worms v. Storey**, (1855) II Ex. 427
(18) **The Europa**, 1908 P. 84
(19) **Nugent v. Smith**, supra
(20) **Notara v. Henderson**, (1872) LR7QB 225

cause, (21) and not the remote cause. The growth of the excepted clauses was rapid until there existed little liability on the part of the shipowner or carrier (22).

Excepted perils in charterparties were unobjectionable because decreased liabilities enabled shipowners to carry freight at a lower rate. The charterer had plenty of time to acquaint himself with the terms of the contract. This was not true of the bill of lading. It was passed freely from hand to hand as part of the currency of trade, conferring on its holder both rights and liabilities. It was of the utmost importance to trade that the bill of lading should pass freely and quickly. Eventually consignees for value who had no control over the terms agreed upon, became interested in the bill of lading not having had the opportunity of examining it to ascertain its true value and the security enbodied therein. Too infrequently such consignees found that ship owners and carriers were under no liability for loss of or damage to cargo. The bill of lading in so many cases was nothing but a useless piece of paper. With the turn of the twentieth century the need of legislation to control the extent to which the shipowner or carrier could protect himself against loss of or damage to the goods in his bailment was most pronounced. The situation threatened the use of the bill of lading in the business world.

In 1893, the Congress of the United States of America passed what was commonly known as the Harter Act. The purpose of the act was to make it unlawful for a shipowner or carrier to contract for certain exemptions from liability and to provide in favour of the shipowner or carrier certain statutory exemptions. The act applied to all contracts made in the U.S.A. and to any consignments entering that country.

In 1910 the Canadian parliament, influenced by the Harter Act, the Australian enactment of 1904 and the dire need in trade for statutory control, enacted the Water-Carriage of Goods Act (23). By section 4 of the act certain clauses in bills of lading which exempted shipowners or their servants from liability for certain acts were prohibited and any attempt to extend such exemption made illegal. Section 6 abolished the absolute warranty of seaworthiness and compelled the shipowner to "exercise due diligence to make the ship in all respects seaworthy." Section 7 listed circumstances of losses for which the shipowner would not be liable. The Act was to apply to cargo on ships carried from any Canadian port.

In 1921 the major maritime powers agreed upon what were to become known as the Hague Rules. These Rules were presented as a standard with the recommendation that maritime countries should legislatively accept them. In 1924 the English parliament did incorp-

(21) **Leyland Steamship Co. v. Norwich Union Co.** (1918) A.C. 350
(22) **Scrutton, supra, Art. 79, Note 3, p. 244**
(23) 1910 10 Ed. VII c. 61.

orate the Rules in the Carriage of Goods by Sea Act. In 1936 a similar enactment was placed on the Canadian statute books (24) which repealed the 1910 act and its subsequent amendments. The desired effect of the 1936 act was to have a stereotyped series of clauses forming part of all contracts of affreightment controlling rights and liabilities of the parties regardless of their wishes.

Sections 2 and 5 of the Carriage of Goods by Sea Act, 1936 (which hereinafter will be referred to as the Act) provides that the Act shall affect only the bill of lading "or similar document of title" on outgoing cargoes whether the destination is another Canadian port or not. By Section 4 the Rules as set out in the Schedule are to be considered part of the bill of lading and are to be so expressed within the bill of lading. By Article V the Rules are not applicable to charterparties, but the article stipulates that "if bills of lading are issued in the case of a ship under a charterparty, they shall comply with the terms of these Rules." Where third parties have acquired possession of bills of lading for value which are documents of title in property and not just evidence of a contract between shipowner and charterer, the Rules as set out in the Act will apply. By Article VI the Rules shall not apply to goods covered by a non-negotiable receipt marked as such, provided the shipments are not "ordinary commercial shipments made in the ordinary course of trade." By Section 5 Canadian coasting trade is not bound by the Rules if the cargo, regardless of its nature, is covered by a non-negotiable receipt, marked as such. The Rules apply to the type of cargo as set out in Article I; the meaning of cargo or "goods," does not apply to live animals nor to deck cargo so carried.

The common law obligation to provide a seaworthy ship for the cargo is abolished by the Act in Section 3. By Article III, Rule 1 the carrier is obliged to use only "due diligence" that the ship be seaworthy "before" and " at the beginning" of the voyage. This due diligence on the part of the carrier, as well as the other minimum responsibilities set out in the Rules, cannot be lessened, and any attempt to do so would be "null and void and of no effect" by virtue of Article III, Rule 8. The obligation to exercise due diligence applies also to servants and agents of the carrier (25).

There is a difference of opinion as to whether or not this legislative obligation to use due diligence to provide a seaworthy ship "before" and "at the beginning" of the voyage has done away with the doctrine of "stages." Scrutton L.J. seems to be of the opinion that it has, because now, provided the shipowner or carrier has done all he is required to do "before" and "at the beginning" of the voyage, any subsequent act would be neglect or default in the navigation or manage-

(24) **The Carriage of Goods by Sea Act, 1936, R.S.C. 1 Ed. VIII c. 49**

(25) **W. Angliss and Company (Australia) Proprietary, Limited v. Peninsular and Oriental Steam Navigation Company 1927 2 K.B. 456**

ment of the ship on the part of the master or the carrier's servants which is excepted by Article IV, Rule 2 (a). (26). But Chorley and Giles state:–

> "....it always seems most reasonable to argue that without express words the Act cannot be taken to have abolished the doctrine of stages in connection with the contracts to which it applies." (27)

Further, they state that the obligation imposed by Article III, Rule 2 is not to be cut down by any protection given by Article IV, Rule 2(a) and referred to a House of Lords case to justify this belief (28).

Rule 1 of Article III continues to provide that the carrier shall use due diligence to "properly man, equip, and supply the ship" and provide proper cargo holds according to the cargo to be shipped aboard. Rule 2 provides for the complete handling of the cargo, subject to Article IV, from the time it is accepted until it is discharged at its consignment port.

The maximum exemptions which the carrier cannot increase are found in Article IV. Under Rule 1 the carrier is absolved from liability for loss of or damage to the cargo which results from unseaworthiness but not for want of due diligence on the part of the carrier, his servants or agents. In other words the carrier is responsible for negligence in not exercising due diligence. Scrutton L.J. feels little is gained by the shipowner under this rule:

> ".....if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants or agents; if due diligence has been used the vessel in fact will be seaworthy." (29)

The only time the shipowner would gain relief would be in the case of a latent defect, but under Rule 2(p) of Article IV an express exception is "latent defects not discovered by due diligence." Therefore Scrutton L.J. feels the "due diligence" clause of Rule 1 possesses no improvement for the carrier which is not covered by the later Rule. With this view MacLachlan J. agrees. (30)

The second portion of Rule 1 of Article IV casts the onus on the carrier or any other person claiming exemption under this section to prove that due diligence was exercised when the loss or damage results from unseaworthiness. The consignee has but to show that his goods were damaged when delivered, or never delivered, and the onus is cast upon the carrier to prove that due diligence was exercised as required by the statute. Once the carrier has proved that he used due diligence to make the ship seaworthy he will be obliged to show that the damage or loss resulted from an excepted peril, in order to protect himself. This excepted peril must also be the causa causans, or causa proxima, and not just a causa sine qua non.

(26) **Supra**, p. 509
(27) **"Shipping Law"** 2nd Ed. p. 116
(28) **Northumbrian Shipping Co. v. E. Timm & Son.** 1939 A.C. 397
(29) **Supra**, p. 513
(30) **"Merchant Shpping"** 7th Ed. p. 376

Rule 2(a) of Article IV provides that the carrier shall not be responsibile for any loss of or damage to cargo which results from the the "act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship." The Courts have construed this clause strictly against the shipowner and have expressed reluctance to extend the clause beyond its clear meaning. The difficulty arises from the fact that many things are done on a ship which have no connection with "the navigation" or "the management of the ship." The only act, neglect, or default which is covered by the exception is that which relates directly to the safety of the vessel. Any act, neglect, or default which directly or indirectly relates to the care of the cargo and not to the ship is not covered by the rule. The rule applies from the moment the cargo is accepted until it is discharged at the port of consignment. The main difficulty lies of course in what is meant by "navigation" and "management."

In the case of The Glenochil (31), the engineer in an attempt to secure stability pumped water into the ballast tanks without inspecting them. The result was leakage through a broken tank and damage to the cargo. The Court decided the act was done in the management of the ship, although negligently done. The intention was to care for the safety of the vessel and not connected in any way with the cargo. If there is mismanagement in the care of the cargo although it involves using part of the ship for such care, and damage results, there can be no claim that there was mismanagement in the care of the ship (32). Every act on the ship does not always relate to the ship as a whole. The outstanding English case on this problem is Gosse Millard, Ltd. v. Canadian Government Merchant Marine Ltd. (33). Here the ship carried a cargo of tinplates subject to the Rules. During the voyage the ship sustained damage and put into dock for repairs. Workmen entered by means of the hatches of the hold where the tinplates were stowed. The hatches were not properly covered and rainwater entered. Damage resulted to the tinplates. The carrier declared that the damage resulted in the management of the ship. The Court held that the negligence had nothing to do with the management of the ship. To hold otherwise would involve an improper use of language the Court declared. This was clearly negligence in not caring for the cargo as required by Article III, Rule 2. Nothing would be left of the obligation to care for the cargo as required if the Court had not decided as it did. What is management of the ship is a question of fact in each case. The exception provided by Article IV, Rule 2(a) is a general negligence exception but as there are words of positive obligation subject to these words of exception, the presumption always is that the obligation is greater than the exception. As pointed out by MacLachlan J. the

(31) (1896) P. 10
(32) Foreman & Ellams Ltd. v. Federal Steam Navigation Co. (1928) 2 K.B. 434
(33) 1929 A.C. 223

test is: (i) was it done in the proper handling of the ship as a ship, even though it was done negligently? or (ii) was it simply a failure on the part of the carrier to fulfill the obligation of caring for the cargo? (34)

The rest of Rule 2 contains the exceptions in case of fire, perils of the sea, Act of God, etc. Some of these are the old common law exceptions, while the others are embodied in the Act with the conception of equitable protection for the carrier. The last clause is the general clause: "any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier" (35). The first three words are very general; they are not intended to give protection against all risks. They are to be interpreted as being ejusdem generis with the previous exceptions set out provided a genus can be found. The ejusdem generis rule provides that where special words are followed and amplified by general words the latter are to be confined in their application to things of the same genus as the preceeding specific words. Here, however, it is difficult to find a genus wide enough to cover the exceptions. Therefore it might seem sufficient if the carrier were to show that the loss or damage was not due to his negligence even though he could not show the exact cause of the loss. As set out by the section the onus of disproving negligence rests with the party claiming exemption under the section.

Leaving Rule 2 of Article IV, which is by far the most interesting, it will be noted that the Act has numerous other beneficial rules for both carrier and shipper. The carrier cannot be responsible for the loss of or damage to cargo which results from reasonable deviations in an attempt to save life or property (36); nor can the carrier be responsible for over a certain sum per unit in case of loss or damage unless the value be declared (37); nor is the carrier responsible for destroying dangerous goods unless they be accepted as such (38); and a shipper is not responsible for any loss or damage sustained by the carrier unless caused by the act, fault, or neglect on the part of the shipper, his agents or servants (39).

The bill of lading, which is so vital in the world of commerce and finance, is thus covered by the Act in the aspects therein set out. Commerce has guaranteed that although the holder of the bill of lading acquires no better title than his predecessor in title in spite of the consignee being a bona fide holder for value, the consignee will be aware of the minimum responsibilities and liabilities imposed upon the carrier as well as the maximum exemptions which cannot be altered

(34) **Supra**, p. 378
(35) Article IV, Rule 2(q)
(36) Article IV, Rule 4
(37) Article IV, Rule 5
(38) Article IV, Rule 6
(39) Article IV, Rule 3

except against the interest of the carrier (40). Consequently the bill of lading can pass freely and quickly with the guarantee of protection to those concerned. This, as pointed out, applies to cargoes outward bound from a Canadian port, and, also it should be added, to cargoes inward bound from another country which likewise has legislatively accepted the Hague Rules.

Might it not be wise to have the Rules apply to all incoming cargoes as well as outgoing? It is agrued that to attempt to have such an application would be an attempt to impose Canadaian legislation upon a contract made outside of Canada; the only connection with Canada is that it is the ultimate destination of the subject matter of the contract. But would it be so unreasonable to argue that once the subject matter or the title to the subject matter has come within Canadian jurisdiction the Rules as set out in the Act should then attach to the contract? There seems to be no real objection. Many shipments come to Canada from foreign countries which do not statutorily recognize the Hague Rules. It is the consignee in the Canadian consignment port who should be protected by the Rules; why not apply the Act to all incoming as well as outgoing shipments regardless of where the contract of affreightment is drawn up.

(40) Article V

Wallace D. Macaulay

BLOOD TESTS: A VAMPIRE IN THE LAW

"The time has come," the walrus said,
To talk of many things,
Of liquor, drugs and stomach pumps,
And 'legal blood' lettings!"
(Apologies to Lewis Carroll)

Recently there has emerged in the law of evidence a new upstart, the child of advancing modern science in the field of crime detection. Spurred on by the pleas of irate citizens alarmed at the rapid increase in automobile accidents resulting from the use or abuse of liquor and drugs, the authorities have offered the new practice of taking blood tests as a useful and practical remedy.

This innovation has had immediate repercussions upon the law of evidence. Not falling conveniently under any one branch thereof, blood tests were at first generally treated by judges as somewhat akin to confessions and statements made by an accused person. This was not a happy choice. Granted there was some similarity between them; but there were also many wide points of difference. The blood sample, like the confession, it was said, must have been given voluntarily in order to admit it into evidence. That was all right, but then the further question arose, namely; was it suggested by a person in authority? and if so was a proper warning given? The case of R. v. Ford (1948) 1D.L.R. 787 was decided on these grounds. Here the analogy was, by logical process carried a little too far. Confessions or statements have no conclusive effect against an accused person, nor are they entitled to any weight beyond that which the jury in their conscience assign to them. Wills, Circumstantial evidence, 7th ed. at p. 133 says;

> "Of the credit and effect due to a confessional statement the jury are the sole judges; they must consider the whole confession, together with all the other evidence of the case, and if it is inconsistent, impropable or incredible or is contradicted or discredited by other evidence, or is the emenation of a weak or excited state of mind, they may exercise their discretion in rejecting it, either wholly or in part...."

In this respect a confession or statement differs from a blood test.

Whether or not the blood was given voluntarily could hardly affect the weight that a jury might give to it. In R. v. McNamara (1951) O.R. 6, Schroeder J. says at p. 8;

> ".....in the case of a statement or declaration, it might very well be that the man had reached such a state of irresponsibility that one would not be inclined to regard his statement as free and voluntary or that one would attach so little weight to it that its value as evidence would be negligible. But how can that condition apply to the physical characteristics of the accused? Does it make the blood

> sample taken any less reliable as evidence? Does it in any way affect the quality of his blood except to give it an alcoholic content?"

This case was appealed. In the course of delivering the judgement of the Ontario Court of Appeal, affirming the judgement of the trial judge, Robertson C.J.O said (supra p. 11);

> "We do not think there is any analogy between the taking of a sample of blood without the consent of the accused and the taking of a statement not made by the accused voluntarily."

At the trial Schoeder J. said by way of dictum (and the Court of appeal agreed with him) (supra p. 9);

> ".....even if this specimen were taken without his consent and against his will, while such action would be an invasion of this man's private rights, and would in fact constitute a trespass to his person he would at most have a cause of action against the doctor sounding in tort. I am not prepared to hold that the sample or the analysis of it may not be offered in evidence for or against the accused."

This notion has now become crystallized under an amendment to s. 285 of the Crimnal Code assented to on June 30th, 1951. Now by s. 285 (4d) in cases of drunken driving or driving while one's ability to drive is impaired by alcohol or drugs "the result of a chemical analysis of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether the person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence."

By subsection (4e) "No person is required to give a sample of blood....for the purposes of this section and evidence that a person refused to give such a sample or that such a sample was not taken is not admissible nor shall such a refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings."

We can gather from the decision in the McNamara case and the above mentioned amendment to s. 285 of the Criminal Code that the rules governing the admissibility of blood tests can no longer be treated as analogous to the rules as to the admissibility of statements or confessions. We are happy that this part of the law has been cleared up but we are sorry that the protection which it gave to the accused is taken away. He must now seek refuge elsewhere. As Roy J. said in the earlier case of R. v. Frechette (1948) 93 C.C.C. 111 at 113;

> "I am of opinion that under no pretext whatever can the accused be forced to furnish evidence of his guilt." At the present stage of the economy of the criminal law, it can be said that the person of the accused is inviolable and that the right that each individual reserves as to his person cannot be taken away. This is a forbidden domain. We must be imbued with the principle that the accused if free. It behooves the representatives of authority to find the evidence to bring about the conviction of an accused when they believe him guilty, but he is not obliged to help them in this work by incriminating himself. A blood test constitutes an attack upon the human body and it is not within the power of a judge to order it if the law does not authorize it...."

Now the law does not authorize it by s. 285 (4d) of the Criminal Code. Blood samples are admissible whether or not they are given freely and voluntarily. We fail to see the protection that S.S. 4(e) gives to the accused. It is a small consolation to a man spending a term in prison that he has an action in tort against the person who took the evidence that put him there.

So it becomes apparent that inroads have been made upon the old doctrine that a man should not be forced to convict himself out of his own mouth. Now not only his bloodstream but the contents of his stomach may be used in evidence against him. His right of privacy is being slowly and systematically gnawed away.

The length to which this trend will develop is in the least a little frightening to all lovers of personal freedom. Envision if you will fifty years hence. We are repelled by the thought that, even on the flimiest of pretexts several large law enforcement officers, lying in wait, might pounce upon some citizen (already sagging under his load of taxes) and after subduing him bend over his prostrate body and extract the very life blood from his veins. Worse still, that a man might be forced literally to "cough up" evidence against himself by means of a stomach pump is a proposition so revolting that we dare not think of it. We wonder where it will all end. Witness the vouge of forcing a suspect to blow up a balloon so that its contents can be studied for traces of alcohol. We dare not use a strong shaving lotion or sit through a long double feature for fear that on driving home we may be involved in some minor traffic accident and the alcoholic aroma or sleepy appearance would be the cause of our being subjected to the most gruelling of tortures. We are terrified by the thought that some wily crown prosecutor could build an airtight case against us with our blood, breath and gastric juices. Perhaps it will become every prosecutor's dream to produce our dismembered body in court at our own trial as exhibit "A" for the prosecution. Alas that a man's stomach should be made to yield up its damning evidence; that his very veins should be tapped; that the privacy of his internal organs should be invaded; and that part of his very being should be forced to turn informer against the rest of him.

If we are no longer protected by the deep rooted principle that a man cannot be forced to criminate himself out of his own mouth can we not find protection elsewhere? Is there no haven within the "four corners" of our constitution? In view of the fact that less evidence is needed to convict a man of driving "while his ability is impaired" accordingly can we not arrest the trend in procuring that evidence when it so fragrantly violates our personal liberty?

We were very close to complete dispair when the Supreme Court of the United States in a very recent decision ruled in clear and unequivocal terms that it is "unconstitutional" to use the contents of a man's stomach in evidence against him. But this was little relief to Canadians, who look with envious eyes to their neighbours to the south as they dine heartily, assured by the pronouncement of their Supreme Court that they still have a constitutional right to retain and enjoy their partially-digested dinner.

Leo Drapeau, III Law U.N.B.

Case and Comment

COMBE v. COMBE (1951) 1 ALL E.R. 767

CONTRACT – "PROMISSORY ESTOPPEL" – PROMISE MADE AND ACTED UPON – ABSENCE OF CONSIDERATION

The much discussed principle enunciated by Mr. Justice Denning (as he then was) in Central London Property Trust, Ltd. v. High Trees House, Ltd., (1947) K.B. 136, has been greatly clarified as a result of the decision in this case. The so-called "High Trees doctrine" stated that when a party makes a promise intended to be acted upon, and which is in fact acted upon by the promisee to his detriment, the promisor shall be held to his promise even in the absence of consideration; consideration would be lacking in such a case if the detriment were not incurred at the express or implied request of the promisor. There was the further requirement that the parties must have intended to create legal relations. After Mr. Justice Denning's decisions in Robertson v. Minister of Pensions, (1948) 2 ALL E.R. 767, and Bob Guiness, Ltd. v. Salomonsen, (1948) 2 K.B. 42, there was a tendency to regard this doctrine as creating a new cause of action. The Combe case makes it clear that the principle has a much more limited application.

A wife, petitioner in divorce proceedings, gave instructions to her solicitors to apply for an order for permanent maintenance in the event of a decree nisi being granted to her. On Feb. 1, 1943 the decree nisi was granted, and on Feb. 9, 1943, the wife's solicitors wrote to the husband's solicitors asking them to confirm, that with respect to permanent maintenance the husband was prepared to make the wife an allowance of £100 a year income tax free. The husband agreed through his solicitors to allow her this sum. The decree absolute was made on Aug. 11, 1943. The husband failed to make the agreed payments, but his wife, knowing he was not in a good financial position, refrained from applying to the court for an order for permanent maintenance. However, in 1950, the wife brought an action against the husband claiming the amount of the arrears on the ground that she was entitled to them under the husband's promise.

The action was tried by Byrne, J. The defendant (husband) contended that the agreement was unenforceable because there was no consideration for the promise. Plaintiff's counsel took the position that a promise was made by the husband for the purpose of making an arrangement about maintenance, that he intended to be bound by it and knew that it was going to be acted upon by the wife, and that the wife did act on it. Mr. Justice Byrne accepted this argument

The defendant's appeal was heard by a Court of Appeal including Lord Justice Denning. They reversed the judgment of the Court below, explaining and distinguishing the High Trees case; they held that since there was no proof that the husband had requested the wife to forbear from applying to the Courts for maintenance, there was no consideration for his promise which was therefore unenforcable.

Perhaps the most interesting feature of this case is the fact that Denning L.J., only two and one-half years after his decision in Robertson v. Minister of Pensions (supra) and within four years of the High Trees case, found it necessary to explain these cases. The principle he had enunciated was not on its face easily reconcilable with the generally accepted view on the law of consideration. He had also given the impression that he was judicially accepting the recommendation of the Law Revision Committee that certain promises should be enforceable even though not supported by consideration. The opportunity was at hand in the present case to explain his true position, and this he did with characteristic lucidity. In his own words:

> "Much as I am inclined to favour the principle of the High Trees case, it is important that it should not be stretched too far lest is should be endangered. It does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so, having regard to the dealings which have taken place between the parties."

Also Lord Justice Asquith said:

> "It is unnecessary to express any view as to the correctness of the decision in the High Trees case, although I certainly must not be taken to be questioning it. I would, however, remark in passing that it seems to me a complete misconception to suppose that it struck at the roots of the doctrine of consideration."

Perhaps the High Trees decision did not strike "at the roots of the doctrine of consideration," but as interpreted by some it did give the doctrine a rather severe shaking. The Court of Appeal in the present case has attempted, not necessarily to strengthen these tenacious roots of consideration, but at least to protect them. The decision is all the more noteworthy because Lord Justice Denning himself came to the defence of the doctrine. The result is that we have the principle of the High Trees case still at our disposal, tempered by the proviso that it may only be used as a defence, and is not available as a cause of action.

Franklin O. Leger, I Law U.N.B.

ABBOTT v. SULLIVAN AND OTHERS

(1952) 1 ALL E.R. 226

In Baird v. Wells, (1890) 44 Ch. D. 661 the plaintiff was a member of the Pelican Club, and it was brought to the attention of the committee by, appropriately enough, the Marquis of Queensberry that the plaintiff had been guilty of conduct unbecoming a member in that while attending a prize-fight between two pugilists names Smith and Slavin, he had engaged a group of "roughs" (sic) to attend and hurl abuse, inter alia, at Slavin. Whether these unsportsmanlike (by 1890 standards) tactics had any tangible effect on the result of the contest does not appear from the report, but they were sufficient to cause the committee to expel the plaintiff from the Pelicans. Stirling J., after finding that the committee had acted ultra vires, decided that as the organization was a proprietary club, there was no right of property in the members, hence an injunction would not lie. However he did say there might be a right in damages for infringement of the member's contract right to have the personal use and enjoyment of the club so long as he complied with its rules.

Young v. Ladies' Imperial Club, (1920) 2 K.B. was a case in which the Court of Appeal granted damages, albeit nominal, (one farthing), to a lady expelled by a committee of the defendant, also a proprietary club, on the grounds that the resolution was ultra vires. It seems the plaintiff made an uncomplimentary remark about a fellow member, a Mrs. Lawrence. The executive, all ladies, met and expelled the plaintiff, but without bothering to notify the Duchess of Abercorn, who had agreed to serve on the executive for prestige purposes, with the proviso that she should not be troubled in any way. The executive stated the duchess wouldn't have come anyway if she had been notified, and submitted that, that should be the end of the matter. Scrutton, L.J. rejecting that contention, said "I think there is some public importance in making clear to club committees that they must act regularly in the expulsion of members."

The courts in these two cases felt damages should be awarded for ultra vires acts of committees resulting in infringement of the minor right to be able to enjoy the use of club property. Minor when compared to the major results of an invalid resolution in the recent case of Abbott v. Sullivan, by which a man was deprived of his livelihood for nearly a year, and yet the English Court of Appeal refused to allow damages.

In that case the plaintiff was a corn porter in the London docks. A prerequisite of such employment was that a man should be accepted by the Overside Corn Porter's Committee and placed on the register of corn porters. Upon acceptance, he agreed to submit to the jurisdiction of the committee and to observe its working rules. However, there was no written constitution or rules, and while all members of the committee were members of the Transport and General Worker's

Union, it was not a committee of the union in the sense of being part of its organization recognised and constituted by the union rules. A complaint was made against the plaintiff, and the committe after a hearing, fined him, being advised in their deliberations by Mr. Platt, a divisional officer of the union. Following the meeting the plaintiff followed Platt into the street and struck him. Platt promptly convened an emergency meeting of the committee which unaminously resolved that as the plaintiff was guilty of an unwarranted and unprovoked assualt on a trade union official, he should be removed from the register of corn porters. It should be mentioned at this point that Mr Platt was found by the trial judge to have been acting without malice in any degree or other improper notive. But, as Sir Raymond Evershed remarked, at 231, "It is, unfortunately, the not uncommon experience of human affairs that the greatest disasters and troubles flow from the actions of men acting under the best possible motives." The committee's resolution was effective September 24th, 1947. The plaintiff appealed to the area committee of the union who recommended that he should be reinstated on the register, and this was done on July 12, 1948. The plaintiff sued for, inter alia, damages, against Sullivan and Isett, who were two of the members of the nine-man committee; and Platt. Why Messrs. Sullivan and Isett were selected is somewhat of a mystery, and one on which the court is unable to throw any light.

All three members of the court agreed with the trial judge who found that as the committee did not have jurisdicition to take disciplinary action as a result of an allegation of a common assult in the street on a trade union official, the resolution of September 24th, 1947, was invalid. There being no written constitution, the onus was on the defendants to show that jurisdiction existed founded on an express or implied contract mutually entered into, and this they were unable to do.

Evershed, M.R., in the majority, felt that the plaintiff's claim had to rest on some contract, either express or implied, made by every corn porter with the committee, and which was broken by the passing of the invalid resolution; and he appears to have rested his decision on his inability to find any express or implied contractual term that a man once received into the company of corn porters should not thereafter be excluded by the committee from the company save for breach by him of some specified rules. Apparently in order to dispose of the Baird case and cases involving statutory tribunals where damages had been awarded, he rejected the notion that "in the case of a body such as that under discussion any relevant or useful analogy can be be found by reference to tribunals established by statute and having a limited jurisdiction conferred on them by statute, or by reference to proprietary clubs."

Morris, L.J., also in the majority, conceded that where there is an exercise of judical functions by a court, then inquiry may be taken as to whether the Court had knowledge or the means of knowledge

of its absence of jurisdiction. However he felt the committee should not be judged on this footing, not being a court. It is submitted this view is unreal, in this age of quasi-judicial functions by tribunals other than courts, and into whose jurisdiction an inquiry may generally be instituted.

Denning, L.J., dissenting, took his characteristic functional approach to the question, and disagreed with the trial judge's refusal to award damages because the latter could not see any legal peg on which to hang it. He thought there was a wrong because the committee should have known their act was ultra vires, and was unable to see why the same results should not flow whether the tribunal was statutory, domestic, within a proprietary club, or, as here, part of a voluntary association. He says "A mistake of law does not excuse a statutory tribunal; Houlden v. Smith (1850) 14 Q.B. 841 and it should not excuse a domestic tribunal."

The result of the case would seem to be that in order to ensure that actions for damages will not lie against them, should they act without jurisdiction, even if they so act in an arbitrary or capricious fashion, voluntary associations should refrain from committing to writing their organization, constitution, rules or regulations.

Edmund Burke, U.N.B. Law III

R. v. NORTHUMBERLAND COMPENSATION APPEAL TRIBUNAL. Ex parte SHAW. (1952) 1 ALL E.R. 122.

CERTIORARI – SPEAKING ORDER – ERROR OF LAW ON FACE OF RECORD

This case raises an interesting point in administrative law. It clears the air surrounding the prerogative writ of certiorari. It should also ease the minds of people who regard the modern trend of sub-delegation to inferior tribunals as dangerous to liberty. From many of these boards there is no appeal and prior to this case there was doubt whether a superior court could use the writ of certiorari in any more than a supervisory capacity to determine whether the board had exceeded its jurisdiction. That the scope of review is broader than this now seems clear.

The applicant, a clerk to a joint hospital board had been compensated by the Gosforth Urban District Council for loss of employment, and being dissatisfied appealed to the compensation tribunal which upheld the award. He moved in the divisional court of the King's Bench Division for an order of certiorari to remove the decision into the High court on the ground of an error of law on the face of the record; this error allegedly consisted in a failure by the board to take into account his service with the hospital board as it ought to have done under the National Health Service (transfer of officers and compensation) Regulations, 1948. It was admitted in the High Court that the decision was wrong, but it was submitted even assuming the error appeared on the face of the record, that the tribunal had acted within its jurisdiction and that therefore the superior court lacked power to issue the writ. The Divisional Court however made the order and the tribunal appealed.

The Court of Appeal dismissed the appeal holding that certiorari does lie, not only where an inferior tribunal exceeds its jurisdiction, but also where an error of law appears on the face of the record.

The court applied R. v. Nat bell Liquors, Ltd. (1922) 2 A.C. 128; Singleton, L.J. quoted Lord Sumner as follows; "that the superior court should be bound by the record is inherent in the nature of the case. Its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise." He goes on to say that Lord Sumner showed how, and why, certiorari fell into disuse in the case of convictions before magistrates, yet there was no alteration in the law as to certiorari. And so it appeared to him that in cases such as the one before the court certiorari would lie if there was an error on the face of the proceedings.

Lord Justice Denning's judgement contains an erudite dissertation on the history and application of certiorari in nearly all fields: conviction by magistrates, orders of justices, statutory tribunals, and arbitrator's awards. Following this review he says; "....the court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by a tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it always had."

Lord Justice Morris summarizes the law in these words: "Cases were cited in argument before us which showed that in times past certiorari lay where justices recorded decisions which were on the face of them bad in law. It was said, however, that this was not shown to have been the practice in the case of non-judicial tribunals. But there is no warrant for the view that the controlling power exercised by certiorari over inferior courts varies according to the description of, or the composition of, the inferior court. Once the body concerned is properly to be described as an inferior court in the sense in which this expression is now well understood, then, subject to any statutory provision, an order of certiorari will issue on any of the grounds recognized by law. It was further said that, though these grounds were formerly wide enough to include cases where decisions were, on the face of them, bad in law, there has in recent years been a contraction, with the result that certiorari no longer lies for such reason. It is said that this basis for the exercise of the controlling power has fallen into abeyance. I can find no justification for this contention."

There is surely wisdom in the words of Singleton, L. J. who says in speaking of the lack of appeals to the courts from many of these tribunals: "I most earnestly wish in such cases, where difficult questions of law, and of interpretation, must arise, that there should be given some right of appeal. After all, it is the function of the courts to determine questions of law. Tribunals are sometimes given an unduly difficult task. There must be a feeling of dissatisfaction if it is recognized that a decision of a tribunal is wrong in law and yet there is no power to correct it. I am satisfied that the course I have suggested would result in a saving of time, and of expense, and would be for the public good."

John P. Funnell, U.N.B. Law III

BOOTS v. E. CHRISTOPHER & CO., (1951) 2 ALL E.R. 1045

ESTATE AGENT – COMMISSION ON COMPLETION OF CONTRACT – DEFAULT OF PURCHASER – FAILURE OF VENDOR TO CLAIM SPECIFIC PERFORMANCE OR DAMAGES

The English Court of Appeal in this recent case was once again called upon to construe a real estate agency contract to determine whether the agent was entitled to his commission.

The plaintiff instructed the defendants, a firm of estate agents, to find a purchaser of his business, and it was agreed that only in the event of the defendants finding the plaintiff a purchaser able and willing to purchase at the price of £2500, or at such lower figure as might be accepted by the plaintiff, the defendants' commission "would be at the rate of five per cent, of the total purchase price obtained." A potential purchaser, able and willing to purchase the business, was duly introduced by the defendants, a written contract was entered into between the plaintiff and the purchaser and a deposit was paid to the defendants. The purchaser subsequently repudiated the contract and authorized the defendants to pay the deposit to the plaintiff, who accepted it, but failed to seek specific performance of the contract, or damages for its breach. The defendants claimed to be entitled to deduct from the deposit the full amount of their commission. The plaintiff, claiming the return of the deposit, failed at first instance; however this judgment was reversed on appeal.

The Court of Appeal was of the opinion that there was a contract arising out of two letters written by the defendants to the plaintiff, holding that the second letter constituted the contractual document. The key words in the second letter which the Court had to interpret are set out in the statement of facts viz. "....of the total purchase price obtained." Counsel for the defendants contended that the word "obtained" merely meant the purchase price as obtained by the agent as the figure contracted to be paid. However the Court of Appeal interpreted the word to mean the purchase price as obtained, or received, on completion. Having thus contrued the vital term of the contract, it is clear that the defendants could not succeed unless they could establish that the non-receipt of the purchase money was due to some wrongful act of the plaintiff.

The trial Judge held that the plaintiff was at fault in failing to bring an action for specific performance or damages, thus depriving the defendants of their commission. The Court of Appeal, however, applied the dictum of Denning L.J. in the case of Dennis Reed, Ltd. v. Goody, (1950) 1 ALL E.R. 919, in which he said that the vendor was not bound to bring an action for specific performance or damages simply to enable the agent to earn his commission; he was entitled to merely accept the deposit, as had been held in Beningfield v. Kynaston (1887) 3 T.L.R. 122, 279.

The judgment of Denning L.J. is of particular interest because in it he suggests the possibility of an estate agent succeeding in a case such as the present, notwithstanding the rigid rule of construction in contracts of this kind which has been followed by the Court of Appeal. He points out that in an action for specific perfomance or damages by the vendor, the purchaser would complete, but under compulsion. Since the purchaser could not properly be said to be "willing" to complete, a claim for commission would not be recoverable on the contract as such. But he does say, and these words are important, "It would, however, be recoverable in an action for restitution, or, if you please, on an implied contract." Where to only a portion of the damages are recovered, or the purchaser forfeits the deposit, it is clear that no claim for commission can be made on the contract as such, however Denning L.J. suggests that the vendor should pay a reasonable remuneration in an action for restitution, which may be a good deal less than the commission. Under his reasoning, an estate agent claiming for a reasonable remuneration, rather than a commission on the full purchase price, may well succeed.

The words of Denning L.J. are, of course, only obiter, and one cannot foretell what weight, if any, will be given them in subsequent decisions. They do, however, represent a novel and refreshing approach to the matter, and, if accepted would tend to ameliorate the effect of a rule of construction of contracts of this type, which, the writer feels, has become too stringent as against the agent.

J. Arthur Ryan, III Law U.N.B.

Practice Notes

1. REMOVAL OF SOLICITOR FROM RECORD

A matter of practical importance to solicitors has presented itself to the writer's knowledge three times recently. The problem is how a solicitor, once engaged by a client and who appears on the record, may have his name removed from the record after his services have been dispensed with.

At first sight this appears to be an unimportant question but on study it presents several difficulties.

To the opposite party all papers and proceedings are sufficiently served by leaving with the solicitor who appears on the record even though in fact he may no longer be acting for the client. How does this come about?

Mr. "A" employees solictor "X" to defend an action brought against him by Mr. "B" through solicitor "Y". After "X" enters an appearance Mr. "A" decides that he will not bother to defend and tells "X" that he no longer represents him and his services are dispensed with.

Neither our Judicature Act nor the rules thereto make any provision to enable "X" to take his name from the record. There is provision for Mr. "A" to remove "X's" name by substituting himself or another solicitor, but "X" himself is unable to do anything. Surely this is a rather anomalous state of affairs, where once a solicitor formally acts as such for his client in any action, he remains in that capacity until the client files the necessary papers to relieve him. Possibly if the client neglects or refuses to formally change his solicitor on the record, the solicitor is entitled to charge his client for any work he might have to do because of papers being served upon him, after his employment has been terminated.

This, however, would seem to be stretching the matter somewhat. However, be that it may, at present a solicitor appears to be powerless to remove his own name from the record.

2. ORDER 32 RULE 6 – JUDGEMENT ON ADMISSIONS

A recent action commenced in the King's Bench Division of the Supreme Court contained a number of interesting points of practice, two of which are briefly presented for the information of the practitioner.

SUMMARY JUDGEMENT ON ADMISSIONS WILL NOT BE GRANTED WHERE SUBSTANTIAL GROUNDS OF DEFENCE, OR A COUNTERCLAIM ARE RAISED, K.C. GRASS (ENTERPRISES) LIMITED v. MacDONALD & McKIM

S.C. K.B.D. 1951 – unreported.
W. A. Gibbon, Solicitor for Plaintiff
H. O. McLellan, Solicitor for Defendant, MacDonald
K. A. Wilson, Solicitor for Defendant, McKim

This action arose out of a covenent in a lease prohibiting assignment or subletting without the consent of the lessor. The defendant MacDonald made an assignment to the defendant McKim without first obtaining the consent of the Plaintiff company as lessor. The plaintiff then commenced an action for possession, damages for breach of covenant and mesne profits from the date of the writ till the date of possession.

In the course of certain applications in the action, admissions were made by the defendants that the assignments had been made without the required consent, although it was not admitted that there had been a forfeiture. Because of such fact the plaintiff applied for summary judgement for possession under Order 32 rule 6 which reads:–

> "Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court or Judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may upon such application make such order, or give such judgment, as the Court or Judge may think just."

Before the application was heard, the pleadings consisted of an amended Statement of Claim, Statement of Defence and Counterclaim of MacDonald and Statement of Defence and amended Counterclaim of McKim. The counterclaims were for relief from forfeiture and for damages for breach of covenant.

At the hearing the defendants raised several points which included the waiver of the right of forfeiture by the plaintiff; the right of the plaintiff to maintain the action, based on the question whether the covenant not to assign ran with the land, and bound unnamed successors in title; the right of the defendants to seek relief under the Landlord and Tenant Act; the claim for equitable relief, which it was claimed the Court had authority to grant under the Judicature Act, Sec. 28 (b), and the matter of facts not being fully developed before the Court.

It was argued further that where the defendant puts forward a matter of fact or law which may constitute a good defence, the Court should not order summary judgment and in particular that where there is a counterclaim, the whole matter should be dealt with at the trial.

Harrison J. before whom the application was made, held that under the circumstances where the defendants had raised the various points of defence and where there was a counterclaim, that summary judgment should not be given, but the whole matter should be developed at the trial.

3. SEC. II JUDICATURE ACT – TRANSFER FROM KING'S BENCH DIVISION TO CHANCERY DIVISION CANNOT BE ORDERED BY CHANCERY COURT JUDGE WITHOUT CONSENT OF PARTIES

In the same action of Grass (Enterprises) Ltd. v. MacDonald et al an application was made by the plaintiff to transfer the action from the King's Bench Division to the Chancery Division.

The action being for ejectment, was properly commenced in the King's Bench Division but the defendants counterclaimed for equitable relief. Accordingly, the plaintiffs believing such could be better dealt with in the Chancery Division, applied for a transfer under the authority of Sec. II of the Judicature Act (1950) Chapter 160 which is as follows:–

> "If a plaintiff assigns his cause to a Division to which according to the rules of Court, or to the Act, the same ought not to to be assigned, the Court or a Judge of that division may direct the cause or matter to be transferred."

Without any argument on the merits of the application, Harrison J., held that as a Judge of the Chancery Division he did not have any authority under the Section to transfer an action commenced in the King's Bench Division to the Chancery Division, without the consent of all parties. Accordingly, he dismissed the application.

4. In an application for attachment for breach of an injunction, the Court will require particulars of the breach to be delivered to the Defendants. Further, where the breach was not wilful, the payment of the costs of the application will be sufficient punishment and attachment will not issue against the offenders.

MALONEY et al x. GALBRAITH et al. Hughes J.
William G. Power Plaintiffs' Solicitor
J. Paul Barry Defendants' Solicitor

5. Where the Defendants applied to have the action struck out for want of a Statement of Claim, but a Statement of Claim was served before the application was heard, the action was allowed to continue, but on the terms it be entered for trial at the next regular sitting of the Court.

MALONEY et al v. GALBRAITH et al. Hughes J.
William G. Power Plaintiffs' Solicitor
J. Paul Barry Defendants' Solicitor

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

Book Reviews

LAW AND CONTEMPORARY PROBLEMS: THE NATIONALIZATION OF BRITISH INDUSTRIES

Volume 16, No. 4. A quarterly published by the Duke University School of Law, Durham, North Carolina. Autumn 1951. ($1.25 per number)

In Great Britain between 1939 and 1949, a bloodless revolution occurred; between those years the control of the basic industries was transferred from private to public ownership. This was no transmogrification and if it was a revolution at all, it was rather dull, in the historical sense, as there was neither blood, nor bayonets, nor barricades; there were only twelve acts of parliament! These acts, conceived after detailed and thorough study, were similar in effect and similar in pattern. Their net result was to establish in Britain a mixed economy, where one segment of British industries and services was privately owned and operated while the other sector was controlled by Parliment through a new instrument of public management-control of the public corporations.

The organization and function of the various public corporations which are managing the iron and steel industries, coal mining, transport and other nationalized industries are the principal focal point of the eight articles contained in this symposium. The authors do not attempt in any way to argue the merits of nationalization. Rather, they accept the twelve acts of parliament and they concentrate in an impartial and scholarly manner, on the management, functions and control of the public corporations.

The first article is written by Clive M. Schmitthoff and deals with the nationalization of the basic industries generally. Mr. Schmitthoff accepts the definition of a public business corporation as given by Denning, L.J., in Tamlin v. Hannaford (1) where it was held that the public business corporation was neither a government department nor an agent of the crown, but, "a commercial corporation---that--acts on its own behalf even though it is controlled by a government department."

While the public corporations are not forbidden to make profits they are not intended to exploit natural or human resources to the detriment of what the economists call the "national good;" "they are entrepreneurs with a conscience."

The most profound and most discerning article is written by Professor W. Friedmann of Toronto University. It is entitled "The Legal Status and Organization of the Public Corporation." Mr. Friedmann states that the characteristic feature of the public corporation

(1) (1950) 1 K.B. 18 at page 25

is "legal autonomy coupled with political responsibility." This dual character was recognized in Tamlin v. Hannaford (2) where it was stated:–

> "In the eye of the law, the (public) corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government."

In short, the public corporation is an institution deliberately designed to integrate public enterprise with the existing common law system.

These first two articles are so much better than the remaining ones that they are necessarily anti-climactic.

Mary Bell Cairns, a lady barrister of the Middle Temple, deals very thoroughly with every legal aspect of compensation for nationalized assets. Compensation has been treated in Britain as a legal right. However, no single method of compensation has been used and Parliament has fixed a different yardstick of compensation for each industry which has been nationalized.

Mr. G. F. Wheldon has written a short but penetrating article on financing the nationalized industries. Mr. Reginald W. Bell points out the need for proper selection and training of the administrative and executive personnel of the new public corporations. A section of the book is devoted to labour relations in the nationalized industries. Mr. Charles Winter is not very exhaustive in his treatment of parliamentary, ministerial and judicial control of the nationalized industries. The last article deals summarily and abruptly with some of the more obvious economic aspects and problems of nationalization.

To those who are used to scandals and political patronage surrounding the operations of government in business it will come as a shock that none of the authors claim that the public corporation in Britain has been used as a vehicle of political corruption. All in all, this symposium is a valuable contribution to the study of government.

(2) Per Denning, L.J., (1949) 2 A.E.R. 327, 329

J. Carlisle Hanson,
Associated with Gilbert and McGloan, Saint John, N.B.

MANSTEIN: HIS CAMPAIGNS AND HIS TRIAL

R.T. PAGET, Q.C., M.P., with a forword by Lord Hankey. (London, Collins, 1951) $3.50

The first half of the book is an account of Field Marshall Manstein's military career and in particular of the defeats he inflicted upon the Russians. However for the purpose of this review I propose only to deal with the second half which contains an account of his trial.

This second half is Mr. Paget's account of the trial itself from a defense counsel's point of view. While no attempt is made to hide the author's sympathy for the accused, this account is well and fairly written and not without humourous touches.

The trial court was set up by Royal Warrant which "permitted in the trials of Germans at least a dozen things, which if any one of them had occured in the trial of an Englishman, would have resulted in the Court of Criminal Appeal quashing the proceedings on the ground that a grave miscarriage of justice had occured." The warrant commenced by imposing punishment for acts which were not merely non-criminal but not even illegal. Von Manstein was denied both a copy of the indictment and knowledge of the evidence against him; both the right to challenge and the right to be tried by officers of his own rank. Most serious of all, hearsay evidence was admitted "whether it was first, second, or a hundredth hand."

Not only did the warrant thus farcify criminal procedure; the very trial itself was of the most dubious legality. It began after the Universal Declaration of Human Rights had been adopted and proclaimed by the United Nations and was directly contrary to paragraphs 10 and 11 (1) and (2) of that document; those that prevent retroactive criminal legislation and provide "for all human beings, without exception....a fair and public hearing by an independent and impartial tribunal." When we consider that Manstein was accorded probably the most inequitable of all trials we can realize how hypocritical these appeared to the onlooker. For once the Russians were more honest. They simply shot such of their prisoners as they no longer needed.

The seventeen charges of the indictment ranged from genocide to the employment of slave labour and the execution of commissars. Among the evidence relied on by the prosecution were statements of Gestapo thugs which it was essential to discredit. Mr. Paget used a report of an American Commission which showed them to have been guilty of torture. This evidence was made unnecessary when original affidavits were discovered which categorically contradicted the prosecution. The remaining evidence was of the same poor caliber and as a result of this and of counsel's efforts only two of the original charges were sustained. Eight were dismissed and Manstein was held accountable on seven others, but only after they had been modified subsequent to the closing of the case by the defence.

It is not the tale of the technical imperfections in procedure, nor the perjured evidence, nor the qualified acquittal that makes Manstein important. It is the author's claim that such trials are "fundamentally unjust.....fundamentally totalitarian....to impose upon an individual symbolic atonement for a crime of a nation is to deny the individual." Mr. Paget has reported a convenient case. Every lawyer should consider it for himself.

Donald M.A.R. Vince

News Items

As this issue goes to press, we are again conscious of the fact that another academic year is practically concluded. Looking back we feel that it has been a successful year, with the exception of the final examinations which have yet to make their all important mark on our history.

Congratulations are in hand to one of renowned graduates of last year, Mr. Carlisle Hanson, who was recently appointed Assistant Editor of the Canadian Bar Review. We are certain Carlisle will do well in this position as we had a preview of his ability in this field when he was editor of the Law Journal last year.

Extra-curricular activities have all but ceased at this stage of the school year. The Social Committee under the guidance of Jack Stark deserve a round of applause for a very successful year. One of its last functions was arranging the recent tour of one of the more famous industries of Saint John (advertising commitments prevent us from revealing the name of the firm.) Jack has been doing extra research work throughout the year with one Hugh Church that may take them to Nevada after graduation. Robert Allan has shown a recent interest in their work.

Orchids to T. V. Kelly whose efforts as Athletic Chairman have rendered U.N.B. Law not too remote from resembling Notre Dame's campus. The law students had a few sessions of hockey at the local Forum, on one occasion sharing the ice with the renowned "Beavers," who refused the challenge tossed to them by the students. Terry was instrumental in forming what was perhaps the first Canadian inter-collegiate bonspiel which was held at Amherst. Teams from Dalhousie and Fredericton as well as the law school participated. It seems just dessert that Terry skipped the winning team in the school's regular league play, which was decided in a close and exciting game with skip Bob Howie and his team.

The moot courts were run in a well organized manner. They finished much earlier this year thus preventing any possible conflict with the exams. George Noble and the faculty are to be congratulated for their work in this constructive pastime.

While the debating team did not carry off the Eaton trophy this year, Bob Allan is to be commended for his efforts in bringing his charges through an interesting year. The experience gained in this field is of immeasurable value to the budding lawyer.

The annual meeting of the law students was a recent event which saw the officers elected for next year's executive. Donald O'Brien was elected president; he succeeds Edmund Burke who has set a very high standard of efficiency for Mr. O'Brien to follow. The other officers elected were Vice-president, William Davidson; secretary, Miss Camille Robichaud; treasurer, John Dube. The newly-instituted office of second vice-president will be left open until next September to allow representation on the council from new incoming students. Committee chairmen elected were: Social and Athletic, Terence Kelly; debating, Allan Mitchell; moot court, Beverley G. Smith; press, Douglas Holyoke. Donat Levesque was appointed editor of the Law Journal and Edward Montgomery business manager. To these new officers we say good luck – and to the passing regime we say "Well done."

Third year students held their annual meeting at which they elected life officers of the graduating class. Those elected were Arthur Ryan as president, John Funnell vice-president, and Jack Stark secretary-treasurer.

EDITOR'S NOTE: the following poem was appropriated by the editor from the wall of the Barrister's library and is probably the work of our poet-librarian, Herman Lordly.

SIC TRANSIT GLORIA

Ten little text books, all in a line.
One thoughtless borrower. Then there are nine.

Nine little text books; some of ancient date.
One died of senility. Now there are eight.

Eight little text books; Jarman, Chitty, Bevan.
Then we had a moot court. Now there are seven.

Seven little text books. (Have the 'binders' fix)
So we sent the seven. Got back six.

Six little text books. Good Lord alive!
Five little text books. We must purchase more.

Looked in next morning. Found only five.
Turn your back a moment. Presto! Four.

Four little text books. Borrow them. They're free.
No fines charged then; so now there are three.

Three little text books, anything but new.
Can we blame the gremlins? We've just two.

Two little text books, left by Vandal, Goth and Hun.
Must look in my office. Might find – one.

One little volume, singing a Doxology.
It will last forever. The subject is "Theology."