# 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.**

**The Twenty-Seventh Annual Meeting of the Canadian Bar Association will be held in the City of Toronto, at the Royal York Hotel, on August 30th, 31st and September 1st, 1944.**

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## CASE AND COMMENT

WILLS—REVOCATION OR SUBSTITUTION—DEPENDENT RELATIVE REVOCATION.—The problem of distinguishing between a mere revocation by obliteration—permissible under the Wills Act,[1] so far as the words before such obliteration "are not apparent"—and a substitution or alteration which requires re-execution of the change, and the confusing manner in which English courts apply the doctrine of dependent relative revocation to such situations, was the subject of a comment in this REVIEW some time ago.[2] The facts in *In the Estate of J. Hamer*[3] again raise the problem. In that case it was conceded that the will as originally executed gave a legacy of "two hundred and fifty pounds." As produced for probate there was an erasure of everything preceding the words "fifty pounds". The words had been so obliterated that a handwriting expert testified there was no possibility of ascertaining from the document what the words erased had been. Henn Collins J. was asked to include the missing words in a grant of probate. The argument in favour of the motion was to the effect that when part of the legacy only had been obliterated the court could "infer" that the testator's intention was to revoke the original amount only in the event of

[1] See 21 of the English Act. And see s. 23 of R.SO. 1937, c. 164.
[2] (1933), 11 Can. Bar Rev. 277.
[3] (1943), 60 T.L.R. 168.

his having substituted another amount and the substitution having failed by reason of non-execution,—the doctrine of dependent relative revocation should apply and the court should take parol evidence of the missing words and admit them to probate accordingly. On the other hand it was argued that this was an erasure without an intent to substitute and the doctrine of dependent relative revocation only applied where the substituted bequest failed.

Henn Collins J. stated that the question was whether there was a substitution for what was originally there, or whether the testator's intention was not to make an addition but solely to obliterate. He decided that the testator intended only to obliterate and therefore probated the will to pass fifty pounds only. With respect, it would seem to be beyond doubt, as a matter of reasonable inference, that the testator's intention was, in this case as in other similar problems, a complex one. He intended to obliterate *and* to substitute. The fact that it was conceded that the will originally passed two hundred and fifty pounds, and as probated passed only fifty pounds, would seem conclusive that a new legacy had been substituted for what was in the will originally. The difficulty is that the English courts, by the mechanical manner in which the doctrine of dependent relative revocation is stated are frequently prevented from recognizing this complex intent. It certainly would shock common sense to have gone back and probated this particular will with the words "two hundred and fifty pounds" in it. The peculiar part of the present judgment, as well as of other English cases, lies in the fact that had the court stated that the testator did intend to substitute fifty for two hundred and fifty, there is a suggestion that it would then have gone back and inserted two hundred and fifty. The writer believes this to be unsound.

Dependent relative revocation is a doctrine designed to effectuate a testator's intentions. In many cases where the amount of a legacy has been changed without re-execution, and the original amount obliterated, it may be reasonable to "infer" that a testator would prefer that his will as originally executed would stand rather than have a resulting partial intestacy. Suppose, however, that part of the will, being the part preceding the word "pounds or dollars" has been completely obliterated and written above it is the word "10". The suggestion in the present case, supported, it is true, by such a decision as *In the Goods of Horsford*,[4] is that the court would come to the conclusion

[4] (1874), L.R. 3 P. & D. 211.

that a substitution was intended and would order the will as originally executed admitted to probate without, *in the first place*, taking evidence of what was in the will originally. If after such an order were made it was discovered that the figures obliterated had been "50,000" the absurdity of probating a will with this amount is apparent and the idea that dependent relative revocation is in aid of the testator's intention would be completely set at naught. It is submitted that there is no necessity for such a result and there is nothing known to this writer which would prevent the taking of evidence as to what was there previously as an aid to ascertaining the testator's probable intention in the situation which confronts the court. In other words, if an obliteration is complete, and is made with the intention of revoking, that revocation should stand regardless of the fate of the attempted substitution unless the court is convinced that the testator would have preferred to have gone back to the original words of the will rather than see the entire bequest fail.[5] As Professor Warren has pointed out,[6] what the courts are really doing in these cases is to relieve against mistake, and it is fundamental that mistake should only be relieved against if the true intention can be given effect. As the testator has validly revoked in these cases the burden of proving a case to set aside a revocation should be heavy.

The facts in the *Hamer* case are slightly more complicated than the illustration used above regarding a complete obliteration of the amount of the legacy and the substitution of another amount. The words "fifty pounds" were in the will when executed. The testator has merely removed other words, namely "two hundred and." Apart from dependent relative revocation this does raise an issue of alteration as opposed to mere revocation. The Court merely put the question whether the will should be probated with "fifty", or "two hundred and fifty" inserted—the so-called dependent relative revocation route. With the court knowing what was in the will originally, it would seem impossible to say that if the word "fifty" could not be given effect to, the testator would have preferred to have "two hundred and fifty" inserted. It is submitted, therefore, that the real question was whether the legatee took fifty pounds or whether there should be a failure of his gift. This depends, in the first place, on whether leaving "fifty" in the will required re-execution.

[5] See this test invoked in *Re Zimmer* (1924), 40 T.L.R. 502.
[6] *Dependent Relative Revocation* (1920), 33 Harv. L.R. 337.

The cases are far from clear concerning the question when an obliteration which affects the remaining part of the will should be re-executed as making a new gift. In *Swinton* v. *Bailey*[7] a gift in a will originally read "to A, her heirs and assigns forever". The testator had obliterated the words "her heirs and assigns forever." This, if valid, left A, under the law as it then stood, only a life estate. The question was whether this change—or substitution—should have been re-executed by the testator. Mellish L.J. stated:

> If it is not a revocation but an addition; if it not only takes away something, but gives something else, then I agree, that would not be a revocation and nothing can be done by obliteration. The difference between revocation and alteration seems to me to be this: if what is done simply takes away what was given before or a part of what was given before then it is revocation, but if it gives something in addition, or gives something else, then it is more than revocation and cannot be done by mere obliteration.

This view is in line with an earlier decision of *Larkins* v. *Larkins*[8] where the court indicated that striking out the name of one of three beneficiaries, to whom property had been left as joint tenants, did not make an alteration in the interest of the others, since "it is not an alteration arising from a new gift, but merely from a revocation." The same case indicated that if the devise had been to the three as tenants in common, the erasure of one name would result in the remaining two taking only a two-thirds interest.

On appeal to the House of Lords in *Swinton* v. *Bailey*, doubts were thrown on the principle in the *Larkins Case* and on the reasoning of Mellish L.J. Lord Penzance stated that "whatever may be the restriction or qualification that is struck out, whether it may have a tendency to increase the benefit of the person in question or not, appears to me to be quite immaterial."

These decisions leave the situation as to alteration resulting from an obliteration in doubt. Even accepting the reasoning of the *Larkins* and *Swinton* cases, however, there would seem no doubt that a decrease of a legacy from two hundred and fifty to fifty pounds is a mere taking away rather than an addition. Somewhat similar problems have arisen concerning the jurisdiction of courts of probate to strike words out of a will on the grounds of mistake. The high water mark of such jurisdiction was reached in *Morrell* v. *Morrell*,[9] where the word "forty" appearing before "shares"

[7] (1876), 45 L.J. Ex. 427; on appeal, 4 App. Cas. 70.
[8] (1802), 3 B. & P. 16.
[9] (1882), 7 P.D. 68.

was struck out as having been introduced by mistake, the effect being to pass four hundred shares which the testator owned. The attitude of the English courts, as manifested in such cases, is that they are not concerned with the meaning or effect of words. On the other hand, in *Rhodes* v. *Rhodes*,[10] Lord Blackburn, speaking of the jurisdiction to strike out words introduced by mistake, said this could be done if "the rejection. . . . . .does not alter the construction of the true part. . . . . A much more difficult question arises where the rejection of words alters the sense of those that remain." This dictum remained a dead letter in the English cases up to the decision of the Court of Appeal in *In re Harrocks*,[11] when it was used by Lord Greene as an additional reason for refusing to strike out certain words in a will which were attacked on the ground of having been introduced by mistake. In the absence of any decision squarely limiting the jurisdiction of a court of probate to strike out words when it would alter the sense of those remaining, and considering the doubts cast on the reasoning of Mellish L.J. in *Swinton* v. *Bailey*, it is practically impossible to prophesy when a court will treat words left in a will after obliteration as a substitution requiring re-execution, and it may be that courts of probate will take the simpler view that they are concerned with words only as symbols and are not concerned with their meaning or effect.

The following illustration may indicate the type of case where one might expect the courts to stop short. Suppose, for example, a clause in a will as executed read: "To my son John I give nothing and give to my son George Five Hundred Dollars." The will as produced for probate has the words "nothing and give to my son George" completely obliterated. Will the courts allow John to take five hundred dollars? It is believed that this would depend on the same principle the courts would follow if evidence were given that the last mentioned words had been introduced by a mistake and had not been read over by the testator and a court was asked to strike them out. This would raise the question of the extent to which Lord Blackburn's principle was applicable. If that principle has any validity—and from *In re Harrocks* it appears to have—surely this is a case where the court would feel compelled to hold that an alteration or substitution was intended and not a mere obliteration or where it should refuse to strike out the words in the other suggested case of mistake. If a court refused to give a bequest to son John of five

[10] 7 App. Cas. 192 at 198.
[11] [1939] P. 198.

hundred dollars, we would have the problem raised by Henn Collins J. in *In the Estate of J. Hamer* namely,whether the will as originally written should be admitted to probate. To be consistent, the writer must admit that on his argument it should not be so admitted, since the testator would have manifested an intention to eliminate George, and to go back and re-instate George would be contrary to the testator's intention. The difficulty, however, is to determine what a court should do as a matter of practice, since, if the obliterated words are omitted from probate and "five hundred dollars" are included, a court of construction would undoubtedly pass the money to son John. The writer can only offer one of two solutions. First a court of probate might conceivably strike out the "five hundred dollars", leaving the whole clause senseless, or secondly, it might take the view which has been running strong in the English cases and refuse to consider the meaning of words obliterated and allow son John to take. Either of these alternatives seems preferable to returning to son George a gift which the testator has clearly manifested he did not wish him to take, *via* the dependent relative revocation route. Despite the renewed vitality given to the dictum of Lord Blackburn in *Rhodes* v. *Rhodes* by *In re Harrocks*, it is the writer's belief that on clear evidence of a mistake, and on proof that the testator had no knowledge or approval of the words "nothing and give to my son George," a court of probate would probably strike out the words. If this be so in case of mistake, then if the words had been obliterated by the testator, son John would seem to become entitled to the $500 and the distinction between revocation and substitution becomes academic.

C. A. W.

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APPEAL — LEAVE TO APPEAL ON APPELLANT PAYING COSTS AND THE JUDGMENT IN ANY EVENT—ACADEMIC QUESTION.—The recent judgment of the House of Lords in *Sun Life Assurance Company of Canada* v. *Jervis*[1] emphasizes again the cardinal principle of English law that the courts refuse to decide academic questions and will only elucidate and develop the law in concrete cases between individuals. In that case the English Court of Appeal, in an action on a life insurance policy, held that the plaintiff was entitled to recover but gave the defendants leave to appeal to the House of Lords on the defendants "undertaking to pay the costs as between solicitor and client in the House of

[1] [1944] W. N. 91.

Lords in any event, and not to ask for the return of any money ordered to be paid by this order". In the House of Lords it was unanimously held that as there was no issue to be decided between the parties the House should decline to hear it. As Viscount Simon L.C. said: "If the House heard the appeal it would not be deciding an existing lis between the parties, but would merely be expressing its view on a legal conundrum without in any way affecting their position." The House of Lords recognized that the appellants were anxious to obtain a decision which would govern their conduct under similar documents, but as Lord Simon pointed out, their proper course was to await for a further claim and bring it to the House of Lords with a party on the record whose interest it was to resist the appeal. The case is additionally interesting because it was held that while the Administration of Justice (Appeals) Act, 1934, provided that no appeal would lie to the House of Lords save by leave of the Court of Appeal or the House itself, this did not mean that whatever conditions were imposed by the Court of Appeal when granting leave would automatically result in the House being compelled to hear the appeal. As Lord Simon again pointed out, it was an essential quality of an appeal that there should exist "a matter in actual controversy which the House undertook to decide as a living issue."

An Ontario Court of Appeal quite recently granted leave to appeal to the Supreme Court of Canada from the decision in *Mathews* v. *Coca-Cola Co. of Canada Ltd.*,[2] on condition that the defendant appellant pay the costs of such appeal and the amount of the judgment against it in any event of the appeal. It will be interesting to see whether the Supreme Court of Canada adopts the same view as that taken by the House of Lords in the *Sun Life Assurance Case.*

While it may seem harsh that a litigant should be deprived of the opportunity of having a difficult point of law settled by the highest tribunals, it is submitted, with respect, that it is more important to the development of English law that moot points should only be dealt with after argument by parties who have a real and substantial interest in the outcome of the litigation. It has been suggested, from time to time, that the state might subsidize impoverished litigants to whom costly appeals over small amounts involving important questions of law might be a real hardship. This would be entirely different from the situation which arises under such orders as came before

[2] [1944] 2 D.L.R. 355.

the House of Lords in the *Sun Life Assurance Case*, where the successful plaintiff can lose nothing by his failure to argue contrary to the appellant's contentions. In Canada, constitutional references to the Supreme Court, such as, for example, *Reference re Regulations (Chemicals) under War Measures Act*,[3] are frequently open to criticism, because they decide no concrete issue and are not presented to the courts by parties between whom, in the language of Lord Simon, there is any existing lis. The extent to which this practice of courts dealing with what are essentially non-justiciable issues should be extended may well be open to argument.

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NEGLIGENCE—LIABILITY TO TRESPASSERS.—*C.P.R.* v. *Kizlyk*[1] is deserving of comment more extensive than what follows in this short note, but it may suffice to record its gist as the recognition by the Supreme Court of Canada (although not without dissent) of a humanitarian approach to the problem of the tort liability of an occupier of land to persons who might be characterized technically as trespassers but of whose presence he is or ought to be aware when he undertakes some activity on the land which involves a risk of harm to them.

The action arose out of the death of a young girl, a pupil at a rural school which had been established in a converted car placed on a siding under an agreement with the railway company. A number of freight cars had been left on the siding for two months and the girl was crushed between two of them which were being coupled as she was crossing the track between them. The Supreme Court of Canada, by a majority, affirmed a judgment of the Manitoba Court of Appeal ordering a new trial and reversing the judgment of the trial Judge who had withdrawn the case from the jury on the ground that the pupil was a trespasser at the place where the fatality occurred to whom the company owed no duty of care. The majority of the Court took the view that the jury might well conclude, on the evidence, that the girl was not a trespasser, but, more important, that even if she were, they might still find liability in the company's failure to take reasonable care, in the carrying on of its operations, for the safety of persons, even trespassers, of whose habitual presence on its property it was or ought to have been aware.

[3] [1943] 1 D.L.R. 248, [1943] S.C.R. 1.

[1] [1944] 2 D.L.R. 81, affirming [1943] 3 D.L.R. 194, [1943] 2 W.W.R. 1, 51 Man. R. 33.

Kerwin J.'s dissent, in which Rand J. concurred, seems vulnerable in at least three respects: (1) in its rather formalistic emphasis on the absence of any permission by the company to the school children to come upon its tracks, a matter which is not germane to the principle of law invoked by the majority, and which moreover appears somewhat forced in the light of the company's admission that the school car was situated where it was landlocked by property of the company; (2) in its over-technical reliance on the fact that because school was let out at 11.30 a.m. on the particular day (the accident occurring shortly afterwards), there was no reason why the company's employees should have known or anticipated the presence of school children on or about the tracks at that time; this, with respect, seems inadequate to justify the company in undertaking to move cars which had for long remained on the siding, without giving any warning or posting any look-out, when it well knew that school children were on the property; (3) in its failure to see any rational distinction between the case of injury to a trespasser resulting from the "static" condition of the land and injury resulting from the occupier's activity on the land.[2]

It is this last point which underlies the decision of the majority and which moved Davis J., in a refreshing reference of a type which should be more frequent in our courts, to quote s. 334 of the RESTATEMENT OF TORTS, as follows:[3]

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.

The decision in the present case is the more significant because it marks a recession from the Supreme Court's rather uncompromising view on trespassers enunciated in *C P.R.* v. *Anderson*;[4] and while there may be vital differences on the facts as between the cases, this alone does not account for the clear switch of principle. It is good to see that the Supreme Court of Canada has not lost the power to modify its opinions.

B.L.

[2] *Cf.* Note (1939), 17 Can. Bar Rev. 445.
[3] Vol. 2, p. 904 (American Law Institute).
[4] [1936] S.C.R. 200.

EXECUTORS AND ADMINISTRATORS — SURVIVAL ACTION BY PERSON IN CHARACTER OF ADMINISTRATOR BEFORE OBTAINING LETTERS OF ADMINISTRATION.—The judgment of the English Court of Appeal in *Ingall* v. *Moran*[1] clarifies the right of a person to maintain an action in the character of personal representative (executor or administrator) before obtaining grant of probate or administration, as the case may be. The Court was specifically concerned with whether a survival action for damages, instituted by a person as administrator of the deceased before obtaining letters of administration, was perfected by a subsequent grant of administration on the doctrine of relation back. In holding that the writ was a nullity which could not be revived, the Court went on to clarify misconceptions about the doctrine of relation back and about differences between representative suits in equity and at common law.

While the doctrine of relation back does not enable a person who becomes administrator to perfect an action improperly instituted, as in the case at bar, it does enable him to sue, after obtaining administration, in respect of matters arising prior thereto.[2] This distinction has apparently been ignored in many Ontario cases[3] which have purported to apply the doctrine of relation back in instances where the action has been commenced before letters of administration were issued. If *Ingall* v. *Moran* is right, then the writ being a nullity, no amendment to cure the defect may be made, as has been suggested in Ontario,[4] nor is it proper to order a stay until title to sue as administrator is perfected. It is true that an executor may sue before obtaining probate, since his status as a personal representative does not depend *ab initio* upon court approbation; but it is entirely proper that he be required to produce probate before obtaining judgment.

The Ontario view, as set forth in *Dini* v. *Fauquier*[5] and *Hedge* v. *Morrow*[6] is grounded on a distinction in the matter under discussion between the chancery and common law practice, a distinction which by virtue of the Judicature Act is resolved in favour of the equity rule. The equity rule is alleged to be

[1] [1944] 1 All E.R. 97.

[2] The statement of Armour J. in *Armstrong* v. *Armstrong* (1879), 44 U.C.Q.B. 615 that letters of administration have no retroactive effect at all is too inflexible to be accurate.

[3] *Cf. Trice* v. *Robinson* (1888), 16 O.R. 433; *Dini* v. *Fauquier* (1904), 8 O.L.R. 712; *Hedge* v. *Morrow* (1914), 32 O.L.R. 218.

[4] *Cf. Chard* v. *Rae* (1889), 18 O.R. 371; *Doyle* v. *Diamond Flint Glass Co.* (1904), 8 O.L.R. 499.

[5] (1904), 8 O.L.R. 712.

[6] (1914), 32 O.L.R. 218.

that an administrator may sue before grant of administration provided that he produces letters of administration at the hearing. The Court in *Ingall* v. *Moran* points out that stated as a general proposition this is too wide; at the most, the equity rule related to administration suits, generally brought by or against persons who would be beneficiaries in the administration. The Court explains further that *Fell* v. *Litwidge*,[7] relied on in the Ontario cases, is contrary to later authorities in so far as it purports to say that in any chancery suit a person might initiate proceedings as administrator before obtaining letters of administration. The conclusion is, then, that notwithstanding the Judicature Act, the common law rule that an administrator must have title as such before action brought remains unimpaired in respect of common law actions.

The Ontario cases above mentioned were suits for damages under the Fatal Accidents Act in which the personal representative does not recover on behalf of the estate but for the benefit of a designated group of dependants of the deceased. It may be that this fact should support a more lenient attitude than where the so-called administrator is suing in the interests of the estate.

In *Doyle* v. *Diamond Flint Glass Co.*,[8] Idington J. refused to apply the doctrine of relation back, in a fatal accidents action, in favour of a person who was not entitled to ask for administration, and while his judgment was reversed[9] the point he made was not impugned. At all events, it seemed clear that the Court was prepared to accept the doctrine of relation back as perfecting an otherwise incomplete title to sue as an administrator. A more recent Ontario judgment, that of Hogg J. in *Byrn* v. *Paterson Steamships Ltd.*[10] seems to support the argument of greater latitude in fatal accidents actions, for there the Court allowed a foreign administrator to sue as plaintiff in such an action, although pointing out that this did not mean he could sue as a foreign personal representative in connection with estate matters. While this judgment is contrary to reported judgments on the same point in Manitoba,[11] it is perhaps sustainable as involving a question of statutory interpretation; viz., whether the words "executor or administrator" in the Fatal Accidents Act should be confined in their application to persons enjoying that character under Ontario law.

[7] (1740), 2 Atk. 120.
[8] (1904), 7 O.L.R. 747.
[9] (1904), 8 O.L.R. 499.
[10] [1936] O.R. 311.
[11] *Cf. Couture* v. *Dominion Fish Co.* (1909), 19 Man. R. 65; *Johnson* v. *Can. Nor Rwy.* (1909), 19 Man. R. 179.

It remains to be noted that the Saskatchewan Court of Appeal in *Burlington* v. *G.T.P. Rwy.*[12] has also taken a different view from the Ontario Courts in fatal accidents actions, and the judgment of Martin J.A. sets forth the position of the doctrine of relation back in the same terms as those used by the English Court of Appeal in *Ingall* v. *Moran*.

B.L.

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ADMINISTRATIVE LAW—STATUTORY PROHIBITION OF JUDICIAL REVIEW — INAPPLICABILITY TO ULTRA VIRES ACTS.—*Society of the Love of Jesus* v. *Smart and Nicolls*[1] is a useful reminder of a limit to the statutory ouster of judicial review of administrative action. Wartime regulations have exhibited an increased resort to an omnibus clause of exclusion of such review, in terms given currency in workmen's compensation legislation.[2] Such a clause seeks to preclude judicial review, whether through injunction, the prerogative writs or otherwise, of any administrative act or omission in the exercise or purported exercise of any power or authority, or in the performance or purported performance of any duty. The courts have consistently taken the position that such a clause cannot be used as a cloak for the exercise of jurisdiction not conferred or authorized by the particular statute or regulations.[3] This means that access to the courts remains, if only to hear that they have no jurisdiction to interfere; but even such a holding implies that the court has satisfied itself that the administrative authority possesses the jurisdiction which it purported to exercise.

In the present case, the Court held that the power to enjoin an *ultra vires* act (determined by it to be *ultra vires*) was not taken away by a statutory provision against judicial review.

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CRIMINAL LAW—OBSCENITY—ARTISTIC PURPOSE.—*Conway* v. *The King*,[1] which involved a charge of obscenity under s. 208 of the Criminal Code, is a paradoxical decision, for it purports to rest on *Regina* v. *Hicklin*[2] and yet its effect is to free the law from the strictures of the *Hicklin* case. The Criminal Code

[12] [1923] 4 D.L.R. 334, [1923] 2 W.W.R. 1161.

[1] [1944] 2 D.L.R. 551 (B.C.).

[2] *Cf.* Workmen's Compensation Act, R.S.O. 1937, c. 204, s. 68(1).

[3] *Cf. Rex ex rel. Davies* v. *McDougall Construction Co.*, [1930] 1 D.L.R. 621, 24 Alta. L.R. 338.

[1] [1944] 2 D.L.R. 530.

[2] (1868), L.R. 3 Q.B. 360.

does not define obscenity, and here, as in England, the test laid down in the *Hicklin* case has been the generally adopted yardstick by which obscenity is measured.

It was, of course, unfortunate that the test of obscenity should have been declared in a case involving a published attack upon the Catholic Church. Lord Chief Justice Cockburn stated in the *Hicklin* case that the test was "whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to immoral influences, and into whose hands a publication of this sort may fall." Clearly, and the judgment bears this out, the author's laudable purpose or honest intent is immaterial. Strictly applied, the *Hicklin* case would result in the debasement of literature and drama; and that it has been invoked against works of merit is only too evident from the cases.[3] One critic, commenting on the *Hicklin* definition, stated that "it is so wide and loose that almost any writing with a sexual content which excites the animosity of a knave or upsets the susceptibilities of a fool can be brought within its bounds."[4]

The matter alleged as obscene in the *Conway* case was a scene of a theatrical performance which had for a background actresses nude from the waist up who tried to create the effect of living statues. In quashing a conviction against the theatre manager, Lazure J. of the Quebec Court of King's Bench stated that since the intention was to create an artistic background not an immoral scene, there was no tendency to depravity within the meaning of the *Hicklin* case. This appears, however, to be a *non-sequitur* in the light of the emphasis in the *Hicklin* case on the tendency of the perfomance to corrupt others, regardless of the accused's intention. And it is doubtful whether Lazure J.'s reference to the need of showing *mens rea* is a sufficient rationalization of the result which he reached with the continued authority of *Regina* v. *Hicklin*.

Undoubtedly the decision in *Conway* v. *The King* is a welcome advance, and in line with similar progress in recent American decisions.[5] If the law must draw a line between decency and indecency it is perhaps better that regard should be had to the purpose of the author or producer than to the effect on whomsoever might come into contact with the book or performance.[6] There can be little intellectual and cultural

[3] *Cf.* Alpert, *Judicial Censorship of Obscene Literature* (1938), 52 Harv. L.R. 40.

[4] CRAIG, ABOVE ALL LIBERTIES, 141.

[5] *Supra*, note 3.

[6] *Cf.* Chafee, *Censorship of Books and Plays*, (1940) 1 Bill of Rights Rev. 16, for a discussion of the problem of censorship.

stimulation in a community which drags everyone down to the level of the most ignorant and boorish.[7] The judicial role in this connection is undoubtedly a delicate one, and divergences in the views of different courts on the same books or performances are understandable. Thus, for example, while James Joyce's 'Ulysses' was banned in England[8] it was given a "clean bill of health" in the United States. In *United States* v. *One Book Called "Ulysses"*, the court declared:[9]

> Art certainly cannot advance under compulsion to traditional forms and nothing in such a field is more stifling to progress than limitation of the right to experiment with a new technique.

B.L.

[7] *Cf.* CRAIG, THE BANNED BOOKS OF ENGLAND.

[8] CRAIG, *supra* note 4, declared that "it is useless to put up any intelligent argument on a question of sexual morals in an English Court of law" (p. 95).

[9] (1934), 72 F. (2d) 705, at p. 708.