THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussionof all matters of interest to the legal profession in Canada. The Editorial Board, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

☞ **Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 1, Ontario.**

CASE AND COMMENT

CONSTITUTIONAL LAW—INSURANCE.—The refusal of the Privy Council to grant special leave to appeal in *Re Section 16 of the Special War Revenue Act*[1] is as eloquent a commentary on the scope of federal legislative power in relation to matters even affecting insurance as might have been afforded by a considered judgment. Apparently the Parliament of Canada has exhausted not only its available avenues, in terms of legislative power, for securing some regulatory control over the business of insurance but also the desire of the Privy Council to entertain any further applications for rulings on the question. After having disappointed the promise held out in the 1916 *Insurance Reference Case*[2] of certain scope for Dominion legislation in relation to foreign insurance companies,[3] the Privy Council has now in effect denied the use of the plenary federal taxing power as a lever upon persons insuring with insurance companies the business of which has been put outside of federal control. There is reason to regret the narrow construction of the federal "trade and commerce" power which has put it completely out of tune with contemporary social and economic issues. Constitutional rigidity in such matters does not serve the national welfare.

B.L.

* * *

WILLS — GIFT OF "MONEY".—The impact of the judgment of the House of Lords in *Perrin* v. *Morgan*,[1] which took a broad

[1] [1943] 4 D.L.R. 657 (P.C.), refusing leave to the Attorney-General for Canada to appeal from the judgment of the Supreme Court of Canada, [1942] 4 D.L.R. 145, commented on in (1942), 20 Can. Bar Rev. 799.

[2] [1916] 1 A.C. 588.

[3] *Cf. In re Insurance Act of Canada*, [1932] A.C. 41.

[1] [1943] A.C. 399, 1 All E.R. 187.

view of the meaning of "money" in a gift by will, is noticeable in two recent Canadian cases. In *Re Hutchinson*,[2] McPherson C.J.K.B. of Manitoba held that a will containing no residuary clause and making a gift of "whatever money I have left when everything is paid" passed the testator's entire residuary personal estate including Dominion of Canada bonds and war savings certificates. Similarly, in *Re Murphy*,[3] the Ontario Court of Appeal, reversing the judgment at trial, held that a will containing no disposition of residue and making a gift for masses of "the money left after . . . . . expenses" passed the net personal estate, including shares of stock as well as cash. It may be noted that in each of these cases the disposable estate consisted entirely of personalty. Had there been realty as well, it is doubtful whether it would have passed under a gift of "money" by virtue only of the authority of the *Perrin Case* and in the absence of any stronger indications that the wills in question afforded that "money" should be construed as encompassing realty as well as personalty.

* * *

SEDUCTION—CIVIL ACTION—FACTS ESTABLISHING RAPE.—In *Mattouk* v. *Massad*[1] the Privy Council has made it clear that a civil action for seduction lies notwithstanding that the facts disclose that the defendant's conduct constituted rape. "The action can be brought for seduction whether based on the special wrong done to the master by persuading the girl to have intercourse or on the wrong done to the girl by the felony of rape by which the master suffered damage." Some courts had indicated that no action lies if the intercourse has been obtained against the will of the person seduced; an example is the Alberta decision of *Cline* v. *Battle*.[2] American authorities have upheld the right of action whether the intercourse was voluntary or involuntary.[3]

* * *

TAXATION — SUCCESSION DUTY — DEPENDANTS' RELIEF ALLOWANCES.—The judgment of Anderson J., Saskatchewan King's Bench, in *Shaw* v. *Toronto General Trusts Corp.*[1] is of interest in the light of the Ontario case of *Re Dunn, Fennell* v. *Treasurer of Ontario*,[2] commented on in this REVIEW,[3] where

[2] [1943] 4 D.L.R. 117.
[3] [1943] 4 D.L.R. 736.
[1] [1943] 2 All E.R. 517 (P.C.).
[2] [1928] 4 D.L.R. 189.
[3] PROSSER, TORTS, 932.
[1] [1943] 4 D.L.R. 712.
[2] [1943] 1 D.L.R. 92.
[3] (1943), 21 Can. Bar Rev. 63.

Plaxton J. held that an allowance to a dependant under the Dependants' Relief Act, R.S.O. 1937, c. 214 was not taxable under the Succession Duty Act.[4]

In the *Shaw Case*, an order was made under the Dependants' Relief Act, R.S.S. 1940, c. 111, increasing the interest which a widow took under her deceased husband's will. The will had directed that succession duties payable on gifts thereunder should be paid out of residue,[5] and Anderson J. took the view that this direction covered the widow's gift as increased by his order. This view was reinforced by s. 13(1) of the Saskatchewan Dependants' Relief Act which states that "where an order is made under this Act, then for all purposes, including the purposes of enactments relating to succession duties, the will shall have effect, and shall be deemed to have had effect as from the testator's death, as if it had been executed, with such variations as are specified in the order, for the purpose of giving effect to the provisions for maintenance made by the order". Accepting the correctness of this position, it is not determinative of the question whether the increase in the widow's share of the estate is subject to duty. That depends on the terms of the Saskatchewan Succession Duty Act and is hence a problem of interpretation similar to that posed in *Re Dunn*.

In *Re Dunn*, the holding that an allowance under dependants' relief legislation was not taxable turned on the definition of "passing on the death" and "succession" in the relevant Succession Duty Act. The Saskatchewan Succession Duty Act, R.S.S. 1940, c. 50 discloses no particular divergence in this respect from the terms of the statute construed in *Re Dunn*, and the opinion may be hazarded that the increase in the allowance for maintenance in the *Shaw Case* would not be dutiable, upon the same reasoning as was advanced in *Re Dunn*.

The order of an increased allowance without deduction for succession duty was justified by Anderson J. on a ground independent of the direction in the will. The learned Judge declared that s. 8 of the Dependants' Relief Act, in empowering him to exercise a discretion in making an allowance for such maintenance as he thinks "reasonable, just and equitable in the circumstances", enabled him to make provision for a net allowance after deduction of succession duty, or, in other words, for an allowance which, after deduction of succession duty, would leave such sum for maintenance as would be reasonable, just

[4] Now, 1939 (Ont. 2nd sess.), c. 1.
[5] *Cf. Toronto General Trusts* v. *Shaw*, [1942] 1 D.L.R. 802, 1 W.W.R. 78.

and equitable in the circumstances. While this is perhaps a novel use of the judicial power under the Dependants' Relief Act, it is hardly impeachable on that ground.

* * *

LABOUR LAW—CERTIFICATION PROCEEDINGS—SECOND APPLICATION WITHIN YEAR OF DISMISSAL OF FIRST.—The Ontario Collective Bargaining Act, 1943,[1] while providing that certification granted to a collective bargaining agency is unimpeachable for one year (in the absence of fraud) makes no specific allusion to the matter of repeated applications for certification, so that this question is left to the discretion of the Labour Court under its omnibus jurisdiction to "determine all matters and questions arising under [the] Act". The Court appears to have settled the question of repeated applications by adopting a simple rule of thumb: Where an application for certification has been dismissed no fresh application may be brought within a year by any collective bargaining agency which either as applicant or intervener sought certification in the abortive proceeding. Decisions to this effect have been made by McFarland J. in *United Electrical Radio & Machine Workers* v. *York Arsenals Ltd.*[2] and by Roach J. in *Local 1177 United Steel Workers of America* v. *Canadian Furnace Ltd.*[3]

While the decisions are in the main grounded on the undesirability of continued disturbance of an industry, they do not and cannot interfere with continued organizing activities so that they fail in their ostensible purpose. Nothing of course prevents an employer from entering into a collective agreement with a bargaining agency which has not been certified and by such a course he may seek to thwart another bargaining agency, to which he objects, from asserting a claim to certification in the future. Inflexible adherence to such a rule as adopted by the decisions mentioned may be unconscionable in various circumstances, such as those in which an agency intervenes to oppose certification for purposes of self-preservation and asks for it on its own behalf, though for formal purposes only. The suggestion in the *York Arsenals Case* that a fresh application within a year violates s. 15(2) of the Act, which forbids appeals from the decision of the Labour Court, cannot be taken too seriously.

In the United States, the National Labour Relations Board under the Wagner Act has not confined itself as the Ontario

[1] C. 4 (Ont.)
[2] [1944] 1 D.L.R. 156.
[3] Decided by Roach J., January 19, 1944.

Labour Court seems to have done. As a rule of practice, the Board has adopted a one-year period as the normal interval following certification which must elapse before it will entertain another application, but it has not been as specific in relation to repeat applications.[4] The difference in approach is, of course, a difference stemming from appreciation of collective bargaining as a desirable condition so that the employees' desire to select representatives for that purpose should be favoured. Industrial stability is more likely to follow from such a policy.

B.L.

* * *

WILLS — LEGACIES — INTEREST. — *Re Pollock, Pugsley* v. *Pollock*[1] is a useful decision on a question of estate administration, viz., the date from which a legacy carries interest. As Bennett J. points out, ordinarily a vested pecuniary legacy carries interest at the expiration of a year from the testator's death, in the absence of any direction in the will. This rule applies also to legacies which by the terms of the will are to be paid "as soon as possible". Where a legacy is directed to be paid immediately after the testator's death or at a fixed date before the expiration of a year, interest begins to accrue in accordance with the direction. A contingent pecuniary legacy carries no interest, of course, (in the absence of any direction in the will or so long as its contingent character continues), but there is an exception in the case of a contingent pecuniary legacy to the testator's child or to someone to whom he stood *in loco parentis*, and interest is payable from the date of the testator's death if there is no other provision in the will for maintenance, provided that the legacy is given directly to the child or person *in loco parentis*. If the legacy is given to trustees for a child, the applicable rule is that interest is payable after the expiration of one year from the testator's death, unless there is some indication in the will requiring a different conclusion.

[4] See Seventh Annual Report, N.L.R.B., 56.
[1] [1943] 2 All E.R. 443.