THE CANADIAN BAR REVIEW

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☞ 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

CONFLICT OF LAWS — VOIDABLE MARRIAGE — ANNULMENT JURISDICTION.—The recent case of *Easterbrook* v. *Easterbrook*[1] decided by Hodson J. on an undefended petition for annulment of marriage, involves an important point, and it is regrettable that in the circumstances an appeal is unlikely. The case of *Inverclyde* v. *Inverclyde*,[2] decided by Bateson J., after full argument on behalf of both parties and reservation of judgment, was somewhat casually dissented from by Hodson J., who preferred to follow the much criticized case of *White* v. *White*,[4] decided by Bucknill J. on an undefended petition.

The petitioner in the *Easterbrook* case was a soldier serving in the Canadian forces in England, who, as alleged in the petition and found by the court, was "domiciled in Canada" (that is, was domiciled in one of the provinces of Canada). Both petitioner and respondent were held to be resident in England at all material times. The respondent was held to be domiciled in England, but inasmuch as the marriage was not alleged to be void *ab initio*, but was alleged to be voidable by virtue of s. 7 (1) (a) of the Matrimonial Causes Act, 1937, (that is, because the "marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage"),[4] it

[1] [1944] Ch. 10, 60 Times L.R. 80.

[2] [1931] P. 29.

[3] [1937] P. 111. For critical comments, see J.H.C.M. (1937) 53 L.Q.R. 315; Kahn-Freund, in ANNUAL SURVEY OF ENGLISH LAW (1937) 320–322; CHESHIRE, PRIVATE INTERNATIONAL LAW (2nd ed. 1938) 22, 342, 343; T.C.T. (1938) 6 Cambridge L.J. 424; Hancock (1943), 21 Can. Bar Rev. 149, at pp. 154, 155.

[4] Held, before the passing of the statute, not to be a ground for annulling a marriage: *Napier* v. *Napier*, [1915] P. 184, C.A.

seems impossible to avoid the conclusion that the respondent's domicile was that of her husband. It seems to be clear that a court of the Canadian province in which both parties were domiciled would have had jurisdiction to entertain a suit for annulment of the marriage, and if that court annulled the marriage, its judgment would be recognized as valid in England: see *Salvesen or von Lorang* v. *Administrator of Austrian Property*.[5] The question in the *Easterbrook* case was, however, a different one, namely, whether the English court had concurrent jurisdiction, based on residence. It is desirable that occasionally a single judge should refuse to follow an earlier decision of a single judge,[6] but in that event it is both desirable and decorous that the later judgment be a reasoned judgment, adequately stating the grounds of dissent from the earlier judgment. In the *Easterbrook* case Hodson J., after mentioning that counsel for the petitioner had drawn his attention to the *von Lorang*, *Inverclyde* and *White* cases, *supra*, continued as follows:

> As in *White* v. *White*, so in this case, there has been no appearance and no protest to the jurisdiction, and I am unable, with all respect to Bateson J., to see the distinction for the purpose of jurisdiction which he appears to have drawn in *Inverclyde* v. *Inverclyde* between voidable and void marriages. In my judgment, on the facts of this case I have jurisdiction, as there was held to be jurisdiction in *White* v. *White*, to pronounce a decree of nullity on the grounds set out in the petition. There will be a decree nisi.

Hodson J.'s selection of the *White* case as a precedent was peculiarly unfortunate, because in that case the respondent was neither resident nor domiciled in England, and the marriage had not been celebrated there, so that none of the three bases of jurisdiction stated in Dicey's rule 65[7] existed, and the case illustrates the notorious inclination of English courts to extend their jurisdiction in undefended annulment cases. In the *Easterbrook* case, however, the marriage had been celebrated in England

[5] [1927] A.C. 641; *cf.* discussion of the *von Lorang* case, the *Inverclyde* case, and other cases relating to annulment jurisdiction in my *Conflict of Laws as to Nullity and Divorce*, [1932] 4 D.L.R. at pp. 28–35.

[6] ALLEN, LAW IN THE MAKING (2nd ed. 1930) 154; Goodhart, *Precedent in English and Continental Law* (1934), 50 L.Q.R. 40, at p. 42.

[7] Applied by the Court of Appeal for Manitoba in *Hutchings* v. *Hutchings* (1930), 39 Man. R. 66, [1930] 4 D.L.R. 673, [1930] 2 W.W.R. 565, so as to put the petitioner, a man domiciled in Manitoba, in the curious dilemma that as the marriage had not been celebrated in Manitoba and the respondent was not resident there, the petitioner, by proving that the marriage was bigamous and therefore void *ab initio*, proved that the respondent's domicile was not in Manitoba, and consequently the court had no jurisdiction to declare the marriage null; *cf.* *Manella* v. *Manella*, [1942] O.R. 630, [1942] 4 D.L.R. 712, and comment by Hancock (1943), 21 Can. Bar Rev. 149—a case of a marriage alleged to be void *ab initio* by reason of the insanity of the woman.

and the respondent was resident there, so that the case came well within Dicey's rule, provided of course that, as Hodson J. held, there is no distinction between void and voidable marriages as regards jurisdiction.

The *Inverclyde* case may be right or may be wrong, but Bateson J.'s carefully reasoned judgment[8] certainly deserves a better fate than to be summarily dissented from without reasons in a judgment on an undefended petition. The marriage was celebrated in England in 1929, and in 1930 the woman sued in England for a declaration of nullity of the marriage on the ground of the impotence of the man, alleging in her petition that she was domiciled in Scotland and resident in England, and that he was domiciled in Scotland and had places of residence in England and Scotland. The respondent appeared under protest on the ground that the court had no jurisdiction. The argument for the respondent, accepted as "sound" by Bateson J., was that impotence differs from other grounds of nullity, such as illegality or informality, as regards annulment jurisdiction. If, for example, a marriage is bigamous, or if any essential element is lacking in the formalities of celebration, a declaration of nullity is merely the judicial ascertainment of a fact, namely, that there never has been any marriage; the marriage is void *ab initio* without regard to the intention or desire of the parties to affirm it or impeach it. On the other hand, impotence is merely a ground upon which either of the parties to the marriage may, if he or she chooses, and as a general rule, obtain an annulment decree; the marriage is voidable, not void, and unless already avoided, becomes unimpeachable on the death of either party. In the case of a voidable marriage, a so-called nullity decree is really a decree dissolving an existing marriage, and consequently if the principle is sound that domicile is the sole basis of divorce jurisdiction, the same principle is applicable to annulment for impotence. Bateson J. therefore dismissed Lady Inverclyde's petition.

In the 5th edition (1932) of Dicey's book Keith, in deference to the *Inverclyde* case, has added to Dicey's rule 65 the following clause:

> (2) Where a declaration is sought on the score of impotence, the court has jurisdiction only where the parties to the marriage are domiciled in England.[9]

[8] *Inverclyde* v. *Inverclyde*, [1931] P. 29, followed in Manitoba in *W.* v. *W.* (1934), 42 Man. R. 578, [1934] 3 W.W.R. 230, and in Ontario in *Fleming* v. *Fleming*, [1934] O.R. 588, [1934] 4 D.L.R. 90.

[9] Keith criticizes the doctrine on the ground that it "may work much injustice" if the domicile is foreign, and says that it "led to an invalid divorce secured by Lady Inverclyde in America."

The suggested analogy between a divorce decree and annulment of a voidable marraige, while it may be sufficient for the purpose of jurisdiction, as held in the *Inverclyde* case, is not perfect. The divorce decree presupposes a valid marriage, dissoluble by purely statutory authority for cause occurring after the celebration of the marriage. The decree is of course not retroactive and does not affect the legitimacy of the children of the marriage. The annulment decree, however, presupposes an impediment existing at the time of the celebration of the marriage,[10] and even if the marriage is said to be voidable, this meant merely, under the former practice, that it was valid in a civil court unless, before the death of either party, it was annulled by an ecclesiastical court. If so annulled, it was in effect declared void *ab initio* and the children of the marriage were retroactively rendered illegitimate, but after the death of either party the civil court would restrain the ecclesiastical court from annulling the marriage, because the only effect of annulment would be to bastardize the children.[11] This doctrine of a marriage being "voidable" by reason of a canonical impediment formerly applied also to a marriage within the prohibited degrees and constitutes the background for Lord Lyndhurst's Act.[12] That statute recited that "marriages within the prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto," and enacted that "all marriages which shall hereafter be celebrated between parties within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever." In effect, what had been a canonical impediment, rendering a marriage voidable in the sense already explained, became as a result of the statute a civil impediment, rendering the marriage void.

Three months after the decision in the *Inverclyde* case, and without mentioning that case, Lord Merrivale gave judgment in *Newbould* v. *Attorney-General*.[13] The petitioner who was born on April 23, 1929, prayed by his father as guardian *ad litem* for a declaration under the Legitimacy Act, 1926, that he was legitimated from the date of the subsequent marriage of his father and mother on November 30, 1929. The only obstacle

[10] This is of course inapplicable to the statutory ground in question in the *Easterbrook* case, *supra*.

[11] *Cf.* BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1811), §§ 259, 265, 267, 277; EVERSLEY, DOMESTIC RELATIONS, chapter 3 (Impediments to Marriage).

[12] The Marriage Act, 1835 (5 & 6 W. 4, c. 54); *cf. Brook* v. *Brook* (1861), 9 H.L.C. 193, 5 R.C. 783.

[13] [1931] p. 75.

to the making of the declaration was that the father had married another woman in 1909, and that this marriage was annulled on the ground of the impotence of the woman on November 25, 1929, that is, after the petitioner's birth, and it is provided by the Legitimacy Act, 1926, s. 1 (2) that

> Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.

Lord Merrivale overcame this obstacle by holding that the annulment in 1929 of the marriage of 1909 operated retroactively so as to amount to a declaration that there had been no marriage, and therefore the petitioner was legitimated. The case was a domestic English case, not involving any question of the conflict of laws or any question of jurisdiction such as that which was the subject of the *Inverclyde* case.

In deciding that the annulment operated retroactively so as to legitimize the petitioner, Lord Merrivale doubtless consoled himself with the thought that there was no child of the marriage who would be rendered illegitimate by the retroactive operation of the annulment — the ground of the annulment being the impotence of the woman. *Mirabile dictu*, it appears from the recent judgment of Pilcher J. in *Clarke* v. *Clarke*[14] that it is possible for a marriage to be annulled on the ground of the impotence of the woman notwithstanding that the woman has borne a child of which the man is the father —the rare case of *fecundatio ab extra*. The learned judge who annulled the marriage did not say that the annulment was retroactive, but on the other hand he did not say anything to negative the applicability of the old doctrine, reaffirmed in the *Newbould* case, that annulment for impotence is retroactive, and did not suggest any theory by which the unfortunate child might be declared legitimate.

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TORTS—NUISANCE OR NEGLIGENCE—COLLISION ON HIGHWAY WITH STANDING TRUCK.—The short judgment of the English Court of Appeal in *Ware* v. *Garston Haulage Co. Ltd.*[1] may have achieved substantial justice but it does violence to principles of liability in tort. A motor truck and trailer broke down on a

[14] [1943] 2 All E.R. 540.
[1] [1943] 2 All E.R. 558.

highway and at nightfall the men in charge left it with the rear light burning (according to their evidence) while they went to get hurricane lamps to put on the road. A motorcyclist coming along in the dark collided with the trailer, and it was found by the trial Judge that the rear light was not then burning. Not more than half an hour elapsed between the time the men went for the lamps and the happening of the accident. The trial Judge based liability on negligence in the failure to make sure that the rear light was burning and would continue to burn. The Court of Appeal affirmed the judgment for the plaintiff on the ground of nuisance.

The imposition of liability in terms of nuisance for accidents occurring on or off highways seems more or less traditional with the English courts, although in very many instances the judgments are supportable on grounds of negligence only.[2] Enough has been said by courts and writers of the elusive character of the term "nuisance" to make it unnecessary to dilate any further on the unsatisfactory basis of a judgment grounded upon it.[3] Perhaps the worst feature of any resort to the term is the readiness of courts, as for example in the instant case, to dispense with analysis of issues when it has once been invoked. No less serious is the tendency to confuse nuisance as a principle of liability with wrongful conduct giving rise to the liability.[4] Since in most nuisance cases the courts purport to impose a strict liability without fault, it has not been difficult to evade proper consideration of the conduct and the ensuing harm, which might involve a question of negligence alone, by tagging the particular problem with the badge of nuisance.

If any meaning can be ascribed to the Court of Appeal's reliance on nuisance in the instant case it must be that the defendants were engaged in an extrahazardous activity or were making an extrahazardous or extraordinary use of the highway.[5] Yet it seemed to have been settled by *Wing* v. *London General Omnibus Co.*,[6] the case of the skidding automobile, that the mere bringing of an automobile upon the highway does not give rise to liability for resulting harm in the absence of negligence in its operation. In these days of heavy vehicular traffic on highways built to accommodate it, the ordinary risks of highway travel include the risk of injury by automobiles driven without

[2] *Cf.* SALMOND ON TORTS (9th ed.), pp. 287 *ff.*
[3] *E.g.* PROSSER ON TORTS, p. 549; HARPER ON TORTS, p. 371.
[4] *Cf.* PROSSER ON TORTS, 553.
[5] *Ibid.*
[6] [1909] 2 K.B. 652, 78 L.J.K.B. 1063.

negligence, and resulting harm is not compensable in courts of law. The numerous studies that have recently been made both in the United States and in Canada with respect to insurance and compensation schemes for motor accident victims underscore the fact that motor traffic is a normal activity from the standpoint of tort liability.[7]

If this is so, why does the Court of Appeal charge the defendants with creating a nuisance (in the sense of subjecting them to absolute liability)? Surely the policy considerations implicit in the decision of nuisance or negligence (whether there is an extraordinary or ordinary risk of harm) have been sufficiently resolved against the principle of nuisance! This is so, at least in Ontario, even where there is a statutory prescription of a penalty for failure to have a rear or tail light burning. In *Falsetto* v. *Brown*,[8] Davis J.A. adverted to the fact that "no attempt was made by the plaintiffs to show anything in the nature of negligence other than the bare fact that the red tail light required by the statute was not at the moment burning". Although one might be disposed to disagree with his refusal to give any effect to the statutory requirement, even as raising a (rebuttable) presumption of negligence, it is clear that no question of nuisance arose for consideration by the mere collision of one vehicle with the rear of another which had no tail light burning. "No doubt," said Davis J.A., "the owner of a vehicle would be negligent if he or the driver knew that there was no bulb in the socket or that the filament in the bulb was broken or that the wiring was defective or that the battery was ineffective." But failure to establish negligence affords no ground for shifting over to nuisance.

Yet this seems to have been what the English Court of Appeal permitted. It is relevant in this connection to examine *Slattery* v. *Haley*,[9] in which the driver of a car was suddenly taken ill and fell back unconscious. The Ontario Court in that case was also urged to base liability on nuisance when it was clear that it could not be founded on negligence. The Court's reply was as follows: "When once the use of a highway is shown to be lawful then the only ground of liability is negligence, the failing to discharge the duty of taking care." It may reasonably

[7] *Cf. Financial Protection for the Motor Accident Victim* (1936), 3 Law & Contemp. Problems; *Compensation for Automobile Accidents* (1932), 32 Col. L. Rev. 785; Report by J. J. Robinette on Compensation for Victims of Motor Accidents, 1943, prepared at request of All Canada Insurance Federation; Report of the Attorney-General of Manitoba's Committee on Indemnity for Motor Vehicle Accidents and Highway Safety (1944).

[8] [1933] O.R. 645 (C.A.).

[9] (1922), 52 O.L.R. 95.

be assumed that whatever was meant by "lawful use of a highway" it covered use by motor vehicles, a use which would not involve extraordinary risk of harm.

One cannot imagine that the English Court of Appeal would have invoked the magic of nuisance if the truck and trailer in the *Ware Case* had been driven at an excessive speed. Is liability then to be based on negligence in the case of a car in motion and on nuisance in the case of a car at rest? Truly, hard cases (from a plaintiff's standpoint) very often make bad law.

B. L.

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TORTS—DISPARAGEMENT OR SLANDER OF TITLE—"MALICE" AS INGREDIENT OF ACTION.—In *Siopiolosz* v. *Taylor*[1] the Ontario Court of Appeal reversed the trial judgment in favour of the plaintiff and ordered a new trial in an action for disparagement or slander of title, largely on the ground of misdirection in charging the jury on the question of "malice". The facts were, briefly, that as a result of the defendant's public assertion that she had an interest in certain goods advertised by the plaintiff for sale by auction, the sale had been depressed. The jury were charged that the plaintiff must prove that the statement was made maliciously, *i.e.* with the intention of injuring the plaintiff, but that the intention could be inferred on proof that the words were calculated to produce actual damage. The Court of Appeal declared that intent to injure must be proved specifically and without the aid of any inference or presumption. It is submitted that both the charge to the jury and the judgment on appeal are somewhat vague as to the exact place of "malice" in actions for disparagement (slander) of title or quality.[2]

It seems clear that in such actions the plaintiff has a rigid burden of proving the ingredients of his cause, which are (1) the publication of the disparaging statement; (2) its character as a disparagement; (3) its falsity; and (4) special damage, which means actual pecuniary loss.[3] While "malice" is often termed an ingredient of the cause of action,[4] analysis of the case law indicates that it is used in this connection as a synonym for the term "without just cause or excuse"; or put another way, when the plaintiff proves the disparagement, its publication, falsity

[10] *Ibid.*, p. 97.
[1] [1944] 2 D.L.R. 92.
[2] As is, for example, SALMOND ON TORTS, 9th ed., 620–2.
[3] *Cf.* PROSSER ON TORTS, p. 1041; HARPER ON TORTS, s. 274.
[4] For example, *Royal Baking Powder Co.* v. *Wright* (1900), 18 R.P.C. 95.

and ensuing damage, he has shown that the defendant has acted "maliciously" in the sense of acting without legal justification. All that this amounts to is a declaration that the plaintiff has established a case calling for an answer; in other words, there is a shifting of the burden of proof in the sense that the defendant must adduce evidence or lose.

This use of "malice" ("legal malice") is and has been confusing, as is only too evident from a reading of cases involving interference with economic relationships and the labour cases dealing with the tort of civil conspiracy.[5] It has nothing to do with "actual malice", that is, intent to injure, but the slippery character of the word "malice" may and has misled courts in requiring proof of an intent to injure when this is no part of the establishing of a *prima facie* case; or in inferring an intent to injure upon proof of formal ingredients of a cause of action when intent to injure is a specific ingredient in establishing such cause. It is unnecessary to emphasize how important the difference is in relation to burden of proof.

In disparagement cases, "actual malice" is irrelevant in the initial building up of a case against the defendant. As in the case of defamation, however, the defendant may have been privileged in his disparagement; for example, by asserting a claim of his own to the property or some interest therein. Again, as in the case of defamation the privilege may be destroyed; and this may be done by showing "actual malice", an intent to injure, on the defendant's part.[6]

The Court of Appeal in the instant case was dealing with a situation involving a claim of privilege, although this is not too explicit in the judgment. Hence it could rightly say that intent to injure, to rebut the privilege, could not be inferred upon proof that the untrue words were calculated to produce actual damage. But it could be shown, for example, by proving that the defendant's assertion of a right in himself was knowingly groundless. A better elaboration of the issues would have been useful in clarifying the question of "malice" in the connection in which it confronted the Court.

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CRIMINAL LAW—CONVICTION ON UNCORROBORATED TESTIMONY AFTER WARNING—UPSETTING VERDICT AS UNREASONABLE. —In *Rex* v. *Dent*[1] the English Court of Criminal Appeal took

[5] See Note, (1942) 20 Can. Bar Rev. 636.
[6] *Cf.* Wood, *Disparagement of Title and Quality* (1942), 20 Can. Bar Rev. 296, 309 *ff.*
[1] [1943] 2 All E.R. 596.

an admittedly "very exceptional course" in quashing as unreasonable a jury verdict of guilty in a case in which, as required by a rule of practice, they had been properly charged that it was dangerous to convict on the uncorroborated evidence of the complainants. While it is usual to upset a verdict of guilty where the required warning is not given,[2] it seems unusual (and the Court so recognized) to do so when the jury have given their verdict in the light of the warning. When one brushes away the Court's reference to the exceptional character of the case, there is left a quoted statement of Lord Reading in *Rex* v. *Baskerville*[3] that it can but rarely happen that the jury would convict on uncorroborated testimony when the proper caution has been given, but if they do they may still have to reckon with the appellate court's statutory power to set aside a verdict as unreasonable or unsupportable in the light of the evidence.

This means simply that over and above the safeguard of a warning to the jury in connection with uncorroborated testimony there is the general power to set aside unreasonable verdicts, a power which appellate courts are loath to exercise in all types of cases and not only in those involving convictions on uncorroborated testimony. Yet the fact that a jury purports to convict after being warned of the danger of so doing, may dispose an appellate court to regard the verdict as unreasonable. This may be an indirect way of turning a rule of practice into an inflexible rule of law making corroboration mandatory.

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NEGLIGENCE—MANUFACTURER'S LIABILITY—DEAD MOUSE IN COCA-COLA BOTTLE—INTERMEDIATE EXAMINATION.—*Mathews* v. *Coca-Cola Co. of Canada Ltd.*[1] in effect overrules *Saddlemire* v. *Coca-Cola Co. of Canada Ltd.*,[2] previously noted in this REVIEW,[3] and brings the law in Ontario into line with the English decisions dealing with the insulation of a manufacturer from liability to a a consumer of his product because of the probability of an intermediate inspection by the retailer or by the consumer himself. The insulating factor is the probability (reasonable possibility) of intermediate examination, not the mere opportunity or possibility. It is true that there are passages in *Donoghue* v. *Stevenson*[4] which might suggest that a mere opportunity or possibility of

[2] *Cf. Rex* v. *Ellerton*, [1927] 3 W.W.R. 364, 49 C.C.C. 94; *Rex* v. *Munevich*, [1942] 3 D.L.R. 482, [1942] 3 W.W.R. 127.
[3] [1916] 2 K.B. 658.
[1] [1944] O.R. 207, [1944] 2 D.L.R. 355.
[2] [1941] 4 D.L.R. 614, [1941] O.W.N. 382.
[3] (1942), 20 Can. Bar Rev. 65.
[4] [1932] A.C. 562.

intermediate examination will suffice to shield the manufacturer, but it should be remembered that the Court in that case was charting a new liability by raising a duty of care in circumstances in which it had not been normally thought to arise; it was left to later cases to work out the circumstances which might repel the liability.

The Court in the *Mathews Case* viewed the probability of intermediate examination as going to duty of care so as to absolve the manufacturer completely. There is, of course, the other view that such probability should go to contributory negligence, in which case, in Ontario at least, damages would be apportioned under the Negligence Act, if the manufacturer were found to be negligent.[5]

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LABOUR LAW—WARTIME LABOUR RELATIONS REGULATIONS —PROFESSIONAL EMPLOYEES DEEMED EMPLOYED IN CONFIDENTIAL CAPACITY — GENERAL ORDER OF EXCLUSION. — The national Wartime Labour Relations Board, appointed to administer the Wartime Labour Relations Regulations, authorized by Order-in-Council P.C. 1003 dated February 17, 1944, seems to have exceeded its jurisdiction or, alternately, to have acted contrary to the "principles of natural justice" in one of its first rulings.[1] Acting upon representations made to it by a number of professional (engineering, etc.) societies, it issued a general order that for the purposes of the Regulations persons employed in a professional capacity shall be deemed employed in a confidential capacity. Since by section 2 (1) (f) of the Regulations, "employee" does not include "a person employed in a confidential capacity", the effect of the ruling is to exclude "professional" employees from the collective bargaining benefits provided by the Regulations.

The Board's direction or ruling was a legislative one in the sense of being a ruling not made in the course of any concrete application before it but by way of announcing a general exclusion. Under section 25 (1) (a) of the Regulations, it is provided that "if a question arises under these regulations as to whether a person is an employer or employee . . . . the Board shall decide the question. . . . ." Read in the light of the Regulations as a whole, this only authorizes the Board to adjudicate (rather than legislate) the issue when it arises upon an

[5] *Cf.* (1939), 17 Can. Bar Rev. 210, at p. 213.
[1] The ruling was announced in a press release dated April 14, 1944.

application for certification of bargaining representatives or perhaps in connection with charges of unfair labour practices or failure to bargain in good faith. This appraisal is fortified by reference to section 24 (7) of the Regulations which says that the Board "shall in every case give an opportunity to all interested parties to present evidence and make representations."

But excess of jurisdiction aside, the Board's ruling is objectionable because of a failure to observe elementary requirements (here given a statutory force by section 24 (7)) of administrative adjudication; that is, the requirements of notice and hearing to interested parties.[2] It is, of course, arguable that if the Board does have a legislative jurisdiction, no notice or hearing is required; that is, the legislative direction will not be upset by a Court because of failure to observe the principle of *audi alteram partem*. This argument, however, must in the particular circumstances yield to the statutory direction of section 24 (7), unless the words "in every case" are read as requiring notice and hearing only when the Board is adjudicating in a concrete case and not when it is making general rulings of a legislative character. If so, whence does it derive its legislative power? Section 27 (1) gives it power to make regulations but only "such . . . . as may be necessary to enable it to discharge the duties imposed upon it by these regulations", and only "with the approval of the Minister [of Labour]". This hardly supports the exercise of power to make general rulings of the character of the one in question.

As a matter of fact, the Board acted in this case without notifying interested trade unions or giving them an opportunity to be heard. This seems all the more remarkable an exercise of administrative authority when it appears that the chairman and vice-chairman of the Board are Judges.

Finally, the Board's ruling is bound to be a source of friction because it has not defined the words "professional" or "confidential". Thus the way is open for an argument in any particular case that certain persons are not "professional" employees and hence are not employed in a "confidential" capacity, and hence are not excluded from the coverage of the Regulations. The most profound objection to the Board's ruling, however, is the association of "professional" employees with "confidential" capacity. It surely should not be that because a person has received scientific or technical education which qualifies him for a particular position in which he uses his know-

[2] *Cf. Board of Education* v. *Rice*. [1911] A.C. 179, at p. 182.

ledge that he is disentitled to bargaining benefits because of "confidential" capacity. And is the same ruling to apply to ordinary industrial workers who happen to be working on some secret plans or processes? The ruling surely is an easy path to a *reductio ad absurdum*. That the Board has leaped too far in its ruling is indicated by the definition of " employee " under the Regulations as including any person employed to do "skilled or unskilled manual, clerical or technical work".

One approach to the question of "confidential capacity" was indicated by the Registrar of the now defunct Ontario Labour Court in *United Automobile etc. Workers of America, Local 240* v. *Ford Motor Co. of Canada Ltd.*[3] He was dealing with the Ontario Collective Bargaining Act, 1943 (Ont.), c. 4 (now repealed) which by section 1 (e) (ii) excluded from the definition of employee "a person acting on behalf of the employer in a . . . . confidential capacity". Taking into account the words "on behalf of the employer", the Registrar ruled that the persons so excluded were those under the special guidance and care of, and having an intimate relation with management. The Dominion Regulations exclude "a person employed in a confidential capacity", saying nothing of acting on behalf of the employer; and perhaps this may warrant a different interpretation. If so, the Dominion Board might take as a guide a decision of the United States National Labour Relations Board holding that a confidential employee was one having confidential information relating to labour relations.[4]

B. L.

[3] [1944] O.W.N. 86.

[4] *In the Matter of Creamery Package Mfg., Co., and S.W.O.C.*, 34 N.L.R.B. No. 15.