CASE AND COMMENT

RYLANDS V. FLETCHER "EXPLAINED AND DISTINGUISHED". —No lawyer should fail to study the decision of the House of Lords in *Read* v. *J. Lyons & Co. Ltd.*[1] "It goes to the roots of the common law." Here and in the Court of Appeal[2] "the true rule of law" in *Rylands* v. *Fletcher*[3] is critically examined. The doctrines of strict liability for the escape of dangerous things which have been based on that rule are severely limited. A development of the law has been consciously and firmly arrested.

The primary purpose of this note is to record the decision. Since the judges face the problem squarely, the reasons for judgment themselves are a critical discussion of the doctrines involved. The developments from the case should be closely followed, for the judges invite the reopening of many questions long considered answered.

The facts are shortly put in the pleadings, which incidentally are an interesting contrast to Canadian pleading. The statement of claim is as follows:

> 1. The Defendants were at all material times the occupiers of certain premises known as the Elstow Ordnance Factory and situate at Elstow in the County of Bedford.
>
> 2. At the said premises the Defendants carried on the manufacture of high explosive shells. To the knowledge of the Defendants high explosive shells were dangerous things.
>
> 3. The Plaintiff at all material times worked in the Armaments Inspection Department at the said premises having been directed so to do by the Minister of Labour and National Service.
>
> 4. On or about the 31st August 1942 the Plaintiff in the course of her employment as aforesaid was lawfully in a shell filling shop at the said premises when a high explosive shell exploded whereby the Plaintiff suffered injuries loss and damage.

The defence is as follows:

> 1. The Defendants are Managers of the Elstow Ordnance Factory for and on behalf of the Minister of Supply and high explosive shells are manufactured in the factory. The Defendants know that high explosive shells are dangerous things. The Plaintiff also knows this. It is not admitted that the Defendants were at any time the occupiers of the factory or that save as agents for the Ministry of Supply they carried on the manufacture of high explosive shells thereat.
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> 2. Paragraph 3 of the Statement of Claim is not admitted.

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[1] [1946] 2 All E.R. 471.
[2] [1945], 1 K. B. 216; [1945] 1 All E.R. 106.
[3] (1866), L.R. 1 Exch. 265; on appeal, L.R. 3 H.L. 330.

3. Paragraph 4 of the Statement of Claim is admitted save that no admission is made as to the nature or extent of the injuries loss or damage.

4. The plaintiff voluntarily incurred the risk of explosion as a risk incidental of her employment.

5. The Statement of Claim discloses no cause of action.

Cassels J. at the trial[4] dealt first with the defence of common employment, concluding that if, as he found, the plaintiff was directed to munitions work under protest the maxim *volenti non fit injuria* could not defeat her claim.

He then found that the defendants were carrying on the manufacture of high explosive shells and, borrowing from the American "Restatement of the Law of Torts", said that they "were carrying on an ultra hazardous activity". He held it to be a non-natural user of the land "in the sense that it is a special use bringing with it increased damages to those who are on or in the neighbourhood of the premises". From that point he proceeded to discuss the defendants' contention that, there being no escape, the plaintiff must allege and prove some negligence, however small in degree.

Cassels J. found that explosives were things dangerous in themselves "which got out of control". He examined the cases and satisfied himself with some care that escape from premises was not an essential of the rule of strict liability for dangerous things. He put the illogicality of the defendants' position in the light of the cases clearly at page 105:

> If in this case the plaintiff had had a friend waiting for her outside the premises when the explosion occurred and that friend had been injured, that friend would have had a case upon strict liability, but the plaintiff, being inside, would have to prove negligence. I cannot see on principle why the plaintiff inside should be faced with the difficulty of proving negligence as the specific cause of the danger having ripened into actual harm to her, whilst her friend outside need only say that the defendants were putting their land to a non-natural use by manufacturing explosives: see POLLOCK ON TORTS, 14th Edn., p. 386. Equally does the strange result follow, if in this case the plaintiff, instead of being on the premises at the time of the explosion, had been approaching the factory, but had not reached it and was injured when only a few yards away.

The defendants appealed and the Court of Appeal (Scott, McKinnon and Du Parcq LL.J.) unanimously allowed the appeal.[5] Before them the plaintiff respondent based argument on the American Restatement and, at page 220, posed another most

[4] [1944] 1 All E. R. 98.
[5] [1945] 1 K.B. 216.

extraordinary case, if escape from the land were a necessary element:

> For instance, where an explosive is being unloaded from a building into a lorry below, outside the land. Three men are unloading from the building; three others loading on to the lorry, and another is just inside the building below. An explosion occurs and all are injured. The men in the lorry succeed in their claim, those in the building fail, and it is doubtful as to the third man.

Scott L.J. wrote a historic judgment. He took as his text the American Restatement and rejected any rule which imposed on a person carrying on a dangerous activity a liability for damage, merely because the activity was dangerous. He then examined the contention that the rule in *Rylands* v. *Fletcher* is not limited to an escape from the land, but covers escape from control. He concluded that control was only a material link in the cases, but not the real ground of liability, and that escape from the premises was essential.

McKinnon and Du Parcq LL.J. also rejected the argument stated in terms of the American Restatement and expressly limited the rule in *Rylands* v. *Fletcher* strictly to what it says.

The appeal to the House of Lords was heard by Viscount Simon L.C., Lord Macmillan, Lord Porter, Lord Simonds and Lord Uthwatt.[6] The plea of *volenti non fit injuria* was withdrawn by Sir Hartley Shawcross A.G., so that the whole question before the House was whether proof or inference of negligence was essential to the plaintiff's case.

Viscount Simon placed his reasons squarely on the ground that there was no escape from "a place which the defendant has occupation of or control over to a place which is outside his occupation or control". He denied that there was a common basis in English law for the cases in which liability for damage had been recognized apart from proof of negligence. He raised the question, but did not decide, whether *Rylands* v. *Fletcher* applied to claims for personal injury as distinguished from damages to property. He suggested that the House would not be bound by *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co.*[7] to decide that the making of munitions in a factory at the Government's request in time of war was a "non-natural use of land".

Lord Macmillan plainly stated at page 476 the revolutionary view that "an allegation of negligence was in general essential"

[6] [1946] 2 All E.R. 471.
[7] [1921] 2 A.C. 465.

for the recovery of damages for personal injuries and adopted this proposition as a basis for his judgment. He then rejected any legal classification of things or operations dangerous in themselves, except in so far as they create by definition a high standard of care, and, having disposed of the other arguments advanced by the plaintiff, expressed strongly his indifference to the arguments that required rationalization of the law of England, legal consistency and logic (page 478).

Lord Porter in reviewing the rule cast doubt on *Musgrove* v. *Pandelis*,[8] where a motor car with a full tank was held to be a dangerous thing, but rested his judgment on there being no escape. He expressly avoided the question whether or not *Rylands* v. *Fletcher* covered personal injuries.

Lord Simonds discussed without deciding a number of points raised in the other judgments, but rested his judgment on there being no escape from the defendants' premises. He put his agreement with Cassels J. on the defence of *volenti non fit injuria* neatly at page 483: "It is not, I think, the law of England that the will of a directing official of a government department becomes the will of the unwilling citizen whom he directs."

Lord Uthwatt at page 483 rejected any rule of absolute liability in the circumstances, and interpreted *Rylands* v. *Fletcher* as relating "to the use of land as affecting other land".

There is no higher court and we must now pick up the broken crockery. It may stimulate further discussion to tabulate the results of *Read* v. *Lyons*:

1. The rule in *Rylands* v. *Fletcher* means what it says and no more.
2. The liability requires
   (a) escape from the defendants' premises,
   (b) non-natural user of the land,
   (c) damage.
3. There is no general principle in English law which is illustrated by the various cases of liability without proof of negligence.
4. There are no general classes of dangerous or ultra hazardous activities or operations or things which by themselves create a strict or absolute liability. They merely impose a high standard of care.

[8] [1919] 2 K.B. 43.

5. *Rainham* v. *Belvedere* is not a binding authority on the non-natural user of land.

6. The rule in *Rylands* v. *Fletcher* may not cover personal injuries.

7. It is a grave fallacy to proceed on the assumption that English law is logical.

Read v. *Lyons* is a decision that unsettles far more than it settles. We must revise completely the old view of *Rylands* v. *Fletcher* as a creative and epoch-making case. It was apparently a narrow decision based largely on property law and illustrating no far-reaching principle of English justice. The rich relative, friend alike to judge and counsel, has lost his English wealth, but he still retains his American estate and his children are known the world over. In Canada they may be disowned and the process is one of vital importance to the profession.

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DIVORCE—COLLUSION.—The recent case of *Dutko* v. *Dutko*[1] before the Manitoba Court of Appeal throws a strong light on the conflict of judicial opinion in Canada as to what constitutes collusion in divorce proceedings. Recent Canadian decisions[2] have moved the boundaries of collusion backwards and forwards and the practitioner is therefore perhaps justified in wondering what boundary, if any, is likely to become fixed and plainly marked.

The facts in *Dutko* v. *Dutko* may be briefly summarized. H, the husband, was domiciled and living in Winnipeg and W, the wife, was living in Ontario. They agreed to share the costs of W obtaining a divorce. H called on a solicitor in Winnipeg and arranged to have W write to this solicitor and give him instructions. At the trial H stated he was prepared to give evidence as to his offence and, upon being questioned by the judge, disclosed the arrangement between himself and W. The fact of adultery was proved by H and a corroborating witness, but the judge found the agreement as to costs collusive and refused the decree.

[1] [1946] 4. D.L.R. 471.

[2] Notably *Wilhelm* v. *Wilhelm*, [1938] O.R. 93, [1938] 2 D.L.R. 222; *Hodgins* v. *Hodgins*, [1942] O.R. 440, [1942] 3 D.L.R. 494; and *Shaw* v. *Shaw*, [1944] 3 D.L.R. 9 (Alberta).

[3] [1942] O.R. 440, [1942] 3 D.L.R. 494.

[4] [1944] 4 D.L.R. 9.

[5] [1946] 4 D.L.R. 471, at p. 501.

On appeal, the majority of the Court of Appeal held the agreement was not collusive and allowed the appeal, but McPherson C.J.M. vigorously dissented. Trueman J.A. sided with the majority without expressing any opinion on the question of collusion. Richards J.A., in a lengthy review of the authorities, stated that the Ontario Court of Appeal in *Hodgins* v. *Hodgins*[3] and the Alberta Court of Appeal in *Shaw* v. *Shaw*[4] had extended the doctrine of *Churchward* v. *Churchward* beyond its meaning as interpreted by subsequent English and Canadian cases and by commentators. "Any agreement to amount to a bar must be obnoxious to the court for some good reason such as an attempt to avoid disclosure of facts which would be a bar or a good defence, if the court so decided in exercising a permitted discretion. *Churchward* v. *Churchward*. A statement of an intention not to defend, when in fact there is no defence, is not collusion or a bar to divorce. I know of no sound reason on which it could be held otherwise."[5] Bergman J.A. expressed substantially the same view.

"The conclusion which I have reached after a careful examination of the authorities is that in order to constitute collusion there must be a corrupt agreement or conspiracy, to which the petitioner is a party, to obtain a divorce by means of manufactured evidence or some fraud or deceit practised on the court."[6]

McPherson C.J.M., in dissenting, stated that an agreement by the respondent to share the costs implied an agreement not to defend and that such an agreement constituted collusion as defined in *Churchward* v. *Churchward*: "if the initiation of a divorce suit be procured, and its conduct (especially if abstention from defence be a term) provided by agreement, this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld".[7] After a lengthy review of the authorities, the learned judge concluded that the doctrine of *Churchward* v. *Churchward* was still good law in England, and he noted that it had been followed by the Court of Appeal in Ontario and Alberta.

It was common ground that collusion means what it was intended to mean in the Matrimonial Causes Act (Imperial) of 1857 and that, if this statute meant what Sir Francis Jeune said it meant in *Churchward* v. *Churchward*,[8] the conduct of the parties in *Dutko* v. *Dutko* was collusive.

[6] [1946] 4 D.L.R. 471, at p. 506.
[7] [1895] P. 7, at p. 30.
[8] [1895] P. 7.

In *Churchward* v. *Churchward* Sir Francis Jeune found the adultery of the respondent fully proved, but he also found collusion: the solicitors of the parties had agreed that if the husband petitioned for a divorce and sought no damages from the co-respondent the wife would pay £100 as costs and settle substantial property on the only child of the marriage. The learned judge stated that collusion in the statute of 1857 was intended to mean what the profession had previously considered collusion; he reviewed the authorities and pronounced his now famous definition: If the initiation of a divorce suit be procured, and its conduct (especially if abstention from defence be a term) provided by agreement, this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld. Since the petitioner had sought a divorce, not because of any wrong suffered by him, but because he could not otherwise obtain the financial settlement desired for his child, and since the parties had entered into an agreement settling the costs and providing that no damages should be sought from the co-respondent and that no defence should be filed, Sir Francis Jeune found a clear case of collusion, regardless of whether any evidence had been in fact withheld from the court.

The definition of collusion given in *Churchward* v. *Churchward* includes three kinds of conduct. If the petitioner is party to an agreement for the fabrication or withholding of evidence this is collusion. Secondly, if the petitioner seeks a divorce, not because of any wrong suffered, but because of inducements, this also is said to be collusion, since the petitioner is not seeking a divorce in good faith. Thirdly, if the petitioner enters an agreement governing the conduct of the case, especially an agreement that the respondent will not defend, this, too, is called collusion by Sir Francis Jeune. McPherson C.J.M. found such an agreement a necessary inference from the agreement to share costs in *Dutko* v. *Dutko*. The *Churchward* definition might be restated as follows: any agreement for the fabrication or withholding of evidence, or any bargain about the commencement or conduct of a divorce suit, is collusive if the petitioner is a party.

Some Canadian judges, notably in *Christmanson* v. *Christmanson*,[9] *Wilhelm* v. *Wilhelm*[10] and *Dutko* v. *Dutko*, seem to deny that a bargain about the commencement or conduct of a divorce suit is collusive unless made for some dishonest purpose. The position of these judges appears to be that each case must be

[9] [1927] 1 D.L.R. 651, [1927] 1 W.W.R. 149 (Sask.).
[10] [1938] O.R. 93, [1938] 2 D.L.R. 222.

examined on its merits and that, if an agreement is not designed to keep something from the court or to impose on the court in some other way, it is not collusive. This, they believe, is the law as stated in English cases subsequent to *Churchward* v. *Churchward*. On the other hand, the position of McPherson C.J.M. had been previously taken by the majority of the Ontario Court of Appeal in *Hodgins* v. *Hodgins*[11] and by the majority of the Alberta Court of Appeal in *Shaw* v. *Shaw*.[12] These judges insist that any agreement condemned under Sir Francis Jeune's definition is still collusive under English law. In view of this conflict of opinion a review of English cases subsequent to *Churchward* v. *Churchward* may be helpful.

Scott v. *Scott*[13] is a case on which the anti-Churchward judges place some reliance. In this case the wife, who was living apart from her husband, sought a larger allowance and was told by her husband's brother that if she would obtain a divorce the necessary evidence would be disclosed, her costs would be paid and her allowance would be increased from £160 to £500 per annum. The wife consulted her solicitor and filed her petition. Bucknill J. found no collusion. He said that the wife had taken advice and had acted for no improper motive. "Collusion may be defined as an improper act done, or an improper refraining from doing an act for a dishonest purpose."[14] *Churchward* v. *Churchward* was distinguished on its facts.

One can speculate *ad infinitum* about the meaning of Bucknill J., when he said the wife acted for no improper motive. He may have meant that in his opinion she had acted in good faith and not because of the bribe offered; and if he meant anything else he has not been followed in subsequent English cases.

In *Laidler* v. *Laidler*[15] the wife (the petitioner) had persistently asked her husband to disclose evidence of what she felt certain to be happening, and eventually the husband told her of an hotel incident, which he said had been the result of her persistent requests. McCardie J. found that the adulterous acts were not the result of agreement, as the husband had stated to his wife, and that the evidence was not collusive. The learned judge commented on *Scott* v. *Scott*, confining it to its facts, and approved *Churchward* v. *Churchward*. "The case of *Churchward* v. *Churchward* contains an admirable review of the authorities, and shows

[11] [1942] O.R. 440, [1942] 3 D.L.R. 494.
[12] [1944] 3 D.L.R. 9.
[13] [1913] P. 52.
[14] [1913] P. 52, at p. 54.
[15] (1920), 90 L.J. (P.) 28.

the wide stretch of the doctrine in question. It is essential to point out, however, that collusion must be distinguished from courtesy. Asperity of language, or the employment of offensive phrases, need not be a feature of matrimonial proceedings. It has been well said, moreover, that a mere agreement between the parties not involving an imposition on the court or a suppression of facts, but merely to facilitate the proofs and smooth the asperities of litigation, is, although liable to be looked into by the court, not collusion or otherwise objectionable."[16]

The comment on *Scott* v. *Scott* was perhaps gratuitous, as the issue in *Laidler* v. *Laidler* was whether the evidence had been fabricated, not whether the proceedings had been instituted or governed by an improper agreement. Nevertheless, the general comments of McCardie J. on the law of collusion have been frequently cited with approval. The learned judge believed the *Churchward* test to be law, but that it did not exclude courtesy between the parties.

In *Carmichael* v. *Carmichael* the respondent, after being served, made financial provision for the petitioner and her child. Lord Merivale P. suspected that the wife had been bribed to take proceedings and was inclined to find collusion within the meaning of *Churchward* v. *Churchward*; but he eventually satisfied himself that the wife was proceeding in good faith. In *Clarke* v. *Clarke*[18] the wife wished to divorce her husband because of adultery disclosed by him, but she was anxious about her support if her husband should predecease her, and even while he lived, as he had apparently no property to secure an order for maintenance. A financial settlement was negotiated, conditional upon the wife obtaining a decree absolute, and thereupon the wife filed her petition. Bateson J. considered the financial settlement proper and not collusive in the circumstances. Here the settlement had not been a bribe and, while the agreement did govern the conduct of the case to the extent of fixing the alimony, the judge evidently considered this reasonable in the circumstances. *Clarke* v. *Clarke* modifies *Churchward* v. *Churchward* to that extent.

In *Beattie* v. *Beattie*[19] the husband had been trying for years to bribe his wife into petitioning for divorce. Finally the wife did accept some money for preliminary costs and even signed

[16] (1920), 90 L.J. (P.) 28, at p. 30.
[17] (1925), 42 T.L.R. 133.
[18] (1925), 42 T.L.R. 132. *Beale* v. *Beale*, [1929] 2 W.W.R. 185 and [1929] D.L.R. 1 (C.A.) is a Canadian case in which a financial settlement was held not collusive.
[19] [1938] P. 99, [1938] 2 All E. R. 74.

an agreement that this money would not be used for personal expenditure and would not be mentioned to the wife's solicitors. The husband disclosed evidence of adultery, a solitary incident in a hotel room. Sir Boyd Merriman ultimately satisfied himself that the wife had not been induced to commence proceedings by her husband's offer or by the payment of any money; the learned judge was satisfied that a change in her own circumstances had caused the wife to file her petition. He employed the *Churchward* test and found nothing wanting.

In *Emmanuel* v. *Emmanuel*,[20] the most recent English case on this subject, the wife had filed a petition charging cruelty and the husband had entered a defence denying cruelty. Earlier, in correspondence, the husband, when charged with cruelty, had claimed desertion by his wife. After the filing of the petition the husband and wife negotiated about division of their effects, possession of the flat, alimony pending a decree, the education of their child, and so on. The learned judge stated that such conduct was not collusive.

The husband however told the petitioner that he was defending only because of her claim for alimony. The petitioner told him not to worry, since she did not intend to claim alimony. The husband however insisted upon the wife signing an agreement; in consideration of him agreeing to withdraw his defence she renounced any claim to alimony. The wife's solicitor tried to persuade the husband to surrender this agreement on the ground that it had been improperly extracted. The agreement was not surrendered, however. While the husband did not withdraw his defence immediately he did eventually and, since the husband did not testify as to why he withdrew, the suspicion remained that he was acting in accordance with the agreement. The evidence disclosed the wife's interest in another man, indicating that the husband had a defence which he would have used had he been threatened with permanent alimony. The learned judge found that the petitioner had not satisfied him, as required by the Matrimonial Causes Act of 1937, that the parties were not in collusion.

"It is not lawful to buy or sell divorce or separation. . . . . If a petitioner accepts a bribe, or extorts one, as an inducement to bring or carry on proceedings, or if he bribes a respondent not to defend, that is collusion. In bribery, as in extortion, innocence or guilt depends on whether the inducement is offered or sought with reasonable cause or not. The line may often be difficult to draw. The provision by a guilty husband of an allowance for his

[20] [1946] P. 115, [1945] 2 All E.R. 494.

wife or of her costs may be merely the provision of the necessaries to which she is entitled by law; but if he pays her a large sum in cash it excites a suspicion that it is the price of freedom. . . . . Conversely the fact that a wife does not claim maintenance, or costs, may be simply because she has means of her own: but if she foregoes or agrees to forego her claims in return for the withdrawal by her husband of a defence on the merits, reasonable cause would be hard to find."[21]

While these English decisions are all by single judges, certain principles appear to be settled. If the petitioner is bribed to commence proceedings, she is barred by her improper motive. This part of *Churchward* v. *Churchward* seems incontestable, in spite of *Scott* v. *Scott*. If the petitioner bargains with the respondent about the defence to be entered, this too is certainly collusion if the husband appears to have a defence which he would have advanced in the absence of agreement. Is it collusion if the respondent had no *bona fide* defence and was simply being difficult? One would expect an English judge to brand such a bargain as collusive regardless of the existence in fact of any defence, on the theory that a petitioner has no right to bargain about the way the respondent will conduct his case. Is it collusion if the petitioner simply wishes to make sure that the respondent will not defend and it is shown at the trial that he never intended to defend? The essential fact seems to be the petitioner's intention to bargain about the defence. There is no indication that English judges will tolerate this in any circumstances.

On the other hand, the English courts do not prohibit co-operation between the petitioner and the respondent.[22] It is not collusive for both parties to desire a divorce[23] or for the guilty party to behave decently, as for example by disclosing his or her offence[24] or by making himself or herself readily available for service.[25] The behaviour of the respondent seems a matter of indifference except in so far as it suggests improper conduct by the petitioner. It is the petitioner and the petitioner only with whom the court is concerned here. Is the petitioner before the

[21] [1945] 2 All E.R. 494, at p. 496.

[22] See *Laidler* v. *Laidler* (*supra*).

[23] This is an inevitable inference from cases such as *Pilkington* v. *Pilkington*, [1939] 1 All E.R. 29, 55 T.L.R. 364 (Ct. of Appeal), which permit disclosure of evidence by the respondent. See also *L.* v. *L.*, [1943] 2 W.W.R. 308, [1943] 3 D.L.R. 333, 10 Hals. Laws of Eng. (Hailsham) 677.

[24] *Pilkington* v. *Pilkington*, [1939] 1 All E.R. 29, 55 T.L.R. 364, *Parry* v. *Parry*, 20 Sask. L.R. 474, [1926] 3 D.L.R. 95 (C.A.), *Dines* v. *Dines*, [1943] O.W.N. 105, [1943] 2 D.L.R. 63, 10 Hals. Laws of Eng. (Hailsham) 678.

[25] *Beale* v. *Beale*, 23 Sask. L.R. 548, [1929] 2 W.W.R. 1, [1929] 3 D.L.R. 1 (C.A.), and generally *Laidler* v. *Laidler* (*supra*).

court in good faith and not because of inducements? Is the petitioner party to an agreement governing the conduct of the case? If the petitioner is free of taint there can be no collusion under the *Churchward* test.

Further, English judges permit the parties to settle such matters as they should reasonably settle between themselves, and under some conditions at least the parties are permitted to agree on a financial settlement.[26] Any agreement on any subject will, however, be examined by the court and if found one-sided the court may well infer some sort of deal in connection with the divorce proceedings. One would gather from *Clarke* v. *Clarke* and *Emmanuel* v. *Emmanuel* that a financial settlement is not bad in itself, but because of what it usually implies. A *bona fide* financial settlement with no indication of bribery on either side would probably not be considered collusive in England. The warning of Lord Merivale in *Carmichael* v. *Carmichael* must, however, be kept constantly in mind. "Every transaction either between the parties or between their legal advisors during the pendency of divorce proceedings, which makes the material elements of a decree of divorce the subject of negotiation, taints the transaction with suspicion of collusion, and must be avoided both by the parties and their representatives."[27]

An agreement as to costs and nothing more could hardly be considered collusive by English standards. An offer by the respondent to pay costs might in some circumstances enable a petitioner to commence proceedings (in the same sense as a disclosure of evidence by the respondent) but such an offer in itself would hardly induce any one to take proceedings unless he or she already wished a divorce for some other reason, if only to free the offending spouse.[28] Again, while such an offer by the respondent implies that no defence will be entered, this is material only if a bargain to that effect should be inferred from the agreement as to costs. As Bergman J.A. aptly remarked in *Dutko* v. *Dutko*, a respondent implies that he will not defend when he discloses evidence of a matrimonial offence; and this, without more, is not collusion. McPherson C.J.M. stated in *Dutko* v. *Dutko* that the agreement as to costs implied an undertaking not to defend, but it is submitted with respect that the implication is immaterial unless the petitioner bargained for it.

[26] *Clarke* v. *Clarke* (1925), 42 T.L.R. 132, and *Emmanuel* v. *Emmanuel*, [1946] P. 115, [1945] 2 All E.R. 494.
[27] (1925), 42 T.L.R.133, at p. 138.
[28] Which is not collusive purpose: *Bell* v. *Bell*, [1944] 1 W.W.R. 191 (B.C.).

In *Dutko* v. *Dutko* it was perhaps possible to infer such a bargain, because there the petitioner agreed to pay half the costs. Possibly one might infer that she agreed to this because she wished an undertaking from the respondent that he would not defend. No such inference, however, appears to have been drawn by any of the judges and presumably the wife's offer was made in ignorance or good nature. In the absence of such an inference it seems impossible to find in *Dutko* v. *Dutko* any bargain about the defence.

The agreement in *Dutko* v. *Dutko* did fix the costs in a sense and Sir Francis Jeune did express the opinion in *Churchward* v. *Churchward* that an agreement fixing costs is collusive, since it is an agreement governing the conduct of the case to that extent. Sir Francis evidently had some doubt about this, however, and since Bateson J. in *Clarke* v. *Clarke* permitted an agreement as to alimony an agreement as to costs would presumably not be considered collusive in England today for the reason given by Sir Francis Jeune. An agreement as to costs may well suggest collusion, but it can hardly constitute collusion in itself.

It is sometimes suggested that an agreement as to costs cannot be collusive if the petitioner is lawfully entitled to costs anyway. Bigham J. expressed such a view in *Malley* v. *Malley*,[29] but it was repudiated in *Laidler* v. *Laidler* and *Beattie* v. *Beattie*, and surely the right to costs is irrelevant if the court is concerned not with the agreement on costs as such, but with the implications of the agreement on costs in a given case.

To one who has read the English cases since *Churchward* v. *Churchward* the serious conflict of judicial opinion in Canada as evidenced by *Dutko* v. *Dutko* is likely to be puzzling, because the English decisions since *Scott* v. *Scott* and *Malley* v. *Malley* seem consistent and indicate agreement among English judges as to what constitutes collusion. Much of the disagreement in Canada seems to stem from the interpretation placed on the word "agreement" in Sir Francis Jeune's definition of collusion. If by "agreement" is meant mutual assent, any statement (express or implied) by the petitioner that she will not seek alimony or any statement (express or implied) by the respondent that he will not defend constitutes an agreement in this sense because the other spouse will certainly approve of the suggested conduct. It is perhaps this wide meaning that has been given to "agreement" by those Canadian judges who have insisted that fraud, trickery or an imposition on the court is essential to a collusive agreement.

[29] (1909), 25 T.L.R. 662.

These judges have rightly concluded that all agreements in the sense of mutual assent (express or implied) are not considered collusion in England and they believe the fraud or trickery requirement explains the English decisions.

On the other hand, McPherson C.J.M. and the majority of the courts in *Hodgins* v. *Hodgins* and *Shaw* v. *Shaw* find no indication of such a requirement in any modern English case except possibly *Scott* v. *Scott*, which they can rightly say has not been followed; and consequently these judges vigorously insist that fraud or trickery is not essential to collusion in England.

If the word "agreement" in Sir Francis Jeune's definition is interpreted to mean bargain and not merely mutual agreement or assent, Canadian judges of the opinion of Richards J.A. and Bergman J.A. would probably agree that the *Churchward* definition of collusion has been little changed by subsequent English cases. These judges would probably agree that if a petitioner bargains, for example, for the respondent's undertaking that he will not defend, such conduct is collusive even if it is not shown that anything is repressed as a result of this bargain. Any such bargain is presumably an imposition on the court. The requirement of a bargain or contract (express or implied) in the definition of collusion might well satisfy those Canadian judges who have refused to accept the Churchward definition.

A bargain does seem essential to collusion in England, apart possibly from cases where an offence has been fabricated. Gratuitous statements of intention by one spouse, as for example a gratuitous statement that no defence will be entered, may arouse suspicion of a collusive bargain, but they are not in themselves collusion. Conduct pursued without inducement by the other spouse does not, it is submitted, constitute collusion between the parties. Whether the other spouse agrees with that conduct or disagrees with it is in itself immaterial. There is evidence, however, that all the judges in *Dutko* v. *Dutko* interpreted agreement to mean mutual assent and found an agreement by the respondent not to defend. It is suggested with respect that the only relevant question was whether or not the petitioner bargained for the respondent's co-operation.

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