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

CONTRACT—WARTIME RESTRICTIONS—DOCTRINE OF FRUSTRATION—EFFECT OF TERMS OF CONTRACT ON RIGHT TO RECOVER BACK A PAYMENT WHERE CONTRACT FRUSTRATED. "Where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless when the time for fulfilment arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case performance becomes impossible from the perishing of the thing without default of the contractor." So stated Blackburn J. in *Taylor* v. *Caldwell* in 1863,[1] and in his judgment may be seen the birth of the "implied term" as the rationale of the doctrine of impossibility of performance in contract. Since that time, many currents of juristic thought are to be discerned in the ever-perplexing and perhaps still unsolved question—what is the true basis upon which the doctrine of frustration of contract rests? The implied term theory was the most fashionable one during the war of 1914-18. "When our courts have held innocent contracting parties absolved from further performance of their promises," said Lord Loreburn in *Tamplin Steamship* v. *Anglo Mexican Petroleum Products*,[2] "it has been on the ground that there was an implied term in the contract which entitled

[1] (1863), 3 B. & S. 826, 833.
[2] [1916] 2 A.C. 397, 403.

them to be absolved . . . No court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted." This theory is based on the supposition that had the parties foreseen the event, they would not have agreed to be bound by the terms of the contract. The law, therefore, regulates a situation which the parties would have regulated by agreement themselves if the necessity had occurred to them—which it did not. On the other side, the most prominent theory is what one might call the "foundation" doctrine, the exposition of which by Lord Haldane in the *Tamplin* case[3] is considered to be the most authoritative. According to his view in that case, discharge by impossibility is not based on the presumed intention of the parties, but arises from the operation of a rule of law. He states his view in this way: "The occurrence itself may be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation." The word "deemed" should be noticed here. Professor McNair, in a learned article,[4] seizes on this and suggests with quite an amount of force that the two theories are really the same, while in the case of *Bank Line* v. *Capel*,[5] Lord Finlay L.C. expresses the identical view.[6]

The difficulty of the implied term theory can be seen in a case like that of *Tatem* v. *Gamboa*,[7] where it was quite obvious that the parties to the contract must have foreseen the contingency of the ship's being seized by General Franco—which is what actually occurred. Now the whole purpose of the implied term doctrine is to provide something which the parties would have themselves provided had they contemplated the unforeseen event. Since, in that case, the unforeseen event must have been in the contemplation of the parties, it was consequently impossible to use the implied term theory, and Goddard J. therefore fell back on Lord Haldane's idea of the disappearance of the foundation of the contract, in order to reach the result at which he arrived. "Whether the circumstances are foreseen or not makes very little difference," he said, "if the foundation of the contract goes, if something is swallowed up in an earthquake, it goes, whether or not the parties have made provision for it."[8] The

[3] *Ibid.*, at page 406.
[4] 56 L.Q.R. 173 at pp. 178-9.
[5] [1919] A.C. 435.
[6] At page 422.
[7] [1938] 3 All E.R. 135.
[8] *Ibid.*, at page 143.

difficulty with this approach is that the "foundation of the contract" is a very vague term. It is submitted, however, that this difficulty can be surmounted if, instead of enquiring "what is at the foundation of the contract?", we enquire "what is *in* the contract?" As a consequence, an "unforeseen" circumstance becomes an "unprovided for" circumstance—which Goddard himself recognizes.[9] It is not so much an *unforeseen impossibility* as an *impossibility for which the contract makes no provision.* "Parties can, if they wish, provide for what in that event is to happen, but if they do not, then the performance of the contract is regarded as frustrated."[10]

The true principle underlying the theory of impossibility is well set out in the illuminating judgment of Lord Porter in *Constantine S.S.* v. *Imperial Smelting Corporation,*[11] namely, that there are some cases in which the promiser absolutely *warrants* the possibility of performance, in which case he is bound to perform in any event, or pay damages. In all other cases he is only obliged to perform if he can, and is therefore excused if performance becomes impossible.[12] As to what *constitutes* impossibility or frustration, one of the best pronouncements on the subject is perhaps that of Lord Dunedin, in *Metropolitan Water Board* v. *Dick, Kerr,*[13] the test being: Does the intervening circumstance "destroy the identity of the work or service, when resumed, with the work or service when interrupted?"[14] As Lord Wright pointed out in the *Constantine* case,[15] when impossibility supervenes, what happens is that "substantial performance is no longer possible." In other words, the performance specified in the contract has become impossible, even though the promisor can go through the particular acts which he undertook to perform. This is often called "frustration of the adventure"—since performance is, thereafter, really in effect, performance of a different contract. The identity of the contract has been lost. For instance, in the coronation case of *Krell* v. *Henry*[16] the rooms which had been engaged were still available, and the plaintiff was still willing to let the defendant have them. This, however, would have been performance of a different contract altogether. It was not a mere demise of the rooms, as Vaughan-Williams L.J. pointed

[9] *Ibid.*, at page 144.
[10] *Ibid.*
[11] [1941] 2 All E.R. 165.
[12] *Ibid.*, at page 198. (This view was expressed by H.W.R. Wade in 1940, in an article in 56 L.Q.R. 519).
[13] [1918] A.C. 119.
[14] *Ibid.*, at page 128.
[15] [1941] 2 All E.R. 165, 185.
[16] [1903] 2 K.B. 740.

out,[17] but rather a licence to use the rooms for a particular purpose —which had become impossible. The learned editor of the 11th edition of Pollock on Contracts[18] puts the problem and the test in his usual concise way: "Would any reasonable third party" (i.e. the court) "consider the effect of the circumstances which have intervened as altering the obligations of one or both parties to such an extent as to make the contract no longer capable of being enforced?"[19] That is the question which the court must answer. This would seem to dispense with any necessity for an implied term, or theory of the disappearance of the foundation of the contract. The question is: *Is this now a different contract from that into which the parties entered?*

The foregoing applies only if the parties have made no express provision for such a contingency as subsequently arises. They may, if they so wish, provide in the contract that each party is to be absolutely liable, frustration notwithstanding. "There can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance notwithstanding that the supervening event may occur" (per Viscount Simon in the *Constantine* case).[20] On the other hand, they may state specifically what is to happen if impossibility supervenes. In such a case, the court will give effect to such a term, just as it will to any other term in the contract.

On the above principles, the recent decision of the Court of Appeal in British Columbia in the case of *Robbins* v. *Wilson & Cabeldu*[21] seems a little confusing. The facts of this case were as follows:—In November 1941, the plaintiff signed a contract with the defendant firm, whereby he sold and delivered to them his automobile, in consideration of which they were to hold the purchase price, $332.29, to the plaintiff's credit towards the purchase of a new car to be bought by him from the defendants within five years. (The purchase price of $332.29 was arrived at by deducting from the normal price of the car, $725.00, an amount which the plaintiff still owed on it to a finance company, $392.71). The contract concluded as follows: "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 a 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

[17] *Ibid.*, at page 750.
[18] Prof. P. H. Winfield, K.C.
[19] POLLOCK, CONTRACTS, 11th ed., at page 235.
[20] [1941] 2 All E.R. 165, 171.
[21] [1944] 3 W.W.R. 625.

as above mentioned." When the plaintiff applied to the defendants for a new car, he was informed that owing to an order of the Motor Vehicle Controller in March 1942, made pursuant to an Order-in-Council issued in February 1941, he would have to obtain a permit for the purchase from the Controller. He therefore applied for such permit, but his application was refused, as he was unable to show "the necessity for such purchase." He therefore requested the defendants to return him the money which they were holding to his credit, and on their refusal to do so, brought an action to recover the sum. Shandley C.C.J. held that the contract had become impossible of fulfilment, and following the decision in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*,[22] gave judgment for the plaintiff.[23] (The Fibrosa case overruled the much criticised case of *Chandler* v. *Webster*,[24] which had held sway for thirty-eight years. The principle in the Fibrosa case is that money is recoverable in *quasi-contract* by the party who has not got that for which he bargained. Viscount Simon L.C., in his judgment, points out the difference between "consideration" in contract, which may be the promise itself, and "consideration" in quasi-contract, which is the performance. Thus, if performance becomes impossible, the consideration fails entirely, and the claim—in quasi-contract—of the party who has paid money under the contract is upheld).

The decision of Shandley C.C.J. was reversed by the Court of Appeal of British Columbia (O'Halloran J.A. dissenting).[25] It is difficult to understand the reasoning of Robertson J.A. who delivered the chief majority judgment.

In the first place, he says that the doctrine of discharge by frustration is based on the Court's implying a term in the contract.[26] The difficulty of this doctrine has been explained above—it proceeds on the assumption that the parties would themselves have supplied this term, had the possibility of the supervening event occurred to them. It is submitted that if this theory were applied to the present case, it would be impossible to hold the contract discharged by frustration, since it must have been in the contemplation of the parties that restrictions might well be placed on the purchase of automobiles—the contract was made *after* the Order-in-Council of February 1941 giving powers to the Motor Vehicle Controller to make regulations, but even if it could be said that the contracting parties did not have this

[22] [1943] A.C. 32.
[23] [1944] 3 W.W.R. 255.
[24] [1904] 1 K.B. 493.
[25] [1944] 3 W.W.R. 625.
[26] *Ibid.*, at page 631.

Order-in-Council in mind when they made their agreement, yet they must have been alive to the fact that it was war time, and that there was consequently quite a degree of probability that the sale of cars would be restricted at some time in the near future (just as the sale of tires had been restricted in the past). The implied term doctrine will therefore not fit the facts of the present case—just as it failed to fit the facts of *Tatem* v. *Gamboa*.[27] We agree with the reasoning of Lord Porter in the *Constantine* case, as to the basis of the theory of impossibility.[28]

In the second place, in regard to what constitutes frustration, it is often a question of extreme difficulty whether the supervening events themselves are such as can be said to terminate the whole contract, or merely to delay or interrupt it. A comparison of the two leading war cases mentioned above will illustrate this—the *Tamplin* case[29] and the *Bank Line* case.[30] Yet this does not seem to bother the judges in the instant case. In fact, they do not discuss the problem at all. Apparently, they take it for granted that frustration has ensued, and leave it at that. Nevertheless, it could well be argued that this was a mere interruption, since the plaintiff might convince the Controller of the necessity for his purchase at a later date, or the Order of the Controller might be withdrawn when the necessity for it has ceased. The plaintiff had five years in which to purchase his new car, of which only five months had elapsed when the Controller imposed his restriction. Would the contract have been frustrated if the restriction had been lifted in say six months—in one year—in three years? What length of time must elapse before the interruption becomes frustration of the adventure? According to Lord Shaw of Dunfermline in the *Bank Line* case,[31] if the stoppage arises from a declaration of war, it is considered to be caused for a period of indefinite duration. The internment and enlistment cases of the first World War—such as *Horlock* v. *Beal*,[32] *Marshall* v. *Glanvil*,[33] —and during the present war—*Unger* v. *Preston Corporation*,[34] follow this reasoning. On the other hand, there is authority for the rule that the cause of frustration must be operative for long enough to raise a presumption of inordinate delay before frustration takes place (see the judgment of Lord Sumner in the

[27] [1938] 3 All E.R. 135. (See above).
[28] [1941] 2 All E.R. 165, 198. (See above).
[29] [1916] 2 A.C. 397.
[30] [1919] A.C. 435.
[31] *Ibid.*
[32] [1916] 1 A.C. 486.
[33] [1917] 2 K.B. 87.
[34] [1942] 1 All E.R. 200.

Bank Line case);[35] the case of *Nordman* v. *Rayner & Sturges*[36] would seem to be in accord with this view—where internment lasted only for one month. In the instant case, in British Columbia, however, the stoppage was not caused by declaration of war; the contract was made over two years after war had been declared. We are back, therefore, at Lord Wright's test in the *Constantine* case:[36A]—is substantial performance still possible? Or, as Lord Dunedin would say:—Is the identity of the contract destroyed? In the *Metropolitan Water Board* case,[37] he answered this question in the affirmative: "The whole range of prices might be different".[38] In the case we are considering, however, this possibility must have been clearly evident when the contract was made— during wartime, when prices are apt to fluctuate violently even over a short period of time—and yet a five year period was stipulated (had the contract been made before the war, different considerations might have applied.) Whether the order of, and subsequent refusal of a permit by the Controller amounted to frustration of the contract or merely caused an interruption thereof is a point on which we shall not express an opinion. We merely call attention to the fact that this question might have received discussion by the Court.

Finally, assuming that the contract *was* rendered impossible of fulfilment, the majority of the Court of Appeal held that the parties provided for such a contingency, the provision being that in such an event, the plaintiff should have no legal right of recovery. With great respect, we cannot agree woth this interpretation of the agreement. Assuming, for the moment, that frustration *was* covered by the language at the end of the contract (with which assumption we do not agree), then the parties certainly *did* make provision for what was to happen in such an event—the sum was to remain as a "*perpetual* credit" to the plaintiff, to which he was to be entitled when he bought a car. In other words, if frustration of the contract supervenes, the sum shall remain for an indefinite time (perpetual) to the credit of the plaintiff until such time as he can buy a car. We cannot see, therefore, how, on this basis, the defendants could be held absolved from an obligation to sell the plaintiff a car at some future date, and to hold the particular sum to the plaintiff's credit until that time. All this, however, on the assumption that the parties intended to include frustration in the latter part of the contract, and to provide for

[35] [1919] A.C. 435, 450-60.
[36] [1916], 33 T.L.R. 87.
[36A] [1941] 2 All E.R. 165, 185.
[37] [1918] A.C. 119.
[38] *Ibid.*, at page 130.

what was to happen in that event. We do not agree, however, that they did so intend. It is true that wide terms—"under any circumstances whatsoever"—were used, but it is submitted that it would have been quite consistent with authority to interpret this clause as *not* referring to frustration of the contract. Many cases could be cited where language appearing absolute in its terms is not interpreted to render it absolute in effect. A recent case which comes to mind is *Court Line* v. *Dant*,[39] where the words "or any other cause preventing the full working of the vessel" were held not to include a case of frustration caused by a boom being placed across the river which rendered it impossible for the ship to move. It is submitted that such language was equally as wide as that used in the agreement for the sale of the automobile in the present case. In these, and like cases of ambiguity, the court must assume that the parties were reasonable in making their contract, and "intended to stipulate for that which is fair and reasonable having regard to their mutual interests and to the main objects of the contract."[40] "The court has to decide, not what the parties actually intended, but what, as reasonable men, they should have intended."[41] Applying the above, we respectfully agree with the dissenting judgment of O'Halloran J.A., in this connection, which we consider irrefutable: "The language of the agreement, construed as it must be in the light of the purpose of the agreement, can reasonably mean but one thing, viz., that the money would be retained as a credit only while the contract remained in existence. . . . . It must be obvious that the parties never intended that, if the contract itself were determined by events for which neither party was responsible, the respondent and others like him would not get their money back either in cash or in money's worth, but that the motor dealers were in effect to receive a present of that money. No motor car owner in his rational senses would agree to such a one-sided and unfair proposition."[42] As, therefore, in our submission, the parties made no provision for frustration of the contract, and on the asumption that it *was* frustrated, and not merely interrupted, it is submitted that the principles of the *Fibrosa* case[43] should have been applied (as they were in the County Court), and the plaintiff allowed to recover his money.

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[39] [1939] 3 All E.R. 314.
[40] Per Lord Watson in *Dahl* v. *Nelson Donkin & Co.*, (1881), 6 App. Cas. 38, 59.
[41] Per Lord Wright in the *Constantine* case, [1941] 2 All E.R. 165, 186.
[42] [1944] 3 All E.R. 625, 627-8.
[43] [1943] A.C. 32.

Since writing the above comment, the writer has had an opportunity of reading a note of the case in the February issue of the CANADIAN BAR REVIEW by Mr. D. M. Gordon of Victoria, B.C.,[44] who agrees with the decision in the case, but comes to his conclusion on entirely different grounds—viz., that as the *Fibrosa* case[45] only applies to a case of *total* failure of consideration, it cannot be applied in the present case, as the failure of consideration was only partial. Mr. Gordon reaches this conclusion by construing the contract as a sale of an automobile for $725.00, in consideration of which the purchasers were to pay $392.71 to a finance company for the plaintiff, and to retain the balance towards the purchase of a new car. They paid the sum to the finance company, which was a partial performance of the contract, and therefore excluded total failure of consideration (in a quasi-contractual claim). If this construction of the terms of the contract is correct, then the writer is in full agreement with Mr. Gordon that the *Fibrosa* case[46] cannot apply, and the plaintiff's claim consequently fails.

However, this is not the view which the court apparently took of the contract. On page 629 of the report of the case,[47] the contract is set out as follows:—

To Messrs. Wilson & Cabeldu Ltd.

I, the undersigned, hereby set over and assign unto you a certain motor vehicle . . . *for the price of . . . three hundred and thirty-two dollars and twenty-nine cents*, made up as follows:—

By allowance for motor vehicle	$725.00
Amount owing to finance company (Commercial Credit Corpn)	$392.71
Net credit	$332.29

In consideration of your purchasing the said motor vehicle *for the price above mentioned*[48] . . . . .

In other words, the automobile was bought and sold for $332.29. It was, in these circumstances, the sale of the plaintiff's equity in an encumbered chattel. The price would have been $725.00 if there had been no encumbrance at all. As it was, however, this encumbrance was deducted from the normal price in order to arrive at the true value of the plaintiff's interest—$332.29, *for which price (according to the terms of the contract)* it *was sold.* It was a contract, therefore, for the sale of a limited interest in an encumbered chattel, no part of the consideration

[44] 23 Can. Bar Rev. 165.
[45] [1943] A.C. 32.
[46] *Ibid.*
[47] [1944] 3 W.W.R. 625, 629.
[48] The italics are mine.

for which had been received by the plaintiff vendor. The principle of the *Fibrosa* case,[49] therefore, should apply, in the absence of any express terms to the contrary contained in the contract itself.

This is the construction of the contract which the court must have taken, since there is nothing in any of the judgments from which one can even infer that payment by Messrs. Wilson & Cabeldu to the finance company of the sum of $392.71 was part of the consideration of the sale. Perhaps Mr. Gordon would *imply* a promise to pay this on the part of the defendants, but the court says nothing about it. If the court had done so, and implied such a promise, it could not have applied the principle in the *Fibrosa* case. On the construction taken by the court, it is submitted that the *Fibrosa* case should have applied, and that the plaintiff should have been allowed to recover his money.

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NEGLIGENCE—CHILDREN'S CONTRIBUTORY NEGLIGENCE—FORESEEABILITY BY DEFENDANT—[Since the comment on the following case appeared in the January issue we have received an additional comment on this case from a learned contributor. In view of the importance of the case we print it below—ED.]

Yachuk v. *Oliver Blais Co., Ltd.*, [1945] O.R. 18, 1 D.L.R. 210, seems to outdo all previous decisions in excusing the misconduct of infant plaintiffs. The plaintiffs, children of tender years, obtained gasoline from the defendant by a false representation that it was wanted for a stalled motor car, then used it for playing with fire, and thereby burned themselves. The defendant was held liable to them in damages, on the ground that it had been negligent in letting them have the gasoline.

Even if we agree that the defendant acted imprudently, negligence alone is not a cause of action; the plaintiffs had to show that the defendant injured them by its negligence. Presumably the statement of claim in this case alleged that the defendant injured the plaintiffs. But the defendant did not injure them; they injured themselves.

It is true that there is a legal principle that a defendant may legally injure a plaintiff even when the plaintiff himself does the physical act that leads to the injury. That principle

[49] [1943] A.C. 32.

however requires the setting of a trap. Thus if I lend a man a gun with a hidden defect, and I do not warn him of it, he can sue me for resulting injury, even though he himself fired the gun. In the famous turn-table case, the infant plaintiffs apparently were allowed to recover because, though their own acts led to their injury, the defendant was responsible, since it let them use dangerous machinery without warning of the danger, which was not obvious to children.

The apparently privileged position that infant plaintiffs seem to occupy is really explained by this: that a defendant may set a trap for infants by acts that would not be a trap for adults. But had the Yachuk infants any right to complain of a trap? Gasoline is not dynamite, dangerous however used, and the plaintiffs had represented that they wanted the gasoline for a purpose not dangerous, and not for their use, but their mother's. After that how could they say that the defendant had failed in any duty to them? An injured third party might claim that the defendant was negligent in believing infants; but how could they themselves claim this? They had to say: "It is true we lied to you; but you should not have believed us; you should have suspected that we were lying."

It is clear that no court would listen to any adult plaintiff who dared to argue thus, and the argument is equally outrageous in any plaintiff's mouth, whatever his age.

D. M. GORDON.

Victoria, B.C.

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WILLS—GIFT OF HOUSEHOLD GOODS AND PERSONAL EFFECTS —WHETHER MOTOR CAR INCLUDED.—The question in *Re Lappin*[1] was whether a gift of "all my household goods, furniture, jewellery and personal effects" passed to the legatee a motor car used by the testator for private and personal purposes. Hope J. held that because of the collocation of the words of gift and the use of the term "personal effects", the motor car did not pass, although it would have passed under a gift of "effects" alone. Although the learned Judge felt himself able to distinguish the array of cases urged against the view which he adopted, two English cases not mentioned in the judgment have some relevance to the issue. In *In re White*,[2] the Court held that a motor car passed under a gift of "all my furniture . . . . and all other articles of personal, domestic or household use or

[1] [1945] 1 D.L.R. 241.
[2] [1916] 1 Ch. 172.

ornament". In *In re Baron Wavertree of Delamere*,[3] it was held that motor cars passed under a gift of "such of the furniture and household effects which at the date of my death shall be in or about . . . . my residences". An American counterpart to the *White* case held that a gift of "articles of personal use or ornament . . . . furniture . . . . and of other articles of domestic and household use or ornament" did not pass a motor car.[4] And another American case, akin to *Re Lappin*, held similarly that a gift of "furniture . . . . household goods and other personal effects" did not include a motor car.[5] This divided state of the authorities invites more precision in description.

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DIVORCE — CRUELTY AS GROUND — PRE-CONFEDERATION LEGISLATION OF NOVA SCOTIA.—The novelty of *Stewart* v. *Stewart*[1] is that it is a case of divorce granted on the ground of cruelty alone and not on the usual, and, in Canada, generally exclusive ground of adultery. The jurisdiction of the Nova Scotia Supreme Court to decree divorce for cruelty derives from a pre-confederation statute, the Court for Divorce and Matrimonial Causes Act, R.S.N.S. 1864, c. 126, which, by s. 4, as amended in 1866,[2] provides that "The Court . . . . may declare any marriage null and void for impotence, adultery, cruelty or kindred within the [prohibited] degrees".

This Nova Scotia statute deals with a matter which by s. 91(26) of the B.N.A. Act is committed to the Parliament of Canada, and its continued effect after confederation was provided for by s. 129 of the B.N.A. Act, subject to amendment or repeal by the competent legislature, *i.e.*, the Parliament of Canada. That Parliament has enacted a Marriage and Divorce Act[3] which does not, however, interfere with the continued operation of the Nova Scotia statute. Section 2 may seem to have some adverse effect for it provides:

> In any court having jurisdiction to grant divorce . . . . any wife may commence an action [for divorce] on the ground that her husband has . . . . been guilty of adultery.

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[3] [1933] Ch. 837.
[4] *Richmond* v. *Rhode Island Hospital Trust Co.*, 46 R.I. 113, 125 Atl. 228.
[5] *Mathis* v. *Causey*, 172 Ga. 868, 159 S.E. 240.
[1] [1945] 1 D.L.R. 500 (N.S. C.A.).
[2] 1866 (N.S.), c. 13, s. 8. The Act was enacted originally in 1858 by 20 & 21 Vict., c. 85. It is, of course, not included in the Revised Statutes of Nova Scotia since confederation, but is reprinted as an appendix in volume 3 to R.S.N.S. 1923.
[3] R.S.C. 1927, c. 127. The Act is a compound of the Marriage Act, R.S.C. 1906, c. 105 and the Divorce Act, 1925 (Can.), c. 41.

However, the purpose of this provision was to make it clear that divorce could be secured for adultery alone, uncoupled with cruelty.[4] It has no bearing in a case where jurisdiction to decree divorce is based on a ground other than adultery.

* * *

TORTS—NUISANCE OR NEGLIGENCE—COLLISION WITH MOVING TRUCK ON HIGHWAY.—*Maitland* v. *Raisbeck*,[1] a judgment of the English Court of Appeal, purports to explain *Ware* v. *Garston Haulage Co. Ltd.*,[2] previously noted in this REVIEW,[3] and distinguishes it in fact and in principle. The explanation indicates that the *Ware* case, involving liability for nuisance as a result of a collision with a standing motor truck, is not to be treated as laying down any principle of general application to accidents on highways. "It was a case of very special facts", according to the Court in the *Maitland* case, with the result that it afforded no help to the plaintiff in the latter case who was injured when the omnibus, in which she was a passenger, collided in the dark with the rear of a moving truck which had no tail light at the time. The plaintiff, being unable to establish negligence either on the part of the omnibus driver or the truck driver, sought to base a claim for recovery against the truck driver on nuisance. This too failed because, in the Court's view, there being no fault in the fact of the tail light being out at the critical time, "it is quite impossible . . . . to say that *ipso facto* and immediately a nuisance is created". There is a rationalization of the *Ware* case in the statement that a nuisance would be created if an obstruction were allowed for an unreasonable time or in unreasonable circumstances. It would be simpler, however, to characterize such a situation as involving negligence.

B. L.

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CONSTITUTIONAL LAW — PROVINCIAL COURTS EXERCISING "DOMINION" JURISDICTION—WHETHER DOMINION OR PROVINCIAL "PROCEDURE" APPLICABLE.—A postscript to a Note on *Stafford* v. *Stafford and Cope* in the immediately preceding number of this REVIEW[1] may be added by a reference to a report of the Dominion Minister of Justice in 1897 on the statutes of the

[4] *Cf. B.* v. *B.*, [1919] 3 W.W.R. 894; *Dorsett* v. *Dorsett*, 57 D.L.R. 636 (Man.).

[1] [1944] 2 All E.R. 272.
[2] [1943] 2 All E.R. 558.
[3] (1944), 22 Can. Bar Rev. 468.
[1] (1945), 23 Can. Bar Rev. 159.

New Brunswick legislature for that year.[2] Among the statutes was "An Act in further amendment of the Law of Evidence, in relation to the evidence of Husband and Wife", which purported to allow husband and wife to give evidence for or against each other in any action or proceeding in the Court of Divorce and Matrimonial Causes, or in any other court of justice. Said the Minister, Honourable Oliver Mowat: "This provision in so far as it intends to make the evidence of the husband and wife admissible in proceedings for divorce is in the opinion of the undersigned *ultra vires*, the subject of divorce being one of the enumerated subjects in section 91 of the British North America Act, and the rules of evidence by which the right to divorce is to be established appertain strictly to the subject of divorce. The objection stated, however, is one to which the Courts may give effect, and as there is room for the operation of the Act in matters within the competence of the Provincial Legislature, the undersigned does not consider that it should be disallowed".

One further example is perhaps apposite. When it became necessary to confer appellate jurisdiction in divorce cases upon the British Columbia Court of Appeal,[3] that jurisdiction was conferred in 1937 by a Dominion statute.[4] The Divorce Act (Ontario), 1930[5] may also be referred to in this connection.

[2] DOMINION AND PROVINCIAL LEGISLATION 1896–1906 (HODGINS), at p. 52.
[3] *Cf. Claman* v. *Claman* (1926), 35 B.C.R. 137, affirmed [1926] S.C.R. 4.
[4] 1937 (Can.), c. 4.
[5] 1930 (Can.), c. 14.