CASE AND COMMENT

COURTS — ENFORCEMENT PROCESS — BUREAUCRATIC INTERFERENCE—EMERGENCY LEGISLATION—SUFFICIENCY OF POWERS. —Assuming at the outset that the emergency of war does justify resort to extraordinary methods of legislation, two things become quite clear from the history of the extension of authoritarian government in Canada. First, the habit of authoritarian legislation grows upon the executive to such an extent that resort is had to such forms of legislation in cases where it is not necessary and not justified by any conception of the emergency that gave rise to it—in some cases hysteria being mistaken for emergency. Secondly, if some limit to the extent of such pseudo-legislation is to be found, it can only be found by a judiciary independent enough to resist legislative encroachment upon the judicial branch of government as well as to review the nature of the emergency and the extent of the authoritarian legislation which may properly be justified to meet the exigencies of the emergency.

When it is seen that acts of parliament have been amended and in one case at least repealed by order in council while parliament is in session, without in either case the remotest connection with the emergency of war, it becomes quite clear that under the present state of political development or degradation no hope for limitation of the extension of authoritarian powers can be hoped for from parliament itself. It is true, of course, that the National Emergency Transitional Powers Act, once known and given greater notoriety under the name of Bill 15, attributed by high political authority to Donald B. Gordon, was considerably modified in its passage through parliament. But the modifications were largely a matter of form and the safeguards against further authoritarian encroachment have not appeared in any way to have put the brakes upon the mill of order-in-council legislation.

In this desert of the arid sand of non-democratic methods of government, it is pleasing, therefore, to find oases in the form of judgments resisting the encroachment of the legislative power upon the judicial branch of government, even if as yet there is no instance of a court having examined the nature and extent of the supposed emergency and declaring unconstitutional any of the many orders in council that either have no relation to the emergency or go far beyond the justification of that emergency. Half a loaf is better than no bread, and if the

courts will at least resist the continuous attempt of this authoritarian legislation to encroach upon the judicial sphere, to make people guilty by order in council and to give administrative officials and bodies power to override the judgments and authority of the courts, some limit has at least been put upon the unbounded ambition of the bureaucrats.

The first of those oases lies in the decision of a Western Court in *Re Bachand & Dupuis*[1] that one of these authoritarian pieces of legislation did not give to the administrator appointed by it the power to overrule and override judicial process issued by the court.

Under provincial legislation, the constitutional validity of which was beyond question, a County Judge directed the issue of a writ of possession of certain property upon the application of a landlord against his tenant. No question arose that the appropriate order of the Wartime Prices and Trade Board prohibited the issue of the writ in question. However, another bureaucratic appointee, the Emergency Shelter Administrator, stepped into the picture, and, purporting to act under the order in council[2] that appointed him, wrote to the sheriff to whom the writ of possession was directed, telling him that the writ was suspended for a certain period and giving him leave to execute the writ after the expiry of that period in the absence of notice from the administrator to the contrary. The sheriff obeyed the order of the administrator, and the landlord applied to the Supreme Court for an order directing the sheriff to execute the writ. Notice of the proceedings was given to the Dominion and provincial Attorneys-General and both were represented at the hearing.

Pending the hearing the Emergency Shelter Administrator, finding evidently that his original letter of suspension of the writ of possession could not be justified under his powers in that capacity, wrote to the landlord purporting to require him to continue to rent the premises in question to the tenant for the period which his abortive direction for suspension of the writ had covered. He also wrote the sheriff requiring him to refrain from evicting the tenant during that period. Both these letters were written under powers given to him as Emergency Shelter Officer under authority given him by the Central Mortgage and Housing Corporation, a copy of the purporting authority being enclosed with each of the letters. The point of this shift of

[1] [1946] 1 W.W.R. 545.
[2] P.C. 9439 of December 19th, 1944.

ground pending the hearing seems to have been that the powers of the Wartime Prices and Trade Board under the Emergency Shelter Regulations had been transferred to the Central Mortgage and Housing Corporation,[3] a corporation created by order in council, and that Corporation had given specific authority to the Emergency Shelter Officer to issue the letters of requirement to the landlord and sheriff that have already been mentioned.

The fundamental question, therefore, that the court had to decide, outside of certain constitutional questions argued by counsel, was whether the Emergency Shelter Regulations justified the actions of the Administrator—or officer as he called himself in his letters sent under the authority of the Central Mortgage and Housing Corporation. These Regulations provided that they and any order made thereunder should prevail over any other law in force in any part of Canada to the extent that such other law was in conflict therewith,[4] and that the Crown in the right of the Dominion and any Province should be bound by the Regulations or any order.[5] The Regulations also gave the Board—later the Corporation on whom the Board's powers were conferred—power to require *inter alia* the things which the Administrator or officer required by his letters pending the hearing.[6]

The court found it unnecessary to deal with the constitutional points raised, which included a consideration of the justification of the legislation under the stated emergency. It did so because it was able to come to a clear conclusion that the powers given to the administrator or the Corporation under the Emergency Shelter Regulations did not extend to authority to order an officer of the court—the sheriff—to disobey the order of a competent court, as it would in fact deny to a subject the fruits of his judgment in a court of law.

The court found that on one occasion all writs of possession had been stayed by order in council,[7] if it was valid. This was cited to show the specific language used by the Executive where it was intended to override orders of a court and that the language used in conferring the powers purporting to be exer-

[3] P.C. 7502 of December 28th, 1945.
[4] P.C. 9439, s. 3 (1).
[5] *Ibid.*, s. 3 (2).
[6] *Ibid.*, s. 4 (h) (k).
[7] Order 537, s. 3. In the judgment this is called P.C. 537, but that seems to be an oversight. It would seem under the reasoning of the case under review that this section of Order 537 was *ultra vires* of the Wartime Prices and Trade Board. But that does not affect the matter, it rather strengthens the court's reasoning.

cised in this case not being so specific should not be extended by implication to the justification of the action taken here.

The court rejected the argument that interference by the legislature with court process was contrary to constitutional principles, holding that the legislature might do so, though to do so would, in the words of Lord Esher M. R.,[8] produce injustice so enormous that the mind of any reasonable man would revolt from it. The court, therefore, concluded that unless it was driven to it by the clearest possible language, the order in council was not to be construed as creating such an enormity of injustice. If this official could require the sheriff to do or refrain from doing any act, he could with equal force so require a judge of Canada's highest court. It could not be conceived that parliament or the executive would ever vest such powers in an official, but if such a thing was to be done it must be done in language that forbade any other interpretation. Questions of policy were not for the court and a court could not reject legislation as against public policy. That would be as objectionable as invasion by the judicial of the legislative branch of government.

The court concluded that if the executive had intended to confer on an official power to overrule judicial process it could have done so in words as clear as those in the order in council in which such process had been specifically stayed.[9]

The court briefly referred to the famous third quarrel between Coke and the King in the reign of James I, when Coke rejected the argument of Bacon as Attorney-General, that a writ *de non prosequendo rege inconsulto* prevented the court even hearing argument that the writ did not apply to the case at bar.[10] This it was pointed out was not an exact precedent, but it was the court's duty to point out the revolutionary effect of conceding to any official the power sought to be exercised here. The integrity of the rule of law was at once destroyed if it became "possible for officials by arbitrary decisions made not in the public courtrooms but in the private offices of officialdom, without hearing the parties, without taking evidence, free of all obedience to settled legal principles, and subject to no appeal, effectively to overrule the Courts and deprive a Canadian citizen

[8] *Ex p. Dunn, Re Brocklebank* (1889), 23 Q.B.D. 461, at p. 462.
[9] The reference is to Order 537 as explained in note (7) above.
[10] *Browneloe* v. *Michil* (1616), 3 Buls. 32. The case is also reported in Moore and Rolle, but these reports being in the old legal mixture of Latin, Norman French and English are only intelligible to the scholar.

of a right he has established by the immemorial method of a trial at law".[11]

Before discussing the other case, two points of comment may well be made here. First, the dictionary definition of "bureaucracy" is "officialism" which does not seem to differ from officialdom. Secondly, it is curious that in seeking examples of infringements of liberty, such as the last six years of bureaucracy have produced, recourse is so often had to the happenings of the first half of the seventeenth century. The struggle then was between the Crown and parliament which represented in some degree the people. Now the struggle is between those who purport to wield the prerogatives of the Crown—which parliament then won from the Crown—and the people, and the parliament, which ought to represent and is in theory now far more representative of the people, is a broken reed, and aids and abets the would-be dictators.

The second instance of curial revolt from bureaucratic dictation arose in *Kane* v. *Helston*[12] where a landlord having obtained an order for a writ of possession, the bailiff executing the writ upon finding that the tenant, if evicted, had nowhere to go, undertook to speak to the judge, who stayed the execution of the writ of possession indefinitely. The Court of Appeal set aside the stay remarking that court process, and therefore the rights of litigants, ought not to be stayed on benevolent or charitable grounds.

Perhaps this does not appear at first blush to have much connection with a revolt of the courts against bureaucratic dictation. But it must be realized that six years of the constant example of "arbitrary decisions made, not in public courtrooms, but in the private offices of officialdom, without hearing the parties, without taking evidence, free of obedience to settled legal principles, and subject to no appeal" make it easy to see how the County Judge fell into the error of directing a stay of the writ. This becomes more apparent when it is remembered that for some time the county judiciary were themselves employed by bureaucracy to make these arbitrary decisions under this kind of arbitrary pseudo-legislation. Undoubtedly the action of the judge in so forgetting his judicial functions that he made the arbitrary decision here impugned, in his private office, without hearing the parties, without taking evidence, free

[11] [1946] 1 W.W.R., at p. 559.
[12] [1946] 2 W.W.R. 559.

of obedience to settled legal principles, but fortunately subject to appeal, was induced by the corrupting influence of the lawlessness of bureaucracy. It would seem, therefore, that the Court of Appeal in putting him right was, just as much in this case as the court in the other case, revolting against the dictates of bureaucracy, which would subvert even the sanctity of judicial process and deprive the subject of what certainly ought to be, if it is not, the inalienable right of recourse to the courts.

In its report at the recent Winnipeg meeting of the Bar Association the Civil Liberties Committee did not attack the right of the executive in an emergency[13] to curtail, however drastically, the liberty of the subject. But it would seem that certain liberties are too sacred even to admit of their being infringed in any emergency and one of them is the right of free access to the courts. Even under the threat of immediate invasion the British parliament would not allow this liberty to be infringed. When it was sought to set up special tribunals in the areas of possible invasion in 1940 the House of Commons would have none of them. The Mother of Parliaments still protects the people.

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MISSTATEMENT BY AN ASSURED—MATERIALITY—BURDEN OF PROOF—AGENT—QUEBEC.—Some interesting questions concerning automobile insurance were discussed in a recent judgment of the Quebec Court of Appeals in *Bertrand* v. *Compagnie Française du Phénix et al.*[1] The court, by a majority judgment, held that an insurance company is justified in repudiating a contract, if the assured failed to disclose in his application a previous serious accident, which had happened a few days before the issue of a first policy and which was caused by his fault. Though formally asked in the application if he had had automobile accidents in the past three years, the assured had answered in the negative. Such a misrepresentation was adjudged to be material and of such a nature as to diminish the appreciation of the risk and to prevent a reasonable insurer from issuing a policy.

A few incidental points were raised, all decided in favour of the insurer. First, there was the fact that the assured had given verbal notice of his previous accident to his insurance agent. Such a statement was not reproduced in his application for a policy and the court rightly held that the verbal notice was not

[13] Where does hysteria end and emergency begin?

[1] [1946] K.B. 81.

a good ground of defence. The applicant had no excuse for not reading the application before signing it and also for accepting the insurance policy without reading it.

I agree with Chief Justice Létourneau, who dissented, when he says that the proof of verbal notice dispelled any idea of bad faith on the assured's part, but the materiality of the misstatement remained. The case is governed by article 2487 of the Quebec Civil Code, which provides in part that "misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity". Even, then, if the bad faith of the assured was out of the question, the court had to ascertain whether the misrepresentation was material.

The assured's express declaration that the contract was to be based upon the veracity of his answers was cut down by a special condition of the policy providing that all declarations made in the proposal were, in the absence of fraud, to be treated as representations and not as warranties, Though with reluctance, Mr. Justice Barclay follows *Kiernan* v. *Metropolitan Life Ins. Co.*[2] to that effect; and he decides accordingly that it is necessary to prove materiality and that the *onus* of doing so is upon the insurer.

Is materiality a question of law or of fact? Contrary to the view expressed by Mr. Justice Stuart McDougall, of the majority, it seems to me that materiality is essentially a question of fact in the Province of Quebec. The insurer is obliged to prove that the misrepresentation or concealment was such as to diminish the appreciation of the risk. The Supreme Court, in a Quebec case, went as far as to decide that the onus rests upon the insurer to prove that he was induced to enter into the contract by such misrepresentation or concealment.[3] We cannot, then, readily concede that materiality is a question of law. If it were so, the mere proof of a misrepresentation would suffice, with most unsatisfactory results. Courts are not too strict, however, on the sufficiency of the proof of materiality; in the present case, statements by officials of the Company that the policy would not have been accepted, if the true circumstances had been known, were considered sufficient. Nevertheless, we are sure the court would have asked more than those *ex post facto* statements, if they had been contradicted in some way by the plaintiff.

On the whole, the judgment presently discussed appears to be in complete harmony with our dominant jurisprudence. An

[2] [1925] S. C. R. 600; [1925] 4 D.L.R. 439.
[3] *Gresham Life Assurance Society* v. *Banque d'Hochelaga*, [1926] S.C.R 313.

assured must fully and fairly disclose every fact that shows the nature and extent of the risk (article 2485 of the Civil Code), particularly in answer to questions put to him. If they are asked, questions pertaining to previous accidents are deemed to be of importance in the appreciation of the risk, as in fact they are in most cases. The insurer is entitled to know all the important facts about the previous conduct of the assured and his past accidents, and to make inquiries in order to ascertain whether or not he will accept the risk or stipulate for a higher premium.

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* * *

COMMORIENTES—INSURANCE—CONFLICT IN STATUTES.—The present epidemic of aircraft disasters makes pertinent the discussion of any decision involving the death of two or more persons in a common disaster. Add to this the probable presence of insurance on the life of one or more of such persons and the case is particularly interesting. Practically all the provinces in Canada have enacted the uniform Commorientes Act,[1] which provides (a) that where two or more persons die in circumstances rendering it uncertain which of them survived the other or others, such deaths are for all purposes affecting title to property to be presumed to have occurred in the order of seniority, whereby the younger is presumed to have survived the older, and (b) that the first provision shall be "read and construed subject to" a particular section of the provincial life insurance statute. This section of the insurance statute is similarly a uniform provision and provides:

> Where the person whose life is insured and any one or more of the beneficiaries perish in the same disaster, it shall be *prima facie* presumed that the beneficiary or beneficiaries died first.[2]

It will be noticed at once that the general statute, the Commorientes Act, presumably provides *inter alia* for two deaths occurring each in a different place and due to a different cause, but yet in such circumstances as to render it uncertain which

[1] British Columbia: 1939, c. 6, s. 2; Saskatchewan: 1942, c. 23, s. 2; Manitoba: 1941-2, c. 8, s. 2; Ontario: 1940, c. 4, s. 1; New Brunswick: 1940, c. 43, s. 2; Nova Scotia: 1941, c. 11, s. 2; Prince Edward Island: 1940, c. 13, s. 2.

[2] British Columbia: R.S.B.C. 1936, c. 133, s. 123; Alberta: R.S.A. 1942, c. 201, s. 248; Saskatchewan: R.S.S. 1940, c. 121, s. 204; Manitoba: R.S.M. 1940, c. 103, s. 166; Ontario: R.S.O. 1937, c. 256, s. 175; New Brunswick: 1937, c. 44, s. 151; Nova Scotia: 1925, c. 2, s. 44; Prince Edward Island: 1940, c. 33, s. 151.

of them was first. On the other hand, the particular statute, the insurance provision, is in express language applicable only to cases where the two deaths occur "in the same disaster". It would be quite possible therefore to apply the general statute to the *whole* problem arising out of insurance in those cases where the two deaths do not occur "in the same disaster". In such a case no conflict arises.

But the ordinary case will be one where both deaths occur in the same disaster and in such case there may easily be an apparent conflict between the two statutes. Such was the situation in *Re Law*.[3] The facts briefly were that Mr. and Mrs. Law were drowned when a storm capsized their row boat at Campbell River, B.C. There were no survivors. Both died intestate. On Mr. Law's life there were three policies of insurance payable to his wife as named beneficiary. Under s. 123 of the Insurance Act,[4] the beneficiary (the wife) was presumed to have *predeceased* the insured (the husband). Under s. 2 (1) of the Commorientes Act,[5] the younger (the wife) was presumed to have *survived* the older (the husband). On an application for the opinion of the court, Macfarlane J. noted that it was agreed that s. 123 of the Insurance Act governed "the immediate destination of the insurance moneys". By way of fuller explanation, it would seem from the facts that this initial agreement meant only that s. 123 operated to rule that the wife, *as named beneficiary*, predeceased her husband, and that under s. 108(4)(d) the moneys, on the death of the preferred beneficiary, became payable to the insured's estate (none of the other alternatives of s. 108 being applicable).

The real issue was whether s. 123 had spent itself when this point was reached. Did s. 123 operate solely to determine whether or not the beneficiary predeceased the insured and leave to the operation of the Commorientes Act the disposition of the insured's estate, including therein the policy moneys? Or, after it had been held that the beneficiary predeceased the insured in so far as the named beneficiary was concerned, did the section go on and operate to the extent that *that*[6] beneficiary's estate could not benefit directly or indirectly from the

[3] [1946] 2 D.L.R. 378; [1946] 2 W.W.R. 405; 13 I.L.R. 81 (B.C., Macfarlane J).

[4] R.S.B.C. 1936, c. 133.

[5] See note 8, *infra*.

[6] Presumably if the husband had had children (the wife had a daughter by a previous marriage), s. 108 (4) (c) would have operated, after s. 123's initial operation, to pass the proceeds to the children, and not to the insured's estate.

policies—*e.g.* as a beneficiary of the insured's estate to which the moneys must go under s. 108? In effect, did s. 123 not only determine the order of deaths, but negatively control the disposition of the proceeds of the policies? His Lordship held that the section had the wider scope and that on the facts the proceeds of the policies should go to the insured's mother as next-of-kin (the wife's estate being excluded from the class of next-of-kin for the purposes of the insurance moneys). Had his Lordship ruled the other way, the wife's estate would have shared in these moneys, as it undoubtedly did in the remaining portion of his estate, under the general rule of the Commorientes Act that the younger is deemed to have survived the older. The chief basis of the decision would appear to be that s. 2(1) of the Commorientes Act is to be "read and construed subject to" s. 123 of the Insurance Act and that this did not mean that the one is complementary to the other. His Lordship also noted the provisions of the Insurance Act (not identified, other than s. 104) with respect to the disposition of the insurance moneys—"whether the moneys pass to the estate of the deceased as insurance moneys or whether when received there they lost colour as insurance moneys.[7]

With respect, it is submitted that there is nothing in s. 123 which in any way suggests that it can affect the rights of the beneficiary of an estate, as opposed to the rights of the beneficiary[8] of an insurance policy. True, as his Lordship notes,[9] the Insurance Act includes "certain statutory directions as to the disposition" of moneys payable to a preferred beneficiary.[10] These directions include in s. 104 a provision that such moneys "shall not, *except as otherwise provided in this Part*, . . . form part of the estate of the insured".[11] But s. 123 itself, which is in the same part of the statute, the life insurance part, provides that this preferred beneficiary shall be presumed to have predeceased the insured and s. 108,[12] to which his Lordship does not specifically refer, provides a long list of options for just such a case—death of a preferred beneficiary. This last mentioned

[7] [1946] 2 D.L.R. 378, at p. 381. As noted below his Lordship apparently disregarded both alternatives and held that the moneys did not form part of the insured's estate at all.

[8] The Insurance Act, R.S.B.C. 1936, c. 133, s. 2, defines "beneficiary" as used in the act as a person *designated* or *appointed* as the one for whom or for whose benefit insurance money is to be payable. If by operation of law the same person is beneficiary of the same moneys, not as insurance moneys but as part of the assets of an estate, it is hardly proper to extend s. 123 to cover such additional rights. S. 123 should be restricted to operate solely within the area marked out by its own terms, as defined.

[9] [1946] 2 D.L.R. 378, at p. 381.

[10] R.S.B.C. 1936, c. 133, s. 104.

[11] S. 104 (1). (Italics mine).

[12] Also contained the life insurance part.

section makes it clear that on the death of the preferred beneficiary, the insured is, subject to any other provision or declaration already made naming another preferred beneficiary in such event, at full liberty to deal with the contract as if he had never named a preferred beneficiary, and that if he dies without so dealing, leaving neither wife nor children, the moneys "shall be payable . . . to his estate".[13] Surely the provisions of s. 104 are no longer applicable. There is nothing left in the act in these circumstances which would cause the moneys to retain their identity "as insurance moneys" once they reach the insured's estate. They become part of his general estate just as do his bank account, cash on hand, proceeds from sales of property, etc. There is nothing in the Insurance Act, once the provisions as to preferred beneficiaries are removed, even to suggest that insurance moneys should be dealt with differently from any other estate asset. And no one would suggest that the Commorientes Act should not apply to the "other assets". Is it not proper to say that s. 123 has spent itself when it determines that the wife, as named beneficiary of insurance policies, predeceased the insured? Section 108 must then operate. Why, thereafter, revive s. 123 instead of allowing the Commorientes Act to come in?

Further, had the legislation sought to exclude insurance moneys from the total operation of the Commorientes Act, it could have done so very easily in express language. It has not done so. The general commorientes rule should apply in all cases except those clearly within the exception. And the exception is solely with respect to s. 123, not the insurance money sections and not insurance generally.

His Lordship also argues that the Commorientes Act does not apply at all here, since there is no uncertainty as to which of the parties survived in so far as the insurance moneys are concerned. With respect, it is submitted that, assuming this to be true in so far as proceeds may be "insurance moneys", they are not such by the time the application of the Commorientes Act is sought. They are by then part of the assets of an estate.

One further word on the case itself. His Lordship, in answer to formal questions, answers No. (2) as follows:

> The proceeds of the said insurance policies do not become part of the general assets of George Thomas Law.[14]

Assuming for this purpose his Lordship to have been correct in the interpretation of s. 123, was this declaration necessary

[13] S. 108 (4) (d).
[14] [1946] 2 D.L.R. 378, at p. 381.

and, in any event, what of s. 108 (4) (d) referred to above? Apart, however, from the question raised in this case, and the doubt expressed as to the validity of this declaration in view of s. 108, there is a larger question that may very well arise in the future. Surely, even on his Lordship's view of the proper disposition of the moneys, he would not want to give to these moneys the protection from creditors which s. 104 gives to moneys going to preferred beneficiaries and which moneys are declared not to be subject to the control of the insured's creditors. Such protection is not given to moneys going to ordinary beneficiaries. It seems that s. 108 by making the beneficiary the estate removes this protection and restores the moneys to the estate and to creditors' claims.

The identical problems of this case can arise in the other provinces,[15] which have enacted the uniform commorientes provision above referred to, since the husband, the distribution of whose estate was in question, died intestate. Even if he had left a will, the problems would, it is submitted, be treated similarly in each such province. But it is interesting to note some slight variations in the statutes where a will is also involved. In six provinces,[16] there is a uniform subsection whereby the general commorientes rule is subject to a provision that, if in the will of a testator there is provision for a substitutional gift in the case of the predecease of the beneficiary, the beneficiary shall be presumed to have died first if both testator and beneficiary die in such circumstances as to render it uncertain which survived the other. British Columbia has a subsection[17] similar in general effect, but not enacted in as all-inclusive language as the uniform subsection. In four[18] of the provinces, the general commorientes rule is further declared to be subject to that section of the Wills Act[19] which provides that where certain beneficiaries, designated by relation to the testator, die before the testator and leaving issue they shall be deemed to have died immediately after the testator. This last provision would seem necessary, if at all, only where the beneficiary so dying was not a lineal descendant of the testator, but an older brother or sister.

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[15] See note 1, *supra*.
[16] Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia and Prince Edward Island.
[17] 1939, c. 6, s. 2 (3).
[18] Ontario, New Brunswick, Nova Scotia and Prince Edward Island.
[19] The Probate Act in Prince Edward Island.