THE CANADIAN BAR REVIEW

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CASE AND COMMENT

CONSTITUTIONAL LAW—PROVINCIAL COURTS EXERCISING "DOMINION" JURISDICTION—WHETHER DOMINION OR PROVINCIAL "PROCEDURE" APPLICABLE.—*Stafford* v. *Stafford and Cope*[1] was a divorce case but among the questions raised by it was the important question whether in divorce proceedings in the provincial courts the applicable Evidence Act is that of the particular province or that of the Dominion. Urquhart J. decided in favour of the provincial enactment, although this conclusion made no difference in the actual result in the case.

The matter is nevertheless of considerable relevance in the determination of the respective spheres of Dominion and provincial legislative competence. It is by no means a narrow problem. In the field of divorce it may involve also the question whether provincial divorce rules, ostensibly directed to "procedure"[2] are nonetheless encroachments on the exclusive power of the Parliament of Canada in relation to "marriage and divorce."[3] With respect to "bills of exchange and promissory notes," it may raise issues as to the extent to which provincial enactments respecting prescription, or imposing conditions precedent to suit, are applicable to actions on bills and notes in the provincial courts.[4] Again, in connection with criminal prosecutions in the

[1] [1945] 1 D.L.R. 263 (Ont.).

[2] *Cf. Andrews* v. *Andrews*, [1945] 1 W.W.R. 113 (Sask. C.A.)

[3] B.N.A. Act, s. 91 (26).

[4] *Cf. Atlas Lumber Co.* v. *Atty.-Gen. Alta. and Winstanley*, [1940] 3 D.L.R. 648, affirmed [1941] 1 D.L.R. 625; *Dorfer* v. *Winchell*, [1942] 2 D.L.R. 772; *Costley* v. *Allen*, [1941] 4 D.L.R. 754, reversed on other grounds [1942] 3 D.L.R. 76, [1942] 2 W.W.R. 239. See Note (1940), 18 Can. Bar Rev. 725; Note (1942), 20 Can. Bar Rev. 64.

provincial courts, the shading off of "criminal law" and "criminal procedure" into the "constitution of courts," of criminal jurisdiction, involves constitutional questions, which may, perhaps, not always be resolved or avoided through devices like legislation by reference.[5] In fine, the possibility of constitutional conflict inheres in all cases of enforcement in provincial courts of claims arising under valid Dominion legislation.

The conflict arises under s. 92(14) of the British North America Act, the enumerations of s. 91 and under the terms of s. 101. A provincial legislature has, under s. 92 (14), legislative authority in relation to the constitution, organization and maintenance of *provincial* courts, both of civil and criminal jurisdiction, including procedure in civil matters in those courts. The Parliament of Canada has authority under s. 101 to establish courts for the better administration of the laws of Canada, i.e., laws which are competent to the Dominion under s. 91.[6] Whether, in view of provincial authority to establish criminal courts and of the exception in s. 91(27)[7] the Dominion can establish such courts under s. 101 of the B.N.A. Act may be open to some doubt, although s. 101 does recite that Dominion power therein conferred is available "notwithstanding anything in this Act." There is at least little doubt as to federal authority to establish Dominion courts to administer Dominion non-criminal legislation, as for example, bankruptcy laws. That the Dominion should be able to prescribe a complete code of procedure in such matters is hardly open to dispute, since provincial authority in relation to civil procedure applies only to provincial courts. Where the Dominion, however, imposes duties on existing provincial courts, something which it is constitutionally entitled to do,[8] alternative views may be suggested. In the first place, it is arguable that the Dominion must take those courts as they are, with their procedure as laid down in provincial enactments. This is the view of Urquhart J. in the *Stafford* case. It may be noted that "procedure in criminal matters" is within exclusive federal authority, so that in such procedure there is an exception by specific constitutional provision from the position just mentioned. In the second place, there is the view that the Parliament of Canada, in imposing duties on provincial courts, constitutes them Dominion courts under s. 101 *qua* those duties.[9] From this it should follow that

[5] *Cf.* Criminal Code, ss. 576, 577, 921.

[6] See *Rex* v. *Hume; Consolidated Distilleries Ltd.* v. *Consolidated Exporters Corp.*, [1930] S.C.R. 531, [1930] 3 D.L.R. 704.

[7] B.N.A. Act, s. 91 (27) reads, *inter alia*, "the criminal law, *except the constitution of the courts of criminal jurisdiction.*"

[8] *Valin* v. *Langlois* (1879), 5 App. Cas. 115; *In re Vancini* (1904), 34 S.C.R. 21.

[9] *Cf. Valin* v. *Langlois* (1879), 3 S.C.R. 1.

the Dominion can prescribe the procedure which should govern in those courts in connection with the duties thus imposed upon them.[10]

The first view raises the additional problem of distinguishing "substance" from "procedure," a matter which bulks large in the conflict of laws. As an example, one can point to the judgment of the Supreme Court of Canada in *Reference re Alberta Debt Adjustment Act, 1937*,[11] where provincial legislation requiring a permit to sue in the provincial courts was characterized as being not "procedure" but as involving a matter of substance. On the other hand, provincial prescription legislation has been characterized as "procedure,"[12] and thus applicable in the enforcement in provincial courts of claims under Dominion legislation. Some Dominion legislation, e.g., the Bills of Exchange Act, does not expressly provide for enforcement of its provisions in any particular court or courts, and it is arguable that the principle advanced by Lord Haldane in *Board* v. *Board*[13] is applicable to repose jurisdiction in provincial courts in accordance with provincial procedure. This principle is, however, consistent with both views or alternatives advanced above, at least so far as no procedure differing from that of provincial courts is laid down in the legislation.

If there is such differing procedure prescribed, then the question arises squarely whether the Dominion must take the provincial courts as it finds them, or whether it can treat them as, in a sense, *ad hoc* Dominion tribunals. Practice, as in bankruptcy, would suggest that the latter point of view is the more valid one. Any attempt to separate the substantive from the procedural is at best artificial,[14] and to adopt the pro-provincial view would mean that Dominion legislative authority under the enumerations of s. 91 must be fitted into the moulds of provincial procedural regulations. That the Dominion may have in most cases preferred to accept provincial procedure in provincial courts would seem

[10] *Cf.* Rinfret J. in *Atty.-Gen. Alta. and Winstanley* v. *Altas Lumber Co.*, [1941] 1 D.L.R. 625, at p. 632: "But it has long since been decided that, with respect to matters coming within the enumerated heads of s. 91, the Parliament of Canada may give jurisdiction to provincial courts and *regulate proceedings in such courts to the fullest extent.*" (Italics mine).

[11] [1942] S.C.R. 31, [1942] 2 D.L.R. 1, affirmed [1943] 2 D.L.R. 1 (P.C.).

[12] *Cf. Dorfer* v. *Winchell*, *supra*, note 4.

[13] [1919] A.C. 956, 48 D.L.R. 13. "If the right exists, the presumption exists that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of Justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other court."

[14] Cf. Falconbridge, *The Disorder of the Statutes of Limitation* (1943), 21 Can. Bar Rev. 786, at p. 800 *et seq.*

to be mere convenience and not a matter of constitutional limitation. It amounts in fact to legislation by reference, a method of enactment which suffers from a constitutional infirmity where the reference is not only to past or existing legislation of a province but encompasses future legislation as well. This at any rate is the doctrine of *Rex.* v. *Zaslavsky.*[15]

On the argument last advanced, the *Stafford* case is wrong. The Dominion Evidence Act expressly states that it is applicable "to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf."[16] There is nothing in this provision to indicate that it is confined to proceedings in courts established by the Dominion. Notwithstanding that divorce jurisdiction has been conferred upon the courts of Ontario, it does not follow that the Dominion having exclusive authority in relation to divorce, may not prescribe the rules of evidence to be applied therein in divorce litigation. To contend that it can for its own courts but that it cannot do so when making use of provincial courts is to point up a distinction without a difference, and to invite construction difficulties in separating substance from procedure that should, if at all possible, be avoided.

B.L.

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NEGLIGENCE—CHILDREN'S CONTRIBUTORY NEGLIGENCE—FORESEEABILITY BY DEFENDANT—DUTY OF CARE OR APPORTIONMENT.—*Yachuk* v. *Oliver Blais Co. Ltd.*,[1] previously noted in this REVIEW,[2] has been reversed on appeal[3] as to the finding of contributory negligence against the infant plaintiff. The unanimous opinion of the Court, in shouldering the defendants with sole legal responsibility, attacked the problem largely in terms of a discussion of what the infant plaintiff knew or could reasonably be expected to know of the effect of the use of gasoline. Perhaps a simpler approach would have been to consider the case in terms of the extent of the defendant's liability; as put by PROSSER ON TORTS, "the risk created by the defendant may include the intervention of the foreseeable negligence of others".[4] Thus, if a defendant might foresee that a child entrusted with a gun may shoot himself or some other person,[5] he might equally foresee that a child

[15] [1935] 3 D.L.R. 788, [1935] 2 W.W.R. 34.
[16] R.S.C. 1927, c. 39, s. 2.
[1] [1944] 3 D.L.R. 615, [1944] O.W.N. 412.
[2] (1944), 22 Can. Bar Rev. 726.
[3] [1945] 1 D.L.R. 210, [1945] O.R. 18.
[4] At p. 357.
[5] *Cf. Dixon* v. *Bell* (1816), 5 M. & S. 198.

entrusted with gasoline may burn himself or his companions. Suppose, however, that instead of himself suffering burns through the igniting of the gasoline with the flaming bulrush, the injured child (or his companion) had ignited a nearby building? Should such misconduct insulate the defendants? As in the actual situation presented by the *Yachuk* case, it is arguable that the result would be within the risk set up by the negligence of the defendants.

The decision of the Manitoba Court of Appeal in *Wasney* v. *Jurazky*[6] seems diametrically opposed to that of the Ontario Court. The *Wasney* case concerned the liability of a defendant who, in contravention of s. 119 of the Criminal Code, sold the infant plaintiff (10–11 years of age) a firearm by the use of which the plaintiff was injured. The Court held that the plaintiff was barred by his own contributory negligence—apportionment of fault being, at the time, impossible in Manitoba.[7] Since the defendant's duty to refrain from selling children under sixteen firearms—whether arising from the Criminal Code or under the common law of the provinces in light of a reasonable man's foresight having regard to the Code—was imposed for the protection of children like the infant plaintiff the problem of the *Yachuk* case was, if anything, even more squarely posed in the Manitoba case.

At common law, apart from any statute permitting apportionment of fault and damages, one can understand and sympathize with a court's desire to impose liability on a defendant in such cases. The techniques available in such cases could be formulated either in terms of "proximate cause" or the defendant's duty to protect even careless persons. In reality it would mean that the court took—as it did in the *Yachuk* case—a more serious view of the defendant's moral culpability than of the plaintiff's. Exactly the same thing occurred in Canada and England in the maze of cases which finally produced *B. C. Electric Railway* v. *Loach*,[8] where the Privy Council was able to translate an earlier act of negligence into a later one ("last clear chance") because of the quite understandable view that the railway's negligence was more serious than that of the plaintiff's.[9]

[6] [1933] 1 W.W.R. 155.

[7] The majority of the Manitoba Court also refused to follow the Ontario cases such as *McKittrick* v. *Byers* (1925), 58 O.L.R. 158; *Knowlton* v. *Hydro-Electric Power Commission* (1925), 58 O.L.R. 80; *Dority* v. *Ottawa R.C. Separate School Trustees* (1930), 65 O.L.R. 360 which would impute the child's negligence to a parent suing to recover medical expenses, etc.

[8] [1916] 1 A.C. 719.

[9] See McIntyre, *The Rationale of Last Clear Chance* (1940), 52 Harv. L.R. 1224; 18 Can. Bar Rev. 665.

There can be no doubt that contributory negligence does limit the defendant's duty to take care. The Australian High Court[10] refused to shorten the statutory duty imposed on an employer regarding fencing dangerous machinery because of contributory negligence of an employee. The House of Lords has recently[11] —although in the case of Lord Wright, reluctantly—refused to follow this view, taking a position which seems to us more akin to that of the Manitoba Court in the *Wasney* case. The House of Lords felt that if careless conduct of a plaintiff was a cause the plaintiff failed because, as Lord Atkin stated, "the injury has not been caused by the defendant's omission but by the plaintiff's own act."[12]

It was to meet the situation of two or more negligent acts "causing" or "contributing" to a plaintiff's injuries that the modern Canadian Negligence Acts were passed. At common law the result had to be all or nothing for a plaintiff. On this basis no one, we should imagine, would question the soundness of making a defendant pay for a breach of duty based on foreseeing careless acts of children. For this reason the Manitoba decision, although perhaps receiving support from the barren view of causation discussed in the House of Lords' judgment just mentioned, would seem less preferable to that of the Ontario Court in the *Yachuk* case on the basis of common law rules forbidding apportionment. The question remains, however, whether in light of statutes permitting apportionment of damages in accordance with fault, such a view of "all or nothing" is necessary. Even as "ultimate negligence" has practically, although perhaps not entirely, disappeared under the modern apportionment acts, it may be that techniques which would have been sound at an earlier date as a means of assessing comparative faults, when such was theoretically impossible, are no longer necessary. As the *Yachuk* case is on appeal to the Supreme Court of Canada it will be interesting to see the extent to which that Court retains under the new legislative policy a doctrine more consistent with a stage when comparative faults had to be obscured by techniques of duty and causation.

C.A.W.

[10] *Bourke* v. *Butterfield & Lewis Ltd.* (1926), 38 Comm. L.R. 354.
[11] *Caswell* v. *Powell Duffryn Assoc. Collieries*, [1940] A.C. 152.
[12] It is interesting to note that in Part II of the Ontario Workmen's Compensation Act, R.S.O. 1937, c. 204, s. 122, the contributory negligence of a workman will not defeat recovery although by s. 123 it may affect the amount of damages recoverable. This antedated by some 12 years the Ontario Negligence Act.

CONTRACTS—FRUSTRATION BY WAR REGULATIONS.—*Robbins* v. *Wilson & Cabeldu Ltd.*, [1944] 3 W.W.R. 625, a recent decision of the Court of Appeal for British Columbia, raises interesting questions on frustration of contracts by war regulations.

The plaintiff, who owned a motor car on which he owed a balance to a finance company, transferred the car to the defendant, a dealer in cars, under a written contract that gave him in return a credit of $332.29, applicable on any new car to be bought from the defendant within five years. The defendant assumed the balance due to the finance company, viz. $392.71, then repaired and later sold the car.

Nearly three years after the original transaction and after the Motor Vehicles Controller had issued orders forbidding the sale of motor cars to persons like the plaintiff, the plaintiff applied to the defendant for a new car, and was refused because not qualified to buy.

The plaintiff then sued for $332.29, and Shandley Co. J. awarded him that sum. He held that the contract was frustrated, that there was a total failure of consideration, and that the decision in *Fibrosa etc.* v. *Fairbairn etc.*, [1943] A.C. 32, applied.

The Court of Appeal, by two to one, reversed this decision. The majority apparently took the same general view of the case as Shandley Co. J., but held that the plaintiff was precluded by the special language of the contract by which the plaintiff had agreed:

> that I am not entitled to payment of all or any part of such price in cash or otherwise, but that I am entitled only to credit for the said sum of $332.29 to be used or exercised by me hereafter towards the purchase price of a new car from you, within five years of date hereof. I further expressly agree that I shall not be entitled to any repayment of the same or any part thereof at any time or under any circumstances whatsoever, it being the true intent of this agreement that such sum shall remain and be a perpetual credit to which I shall be entitled only if, as and when I purchase such new car from you as above mentioned.

The majority held that this language was so wide that it governed even a case of frustration. O'Halloran J.A. dissenting, held that the language was not directed to possibility of frustration, and he would have dismissed the appeal.

All the Judges seem to have assumed that *prima facie* the plaintiff was entitled to $332.29 once the contract was frustrated. It is submitted however that this assumption went too far, and that even if the clause quoted from the contract had not been there, the plaintiff must have failed in his claim, as presented.

The House of Lords decided in the *Fibrosa* case that when a purchaser of a machine had paid part of the purchase money, but had not obtained delivery, and then future delivery was made impossible by outbreak of war, the purchaser was entitled to get his money back because there was a total failure of consideration. But the Lords did not question earlier decisions which held that if the failure of consideration had been only partial, the loss must have lain where it fell.

In the *Robbins* case there was not a total failure of consideration. The defendant had agreed to assume and pay off the finance company's claim against the car, and had actually paid this, which was a partial performance of the contract and excluded total failure of consideration.

But apart from that, the courts seem to have assumed too much in the plaintiff's favour, even if the consideration had failed entirely. Even then the plaintiff's right would only have been to be restored to his original position, as on rescission; but that meant, not that he was entitled in cash to the amount of the credit, but that he was entitled to get his car back. Here indeed the car had been sold, so that he could not get it back. There seems to be no direct authority on the effect of sale in such a case; but it would seem that if this did not prevent the plaintiff's recovering altogether, he was at most entitled to the proceeds of re-sale.

The defendant actually brought into court the proceeds of re-sale, less expenses of re-conditioning the car, and less its commission on the re-sale. But all later seem to have assumed that the re-sale was irrelevant.

The trial judge's course seems to have been equivalent, not to ordering rescission, but to ordering specific performance, but with a variation that made the defendant do what it had never agreed to do, viz. to pay in cash. Possbily if it had been put to the judge that he could only restore to the plaintiff what he had lost, he might still have awarded $332.29, as the parties' estimate of its value. But this would hardly be right; for the defendant in supplying a new car would make a profit; giving a credit of $332.29 would not be at all the same thing as paying that sum in cash.

If the plaintiff had sued for the proceeds of re-sale of his car, then the clause quoted from the contract would not have applied, and would have been no bar.

Then it would have been an interesting question what the defendant could have deducted from the gross sale price. There

seems to be little doubt that the cost of repairs was deductible, certainly so, if it was a disbursement. Even if this represented the value of the defendant's labour, it would seem deductible, since this increased the value of the car. The charge for commission on re-sale however raises more difficulty. The work was not done for the plaintiff, but by the defendant as owner for its own benefit. The work did not enhance the value of the car. On the other hand the defendant was a corporation and probably had to pay the salesman who sold the car, even if it did not pay the equivalent of the commission claimed.

The questions thus raised are far from easy. Cases on rescission are probably of little help, because rescission is usually ordered because of default by the opposite party and a fairly strict view would be taken of allowances to be made to him. But the defendant here acted properly throughout. Still it might be that for work done by it that did not benefit the property, it should be treated like a mortgagee in possession, who is allowed nothing for collecting rents personally, or that if it could claim that it had been put to expense for a salesman's wages, it could claim only a bare indemnity, and not the amount of a commission chargeable to a customer. The point seems to be decidedly obscure.

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TAXATION—SUCCESSION DUTY—LEGISLATIVE INTERFERENCE WITH SITUS OF SHARES—The reference by a correspondent to amendments to the British Columbia Companies Act bearing on situs of shares[1] offers some excuse for adverting to the subject again. This legislation, providing for transfer on a register in the province, "and not elsewhere", is similar to earlier legislation enacted in Nova Scotia,[2] as a result, apparently, of the judgment of the Nova Scotia appellate court in *Attorney-General for N. S.* v. *De Lamar*.[3] Among the points raised by the case was one involving the effect of a Nova Scotia statute requiring the keeping of a transfer register in Nova Scotia and providing further that "such register shall be the principal register and any other register . . . . shall be deemed to be part of the principal register, and shall be a branch or subsidiary register". The court

[1] (1945), 23 Can. Bar Rev. 77.
[2] Succession Duty Act, R.S.N.S. 1923, c. 18, s. 7 (c); Companies Act, 1935 (N.S.), c. 6, s. 42 (7).
[3] (1921), 54 N.S.R. 497, 61 D.L.R. 251.

held that this legislation could not bring within Nova Scotia shares in a company which were transferable on a branch register in another jurisdiction where the deceased owner was domiciled and where the share certificates were located. It was unnecessary to make any declaration of the invalidity of the statute since it did not clearly alter situs, but the court did indicate that it would not be receptive to any legislative attempts in that direction.